



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2007-089

NETGEAR, Inc.

*Decision made
Monday, March 3, 2008*

*Decision and reasons issued
Friday, March 7, 2008*

IN THE MATTER OF a complaint filed by NETGEAR, Inc. under section 30.11 of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47

BY

NETGEAR, INC.

Complainant

AGAINST

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

**Government
Institution**

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Diane Vincent
Diane Vincent
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. NETGEAR, Inc. (Netgear) alleged that the Department of Public Works and Government Services (PWGSC) improperly conducted the above-noted solicitation.

3. Subsection 6(1) of the *Regulations* provides that a complaint shall be filed with the Tribunal “. . . not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.” Subsection 6(2) provides that a potential supplier who has made an objection to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal “. . . within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.”

4. In other words, a complainant has 10 working days from the date on which it first becomes aware (or reasonably should have become aware) of its ground of complaint to either object to the government institution or file a complaint with the Tribunal. If a complainant objects to the government institution within the designated time, the complainant may file a complaint with the Tribunal within 10 working days after it has actual or constructive knowledge of the denial of relief by the government institution.

5. According to the complaint, on February 1, 2008, Netgear sent an e-mail to PWGSC objecting to Solicitation No. EN869-060331/AA, Request for Volume Discount (RVD) 179, posing a number of questions and specifically asking PWGSC to keep its enquiries confidential. On February 4, 2008, PWGSC responded to Netgear’s questions indicating that the Crown would not change the terms and conditions of the Departmental Individual Standing Offer (DISO). On February 21, 2008, Netgear resubmitted its objections to the contracting officer named on page 1 of the DISO and, on February 22, 2008, its objections were once again rejected by PWGSC. On February 25, 2008, Netgear filed its complaint with the Tribunal. In the complaint, Netgear alleges that it subsequently learned that PWGSC had divulged that the questions had been asked by Netgear to other DISO holders and end-user departments.

6. The Tribunal is of the view that Netgear was aware on February 4, 2008, of PWGSC’s response regarding its objections and that PWGSC had denied the relief it was seeking. As for Netgear’s contention that it discovered after some research that it believed it had sent its objections to the wrong person since it was not the person named at Article 6 of the Networking Equipment Support Services DISOs, the Tribunal notes that Page 1 of the Request for Quotation of RVD179 specified to whom to address enquiries with respect to the RVD, that is, to the very person to whom Netgear addressed the questions on February 1, 2008. The Tribunal is of the opinion that Netgear sent its objection to the correct person and that the objection was responded to on February 4, 2008. Therefore, in order for a complaint to have been filed with the Tribunal in accordance

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

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

with subsection 6(2) of the *Regulations*, it would have had to have been filed with the Tribunal within 10 working days of that date. As the complaint was not filed until February 25, 2008, the Tribunal finds that the complaint was not filed within the required time limit.

7. Regarding Netgear's allegation that PWGSC disclosed confidential information to other DISO holders and to the end-user departments, the Tribunal finds that the complaint does not disclose a reasonable indication that the procurement was not carried out in accordance with the applicable trade agreements. Therefore, the ground of complaint relating to disclosure of confidential information by PWGSC is not accepted for inquiry.

8. Netgear submitted that the issues described in the complaint are of a systemic nature and that subsections 6(3) and 6(4) of the *Regulations* should apply. These sections read as follows:

(3) A potential supplier who fails to file a complaint within the time limit set out in subsection (1) or (2) may file a complaint within the time limit set out in subsection (4), if the Tribunal determines, after considering all of the circumstances surrounding the procurement, including the good faith of the potential supplier, that

[...]

(b) he complaint concerns any aspect of the procurement process, of a systemic nature, relating to a designated contract, and compliance with one or more of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade and the Agreement on Government Procurement.

(4) A complaint under subsection (3) may not be filed later than 30 days after the day the basis of the complaint became known or reasonably should have become known to the potential supplier.

9. The Tribunal is of the view that the issues referred to in the complaint are not "systemic" as no evidence was presented to the effect that the procurement action is the result of a general policy or a regular and continuous practice that pertains to the broader procurement system. The Tribunal is consequently of the view that subsections 6(3) and 6(4) do not apply.

DECISION

10. Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Diane Vincent
Diane Vincent
Presiding Member