



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2008-019

NETGEAR, Inc.

*Decision made
Wednesday, July 2, 2008*

*Decision and reasons issued
Thursday, July 17, 2008*

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

BY

NETGEAR, INC.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

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.

Pasquale Michaele Saroli

Pasquale Michaele Saroli

Presiding Member

Audrey Chapman

Audrey Chapman

Acting 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. Moreover, 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) of Santa Clara, California, alleged that the Department of Public Works and Government Services (PWGSC), in regard to a Request for Volume Discount (RVD) for Solicitation No. EN869-071124/O) (RVD302) issued under the Networking Equipment Support Services (NESS) Departmental Individual Standing Offer (DISO) No. EN578-030742/000/EW:

- (1) improperly limited the procurement to products of a particular supplier and applied tendering procedures in a discriminatory manner by unjustifiably specifying products by brand name and refusing to provide additional information which was allegedly required to allow bidders of equivalent products to prepare their bids;³
- (2) improperly refused to respond to questions that had been properly submitted, as per the terms of RVD302, during the solicitation period, which ran from May 16 to 27, 2008, as well as within the time frames specified in RVD302;⁴
- (3) further discriminated and demonstrated bias against Netgear by ignoring Netgear's request to update its price list as is contemplated by the terms and conditions of the NESS DISO; and
- (4) disclosed, in bad faith, confidential information to competitors and end-user departments.

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 that 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. Where a complaint includes several grounds, some of these grounds may have been the subject of an objection to the relevant government institution, while others may not have been. In such instances, subsection 6(2) of the *Regulations* applies only to those grounds of complaint to which an objection to the government institution expressly refers. Subsection 6(1) establishes the deadline for filing a complaint with the Tribunal on any other grounds of complaint. Accordingly, when applying the time limits imposed by section 6, the Tribunal must consider the various grounds of complaint separately.

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

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

3. A similar ground of complaint was raised by Netgear in previous complaints concerning other RVDs issued under the NESS DISO. The Tribunal notes that, in recent months, Netgear filed 20 other complaints, concerning other RVDs relating to the same DISO: PR-2007-075 to PR-2007-078, PR-2007-080 to PR-2007-083, PR-2007-088, PR-2007-090 to PR-2007-094, PR-2008-003 to PR-2008-006, PR-2008-014 and PR-2008-015. In this complaint, Netgear argues that PWGSC was untruthful in the submissions that it made in those previous related cases.

4. Netgear argues that, in doing so, PWGSC deliberately intended to ensure that Netgear would not be able to submit a bid.

5. On June 25, 2008, Netgear, through its agent, Trust Business Systems (Trust), filed its complaint with the Tribunal. Consequently, for those grounds of complaint that were not the subject of an objection, the timeliness of the complaint (i.e. for the complaint to be considered “on-time”), by virtue of subsection 6(1) of the *Regulations*, would require that the date on which Netgear had or reasonably should have had knowledge of the grounds of complaint not be earlier than June 11, 2008. For grounds of complaint that were the subject of an objection (assuming that the objection itself had been made in a timely manner), the timeliness of the complaint, under subsection 6(2), would depend on Netgear not having actual or constructive knowledge of the denial of relief from PWGSC before June 11, 2008.

6. According to the non-confidential information provided by Netgear, PWGSC wrote a letter to Trust, dated June 3, 2008, responding to an e-mail sent to PWGSC by Trust on behalf of Netgear on May 20, 2008, regarding RVD302. In this letter, PWGSC stated the following:

...

As you are aware, on May 15, 2008, the [Tribunal] issued its Determination and Reasons with respect to certain Complaints filed by [Trust] on behalf of [Netgear], (PR-2007-080 to 083). Each of the Complaints in that matter . . . also concerned an RVD issued with respect to the NESS DISO. As you are also aware, each of the subject RVDs in PR-2007-080 to 083 were very similar to RVD #302, the RVD referred to in your message of May 20, 2008. In each Complaint, [Trust] raised essentially the same issues that it has raised in its May 20, 2008 email to PWGSC.

In the course of its inquiry into these Complaints, the Tribunal considered these issues and on May 15, 2008 provided the Parties . . . with its Determination, setting out its analysis, conclusions and recommendations finding none of the allegations to be valid. The Tribunal’s Determination in PR-2008-080 to 083 thereby responds to each of the issues set out in your message of May 20, 2008.

...

Given that the Tribunal has now provided the Parties with its Determinations with respect to these issues, PWGSC considers these matters closed.⁵

7. The Tribunal has reviewed Netgear’s e-mail of May 20, 2008, and considers that, by virtue of this e-mail,⁶ Netgear’s first ground of complaint (i.e. that PWGSC improperly limited the procurement to products of a particular supplier and applied tendering procedures in a discriminatory manner) was the subject of an objection. Since RVD302 was issued on May 16, 2008, the Tribunal also considers that Netgear’s objection was made within 10 working days after the day on which the basis of the objection became known or should reasonably have become known to Netgear. Therefore, pursuant to subsection 6(2) of the *Regulations*, in order to determine whether this ground of complaint was filed within the time limits set out in the *Regulations*, the Tribunal must examine whether the complaint was filed within 10 working days after the day on which Netgear had actual or constructive knowledge of the denial of relief.

8. On this issue, the Tribunal is of the view that PWGSC’s June 3, 2008, letter to Trust, which clearly states that, in PWGSC’s view, the Tribunal’s determination in File Nos. PR-2007-080 to PR-2007-083 responds to the issues raised by Netgear in its objection and that PWGSC considers the matters raised by Netgear closed, constitute a formal notice of the denial of relief. The Tribunal notes that, according to the information provided by Netgear, PWGSC delivered that letter to Trust, via courier, on June 10, 2008. Indeed, Netgear included, as Attachment B to its complaint, a photocopy of the delivery envelope on which the following notations were made: “RECEIVED JUN 10 2008 4:17 pm” and “June 10 Left Message on Debbie’s V/M”. However, in the body of the complaint, Netgear asserted that the letter was only opened and read by Ms. Debra Lance, the president of Trust, on June 12, 2008.

5. Complaint, exhibit B.

6. Netgear has designated the contents of this e-mail as confidential information.

9. The Tribunal finds that the letter in question was under the control of Trust on June 10, 2008, with notations on the document clearly confirming this fact. The Tribunal also finds that Trust received actual notice of the denial of relief once the document was under its control. In this regard, once Trust accepted delivery of the letter, Netgear must be taken to have had knowledge of its contents and, thus, of PWGSC's denial of relief. It is the Tribunal's view that it must apply an objective standard in determining when actual or constructive knowledge of the denial of relief occurred, with particular attention being paid to the date of the delivery and receipt of the relevant correspondence between the government institution and the complainant. Indeed, basing such determinations on considerations relating to the correspondence management practices of complaining firms would introduce a level of subjectivity into the process that could not only compromise the consistency of the Tribunal's determinations on the timeliness of complaints under subsection 6(2) of the *Regulations* but also lend itself to the circumvention of prescribed time frames.

10. In this case, the Tribunal finds that Trust had knowledge of the denial of relief when the notice of that denial was received by Trust in its capacity as the author of the objection made on behalf of Netgear. The Tribunal has determined that receipt occurred on June 10, 2008, which means that any complaint relating to the grounds contained in the objection would have had to have been filed on June 24, 2008, at the latest. As the complaint was filed on June 25, 2008, these grounds of complaint have been filed beyond the time frame prescribed in subsection 6(2) of the *Regulations*.

11. Moreover, the Tribunal notes that, despite Netgear's objection of May 20, 2008, the solicitation closed on May 27, 2008. Given that the issues raised by Netgear regarding RVD302 were not addressed by amendments to the solicitation, PWGSC's denial of relief appeared to have occurred on the date of bid closing. In light of this fact, it is plausible that Netgear had constructive knowledge of the denial of relief on May 27, 2008, when the RVD closed, or well before June 10, 2008. However, the Tribunal does not consider that it is necessary to further address this issue, having regard to its above finding regarding timeliness.

12. With respect to Netgear's claim that PWGSC improperly refused to respond to questions that had been properly submitted by it, the Tribunal notes that this allegation was not the subject of Netgear's objection of May 20, 2008. In fact, this ground of complaint flows from the position that PWGSC took in its letter dated June 3, 2008, which, according to Netgear, indicates that PWGSC refused to provide any response to its enquiries. As discussed above, PWGSC's letter was received by Netgear on June 10, 2008. In the Tribunal's opinion, in determining when the basis for a ground of complaint became known or reasonably should have become known to a potential supplier, the exchange of correspondence between the government institution and the complainant is also a key consideration. In this case, the Tribunal considers that the correspondence between PWGSC and Netgear indicates that the basis for this ground of complaint became known or should reasonably have become known to Netgear on June 10, 2008, at the latest. As such, pursuant to subsection 6(1) of the *Regulations*, any complaint relating to this ground would have had to have been filed on June 24, 2008, at the latest. As the complaint was filed on June 25, 2008, this ground of complaint has been filed beyond the time frame allowed in subsection 6(1).

13. With respect to the remaining grounds of complaint, i.e. that PWGSC improperly disclosed certain confidential information to the other parties and that PWGSC ignored Netgear's requests to update the prices and descriptions of its equipment on PWGSC's internal system, they were not the subject of Netgear's objection, are of a general nature and do not relate specifically to RVD302. While it is difficult, based on the information contained in the complaint, to determine exactly when Netgear became aware of these grounds, it is clear that this occurred well in advance of June 11, 2008. Indeed, the Tribunal notes that Netgear raised identical grounds in its complaints in File Nos. PR-2008-014 and PR-2008-015, which were filed with the Tribunal on May 14, 2008. Moreover, the confidential documents submitted by Netgear indicate that the basis for these grounds became known or reasonably should have become known to Netgear earlier than June 11, 2008. The Tribunal therefore concludes that these grounds of complaint were filed outside the allowable time frame specified in subsection 6(1) of the *Regulations*.

14. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaint and considers the matter closed.

DECISION

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

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member