



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DETERMINATION AND REASONS

File Nos. PR-2007-075 to  
PR-2007-077

NETGEAR, Inc.

v.

Department of Public Works and  
Government Services

*Determination issued  
Thursday, May 15, 2008*

*Reasons issued  
Friday, May 23, 2008*

## TABLE OF CONTENTS

DETERMINATION OF THE TRIBUNAL.....	i
STATEMENT OF REASONS .....	1
COMPLAINT .....	1
PROCUREMENT PROCESS.....	2
TRIBUNAL’S ANALYSIS.....	6
Limiting the Procurements to Products of Particular Suppliers .....	14
Improperly Declaring Netgear’s Proposal Non-compliant in Response to RVD136.....	19
Purchasing Software Through a Hardware-only Solicitation Process .....	20
Costs .....	22
DETERMINATION OF THE TRIBUNAL .....	23

IN THE MATTER OF three complaints filed by NETGEAR, Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO a decision to conduct an inquiry into the complaints under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

**NETGEAR, INC.**

**Complainant**

**AND**

**THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT  
SERVICES**

**Government  
Institution**

**DETERMINATION OF THE TRIBUNAL**

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that two of the complaints, PR-2007-075 and PR-2007-076, are not valid and one of the complaints, PR-2007-077, is valid in part.

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal awards the Department of Public Works and Government Services its reasonable costs incurred in responding to the complaints, which costs are to be paid by NETGEAR, Inc. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for these complaint cases, taken as a whole, is Level 2, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Diane Vincent

Diane Vincent

Presiding Member

Susanne Grimes

Susanne Grimes

Acting Secretary

The statement of reasons will be issued at a later date.

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## STATEMENT OF REASONS

### COMPLAINT

1. On January 2, 2008, NETGEAR, Inc. (Netgear) filed four complaints with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning Requests for Volume Discount (RVDs) for Solicitation Nos. EN869-060292/C (RVD134), EN869-060331/D (RVD136), EN869-060331/G (RVD141) and EN869-060292/D (RVD142) by the Department of Public Works and Government Services (PWGSC) on behalf of Defence Research and Development Canada (RVD134), the Department of National Defence (DND) (RVD136 and RVD141) and the Department of the Environment (RVD142) for networking equipment.<sup>2</sup> All RVDs were issued under the Networking Equipment Support Services (NESS) Departmental Individual Standing Offer (DISO) No. EN578-030742/000/EW.

2. Netgear alleged that PWGSC improperly limited the procurement to products of particular suppliers, specifically Cisco Systems Canada Co. (Cisco) (RVD134, RVD136 and RVD142) and Hewlett-Packard (HP) (RVD141), and applied tendering procedures in a discriminatory manner. With respect to this ground of complaint, Netgear specifically alleged that PWGSC:

- (1) had no justification for specifying products by brand name;
- (2) refused to provide additional information to bidders (i.e. information about existing devices and networks), such as network diagrams, in order to permit bidders to prepare their proposals; and
- (3) failed to allow suppliers to demonstrate, through testing, the equivalency of their proposed products.

3. Netgear also alleged that, regarding RVD136, PWGSC incorrectly declared its proposal non-compliant for proposing products that, PWGSC claimed, were not contained on Netgear's approved product list. In addition, Netgear alleged, with respect to RVD141, that PWGSC improperly attempted to purchase software through a solicitation process that should have been limited to hardware only.

4. As a remedy, Netgear requested that the Tribunal cancel the contract awarded in response to RVD136 and award it to Trust Business Systems (Trust), the sole bidder of Netgear products for the requirement, if it was found that Trust submitted the lowest-priced proposal. Regarding the other RVDs, and RVD136 if the above requested remedy was not granted, Netgear requested that the Tribunal recommend that all contracts be cancelled and that the requirements be re-tendered without the use of the "Equivalents" section of the NESS DISO and that only the generic specifications found in Annex A to the NESS DISO be used. As a further alternative, Netgear requested that its agent, Trust, be compensated for its lost opportunity to participate in and profit from these solicitations. In addition, Netgear requested its complaint costs, the issuance of postponement of award of contract orders and the application of the express option. It also requested that the Tribunal require PWGSC to conduct all future NESS DISO procurements using only the generic specifications found in Annex A to the NESS DISO and that brand-name specifications not be used. It further requested that PWGSC be required to properly describe and justify all operational requirements and that all information necessary to permit suppliers to submit responsive tenders be included in future RVDs.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

2. The four RVDs in question (i.e. RVDs 134, 136, 141 and 142) were each considered to be the subject of a separate complaint and were therefore assigned separate file numbers (i.e. PR-2007-075 to PR-2007-078).

5. On January 10, 2008, the Tribunal informed the parties that it had accepted the complaints for inquiry, as they met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>3</sup> These complaints were the first in a series of similar complaints filed by Netgear that were accepted for inquiry by the Tribunal.<sup>4</sup> The Tribunal did not issue postponement of award of contract orders nor did it find that the complaints were suitable for the expedited resolution process (i.e. the express option). On January 15, 2008, PWGSC acknowledged receipt of the complaints and informed the Tribunal that RVD142 had been cancelled. Accordingly, on January 23, 2008, the Tribunal informed both parties that it was dismissing the complaint in File No. PR-2007-078 in accordance with paragraph 10(a) of the *Regulations*, as it had determined that the complaint could have no valid basis, as there was no procurement upon which to file a complaint. On February 4, 2008, PWGSC filed the Government Institution Report (GIR). On February 14, 2008, Netgear filed its response to the GIR. On February 18, 2008, the Tribunal requested that PWGSC provide additional information regarding the procurement process and the contents of the RVDs in question. On February 22, 2008, PWGSC responded to the Tribunal's request and, on February 29, 2008, Netgear filed its comments on PWGSC's response.

6. Given that there was sufficient information on the record to determine the validity of the complaints, the Tribunal decided that a hearing was not required and disposed of the complaints on the basis of the information on the record.

## PROCUREMENT PROCESS

7. The NESS DISO upon which the RVDs are based was issued to a number of companies that had participated in a competitive Request for a Standing Offer (RFSO) process to become suppliers of networking equipment to the federal government. The NESS DISO competition ran from June 24 to July 11, 2006, and, on October 13, 2006, Netgear and 22 other companies were issued DISOs. During this process, all potential DISO holders were afforded the opportunity to comment on, or seek amendments to, the terms of the RFSO, which included a model standing offer that would form the basis of the subsequent DISOs. The companies were only issued DISOs for those categories of equipment for which they were able to qualify their products by meeting generic specifications that had been included as part of the RFSO. In Netgear's case, its DISO is limited to Category 1.1 equipment or Layer 2 LAN switches. According to the process described in the NESS DISO, subject to the limitations discussed below, PWGSC can either issue call-ups directly to a company for the supply of the equipment or open the requirements to competition by sending Requests for Quotations, in the form of RVDs, to the applicable NESS DISO holders, that could then present PWGSC with a best and final offer for the specific requirement. However, for requirements that exceed \$100,000, PWGSC is obligated, by the terms of the NESS DISO, to issue an RVD. The DISO also contains a provision which confirms that offerors, such as Netgear, acknowledge and agree that the terms and conditions set out in the DISO apply to every call-up.

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3. S.O.R./93-602 [*Regulations*].

4. Netgear filed 14 other complaints, concerning other RVDs issued under the NESS DISO, that were accepted for inquiry by the Tribunal (File Nos. PR-2007-080 to PR-2007-083, PR-2007-088, PR-2007-090 to PR-2007-094 and PR-2008-003 to PR-2008-006). On April 29, 2008, the Tribunal determined that the complaints that were the subject of File Nos. PR-2007-080 to PR-2007-083 were not valid and sent its statement of reasons to the parties on May 15, 2008. The Tribunal's determinations with respect to the other complaints are still pending.

8. Appendix A to Annex A of the NESS DISO contains generic specifications for LAN switches. All Category 1.1 NESS DISO holders may bid their pre-qualified products for any requirements utilizing these specifications. These generic specifications are performance-based and do not reference any particular brand name or product. The NESS DISO also allows PWGSC to specify brand-name products. In such circumstances, bidders may propose equivalent products, as long as the following conditions, which are found in Article 14 of the NESS DISO, are met:

...

**Equivalents:** *These equivalents conditions only apply when a Client has specified a product by Brand Name. All other RVDs shall be based on the generic specifications found at Annex A*

An RVD may include requirements to propose equipment that has been specified by brand name, model and/or part number. Products that are equivalent in form, fit, function and quality that are fully compatible with, interchangeable with and seamlessly interoperate with the items specified in the RVD will be considered where the Offeror:

- i. clearly designates in its RVD response the brand name, model and/or part number of the equivalent product being proposed;
- ii. demonstrates that the proposed equivalent is fully compatible with, interoperates with and is interchangeable with the items specified in the RVD;
- iii. provides complete specifications and descriptive technical documentation for each equivalent item proposed;
- iv. substantiates the compliance of its proposed equivalent by demonstrating that it meets all mandatory performance criteria that are specified in the RVD; and
- v. clearly identifies those areas in the specifications and descriptive technical documentation that demonstrate the equivalence of the proposed equivalent item.

Upon request, the Offeror must submit a sample to the Contracting Authority for testing and may be required by the Contracting Authority to perform a demonstration of its proposed equivalent product. Proposed equivalent products will be considered non-compliant if:

- i. the RVD response fails to provide all the information required to allow the Contracting Authority to evaluate the equivalency of the proposed equivalent, including additional information requested during the evaluation;
- ii. the Contracting Authority determines that the proposed equivalent fails to meet or exceed the mandatory requirements specified in the RVD; or
- iii. the Contracting Authority determines that the proposed equivalent is not equivalent in form, fit, function or quality to the item specified in the RVD, or that the proposed equivalent is not fully compatible, interoperable and interchangeable with existing Crown equipment as described in the RVD.

...

9. The NESS DISO contains the following articles which pertain to the conduct of testing:

#### **14) Call-up Process/Limitations**

...

**Demonstration or Compatibility Testing:** PWGSC may require that the Offeror demonstrate through testing (including compatibility testing) that any items that it proposes to deliver in response to an RVD meet the RVD specifications. ...

...

**49) Demonstration or Compatibility Testing****a. GUIDELINES**

At the sole discretion of Canada, products offered under this DISO may be subject to a functional and performance evaluation prior to call-up/contract award.

...

b.13 Canada is not obligated to test any or all products or options proposed.

...

10. Article 14 of the NESS DISO also contains the following regarding the issuance of RVDs:

**Call-up Process/Limitations**

Individual Call-Ups made by the ITSB [PWGSC's Information Technology Services Branch] Administrative Authority (*Article 6c*) on behalf of identified users pursuant to this Standing Offer must not exceed the following limits. These limits are on a per-Category basis. Individual call-ups shall not cross Categories:

...

Once an Offeror has qualified in a Category, all equipment offered by that Offeror as listed in the OEM's [Original Equipment Manufacturer] Canadian Published Price List *that falls within that Category's technical definition* will be available for call-up.

...

11. Each RVD contained the following provisions:

**BIDDER'S PROPOSAL: (Mandatory)**

...

3. . . . If the bid is for an equivalent product, it must indicate the equivalent OEM and OEM model number for each line item. If an equivalent product bid does not indicate the make and model number of the equipment bid, the bid will be deemed non responsive and will be given no further consideration.

...

5. All line items listed in Annex "A" must be bid (EVEN IF EQUIVALENT EQUIPMENT IS BEING PROPOSED) in order for a Proposal to be considered.

...

7. The terms and conditions of Departmental Individual Standing Offer (DISO) #EN578-030742/000/EW shall apply to the evaluation of this RVD and to any resulting Contract/Call-up.

**EVALUATION CRITERIA: (Mandatory)**

1. Proposals must comply with all mandatory conditions and technical requirements of DISO #EN578-030742/000/EW and this RVD.

2. Compliant proposals will be evaluated based on the lowest aggregate cost.

**EQUIVALENT BIDS:**

Equivalent bids must meet all of the requirements of the DISO with regards to equivalent bids. An equivalent bid must include full substantiation of equivalency for each line item for which an equivalent product is being proposed.

...



	RVD Annex "A" - LIST OF DELIVERABLES
<b>Requirements:</b>	<b>For the supply and delivery of the following [CISCO/NORTEL/HP]<sup>5</sup> products or equivalent. Note: Any equivalent products must be fully substantiated as indicated in the NESS DISO document. List equivalent products by OEM and part number with a cross reference to the list below.</b>

...

12. In December 2007, PWGSC sent the three RVDs to the eight Category 1.1 NESS DISO holders, including Netgear. For each RVD, with slight variations regarding RVD134, PWGSC was asked the following questions and, for each RVD, PWGSC responded in the same manner:<sup>6</sup>

**Question 1:**

This question is directed to the end user. Will the Crown ask the end user to provide to us a network diagram that shows the devices that are currently installed and how they are configured in this network, and where and how the new switches described in this solicitation will be installed and configured into the existing network?

**Answer 1:**

Due to security reasons, the Crown will not provide a client network diagram.

**Question 2:**

Will the client provide their Category 1.1 L2-LAN switch operational requirements with justification, without referring to [Cisco/HP] part numbers? *Will PWGSC provide any justifications provided by the client for specifying a product by brand name?*<sup>7</sup> The Crown is obligated to conduct all solicitations in an unbiased way and referring to [Cisco/HP] part numbers is clearly biased towards [Cisco/HP] products. No party may prepare, design or otherwise structure any procurement contract, including attempting to use DISO terms and conditions that are discriminatory, in order to avoid fair and open competition for a particular solicitation.

**Answer 2:**

The crown will not change the terms and condition of the DISO, which was the subject of a fair and open competition.

**Question 3:**

DISO Article 14 states that the first option for handling RVDs is ["based on the generic specifications found at Annex A.", and the second option under the section entitled "Equivalents", which states that "these equivalent conditions only apply when a Client has specified a product by Brand Name.["] In the case of the second "Brand Name" option there is a potential for the end user client to breach the Trade Agreements depending on how the RVD solicitation is handled and how the bid is evaluated. Will the Crown amend Article 14 of the DISO for the purposes of this RVD solicitation to remove the second RVD solicitation option called "Equivalents" and will the Crown provide the requested tender documentation including all information necessary to permit suppliers to submit responsive tenders, including technical specifications and plans?

**Answer 3:**

The crown will not change the terms and conditions of the DISO.

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5. RVD157 and RVD165 referenced CISCO, RVD166 referenced NORTEL and RVD174 referenced HP.  
6. Netgear's complaint at 7-8.  
7. The italicised text only appears in the question for RVD134.

**Question 4:**

We are specifically concerned in the DISO where it states that Canada is not obligated to request bidders to demonstrate their proposed products. It may be difficult to evaluate the products proposed by a bidder based on an evaluation of a product datasheet without a demonstration of a capability. If the client is questioning a capability prior to a contract award, they should be obligated to request this demonstration prior to any contract award, and this should not be optional. The client may make incorrect assumptions about a capability, such as the ability to interoperate with an existing infrastructure, and not allowing a bidder to demonstrate the capability of a proposed product is discriminatory to the bidder. Most manufacturers design their products to interoperate within a network infrastructure that includes [Cisco/HP] equipment or they would not be in business in the first place. Will the client confirm that testing will be an obligation and not optional *if there is any question about compatibility, interoperability or interchangeability*,<sup>[8]</sup> so that we are not restricted from being allowed to demonstrate the proposed equivalent products?

**Answer 4:**

The crown will not change the terms and conditions of the DISO.

13. In addition, the following question relating to RVD141 was asked:

**Question 5:**

It is our understanding that the NESS DISO is supposed to be used to acquire network hardware that, in the case of this solicitation meets the requirements of Category 1.1. Item 6 is Network Management Software therefore it should not be part of this solicitation. As a result will the Crown please delete this item from the solicitation?

**Answer 5:**

Item 6 is within the scope of Category 1.1, therefore it will remain in this solicitation.

14. Netgear submitted a proposal in response to RVD136, but did not bid on the other RVDs. According to PWGSC, bids were received for, and contracts awarded in relation to, RVD134, RVD136 and RVD141.

15. On January 2, 2008, Netgear filed its complaints with the Tribunal.

**TRIBUNAL'S ANALYSIS**

16. Subsection 30.14(1) of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of the complaint. Moreover, at the conclusion of the inquiry, the Tribunal must determine whether each complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements. In these instances, Netgear, which is a U.S.-based corporation,<sup>9</sup> cited provisions of both the *Agreement on Internal Trade*<sup>10</sup> and the *North American Free*

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8. The italicised text only appears in the questions for RVD134.

9. The information provided with the complaints indicates that Netgear was incorporated in Delaware and that its business address is in Santa Clara, California.

10. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <[http://www.ait-aci.ca/index\\_en/ait.htm](http://www.ait-aci.ca/index_en/ait.htm)> [AIT].

*Trade Agreement*<sup>11</sup> in its complaints. In its GIR, PWGSC did not directly address the issue of which agreements apply to the procurements at issue.

17. While there is no doubt that *NAFTA* and the *Agreement on Government Procurement*<sup>12</sup> apply to these procurements, the Tribunal notes that the question of whether a U.S.-based entity has standing to file a complaint under the *AIT* is currently before the Federal Court of Appeal.<sup>13</sup> As a result, whether or not the Tribunal has jurisdiction to examine Netgear's allegations that the procurements were not conducted in accordance with the requirements of the *AIT* will remain unclear until the Federal Court of Appeal clarifies the law on this issue.

18. In the context of these complaints, however, the Tribunal is of the view that it is not necessary to determine whether the procurements were conducted in accordance with the requirements of the *AIT* because the relevant provisions of all three trade agreements have much the same effect and Netgear's allegations are essentially the same under all agreements. As the provisions of the *AIT* invoked by Netgear do not impose obligations on the government institution that are more stringent than those contained in *NAFTA* or the *AGP*, whether Netgear has standing under the *AIT* is of no material consequence to the Tribunal's determination. In short, without pre-judging the outcome of the above-mentioned judicial review application, even if Netgear had standing under the *AIT*, this would not affect the ultimate disposition of these complaints, given that the Tribunal's analysis under *NAFTA* and the *AGP* would equally apply under the *AIT*. In view of the above, the Tribunal will limit its examination to whether the procurements were conducted in accordance with the requirements of *NAFTA* and, in the case of RVD136, the *AGP*.

19. The following articles of *NAFTA* are relevant to this inquiry:

**Article 1007: Technical Specifications**

1. Each Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade.

...

3. Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as "or equivalent" are included in the tender documentation.

...

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11. North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, 17 December 1992, 1994 Can. T.S. No. 2 (entered into force 1 January 1994) [*NAFTA*].

12. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [*AGP*]. While *NAFTA* applies to all three RVDs that are the subject of these complaints, the *AGP* applies only to RVD136. The *AGP* does not apply to RVD134 and RVD141, as the estimated value of the items specified in those RVDs fell below the applicable monetary threshold for procurements subject to the *AGP*.

13. See *Canada (Attorney General) v. Northrop Grumman Overseas Services Corporation*, A—310—07 (FCA). This judicial review application concerns the Tribunal's determination in File No. PR-2007-008 (30 August 2007) regarding the complaint filed by Northrop Grumman Overseas Services Corporation.

**Article 1008: Tendering Procedures**

1. Each Party shall ensure that the tendering procedures of its entities are:
  - a. applied in a nondiscriminatory manner; and

...

**Article 1013: Tender Documentation**

1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders . . . . The documentation shall also include:

...

- g. a complete description of the goods or services to be procured and any other requirements, including technical specifications, conformity certification and necessary plans, drawings and instructional materials;
  - h. the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders . . . .

...

20. The articles of the *AGP* that are relevant to this inquiry read as follows:

**Article VI - Technical Specifications**

1. Technical specifications laying down the characteristics of the products or services to be procured, such as quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labelling, or the processes and methods for their production and requirements relating to conformity assessment procedures prescribed by procuring entities, shall not be prepared, adopted or applied with a view to, or with the effect of, creating unnecessary obstacles to international trade.

...

3. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tender documentation.

...

**Article VII: Tendering Procedures**

1. Each Party shall ensure that the tendering procedures of its entities are applied in a non-discriminatory manner...

...

**Article XII - Tender Documentation**

...

2. Tender documentation provided to suppliers shall contain all information necessary to permit them to submit responsive tenders, including . . . .

...

- (g) a complete description of the products or services required or of any requirements including technical specifications, conformity certification to be fulfilled, necessary plans, drawings and instructional materials;

- (h) the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders . . . .

21. Netgear submitted that there was absolutely no justification for specifying products by brand name in the case of the solicitations at issue and that, in so doing, PWGSC breached the trade agreements. Netgear submitted that its agent, Trust, would have been able to submit proposals and be awarded the contracts as the lowest-priced bidder had the RVDs been conducted in accordance with the requirements of the trade agreements. It submitted that the detailed terms of the RVDs, while on the surface purported to allow equivalent products, actually had the effect of ensuring that no responsive equivalent bid could be submitted. It claimed that certain restrictive sections, including the “Equivalents” section of Article 14 of the NESS DISO, which were incorporated by reference into the RVDs, allowed PWGSC to adopt unjustifiable and unnecessarily restrictive specifications. Netgear submitted that, while it is true to a point that the government entity can decide its own requirements, the use of the “Equivalents” section of the NESS DISO did not cloak PWGSC with the authority to devise restrictive technical specifications, or procurement terms and conditions, which are designed to, or which have the practical effect of, precluding real competition. As such, Netgear argued that all future NESS DISO procurements should be conducted using only generic specifications without making reference to brand names.

22. Netgear submitted that PWGSC’s conduct demonstrated extreme favouritism towards Cisco and HP and extreme bias against all other DISO holders in Category 1.1. It submitted that the Tribunal has already ruled, in File No. PR-2001-048,<sup>14</sup> that these kinds of procurement practices are in breach of the trade agreements and that bidders are at liberty to propose, during the procurement process, alternative approaches or solutions. Netgear submitted that PWGSC cannot design specifications so as to ensure that only the product that it wants to buy can actually satisfy the stated requirements. Netgear submitted that PWGSC provided no justification for specifying products by a particular brand name and that no functional justification had ever been provided by the client departments, or by PWGSC, with respect to the equivalency restrictions. It also submitted that PWGSC, as part of its internal procedures and consultation with the client departments, would have been aware of the technical justification for the use of brand-name products, but refused to provide it to bidders that requested more information about the requirement during the solicitation phase. In this regard, Netgear filed an internal PWGSC document entitled “NESS Fact Sheet” which, in its view, demonstrates that, for each and every RVD, client departments must have provided PWGSC with a technical justification for the use of brand-name products.

23. Netgear submitted that, at the time of the issuance of its DISO, it “. . . had no idea that PWGSC would [use the Equivalents section of Article 14] to avoid fair and open competition, and to avoid the obligation to allow bidders to demonstrate their products . . .” Netgear submitted that all of its products adhere to open standards for all protocols, interfaces and associated software and hardware, as do all manufacturers of the products mentioned in the RVDs. It claimed therefore that interoperability is not an issue. Netgear submitted that companies like itself would not be in business if their products did not interoperate with other manufacturers’ products. It further submitted that its products have been extensively tested in its labs and had been confirmed to operate with Cisco’s, HP’s and other companies’ products.

24. Netgear submitted that PWGSC made it clear that it wanted only Cisco or HP products when it refused to answer questions or provide information requested by bidders. It claimed that, although the RVDs say that equivalent products may be offered, bidders that might have been able to provide alternative product solutions were prevented from doing so by the lack of information contained in the RVDs with regard to the clients’ actual operational requirements. It submitted that bidders asked for information about the existing technological environments (e.g. network diagrams that showed the existing network devices and configuration) for all three RVDs, but that PWGSC refused to provide it. It claimed that bidders should be allowed to have this information in order to prepare their proposals. Netgear submitted that PWGSC, in responding to inquiries with “The Crown will not change the terms and conditions of the DISO.”, avoided questions that bidders were entitled to ask according to the terms of each solicitation. Netgear claimed that

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14. *Re: Complaint Filed by Foundry Networks Inc.* (12 March 2002).

this approach makes no sense, given that PWGSC is required to provide bidders with all the information they require to submit bids and that, in these cases, bidders of equivalent products were denied basic and crucial information about the existing equipment and networking environment.

25. PWGSC submitted that, in keeping with the terms of Article 14 of the NESS DISO, RVDs issued pursuant to the NESS DISO could specify equipment by brand name. It further submitted that the complaints filed regarding the terms of the NESS DISO were not filed in a timely manner and ought to be dismissed. It noted that the Tribunal, in its decision in File No. PR-2007-021,<sup>15</sup> decided not to conduct an inquiry and expressly and directly advised Trust of the following:

Given that holders of the NESS DISO would have received a copy of the standing offer on October 13, 2006, any complaints to the Tribunal regarding the terms and conditions contained therein would have had to be filed within 10 working days of the receipt of the standing offer, i.e. by October 27, 2006.

26. PWGSC submitted that the allegations set out by Netgear in these complaints virtually duplicate the allegations made by Trust, Netgear and another related company in a large number of complaints that have been filed since May 2007. It submitted that, given that the same allegations have been addressed and repeatedly dismissed by the Tribunal, the allegations in the current complaints are similarly without merit and ought to be dismissed.

27. PWGSC also submitted that the Tribunal had determined, in File No. PR-2007-021, that the complaint did not disclose a reasonable indication that the procurement had not been carried out in accordance with the applicable trade agreements, as well as the following:

Based on the information in the complaint, the Tribunal is of the opinion that the issuance of the RVD and the process followed by PWGSC are compliant with the process outlined in section 14 of the NESS DISO. . . .

28. PWGSC submitted that this ruling informed Trust that PWGSC's conduct, with respect to the manner in which the RVDs were processed and, particularly, regarding the provision of network diagrams, was in accordance with the provisions of Article 14 of the NESS DISO and did not disclose a reasonable indication that the procurement had not been carried out in accordance with the trade agreements.

29. With respect to Netgear's allegation that insufficient information was provided to allow potential bidders to propose equivalent products, PWGSC also submitted that, where, pursuant to a NESS DISO, it has issued an RVD which directs bidders to demonstrate the equivalency of offered equipment with respect to specified brand-name products, it is not obliged to provide bidders with additional information, such as network diagrams, which would be relevant only if the RVD had permitted demonstration of equivalency with respect to generic requirements.

30. On February 18, 2008, the Tribunal requested that PWGSC respond to four questions. Netgear was then given the opportunity to comment on PWGSC's responses. The first three questions related to Netgear's first main ground of complaint, i.e. that PWGSC improperly limited the procurement to products of particular suppliers. The first question read as follows:

Given that Article 1007(3) of the North American Free Trade Agreement reads, in part, that a particular trademark or name should not be used "unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirement", how does PWGSC justify using the brand names in the subject RVDs?

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15. *Re Complaint Filed by Trust Business Systems* (12 June 2007).

31. PWGSC submitted that the NESS DISO contemplates two methods of defining the technical requirement: (1) the use of the generic specification or (2) the use of brand names or equivalents. It submitted that, as an example, in the case of RVD035,<sup>16</sup> generic specifications were used because it was determined that interoperability with a network was not an issue. With respect to the RVDs at issue, however, PWGSC submitted that ITSB, as the technical authority, took into consideration the critical importance of the integrity of the subject networks, and the risks inherent in relying on the generic specifications, and determined that the specific brand name option, with equivalents, should be used. According to the Director of Network Management at ITSB:<sup>17</sup>

In the circumstances where interoperability is required with existing equipment, a precise description of the exact technical requirements presents a very high level of complexity because of the vast number of features and performance criteria involved. There are literally hundreds of such factors that would be required to be addressed not only in respect of product specifications, but also, and more critically, in regard to specific interoperability requirements. If we were limited to using generic specifications, it would be quite possible that essential criteria might be inadvertently omitted, resulting in the purchase of a product that does not completely interoperate with existing supplies. Hence, it is necessary for us to be able to insist on full interoperability with brand-named products to ensure that the Crown requirements are fully met. It is vital that the equipment so purchased be interoperable with existing supplies, as a failure to do so could result in a compromise of Crown networks

It is the professional opinion of ITSB that, in the particular circumstances of RVDs 134, 136 and 141 and the requirements for the networks at issue for those procurements, the use of generic specifications would have created [a]n unacceptable risk of not ensuring that fully compatible products would be procured.

32. Netgear submitted that PWGSC did not respond directly to the Tribunal's question. Netgear submitted that the NESS DISO process involves both PWGSC and the end-user department, which is responsible for providing the justification for not using the generic specifications prior to the release of the RVDs. It submitted that PWGSC should therefore have had these justifications for each of the RVDs in question and that PWGSC was not acting in good faith when it did not provide that information to the bidders. Netgear submitted that, when DISO holders asked legitimate questions regarding the operational requirements, including the justifications, PWGSC did not involve the end-user departments and did not provide this information to the bidders. Regarding RVD035, Netgear submitted that this RVD was the only one issued during the entire period of the NESS DISO process that had used the generic specification.

33. The second question read as follows:

Regarding the allegation that PWGSC did not provide adequate information in the tender documents to allow bidders to prepare responsive tenders, the Tribunal notes that the "Equivalents" provision found in section 14 of the DISO requires that the Offeror, to demonstrate equivalence to the requested products, must:

iv. [substantiate] the compliance of its proposed equivalent by demonstrating that it meets all mandatory performance criteria that are specified in the RVD.

Given this requirement, what mandatory performance criteria, if any, were provided in order that bidders of equivalent products would be able to substantiate such compliance in cases where only a particular brand-name product was specified?

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16. RVD035 is not at issue in these complaints.

17. Attachment 1 to PWGSC's response to the Tribunal's questions of February 18, 2008, at 1.

34. PWGSC submitted that this section of the NESS DISO places the onus on the supplier to demonstrate that it meets the specified mandatory performance requirements. It submitted that the identification of a particular brand-name product provides notice that the mandatory performance requirements for the solicitation are the performance specifications of that particular product. It submitted that such specifications are well understood in the industry and that the designation of a particular product provides a convenient point of reference for the industry. It also submitted that Netgear refers to this reality on page 3 of its comments on the GIR when it stated the following:

...

All of the products manufactured by Netgear adher[e] to these open standards for all protocols, interfaces and associated software/firmware, and so do all of the manufacturers['] products mentioned in the RVDs, therefore interoperability is absolutely not an issue. Companies like Netgear would not be in business if their products did not operate with other [manufacturer[s']] products like Cisco.

...

35. PWGSC claimed that the "Equivalents" clause does not require, when it identifies a specific brand name, that it also provide separate generic mandatory performance specifications replicating the performance specifications of the named product. This, it submitted, would create a redundancy and defeat the purpose of using a brand-name product. It submitted that part (iv) of the "Equivalents" clause was included to allow PWGSC to add any required performance specifications, in addition to those of the designated product, if required. According to PWGSC, in the case of the three RVDs at issue, it determined that the performance specifications of the identified product would suffice.

36. Netgear submitted that, again, PWGSC did not answer the Tribunal's question. It submitted that PWGSC absolutely refused to provide any mandatory performance criteria to bidders in order to allow them to substantiate such compliance. Netgear submitted that it did not initially have an issue with using brand names as a point of reference, since most manufacturers have products of competing port densities (e.g. 24-port 10/100 switch, 48-port 10/100 switch). It claimed that it did not expect PWGSC to abuse the ability of using a brand name as a point of reference and then refuse to provide any other operational requirement specifications. It submitted that PWGSC's actions rendered the "Enquires" section of the RVD solicitations meaningless.

37. The third question read as follows:

Regarding the "Equivalency Report" attached as confidential exhibit 13 to the GIR, how was the equivalence to the products listed in RVD136 determined? Specifically, to what specifications were the NETGEAR Inc.'s (Netgear) products compared?

38. PWGSC submitted that Article 14 of the NESS DISO places the onus on the bidder to substantiate its claims that its product is compatible with, interoperates with and is interchangeable with the items specified in the RVD. It submitted that the evaluator determined that Trust had not provided either sufficient or pertinent information to do so. PWGSC submitted that the interoperability requirements must be satisfied by more than mere assertions and non-responsive information. PWGSC submitted that the evaluator then set aside Trust's offer and deemed it unnecessary to further consider any remaining compatibility requirements.

39. Netgear submitted that, once again, PWGSC did not respond to the Tribunal's question. It submitted that it is apparent that a PWGSC employee, not a DND employee, was involved in the technical evaluation, which makes no sense given that DND, as the end user, was to be held accountable in the event



of a challenge to the Tribunal.<sup>18</sup> It also noted that Trust had provided two options as part of its proposal and that, apparently, the evaluator had not performed evaluations of both options. It submitted that, if PWGSC had wanted a demonstration regarding the proposed products' capabilities, it could have requested one.

40. The Tribunal, in considering the allegations in these complaints, must address two distinct procurement phases relating to each of the RVDs. The first phase is that of the NESS DISO itself, while the second phase relates to the individual RVDs.

41. As the Tribunal stated in File No. PR-2007-021, the time for any NESS DISO holder to have filed a complaint or objected about provisions of that standing offer would have been during that particular solicitation period, i.e. from June to July 2006, or when the actual DISOs were issued, i.e. October 13, 2006. As noted by PWGSC, the Tribunal identified October 27, 2006, or 10 working days after the DISOs were issued, as the date by which any complaints/objections about the structure of the NESS DISO would have had to have been made. The Tribunal therefore finds that all grounds of complaint contained in the current complaints concerning articles in the NESS DISO were filed outside the time limits prescribed by the *Regulations*. As such, the Tribunal accepts that, when PWGSC decides to specify equipment by brand name, it must follow the procedure outlined in Article 14 of the NESS DISO. Accordingly, Netgear cannot, at this time, argue that all future NESS DISO procurements should be conducted using a procedure that is different from the one outlined in Article 14.

42. However, the Tribunal's statement in File No. PR-2007-021 does not mean that PWGSC necessarily complies with the requirements of the trade agreements whenever it chooses to identify a product by brand name as opposed to referring to generic specifications in an individual RVD. In this regard, the Tribunal notes that PWGSC has attempted to infer from previous determinations that the Tribunal has already determined that the NESS DISO conforms to the requirements of the trade agreements and that, consequently, all RVDs that follow the process outlined in Article 14 of the NESS DISO are consistent with the requirements of the trade agreements. The Tribunal has not done so. What the Tribunal did in previous cases was to determine, as it has in the present cases, that complaints or objections about the contents of the NESS DISO are untimely. That the Tribunal is unable to address the contents of the NESS DISO does not amount to a pronouncement on its compliance with the trade agreements.

43. In any event, the Tribunal finds that, irrespective of whether the NESS DISO conforms to the requirements of the trade agreements, each RVD, individually considered, is a distinct process which can lead to the awarding of a "designated contract" as defined in section 30.1 of the *CITT Act* and must therefore comply with the requirements of the trade agreements. The Tribunal notes that potential suppliers may file complaints with the Tribunal concerning any aspect of the procedures that are used by the Government and that lead to the awarding of contracts. As a result, the Tribunal is of the view that the terms of the NESS DISO do not shield PWGSC from having to conform to the trade agreements with respect to any RVD, including the ones in question. Specifically, in the circumstances of these RVDs, the Tribunal must determine whether PWGSC was justified in specifying products by brand name and whether it conducted the procurements in accordance with the above-noted *NAFTA* and *AGP* provisions.

44. In light of the foregoing, the Tribunal will now address Netgear's three main grounds of complaint, namely: that PWGSC improperly limited the procurement to products of particular suppliers; that, regarding RVD136, PWGSC incorrectly declared its proposal non-compliant for proposing products that were not contained on Netgear's approved-product list; and that, with respect to RVD141, PWGSC improperly attempted to purchase software through a solicitation process that should have been limited to hardware.

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18. In accordance with Exhibit A to Netgear's February 29, 2008, comments on PWGSC's response to the Tribunal's request for information.

### Limiting the Procurements to Products of Particular Suppliers

45. Netgear alleged that PWGSC improperly limited the procurements to products of particular suppliers in these complaints as well as in the 14 other complaints, concerning RVDs issued under the NESS DISO, that were accepted for inquiry by the Tribunal. As it stated in its statement of reasons in File Nos. PR-2007-080 to PR-2007-083, the Tribunal considers that this ground of complaint can be divided into three main allegations. The Tribunal will address each of these allegations separately. Given that Netgear's arguments, the alleged PWGSC shortcomings and the information filed by the parties are essentially the same in the complaint files at issue and in File Nos. PR-2007-080 to PR-2007-083, the Tribunal deems it appropriate to rely on the analysis developed in the statement of reasons in those files, which was issued on May 15, 2008.

#### Allegation 1—PWGSC had no justification for specifying products by brand name

46. The crux of Netgear's argument is that PWGSC failed to provide information regarding the various departments' actual justifiable operational requirements and that it failed to justify its use of brand names in the case of the solicitations at issue. In support of this argument, Netgear made reference to the previously mentioned NESS Fact Sheet which, it claimed, imposed an obligation on client departments to provide to PWGSC, for each RVD, a technical justification for the use of brand-name products.

47. PWGSC, on the other hand, submitted that each RVD requirement is examined by PWGSC's ITSB, acting as the coordinating technical authority, and the client department. Relying on a technical opinion prepared by the Director of Network Management at ITSB,<sup>19</sup> PWGSC argued that, for the RVDs in question, the operational requirement of interoperability with existing departmental networks justified the use of brand names.

48. Article 1007(3) of *NAFTA* prohibits technical specifications from making reference to a brand name "... unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements . . . ." In cases where there is no sufficiently precise or intelligible way of describing a requirement, Article 1007(3) requires that the tender documentation include words such as "or equivalent" when referring to a brand name.

49. Article VI(3) of the *AGP* similarly states that there shall be "... no requirement or reference to a particular trademark or trade name . . . unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as "or equivalent" are included in the tender documentation . . . ."

50. The Tribunal does not interpret either article as necessarily requiring that government entities justify, *during* the procurement process, the use of brand names to describe procurement requirements. However, this is not to say that they are never required to do so. Evidently, when such an issue becomes the subject of an inquiry by the Tribunal as it has in these cases, a government entity must be able to, at that time, provide the Tribunal with an explanation as to why there was no "sufficiently precise or intelligible way" of describing the procurement requirements. Whether this justification is provided by way of an internal document such as PWGSC's NESS Fact Sheet or any other means is, in the Tribunal's opinion, irrelevant as long as the Tribunal is capable of properly ascertaining the nature of the justification.

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19. Attachment 1 to PWGSC's response to the Tribunal's questions of February 18, 2008.

51. In the present cases, the technical opinion prepared by the Director of Network Management at ITSB, and relied upon by PWGSC, provided the Tribunal with a justification for the actual operational requirements of the client departments as well as a justification for the use of brand names with respect to the RVDs in question. According to the technical opinion, the RVDs “. . . involved the procurement of networking equipment to be installed and integrated into existing networks whose integrity and reliability was essential to the respective host department or agency . . .” Further, the technical opinion provided that “. . . [i]t is vital that the equipment so purchased be interoperable with existing supplies, as a failure to do so could result in a compromise of Crown networks . . .” With respect to the use of brand names, the technical opinion provided the following:

. . .

In the circumstances where interoperability is required with existing equipment, a precise description of the exact technical requirements presents a very high level of complexity because of the vast number of features and performance criteria involved. There are literally hundreds of such factors that would be required to be addressed not only in respect of product specifications, but also, and more critically, in regard to specific interoperability requirements. If we were limited to using generic specifications, it would be quite possible that essential criteria might be inadvertently omitted, resulting in the purchase of a product that does not completely interoperate with existing supplies . . .

It is the professional opinion of ITSB that, in the particular circumstances of RVDs 134, 136 and 141 and the requirements for the networks at issue for those procurements, the use of generic specifications would have created an unacceptable risk of not ensuring that fully compatible products would be procured.

. . .

52. The Tribunal notes that, while Netgear claimed that there was absolutely no justification for specifying a product by brand name, as all manufacturers of products similar to those mentioned in the RVDs adhere to open standards for all protocols, interfaces and associated software and hardware, it failed to provide the Tribunal with any evidence to properly support this allegation. Furthermore, Netgear has not provided the Tribunal with any evidence (e.g. comparative test results from an independent laboratory or engineering reports) to indicate that their products or those sold by other manufacturers have all the necessary features or performance characteristics that would permit them to operate like the items specified in the RVDs without causing problems. As the Tribunal has stated on numerous occasions, there is an onus on the complainant to prove its case and substantiate its allegations. The Tribunal is of the view that Netgear has failed to do so in these cases.

53. Therefore, the Tribunal accepts PWGSC’s justifications as being reasonable in the circumstances of the RVDs in question. The Tribunal believes that the use of brand names was justified, given that there appeared to be no sufficiently precise way of otherwise describing the procurement requirements. The Tribunal notes that, although it made reference to brand-name products in the RVDs, PWGSC allowed for equivalent products to be proposed, as required by Article 14 of the NESS DISO and Article 1007(3) of *NAFTA* and Article VI(3) of the *AGP*.

54. Accordingly, the Tribunal is of the view that PWGSC has, in these circumstances, acted in conformity with Article 1007(3) of *NAFTA* and Article VI(3) of the *AGP* and finds that this ground of complaint is not valid.

Allegation 2—PWGSC refused to provide additional information to bidders (i.e. information about existing devices and networks), such as network diagrams, in order to permit bidders to prepare their proposals.

55. Netgear claimed that PWGSC did not comply with the requirements of the trade agreements when it failed to provide bidders that sought to propose equivalent products with essential information that they claimed would have been required in order to allow them to submit responsive equivalent bids. In particular, Netgear submitted that, without being provided with network diagrams and additional information on the actual operational requirements, existing devices and networks of client departments, bidders could not demonstrate the equivalency of their proposed products. In short, according to Netgear, without the provision of additional information by PWGSC, it was impossible for bidders to prepare a compliant proposal for an equivalent product.

56. In this regard, the Tribunal notes that Article 1013 of *NAFTA* requires that suppliers be provided with “. . . all information necessary to permit [them] to submit responsive tenders . . . .” The Tribunal considers that paragraphs (g) and (h) make it clear that, in order to comply with this provision, a government institution must provide to suppliers “. . . a complete description of the goods or services to be procured and any other requirements, including technical specifications . . .” and the “. . . factors other than price that are to be considered in the evaluation of tenders . . . .” The Tribunal notes that *NAFTA* does not require that operational requirements and technical specifications be expressed in any particular format.

57. Article XII(2) of the *AGP* also requires that suppliers be provided with “. . . all information necessary to permit them to submit responsive tenders . . .” which shall include, among other things, “. . . a complete description of the products or services required or of any requirements including technical specifications, conformity certification to be fulfilled, necessary plans, drawings and instructional materials . . .” and “. . . the criteria for awarding the contract, including any factors other than price that are to be considered in the evaluation of tenders . . . .” The Tribunal also notes that the *AGP* does not require that operational requirements and technical specifications be expressed in any particular format.

58. PWGSC stated that the identification of a particular brand-name product provides notice that the mandatory performance requirements for the solicitations are the performance specifications of that particular product. It added that such specifications are well understood in the industry and that the designation of a particular product provides a convenient point of reference for the industry.<sup>20</sup> According to PWGSC, there are no other mandatory performance requirements in the case of the RVDs in question.

59. The Tribunal notes that Netgear did not dispute PWGSC’s statements that, as specified, the technical requirements are generally known to the industry. Moreover, it did not provide evidence that there are other undisclosed requirements, specifications and factors to be considered in the evaluation of tenders. Therefore, the Tribunal concludes that the requirements and technical specifications referred to in these solicitations are generally known to the industry and that the identification of a product by brand name, as well as by model and serial number, informed potential suppliers of the mandatory performance requirements that had to be met by any proposed equivalent products. On the basis of the information provided, the Tribunal finds that the evaluation of proposed equivalent products was, in each instance, to be based solely on the technical specifications of the specified brand-name products and, therefore, concludes that, by indicating that it required interoperability with certain identified brand-name products, PWGSC adequately set out its operational requirements and technical specifications.

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20. PWGSC’s letter dated February 25, 2008, at 3.

60. In these circumstances, the Tribunal considers that Netgear has not established that PWGSC failed to provide suppliers with all the information necessary to submit responsive tenders and is not convinced that PWGSC was required to provide additional information on the client departments' existing equipment and network environment in order to allow suppliers to submit a compliant equivalent bid. The Tribunal is of the view that additional information would only have been required had the evaluation of any proposed equivalent products in the solicitations at issue been based on requirements or technical specifications other than those of the identified brand-name products. However, this does not appear to be the case.

61. In fact, the Tribunal notes that Article 14 of the NESS DISO, which is incorporated in the RVDs in question, clearly places the onus on the bidder to demonstrate that any product proposed be:

... equivalent in form, fit, function and quality [and] fully compatible with, interchangeable with and seamlessly interoperate *with the items specified in the RVD* [by] ... :

- i. clearly designat[ing] in its RVD response the brand name, model and/or part number of the equivalent product being proposed;
- ii. demonstrat[ing] that the proposed equivalent is fully compatible with, interoperates with and is interchangeable *with the items specified in the RVD*;
- iii. provid[ing] complete specifications and descriptive technical documentation for each equivalent item proposed;
- iv. substantiat[ing] the compliance of its proposed equivalent by demonstrating that it meets all mandatory performance criteria that are specified in the RVD; and
- v. clearly identif[ying] those areas in the specifications and descriptive technical documentation that demonstrate the equivalence of the proposed equivalent item.

...

[Emphasis added]

62. Given that the onus placed on the bidders is to demonstrate equivalency with the "items specified in the RVD", the Tribunal fails to understand why they would require network diagrams and additional information on the actual operational requirements, existing devices and networks of client departments in order to submit responsive proposals and demonstrate the equivalency of the proposed equivalent items. The Tribunal is of the view that, considering the information that was provided by PWGSC and the terms of Article 14 of the NESS DISO, Netgear has not substantiated its allegation that, without additional information, it was impossible for bidders seeking to offer equivalent products to prepare compliant proposals. In view of the above, the Tribunal considers that it has not been established that the solicitations were structured to ensure that only Cisco or HP products (as the case may be) be deemed compliant.

63. The Tribunal considers that, when they are provided with a brand name, as well as a model and serial number, companies involved in supplying network equipment would be able to make determinations as to which of their products, if any, would be fully compatible with, interchangeable with and seamlessly interoperate with the items specified in the RVD. Indeed, the Tribunal notes that, in its response to PWGSC's answers to the Tribunal's questions of February 18, 2008, Netgear stated the following:

...

Note that Netgear products have been extensively tested in Netgear's labs and confirmed to interoperate with Cisco, Nortel, HP, Foundry and other products ...

64. Despite this purported testing and Netgear's repeated assertions that compatibility and interoperability between its products and those of Cisco or HP are not an issue, the Tribunal finds that, when its agent, Trust, chose to bid (i.e. in the case of RVD136), its efforts to demonstrate equivalency with the

requested brand-name products lacked the rigour necessary to convince the Tribunal that more information was required to bid. In fact, Trust did not even compare the technical specifications of Netgear's proposed products with those of the specified brand-name product. The Tribunal considers that only presenting a list of the technical specifications of Netgear's proposed product does not constitute a demonstration of equivalency with the items specified in the RVD.

65. In the Tribunal's opinion, if Trust or Netgear had provided evidence demonstrating a level of equivalency with the requested product with its bid (i.e. an engineering report, results from benchmark comparison testing or even a thorough comparison and analysis of the technical specifications of its products vis-à-vis those of the items specified in the RVD) and PWGSC still concluded that Trust's bid was non-compliant, Netgear's argument that it was unable to properly bid without additional information or that the tendering procedures were applied in a discriminatory manner would have been more substantial. However, it appears to the Tribunal that Trust's bid did not contain anything to support any claims of compatibility that would have, at a minimum, allowed PWGSC to evaluate the equivalency or appropriateness of Trust's proposed products. Despite Netgear's claims about the capabilities of its products, the Tribunal can find nothing of substance in the documents submitted as part of its complaints that would have allowed Netgear to substantiate, in a concrete way, its claims that its products met or exceeded all of the requirements.

66. Based on the case presented in the complaints, the Tribunal is unable to conclude, on balance, that the need for additional information, including network diagrams or a listing of other devices required to interface with the requested switches, was warranted. Article 14 of the NESS DISO clearly states that "[p]roducts that are equivalent in form, fit, function and quality that are fully compatible with, interchangeable with and seamlessly interoperate *with the items specified in the RVD* will be considered . . ." [emphasis added]. This statement, which is incorporated by reference into each RVD, does not require bidders to address larger network issues which, in the Tribunal's opinion, may have required additional information like a network diagram or an interface product listing.

67. With respect to Netgear's argument that the Tribunal has already decided in File No. PR-2001-048 that the failure by a government institution to provide a network diagram amounts to a violation of the trade agreements, the Tribunal notes that its statements in File No. PR-2001-048 do not mean that the refusal to provide information about existing devices and the particular network environments always results in a breach of the applicable provisions of the trade agreements. While, in certain circumstances, this information may be required in order for potential bidders to be able to submit proposals, it may not be necessary in other situations. For example, in File No. PR-2003-001,<sup>21</sup> the Tribunal determined that, in the circumstances of that case, while it might have been helpful, a network diagram was not necessary to permit suppliers to submit responsive tenders. Similarly, in the current complaints, for the above-noted reasons, the Tribunal is of the view that information about existing devices and the particular network environments was not necessary.

68. Accordingly, in the circumstances where Trust has submitted a bid (i.e. in the case of RVD136), the Tribunal finds that there is no evidence that PWGSC did not act in accordance with the terms of the NESS DISO or the requirements of *NAFTA* and the *AGP* when it declared Trust's bid non-compliant for failing to demonstrate equivalency. The Tribunal also cannot conclude that PWGSC failed to provide adequate information for those RVDs (RVD134 and RVD141) for which Trust did not submit responses. For these reasons, the Tribunal finds that this ground of complaint is not valid.

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21. *Re Complaint Filed by Bajaj Inc.* (7 July, 2003).

Allegation 3—PWGSC failed to allow suppliers to demonstrate, through testing, the equivalency of their proposed products

69. The Tribunal finds that the NESS DISO is clear in defining that testing is to be conducted at the discretion of the Crown. As noted above, the Tribunal considers that allegations regarding the content of the NESS DISO had to have been filed by October 27, 2006, in order for them to be considered filed within the time limits prescribed under section 6 of the *Regulations*. As such, this ground of complaint has not been filed in a timely manner.

70. In any event, the Tribunal considers that accepting Netgear's apparent argument that PWGSC should have provided suppliers with an opportunity to demonstrate, through testing, any proposed equivalent products would inappropriately relieve bidders from the requirement to demonstrate, following the process outlined in Article 14 of the NESS DISO, the equivalency of their proposed products with the items specified in the RVDs. Such a result would be contrary to the terms of the NESS DISO, as it would imply that a party could have simply proposed a product without providing any information regarding equivalency and expected to be offered an opportunity to demonstrate, through testing, such equivalency with items specified in the RVDs.

71. Finally, the Tribunal notes that Netgear also argued that, as a result of PWGSC's alleged shortcomings with respect to justifications given for the use of brand-name products and the lack of information provided to bidders, the tendering procedures were biased in favour of products of other suppliers and that the procurement processes were thus conducted in a discriminatory manner contrary to Article 1008 of *NAFTA* and Article VII of the *AGP*.

72. The Tribunal has already rejected Netgear's three allegations to the effect that PWGSC improperly limited the procurements to products of particular suppliers. Accordingly, the Tribunal is unable to conclude that PWGSC's conduct breached the non-discrimination provisions found at Article 1008 of *NAFTA* and Article VII of the *AGP*.

**Improperly Declaring Netgear's Proposal Non-compliant in Response to RVD136**

73. Netgear submitted that PWGSC had incorrectly determined that the products that Trust proposed in response to RVD136 were not listed on the PWGSC-approved Netgear published price list at the closing date. Netgear claimed that this was a disguised means of disqualifying suppliers that were capable of offering an equivalent solution to the specified brand-name product.

74. Other than making these assertions, Netgear provided no evidence or information to substantiate this ground of complaint in the submissions that it made throughout the complaint proceedings. As there is nothing on the record to support Netgear's allegation in this regard, the Tribunal is unable to conclude that Netgear was disqualified because its proposed products were not included on its published price list. In fact, based on the totality of the evidence presented in these complaint proceedings and the Tribunal's findings with respect to Netgear's other grounds of complaint, the Tribunal is of the view that Netgear was disqualified because it failed to adequately demonstrate the equivalence of its products with those specified in the RVD.

75. Netgear also submitted that it was apparent that a technical analyst from PWGSC, not from DND, had performed the evaluation of its proposal and that his opinions were incorrect and unsupported by the equivalency report<sup>22</sup> that was prepared. Netgear noted that the same manufacturer fabricates the gigabit interface converters for both Netgear and Cisco and that, therefore, the Netgear proposed items were fully compatible and interoperate with Cisco products.

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22. Confidential Exhibit 13, GIR.

76. According to PWGSC, it received three bids in response to RVD136. It submitted that two of the bids, including Trust's bid, were determined to be non-compliant with the requirements of the RVD. It submitted that its technical analyst had found that Trust's bid did not comply with the technical equivalent product requirements specified in the RVD and the NESS DISO. PWGSC submitted that the aforementioned equivalency report highlighted the differences between the proposed Netgear products and the items listed in the RVD.

77. As it has stated many times in the past, the Tribunal will not substitute its judgment for that of the evaluators unless they have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a proposal, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.<sup>23</sup> The Tribunal does not find that any of these circumstances exist in the complaints before it. The Tribunal therefore finds that PWGSC properly evaluated Netgear's proposal in accordance with the methodology defined in the RVD and in the NESS DISO and that this ground of complaint is not valid.

### **Purchasing Software Through a Hardware-only Solicitation Process**

78. Netgear also submitted that PWGSC attempted to purchase items (i.e. network software) that were outside the scope of Category 1.1 of the NESS DISO. It claimed that this attempt represented a breach of the terms and conditions of the NESS DISO, as well as of the trade agreements.

79. PWGSC did not address this allegation in the GIR. However, in a subsequent RVD (that is not at issue), PWGSC did remove requirements for software through amendments to the RVD.

80. Given the lack of information provided on this issue, the Tribunal requested, as part of the questions that it sent to PWGSC on February 18, 2008, that PWGSC specifically comment on Netgear's allegation. This constituted the fourth question asked and read as follows:

Regarding RVD141, Netgear alleged that PWGSC attempted to purchase software products on a hardware-only procurement instrument. Please comment on this allegation.

81. In its response, PWGSC submitted that section 29 of the NESS DISO provides the following regarding the material being procured:

**29) Material**

...

- iii) Any applicable software shall be the current release, unless otherwise specified, in general use and require no further research and development. The software shall be supported by, and fully compatible with the hardware up to the limit of hardware expansion capability. All software must be completely integrated and fully interfaced with the hardware.

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23. *Re Complaint Filed by K-W Leather Products Ltd.* (3 September 2002), PR-2002-012 (CITT); *Re Complaint Filed by Polaris Inflatable Boats (Canada) Ltd.* (23 June 2003), PR-2002-060 (CITT); *Re Complaint Filed by The Impact Group* (14 June 2006), PR-2005-050 (CITT); *Re Complaint Filed by Excel Human Resources Inc. (operating as excellTR)* (25 August 2006), PR-2005-058 (CITT); *Re Complaint Filed by Maxxam Analytics Inc.* (20 September 2007), PR-2007-017 (CITT).



82. PWGSC submitted that item 6 of RVD141, ProCurve Manager Plus 2.1 100 Media (ProCurve), is a software tool that allows a network operator to configure, update, monitor and troubleshoot the ProCurve devices requested in the RVD, and is integrated into the subject network. PWGSC submitted that, as such, it is directly related to the operation of the requested equipment and serves to enhance and improve its functionality, thereby fully falling within the scope and intent of article 29(iii) of the NESS DISO. It also noted that the value of the software was approximately 1 percent of the value of the hardware components of the RVD.

83. In its comments on PWGSC's response, Netgear submitted that PWGSC has taken article 29 (iii) of the NESS DISO completely out of context and submitted that the software referred to in this article related to the software that comes with the switches in Category 1.1 and that runs on the switches themselves. It submitted that this is analogous to purchasing a personal computer (PC) that comes with a Windows™ operating system and that, after the initial purchase, all other application software is purchased separately. It submitted that HP's ProCurve is an application software that does not run on the switches, instead running on a separate PC. It submitted that, while there may be an HP software standing offer, it is completely inappropriate to purchase the software through the NESS DISO hardware standing offer.

84. Regarding PWGSC's statement that the software only represented 1 percent of the price of the RVD, Netgear submitted that the terms of the RVD required that all items be bid on and that not bidding on the ProCurve software would have rendered its bid non-compliant.

85. In the Tribunal's opinion, the trade agreements, including *NAFTA*, entail that a government institution is governed by the terms set out in the tender documentation for any particular solicitation. Accordingly, a government institution will conduct a procurement process in a manner inconsistent with *NAFTA* if it does not act in accordance with the terms of the solicitation documents. In the case of RVD 141, the Tribunal is of the view that the purchase of software, such as HP's ProCurve as part of an RVD, was inappropriate given the wording of the NESS DISO. The Tribunal notes that Article 14 of the NESS DISO specifically states that "[i]ndividual call-ups<sup>24</sup> shall not cross Categories". In reviewing the generic L2 LAN switch specification attached to Netgear's DISO, and the NESS DISO itself, the Tribunal cannot find any reference that would allow the purchase of software with the capabilities of those attributed, by both PWGSC and Netgear, to HP's ProCurve. Thus, the Tribunal considers that PWGSC attempted to purchase items that are outside the scope of Category 1.1 of the NESS DISO. In the Tribunal's opinion, this is tantamount to impermissibly changing the terms of the solicitation. The Tribunal therefore finds that PWGSC, in attempting to purchase the aforementioned software, has "crossed categories" and has acted in contravention of the NESS DISO provisions and, therefore has not conducted this part of the procurement in accordance with *NAFTA*. Accordingly, the Tribunal finds that this ground of complaint is valid.

86. Although the Tribunal has found this ground of complaint to be valid, it will not recommend a remedy in relation to this ground because, after taking into consideration the criteria found at subsection 31.15(3) of the *CITT Act*, the Tribunal finds that there was no prejudice suffered by Netgear. Firstly, on the basis of the information presented, the Tribunal is not convinced that Netgear would have submitted a response to RVD141 had the above-noted software not been included as a requested item. Secondly, based on its findings with respect to Netgear's other grounds of complaint, the Tribunal is not convinced that, even if PWGSC had respected the boundaries of the product categories as stated in the NESS DISO, Netgear would have acted differently in submitting a bid than it did for RVD136 where it did not attempt to demonstrate equivalence with the items specified in the RVD. The Tribunal also notes that, in

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24. For the purposes of these complaints and the procurement processes described in the NESS DISO, the term "RVD" can be substituted for "call-up".

the context of a subsequent RVD to purchase products covered by Category 1.1 of the NESS DISO, PWGSC removed the requirement for a particular software program from that RVD.<sup>25</sup> The Tribunal is of the view that PWGSC's action suggests that it will respect the boundaries of the product categories in future procurement processes under the NESS DISO. On the basis of the foregoing, the Tribunal has decided not to recommend a remedy.

### Costs

87. PWGSC submitted that Netgear knew, or ought to have known, based on previous Tribunal determinations, that the allegations contained in the complaints were repetitious and without merit. PWGSC requested that it be awarded its costs for responding to these complaints. It also requested that the Tribunal take into account the conduct of Netgear's agent, Trust, in the filing of these and the many earlier complaints. It submitted that, notwithstanding the prior guidance provided to Trust by the Tribunal on more than one occasion, Trust chose to disregard this guidance and continue to file redundant complaints with respect to the same elements of the NESS DISO, thus needlessly burdening the resources of the Tribunal and other parties. As such, bearing in mind the Tribunal's *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), PWGSC submitted that the Tribunal ought to give consideration as to whether Trust has engaged in frivolous and vexatious litigation and fix costs accordingly.

88. Netgear submitted that, when awarding costs pursuant to its *Guideline*, the Tribunal ought to give consideration to PWGSC's conduct, specifically that PWGSC did not provide the information requested by the Tribunal.

89. In the Tribunal's opinion, while it is true that some of the similar complaints filed by Netgear's agent concerning other RVDs issued under the NESS DISO were not accepted for inquiry, the fact remains that, in the case of these complaints and the other previously mentioned complaints, the Tribunal determined that inquiries were warranted. Had the Tribunal considered that Netgear's complaints amounted to "frivolous or vexatious litigation" in light of its prior decisions not to conduct inquiries in certain instances, it would not have accepted them for inquiry. Therefore, the Tribunal will not give consideration to whether Trust has engaged in frivolous and vexatious litigation in fixing costs.

90. The Tribunal also disagrees with Netgear's argument that PWGSC did not provide the information requested by the Tribunal. PWGSC provided information that it considered sufficient to respond to the Tribunal's questions. In any event, given the Tribunal's disposition of the complaints, it is not necessary to give consideration to PWGSC's conduct in awarding costs.

91. In view of the above and the circumstances of these complaint cases, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaints. The Tribunal considered its *Guideline* and is of the view that these complaint cases, taken as a whole, represent a complexity level corresponding to the medium level of complexity referred to in Appendix A of the *Guideline* (Level 2). The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The complexity of the procurements was low, in that the goods in question are off-the-shelf, standard items. The complexity of the complaints was medium, in that the issue involved allegations concerning perceived restrictive specifications. Finally, the complexity of the complaint proceedings was medium, as there was a single minor motion, there were no interveners, and no public hearing was held. The

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25. In its comments on PWGSC's response to the Tribunal's questions, Netgear indicated that, for RVD211, a requirement for Cisco software was removed from the solicitation.

135-day time frame was allowed following PWGSC's failure to serve Netgear with its responses to the Tribunal's questions as it had been directed to do by the Tribunal. As the Tribunal has found one of Netgear's grounds of complaint to be valid, it will depart from its *Guideline* and reduce the amount normally payable for a Level 2 case from \$2,400 to \$1,000. Therefore, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

#### **DETERMINATION OF THE TRIBUNAL**

92. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that two of the complaints, PR-2007-075 and PR-2007-076, are not valid and one, PR-2007-077, is valid in part.

93. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaints, which costs are to be paid by Netgear. The Tribunal's preliminary indication of the level of complexity for these complaint cases, taken as a whole, is Level 2, and its preliminary indication of the amount of the cost award is \$1,000. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by the *Cost Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Diane Vincent

Diane Vincent

Presiding Member