



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File Nos. PR-2007-080 to
PR-2007-083

NETGEAR, Inc.

v.

Department of Public Works and
Government Services

*Determination issued
Tuesday, April 29, 2008*

*Reasons issued
Thursday, May 15, 2008*

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IN THE MATTER OF four 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 the complaints are 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 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 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

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

| | |
|---|--|
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STATEMENT OF REASONS

COMPLAINT

1. On January 31, 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*¹ concerning Requests for Volume Discount (RVDs) for Solicitation Nos. EN869-060331/J (RVD157), EN869-060331/V (RVD165), EN869-060331/U (RVD166) and EN869-060331/W (RVD174) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (RVD174), the Department of the Environment (EC) (RVD165, RVD166) and the Passport Office (RVD157) for networking equipment.² 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) (RVD157, RVD165), Nortel Networks (Nortel) (RVD166) and Hewlett-Packard (HP) (RVD174), 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 structured the procurements to avoid its obligations under the trade agreements by splitting EC's requirements in two RVDs (RVD165 and RVD166) to avoid competition and circumvent contracting provisions found in the NESS DISO.

4. As a remedy, Netgear requested that the Tribunal cancel the contract awarded in response to RVD157 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 RVD157 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 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.

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

2. The four RVDs in question (i.e. RVDs 157,165,166 and 174) were each considered to be the subject of a separate complaint and were therefore assigned separate file numbers (i.e. PR-2007-080 to PR-2007-083).

5. On February 8, 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*.³ These complaints were the second in a series of similar complaints filed by Netgear that were accepted for inquiry by the Tribunal.⁴ That same day, the Tribunal also issued postponement of award of contract orders. The Tribunal, however, did not find that the complaints were suitable for the expedited resolution process (i.e. the express option). On February 12, 2008, PWGSC acknowledged the receipt of the complaints and informed the Tribunal that a contract had been awarded regarding RVD157. Accordingly, on March 12, 2008, the Tribunal rescinded its postponement of award of contract order in relation to RVD157. On March 4, 2008, PWGSC filed the Government Institution Report (GIR). On March 17, 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 RVDs are based was issued to a number of companies who 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 it can open the requirements to competition by sending Requests for Quotations, in the form of RVDs, to the applicable NESS DISO holders, who 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 circumstances, bidders may propose equivalent products, so long as the following conditions, which are found in Article 14 of the NESS DISO, are met:

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

4. Netgear filed four other series of 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-2007-088, PR-2007-090 to PR-2007-094 and PR-2008-003 to PR-2008-006). The Tribunal's determinations with respect to the other four series of complaints are still pending.

...

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:

Call-ups Made by the Administrative Authority (ITSB)

Call-ups made against this Standing Offer, shall not exceed \$100,000.00 GST/HST included.

Multiple call-ups ARE NOT to be issued to circumvent the above limitations UNDER ANY CIRCUMSTANCES.

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.

Call-ups made by PWGSC Contracting Authority Using Request for Volume Discount Process:

Use of RVD Process: For requirements that exceed the above-noted Call-up Limitations, PWGSC will issue a Request for Volume Discount ("RVD") which can also be defined as a request for a "Best and Final Offer" (BAFO). In addition to such requirements, PWGSC may, at its discretion, issue a Request for Volume Discount for any requirement. The Request for Volume Discount process allows Offerors to confirm to PWGSC their best and final offer in respect of a specific requirement for one or more Clients.

...

11. The following clause was added to Article 14 of the NESS DISO via amendment 001, issued on December 27, 2006:

At page 8 of the DISO, Article 14), "Call-up Process/Limitations"

Insert: *Call-ups Made by the Administrative Authority (ITSB)*

Call-ups made against this Standing Offer, shall not exceed \$100,000.00 GST/HST included. Call-ups up to \$25,000.00 will be processed directly by the ITSB Administrative Authority. Call-ups between \$25,000.01 and \$100,000.00 will require OEM justification. . . .

12. 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 | |
|--------------------------------------|---|
| Requirements: | For the supply and delivery of the following [CISCO/NORTEL/HP]⁵ 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. |

...

13. In January 2008, PWGSC sent the four RVDs to the eight Category 1.1 NESS DISO holders, including Netgear. For each RVD, PWGSC was asked the following questions and, for each RVD, PWGSC responded in the same manner:⁶

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 [Cisco/Nortel/HP] part numbers? The Crown is obligated to conduct all solicitations in an unbiased way and referring to [Cisco/Nortel/HP] part numbers is clearly biased towards [Cisco/Nortel/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.

5. RVD157 and RVD165 referenced CISCO, RVD166 referenced NORTEL and RVD174 referenced HP.
 6. See, for example, Netgear's complaint at 3-4.

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 [Cisco/Nortel/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, 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.

14. On January 18, 2008, Netgear submitted a proposal in response to RVD157. It did not bid on the other RVDs.
15. On January 31, 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,⁷ cited provisions of both the *Agreement on Internal Trade*⁸ and the *North American Free Trade Agreement*⁹ in its complaints. In its GIR, PWGSC did not directly address the issue of which agreements apply to the procurements at issue in these complaints.

17. While there is no doubt that *NAFTA* applies 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.¹⁰¹¹ 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 the *AIT* and *NAFTA* have much of the same effect and Netgear's allegations are essentially the same under both agreements. Since 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*, 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* 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*.

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.

...

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

8. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].

9. *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*].

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

11. 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 procurements at issue in these complaints as the estimated value of the items specified in each RVD fell below the applicable monetary threshold for procurements subject to the *AGP*.

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. Netgear submitted that there was absolutely no justification for specifying products by brand name in the case of the solicitations at issue in these complaints 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 requirements should be conducted using only generic specifications without making reference to brand names.

21. Netgear submitted that PWGSC’s conduct demonstrated extreme favouritism towards Cisco, Nortel 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-2001-048,¹² 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 who 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.

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

22. Netgear submitted that, at the time of the issuance of its DISO, it “. . . had no idea that PWGSC would [use the Equivalent 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 technical staff has extensive training and certifications on Cisco, Nortel, HP, Foundry Networks Inc., Netgear 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 ITSB, who, Netgear submitted, claimed to be providing professional opinions about the circumstances surrounding the RVDs, but did not provide any background on his education or training as it specifically relates to Layer 2 LAN switches.

23. Netgear submitted that PWGSC made it clear that it wanted only Cisco, Nortel 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 who 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 four RVDs but that PWGSC refused to provide it. It claimed that bidders should be allowed 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 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.

24. 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-2007-021,¹³ 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.

25. 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.

26. 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 name or equivalents. It submitted that each RVD requirement is examined to determine which method is applicable to the unique

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

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.¹⁴

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] 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."

27. Given the circumstances of the RVDs 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.

28. 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. . . .

29. 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.

30. 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.

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

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

14. See GIR at 18-19.

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 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 requirements should be conducted 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 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.

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 subsection 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 used by the government and leading 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 in these complaints. Specifically, in the circumstances of these RVDs, the Tribunal must determine whether PWGSC was justified to specify products by brand name and whether it conducted the procurements in accordance with the above-noted NAFTA provisions.

36. In light of the foregoing, the Tribunal will now address Netgear's two main grounds of complaint, namely, that PWGSC improperly limited the procurement to products of particular suppliers and that PWGSC structured the procurements to avoid its obligations under the trade agreements by splitting EC's requirements to avoid competition and circumvent contracting provisions found in the NESS DISO.

Limiting the Procurements to Products of Particular Suppliers

37. The Tribunal considers that this ground of complaint can be divided into three main allegations. The Tribunal will address each of these allegations separately.

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 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 these complaints. 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.

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,¹⁵ PWGSC argued that, for the RVDs in question, the operational requirement of interoperability with existing departmental networks 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.

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 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.

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 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. . . .

15. See GIR at 17-19. Although the opinion prepared by the Director of Network Management at ITSB, and dated February 22, 2008, was done for the purpose of the Tribunal's inquiry in File Nos. PR-2007-075 to PR-2007-077 and, as such, pertained to the RVDs at issue in those complaint cases, PWGSC maintained that the justifications provided therein were equally applicable to the circumstances of the RVDs at issue in the current complaints. The Tribunal therefore accepts these justifications as being relevant for the purposes of the RVDs at issue in the current complaints.

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 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 this case.

44. Therefore, the Tribunal accepts PWGSC's justifications as being reasonable in the circumstances of the RVDs in question in these complaint cases. 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*.

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 who 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.

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 the designation of a particular product provides a convenient point of reference for the industry.¹⁶ According to PWGSC, there are no other mandatory performance requirements in the case of the RVDs in question in these complaints.

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 these solicitations are generally known to the industry and that the identification of a product by brand name, as well as 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 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 in these complaints 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.

51. In fact, the Tribunal notes that Article 14 of the NESS DISO, which is incorporated in the RVDs in question in these complaints, 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[y]ing those areas in the specifications and descriptive technical documentation that demonstrate the equivalence of the proposed equivalent item.

. . .

[Emphasis added]

16. GIR, Exhibit 19 at 3.

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 the actual operational requirements, existing devices and networks of client departments in order to submit a responsive proposal and demonstrate the equivalency of the proposed equivalent item. 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 an equivalent product to prepare a compliant proposal. In view of the above, the Tribunal considers that it has not been established that the solicitations were structured to ensure that only Cisco, Nortel or HP products (as the case may be) 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 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].¹⁷

54. Despite this purported skill set and Netgear’s repeated assertions that compatibility and interoperability between its products and those of Cisco, Nortel or HP is not an issue, the Tribunal finds that when its agent, Trust, chose to bid (i.e. in the case of RVD157), 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.

55. 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.

17. Comments on the GIR at 6, para. 6.

56. 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.

57. 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 a proposal, it may not be necessary in other situations. For example, in File No. PR-2003-001¹⁸ 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.

58. Accordingly, in the circumstances where Trust has submitted a bid (i.e. in the case of RVD157), 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* 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 (RVD165, RVD166 and RVD174) for which Trust did not submit responses. For these reasons, the Tribunal 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

59. 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.

60. 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.

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

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

62. 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*.

Splitting Requirements to Avoid Competition

63. Netgear also submitted that PWGSC breached the trade agreements by issuing two EC solicitations, specifically RVD165 and RVD166, in order to avoid competition. It submitted that this was a violation of Article 14 of the NESS DISO, which states that "***Multiple call-ups ARE NOT to be issued to circumvent the above limitations UNDER ANY CIRCUMSTANCES.***"

64. PWGSC submitted that Netgear's allegations were based on a fundamental misconstruction of Article 14 of the NESS DISO. It submitted that Article 14, as amended, states that requirements with an estimated value of less than \$100,000 could be fulfilled through the use of a call-up, i.e. a contract directed to one of the NESS DISO holders, so long as proper justification was provided.¹⁹ It submitted that Article 14 only requires the use of the RVD process for requirements that exceed \$100,000. PWGSC submitted that all four RVDs in question in these complaints were valued at less than \$100,000 and that, despite this, it chose to compete the requirement through the RVD route, instead of directing them to companies through call-ups. PWGSC therefore claimed that Netgear's allegation that it was attempting to avoid competition is not only utterly without merit, but that the opposite is true—PWGSC went beyond its obligations and conducted each procurement on a competitive basis.

65. The Tribunal considers that PWGSC has followed the dictates of the NESS DISO in conducting RVD165 and RVD166 in the manner in which it did. The Tribunal notes that, given the relatively low dollar value of these RVDs (estimated at \$50,000 and \$60,000 respectively),²⁰ PWGSC was within its rights, by virtue of Article 14 of the NESS DISO, to issue a call-up directly to the companies whose products were requested, so long as it had received the proper justification as contemplated by that article. The Tribunal notes, however, that PWGSC chose to expand the competition possibilities by using the RVD process for the two solicitations. The Tribunal also notes that the RVDs were requesting the products, or equivalents, of two different manufacturers, namely, Cisco (RVD165) and Nortel (RVD166). For these reasons, the Tribunal finds that this ground of complaint is not valid.

Costs

66. The Tribunal awards PWGSC its reasonable costs incurred in responding to the complaints. The Tribunal considered its *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*) and is of the view that these complaint cases, taken together, have 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

19. The terms of the NESS DISO refer to OEM justification.

20. Netgear's complaint at 2, para. C.

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 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.

DETERMINATION OF THE TRIBUNAL

67. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaints are not valid.

68. 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 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 *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Diane Vincent

Diane Vincent
Presiding Member