



BY FACSIMILE

September 19, 2007

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Subject: Solicitation Nos. EN869-060159/G (RVD037), EN869-060295/J (RVD082) and EN869-060293/M (RVD044)
Trust Business Systems (File Nos. PR-2007-034, PR-2007-035 and PR-2007-042)

The Canadian International Trade Tribunal (the Tribunal) (Ellen Fry, Presiding Member) has reviewed the above complaints submitted by Trust Business Systems (Trust) on September 7, 2007, and has decided not to initiate an inquiry into the complaints.

Trust alleged that the Department of Public Works and Government Services (PWGSC) improperly awarded the contracts. Specifically, it alleged that its proposed products were incorrectly deemed not equivalent to the products requested, that PWGSC awarded the contracts without testing and that PWGSC attempted to buy products under the wrong standing offer category.

Pursuant to section 30.11 of the *Canadian International Trade Tribunal Act (CITT Act)*, a "... potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract" Subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* requires the Tribunal to determine, among other things, whether the complainant is a potential supplier. Section 30.1 of the *CITT Act* defines a potential supplier as a "... bidder or a prospective bidder on a designated contract."

Netgear, Inc. (Netgear) is the holder of standing offer EN578-030742/017/EW (the Offeror). Although the Offeror may authorize a number of agents to act on its behalf for the purposes of quoting prices and fulfilling call-ups and for the purposes of receiving payment, the standing offer indicates that Netgear remains the only authorized bidder, i.e. the party that ultimately bears the rights and obligations concerning the bid. According to the standing offer, the appointment of agents "... does not amend, diminish or modify any of the responsibilities of the Offeror under the standing offer. The Offeror agrees and understands that it shall be the responsibility of the Offeror to ensure that all of its authorized resellers and service outlets conform to the terms and conditions of the standing offer"

Accordingly, the solicitations in the form of Requests for Volume Discount (RVDs) were sent to Netgear. The RVDs indicated what was to be contained in the responding proposals. Item 2 of the mandatory criteria required that, “[i]f prices provided by a DISO [Departmental Individual Standing Offer] Agent form part of a bidder’s proposal, the DISO holder (Offeror) and Agent must sign the certification attached as Annex ‘B’ – DISO HOLDER (OFFEROR) CERTIFICATION” to the RVD. The certification states that the DISO holder (Offeror) certifies that the prices quoted by its DISO Agent as part of the proposal are correct.

Consequently, the Tribunal is of the view that, notwithstanding Trust’s role as the agent of Netgear for certain purposes, it is clear that Netgear, and not Trust, remains the bidder in the solicitation.

In addition, the Tribunal has no information before it to indicate that Trust is an agent of Netgear for the purposes of filing a complaint with the Tribunal. The Tribunal notes that, under the standing offer, Netgear has the right to appoint multiple agents, if desired. Accordingly, it is possible that Netgear could submit several bids in response to an RVD, through different agents, and that the situation of the various Netgear bids would determine Netgear’s position concerning the desirability of filing a complaint with the Tribunal.

Accordingly, the Tribunal is of the opinion that Trust is not a potential supplier as defined by the *CITT Act* for the purpose of filing a complaint. As such, the Tribunal will not initiate an inquiry into these complaints and considers these matters closed.

Notwithstanding the foregoing, the Tribunal would like to draw your attention to a number of points concerning the substance of your complaints. With respect to Trust’s allegation that PWGSC incorrectly deemed that its proposed products were not equivalent to the products specified in the RVD, the Tribunal notes that Article 14 of Netgear’s standing offer, under the section entitled “Equivalents”, states that “[t]hese equivalent 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.” In Trust’s complaints, the RVDs in question requested specific brand name products and provided for equivalent products to be proposed. Therefore, according to the terms of the standing offer, bidders were not required to demonstrate equivalency to the generic specification found at Annex A of the standing offer, rather they were required to demonstrate equivalency to the product named in the RVDs. In Trust’s responses to the RVDs, it attempted to show equivalency to the generic specifications instead of to the products named in the RVDs. This was contrary to the terms of the standing offer.

With respect to Trust’s allegation that PWGSC awarded the contracts without testing, the Tribunal notes that the standing offer provides that, “[u]pon 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”. Accordingly, the Tribunal notes that testing was at the discretion of PWGSC and that, therefore, PWGSC was not obligated to test equivalent products.

The Tribunal notes that, with respect to Trust's complaint relating to Solicitation No. EN869-060293/M (File No. PR-2007-042), Trust's quoted price was below the monetary thresholds for procurement under the *Agreement on Internal Trade*, the *North American Free Trade Agreement* and the *Agreement on Government Procurement*. Since Trust provided no other information concerning the estimated cost of the procurement, the Tribunal would likely have concluded that the estimated cost of the procurement was too low to give the Tribunal jurisdiction to accept the complaint for inquiry.

Yours sincerely,

Hélène Nadeau
Secretary