



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2007-088

NETGEAR, Inc.

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Monday, May 26, 2008*

Canada

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IN THE MATTER OF a complaint 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 complaint 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 the complaint is not valid.

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 complaint, which costs are to be paid by NETGEAR, Inc. The Canadian International Trade Tribunal's preliminary indication of the level of complexity for the complaint case is Level 1, 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

Hélène Nadeau

Hélène Nadeau

Secretary

Tribunal Member:	Diane Vincent, Presiding Member
Director:	Randolph W. Heggart
Investigation Manager:	Michael W. Morden
Investigator:	Josée Leblanc
Counsel for the Tribunal:	Alain Xatruch Georges Bujold
Complainant:	NETGEAR, Inc.
Counsel for the Complainant:	Debra Lance
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	Susan D. Clarke Ian McLeod

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

COMPLAINT

1. On February 25, 2008, NETGEAR, Inc. (Netgear) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning a Request for Volume Discount (RVD) for Solicitation No. EN869-060292/M (RVD171) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for networking equipment. The RVD was 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 a particular supplier, Nortel Networks (Nortel), 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 PWGSC had, in bad faith, disclosed certain confidential information to competitors and end-user departments, thus demonstrating bias and discriminatory behaviour toward Netgear.

4. As a remedy, Netgear requested: that the Tribunal recommend that the contract awarded in response to RVD171 be cancelled; 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 Business Systems (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 a postponement of award of contract order 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. It also requested that, due to the systemic nature of the issues relating to this complaint, the Tribunal issue a ruling to stop the award of any contract relating to the NESS DISO until it had determined the validity of this complaint and previous ones.²

5. On March 6, 2008, the Tribunal informed the parties that it had accepted the complaint, in part, for inquiry, as it 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*.³ This

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

2. At the time of Netgear's request for this remedy, the Tribunal had already accepted for inquiry a number of complaints filed by Netgear concerning other RVDs issued under the NESS DISO (File Nos. PR-2007-075 to PR-2007-077 and File Nos. PR-2007-080 to PR-2007-083).

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

complaint was part of a group of similar complaints filed by Netgear that were accepted for inquiry by the Tribunal.⁴ That same day, the Tribunal also issued a postponement of award of contract order. Regarding the allegation that PWGSC had inappropriately disseminated confidential information, the Tribunal informed Netgear that the complaint did not disclose a reasonable indication that PWGSC had not carried out the procurement in accordance with the applicable trade agreements and that, as a result, that ground of complaint would not form part of the Tribunal's inquiry. The Tribunal did not issue a postponement of award of contract order relating to the NESS DISO itself and did not find that the complaint was suitable for the expedited resolution process (i.e. the express option). On March 11, 2008, PWGSC acknowledged receipt of the complaint and informed the Tribunal that a contract had been awarded. Accordingly, on March 12, 2008, the Tribunal rescinded its postponement of award of contract order. On March 31, 2008, PWGSC filed the Government Institution Report (GIR). On April 10, 2008, Netgear filed its response to the GIR.

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

PROCUREMENT PROCESS

7. The NESS DISO upon which the RVD is 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.

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

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-2007-075 to PR-2007-077, PR-2007-080 to PR-2007-083, PR-2007-091 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. On May 15, 2008, the Tribunal determined that the complaints that were the subject of File Nos. PR-2007-075 to PR-2007-077 were, for the most part, also not valid. The Tribunal's determinations with respect to the other complaints are still pending.

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. The 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
Requirements:	For the supply and delivery of the following NORTEL NETWORKS 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.

...

11. On February 5, 2008, PWGSC sent the RVD to the eight Category 1.1 NESS DISO holders, including Netgear. During the solicitation period, PWGSC was asked the following questions and it responded as follows:

Question 1:

This question is directed to the end user. Will PWGSC 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. In addition, there is nothing in the DISO which obligates the Crown to provide such a diagram. The Crown will not change the terms and conditions of the DISO.

Question 2:

Will the client provide their Category 1.1 L2- LAN switch operational requirements with justification, without referring to Nortel part numbers? The Crown is obligated to conduct all solicitations in an unbiased way and referring to Nortel part numbers is clearly biased towards Nortel 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:

Section 14 of the DISO allows for equivalents to be proposed where brand names have been specified. 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.

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 Nortel 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, so that we are not restricted from being allowed to demonstrate the products that we plan to demonstrate?

Answer 4:

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

12. RVD171 closed on February 8, 2008. Netgear did not submit a proposal.
13. On February 25, 2008, Netgear filed its complaint with the Tribunal.

TRIBUNAL'S ANALYSIS

14. 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 the 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 this instance, Netgear, which is a U.S.-based corporation,⁵ cited provisions of both the *Agreement on Internal Trade*⁶ and the *North American Free Trade Agreement*⁷ in its complaint. In its GIR, PWGSC did not directly address the issue of which agreements apply to the procurement at issue.

15. While there is no doubt that *NAFTA* applies to this procurement, the Tribunal notes that the Federal Court of Appeal has recently held that an entity that wishes to avail itself of the benefits of the provisions of the *AIT* must demonstrate that it meets the requirements of the definition of "Canadian supplier" under Article 518 of the *AIT*.^{8,9} Article 518 defines "Canadian supplier" as "... supplier that has a place of business in Canada" and further defines "place of business" as "... an establishment where a supplier conducts activities on a permanent basis ...". Since Netgear is a U.S.-based entity with a business address in Santa Clara, California, the Tribunal is of the view that it is not a "Canadian supplier" within the meaning of Article 518 of the *AIT* and the Tribunal is therefore without jurisdiction to examine Netgear's allegations that the procurement was not conducted in accordance with the requirements of the *AIT*.

16. In any event, in the context of this complaint, the Tribunal is of the view that the provisions of the *AIT* invoked by Netgear do not impose on the government institution obligations that are more stringent than those contained in *NAFTA*. As such, even if Netgear had standing under the *AIT*, this would not have affected the ultimate disposition of this complaint given that the Tribunal's analysis under *NAFTA* would equally apply under the *AIT*.

-
5. The information provided with the complaint indicates that Netgear was incorporated in Delaware and that its business address is in Santa Clara, California.
 6. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
 7. *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*].
 8. See *Canada (Attorney General) v. Northrop Grumman Overseas Services Corporation*, 2008 FCA 187 (22 May 2008).
 9. It should be noted that the *Agreement on Government Procurement (AGP)* (15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>) does not apply to the procurement at issue in this complaint as the estimated value of the items specified in the RVD fell below the applicable monetary threshold for procurements subject to the *AGP*.

17. 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.

...

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

...

18. Netgear submitted that there was absolutely no justification for specifying products by brand name in the case of the solicitation at issue and that, in so doing, PWGSC breached the trade agreements. Netgear submitted that its agent, Trust, would have been able to submit a proposal and be awarded the contract as the lowest-priced bidder, had the RVD been conducted in accordance with the requirements of the trade agreements. It submitted that the detailed terms of the RVD, 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 RVD, 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 requirements should be tendered using only generic specifications without making reference to brand names.

19. Netgear submitted that PWGSC's conduct demonstrated extreme favouritism towards Nortel and extreme bias against all other DISO holders in Category 1.1. It submitted that the Tribunal has already ruled, in File No. PR-2001-048,¹⁰ 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 DND, or by PWGSC, with respect to the equivalency restrictions. It also submitted that PWGSC, as part of its internal procedures and consultation with DND, 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.

20. 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 its products adhere to open standards for all protocols, interfaces and associated software/firmware, as does Nortel. 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 technical staff has extensive training and certifications on Cisco Systems Canada Co.'s, Nortel's, Hewlett-Packard's, Foundry Networks Inc.'s, Netgear's and other manufacturers' products and has been extensively involved in compatibility and interoperability testing between these products. It submitted that the experience and training of its technical staff is far superior to and more extensive than that of the Director of Network Management at PWGSC's Information Technology Services Branch (ITSB), who, Netgear submitted, claimed to be providing professional opinions about the circumstances surrounding the RVD, but did not provide any background on his education or training as it specifically relates to Layer 2 LAN switches.

21. Netgear submitted that PWGSC made it clear that it wanted only Nortel products when it refused to answer questions or provide information requested by bidders. It claimed that, although the RVD says 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 RVD 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), 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 the solicitation. Netgear claimed that this approach makes no sense, given that PWGSC is required to provide bidders with all the information that they require to submit bids and that, in this case, bidders of equivalent products were denied basic and crucial information about the existing equipment and networking environment.

22. In its comments on the GIR, Netgear claimed that, upon further investigation, it had found a new ground of complaint. Specifically, it alleged that the Nortel products identified in the RVD did not meet the mandatory performance requirements specified under Category 1.1 of Appendix A to Annex A of the NESS DISO. It submitted that nowhere in the RVD or in the GIR did PWGSC provide any proof that the requested Nortel products met those requirements.

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

23. 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-2007-021,¹¹ 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 3, 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.

24. PWGSC submitted that the allegations set out by Netgear in this complaint 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 complaint are similarly without merit and ought to be dismissed.

25. PWGSC submitted that the NESS DISO contemplates two methods of defining the technical requirement: (1) the use of the generic specification and (2) the use of brand names or equivalents. It submitted that each RVD requirement is examined to determine which method is applicable to the unique circumstances of the RVD. This examination occurs between PWGSC's ITSB, acting as coordinating technical authority, and the client department. According to the Director of Network Management at ITSB:¹²

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 [the RVDs in question] the use of generic specifications would have created [a]n unacceptable risk of not ensuring that fully compatible products would be procured.

26. Given the circumstances of the RVD in question, specifically the operational requirement of interoperability with existing networks, PWGSC submitted that the use of the "brand-name" option was justified and fully consistent with the requirements of the trade agreements.

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

12. See GIR at 14-15 and letter found at Exhibit 12 of the GIR.

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 RVD was 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. PWGSC did not request an opportunity to address Netgear's alleged new ground of complaint regarding whether the requested Nortel products met the specifications listed under Category 1.1 of Appendix A to Annex A of the NESS DISO.

31. PWGSC requested that the complaint be dismissed and that it be awarded its costs.

32. The Tribunal, in considering the allegations in this complaint, must address two distinct procurement phases relating to the RVD. The first phase is that of the NESS DISO itself, while the second phase relates to the actual RVD.

33. 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 complaint 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 requirements should be tendered using a procedure that is different from the one outlined in Article 14.

34. 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 case, 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.

35. 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 one in question. Specifically, in the circumstances of this RVD, the Tribunal must determine whether PWGSC was justified in specifying products by brand name and whether it conducted the procurement in accordance with the above-noted *NAFTA* provisions.

36. In light of the foregoing, the Tribunal will now address Netgear’s main ground of complaint, namely, that PWGSC improperly limited the procurement to Nortel products, as well as its new ground of complaint, namely, that the Nortel products identified in the RVD did not meet the mandatory performance requirements specified under Category 1.1 of Appendix A to Annex A of the NESS DISO.

Limiting the Procurement to Nortel Products

37. Netgear alleged that PWGSC improperly limited the procurement to Nortel products. It made similar allegations of improper limitations of procurements to products of particular suppliers in the other complaints, concerning RVDs issued under the NESS DISO, that were accepted for inquiry by the Tribunal. 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 this complaint and in File Nos. PR-2007-075 to PR-2007-077 and PR-2007-080 to PR-2007-083, the Tribunal deems it appropriate to rely on the analysis developed in the context of its inquiries into those previous similar complaints.¹³

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

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

39. 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,¹⁴ PWGSC argued that, for the RVDs in question, the operational requirement of interoperability with DND’s existing network justified the use of brand names.

40. 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.

13. The statement of reasons in File Nos. PR-2007-080 to PR-2007-083 and PR-2007-075 to PR-2007-077 were distributed to the parties on May 15, 2008 and May 23, 2008, respectively.

14. See GIR at 14-15 and letter found at Exhibit 12 of the GIR.

41. The Tribunal does not interpret Article 1007(3) of *NAFTA* 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 this case, 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.

42. In the present case, 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 RVD in question. According to the technical opinion, the RVD “. . . 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 [the RVDs in question] 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.

. . .

43. 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 RVD adhere to open standards for all protocols, interfaces and associated software/firmware, 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 RVD 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 this case.

44. Therefore, the Tribunal accepts PWGSC’s justifications as being reasonable in the circumstances of the RVD in question. The Tribunal believes that the use of a brand name 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 RVD, PWGSC allowed for equivalent products to be proposed, as required by Article 14 of the NESS DISO and Article 1007(3) of *NAFTA*.

45. Accordingly, the Tribunal is of the view that PWGSC has, in these circumstances, acted in conformity with Article 1007(3) of *NAFTA* 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

46. 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 DND's actual operational requirements, existing devices and networks, 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 compliant proposals for equivalent products.

47. 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.

48. 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.¹⁵ According to PWGSC, there are no other mandatory performance requirements in the case of the RVD in question.

49. 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 this solicitation are generally known to the industry and that the identification of a product by brand name, as well as by a 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.

50. 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 DND's existing equipment and network environment in order to allow suppliers to submit compliant equivalent bids. The Tribunal is of the view that additional information would only have been required had the evaluation of any proposed equivalent products in the solicitation at issue in this complaint 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.

15. GIR, Exhibit 10 at 3.

51. In fact, the Tribunal notes that Article 14 of the NESS DISO, which is incorporated in the RVD 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]

52. 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 DND’s actual operational requirements, existing devices and networks 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 solicitation was structured to ensure that only Nortel products be deemed compliant.

53. 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 comments on the GIR, Netgear stated the following:

... The Tribunal should note that technical staff at Trust Business Systems and Netgear have extensive training and certifications on Cisco, Nortel, HP, Foundry, Netgear, and other manufacturer’s products, and have been involved extensively in compatibility and interoperability testing between these products. Some staff have even participated in testing conducted at independent third party organizations such as the Tolly Group. It is our position that the experience and training of our technical staff is far superior to and more extensive than that of [the Director of Network Management at PWGSC’s ITSB].¹⁶

54. Given this purported skill set and Netgear’s repeated assertions that compatibility and interoperability between its products and those of Nortel are not an issue, the Tribunal considers that Netgear was provided with the information that was necessary for it to identify which of its products, if any, were equivalent to those specified in RVD171 and to submit evidence that demonstrated a level of equivalency between such products and the items specified in the RVD.

16. Comments on the GIR at 6, paragraph 6.

55. 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 RVD171, 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. Based on the case presented in the complaint and the lack of evidence, 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. In view of the above, the Tribunal cannot accept Netgear’s argument that the terms of RVD171 had the effect of ensuring that no responsive equivalent bid could be submitted.

56. 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-2003-001,¹⁷ 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 this complaint, for the above-noted reasons, the Tribunal is of the view that information about existing devices and the particular network environments was not necessary.

57. Accordingly, the Tribunal cannot conclude that PWGSC failed to provide Netgear with adequate information and so finds that this ground of complaint is not valid.

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

58. 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.

59. 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 RVD. 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 RVD.

60. 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

17. *Re Complaint Filed by Bajai Inc.* (7 July 2003).

suppliers and the procurement processes were thus conducted in a discriminatory manner contrary to Article 1008 of *NAFTA*.

61. The Tribunal has already rejected Netgear's three allegations to the effect that PWGSC improperly limited the procurement to Nortel products. Accordingly, the Tribunal is unable to conclude that PWGSC's conduct breached the non-discrimination provisions found at Article 1008 of *NAFTA*.

The Nortel Products Specified in the RVD did not Meet the Category 1.1 Specifications

62. As indicated above, in its comments on the GIR, Netgear claimed to have found a new ground of complaint. It submitted that the Nortel products identified in the RVD did not meet the mandatory performance requirements specified under Category 1.1 of Appendix A to Annex A of the NESS DISO. It added that PWGSC had not provided any proof, either in the RVD or in the GIR, that the requested Nortel products met those requirements.

63. Subsection 30.14(1) of the *CITT Act* provides that, in conducting an inquiry, the Tribunal shall limit its considerations to the subject matter of the complaint. As such, the Tribunal must be cautious in the manner in which it handles new grounds of complaint that are raised *after* it has decided to conduct an inquiry into a complaint. The Tribunal is of the view that its authority to consider grounds of complaint that were not included in a party's original complaint or that were not a result of access to new information in the GIR is questionable. If the Tribunal were to accept a new ground of complaint under such circumstances, it could, in effect, be allowing complainants to bypass the formal complaint process which, among other things, requires that the information submitted disclose a reasonable indication that the procurement was not conducted in accordance with the trade agreements and that the Tribunal decide, within five working days after the day on which a complaint is filed, whether to conduct an inquiry into a ground of complaint.

64. As the Tribunal is of the view that Netgear's new ground of complaint did not arise as a result of access to new information in the GIR and, in any event, as Netgear has failed to provide any evidence to support this ground of complaint,¹⁸ the Tribunal has not examined the matter further.

Costs

65. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint. The Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) and is of the view that this complaint case has a complexity level corresponding to the first level of complexity referred to in Appendix A of the *Guideline*. 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 procurement was low, in that the goods in question are off-the-shelf, standard items. The complexity of the complaint was medium, in that the issue involved allegations concerning perceived restrictive specifications. Finally, the complexity of the complaint proceedings was low, as there were no motions, no interveners and no public hearing. The 90-day time frame was respected, and the parties were not required to file submissions beyond the scope of normal proceedings. Accordingly, as contemplated by the *Guideline*, the Tribunal's preliminary indication of the amount of the cost award is \$1,000.

18. It should be noted that, while Netgear has submitted that PWGSC did not provide any proof that the requested Nortel products met the requirements specified under Category 1.1 of Appendix A to Annex A of the NESS DISO, the Tribunal could find no provision in the solicitation documents which requires that PWGSC provide proof that items requested in an RVD meet those requirements.

DETERMINATION OF THE TRIBUNAL

66. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

67. Pursuant to section 30.16 of the *CITT Act*, the Tribunal awards PWGSC its reasonable costs incurred in responding to the complaint, which costs are to be paid by Netgear. The Tribunal's preliminary indication of the level of complexity for this complaint case is Level 1, 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