



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File Nos. PR-2008-038 to
PR-2008-043

NETGEAR, Inc.

*Decision made
Friday, December 12, 2008*

*Decision and reasons issued
Thursday, January 8, 2009*

IN THE MATTER OF six complaints 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 complaints.

Serge Fréchette
Serge Fréchette
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. 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 Requests for Volume Discounts (RVDs) for Solicitation Nos. EN869-060297/M (RVD211), EN869-060292/Y (RVD315), EN869-060292/X (RVD316), EN869-060297/N (RVD318), EN869-060297/V (RVD325) and EN869-071750/I (RVD336) 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 particular suppliers and applied tendering procedures in a discriminatory manner by unjustifiably specifying products by brand name and refusing to provide additional information which, according to Netgear, was required to allow bidders of equivalent products to prepare their bids;
- (2) was untruthful in responding to past complaints and in past solicitations by stating that there was no other sufficiently precise or intelligible way of describing a requirement other than specifying a brand name and part number;
- (3) disclosed, in bad faith, confidential information to competitors and end-user departments;
- (4) further discriminated and demonstrated bias against Netgear by ignoring Netgear's request to update its published price list (PPL);
- (5) removed items from the previously approved PPL, thereby improperly stating that the items were outside the scope of the NESS DISO category in question;
- (6) being aware of the very short solicitation period for the RVDs, deliberately engineered the RVDs so that only the resellers of the requested brand-name items could win;
- (7) regarding RVD315, RVD316 and RVD318, purposely provided information too late in the solicitation process to allow Netgear to properly bid;
- (8) regarding RVD325 and RVD336, deliberately did not provide the necessary information that would have allowed Netgear to properly bid;
- (9) refused to provide information regarding the results of the RVDs;
- (10) refused to meet with Netgear in order to provide a debriefing and explain why Netgear's proposals were deemed non-compliant; and
- (11) regarding the NESS DISO as a whole, refused to amend it, as requested by Netgear, and also improperly cancelled Netgear's DISO.

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

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

3. The Tribunal originally received Netgear's complaints on November 27, 2008. However, the Tribunal found that Netgear's complaints did not conform to the requirements of subsection 30.11(2) of the *CITT Act*, which requires a clear and concise statement of the substantive and factual grounds of a complaint before the Tribunal can consider the complaint. Therefore, in accordance with subsection 30.12(2), at 1:38 p.m. on December 5, 2008, the Tribunal faxed a letter to Netgear requesting clarification regarding the following statement: "...entities may not adopt unjustifiable and unnecessarily restrictive specifications . . . that become a disguised means of disqualifying suppliers that are capable of offering an 'equivalent' solution to the specified brand-name product . . ." When referring to specifications, Netgear appeared to mingle PWGSC's requirements regarding bidding for the RVDs with its approach to the evaluation of submitted bids. Therefore, the factual grounds of Netgear's complaints in that respect were unclear to the Tribunal. Netgear provided its clarifications on December 10, 2008.

4. 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."

5. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,³ Chapter Five of the *Agreement on Internal Trade*⁴ or the *Agreement on Government Procurement*⁵ applies. In these cases, *NAFTA* applies to all six RVDs and the *AGP* applies only to RVD318.

6. The first two grounds of complaint, which relate to PWGSC's manner of describing the requirements and its alleged lying about the manner in which it claims that it was required to describe the requirement, have been previously addressed by the Tribunal and, as such, constitute a matter already decided.⁶

7. In the previous decisions, the Tribunal considered that Netgear had not established that PWGSC failed to provide suppliers with all the information necessary to submit responsive tenders and was not convinced that PWGSC was required to provide additional information on the client departments' existing equipment and network environments in order to allow suppliers to submit compliant equivalent bids. The Tribunal considered that, by providing a brand name, as well as model and serial numbers, companies involved in supplying network equipment should be able to make determinations as to which of their products, if any, would be fully compatible with, interchangeable with and seamlessly interoperable with the items specified in the RVDs. The Tribunal can find no new set of facts that would justify a re-examination of those grounds of complaint.

3. *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*].

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.

5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].

6. The same grounds of complaint were alleged by Netgear in previous complaints concerning other RVDs issued under the NESS DISO. The Tribunal has ruled on these grounds in File Nos. PR-2007-075 to PR-2007-077, PR-2007-080 to PR-2007-083, PR-2007-088, PR-2007-091 to PR-2007-094, PR-2008-003 to PR-2008-006, PR-2008-014 and PR-2008-015, and PR-2008-019.

8. The third ground of complaint, which is that PWGSC divulged confidential information, has also been previously addressed by the Tribunal.⁷

9. In the Tribunal's view, Netgear's repeated submissions of the above grounds of complaint border on a vexatious abuse of process.

10. Regarding the fourth and fifth grounds of complaint, which are linked to the treatment of Netgear's PPL, the Tribunal is of the view that such processes would constitute contract administration and would not be part of the procurement process *per se*. Subsection 30.11(1) of the *CITT Act* limits the Tribunal's jurisdiction to "... any aspect of the procurement process ...", which encompasses all elements of the procurement cycle up to and including contract award. Contract administration issues, however, are beyond the scope of the Tribunal's inquiry process and jurisdiction. In addition, after examining the complaints in respect of these grounds, the Tribunal can find no reasonable indication that Netgear's bids on the RVDs were rejected because the proposed products were not included in Netgear's PPL. Therefore, the Tribunal finds that Netgear has not demonstrated that PWGSC was acting contrary to the requirements of the trade agreements.

11. Regarding the sixth ground of complaint, which is that PWGSC, being aware of the short RVD solicitation process, engineered the RVDs so that only the resellers of the requested brand-name products could win, the Tribunal notes that article 14 of the NESS DISO states the following:

...

RVD Response Time: The standard period for Offerors to submit an RVD response will be four (4) working days from the date of RVD issuance. This period may be reduced for urgent requirements, or extended for more complex requirements, at the discretion of the PWGSC Contracting Authority.

...

12. It is clear to the Tribunal that the basic premise of the NESS DISO was to allow government agencies and commercial entities to create an agreed-upon contracting vehicle that permitted a shortened procurement cycle. The NESS DISO was negotiated in the summer of 2006 and issued to companies on October 13, 2006. If Netgear had concerns about this article of the NESS DISO, it should have filed its complaints with the Tribunal within 10 working days of that date, or by October 27, 2006. Therefore, the Tribunal considers that this ground of complaint was filed outside the time frame specified in section 6 of the *Regulations*.

13. Regarding the seventh and eight grounds of complaint, which are that Netgear alleged that PWGSC provided information too late in the solicitation process for it to be of value to Netgear, or that PWGSC failed to provide appropriate responses at all, the Tribunal notes that Netgear is alleging that PWGSC was aware of particular circumstances of Netgear's bidding protocol and deliberately shortened the response time available to Netgear. As the Tribunal noted above regarding the sixth ground of complaint, the NESS DISO was instituted to allow for a shortened procurement cycle. The Tribunal also notes that Netgear was able to submit bids for all six RVDs. Therefore, in providing all NESS DISO holders with the same information at the same time, the Tribunal finds that PWGSC has not conducted the procurements in a manner contrary to the applicable trade agreements.

7. The Tribunal ruled on this ground in File Nos. PR-2008-014 and PR-2008-015, and PR-2008-019.

14. Regarding the ninth and tenth grounds of complaint, which are that Netgear alleged that PWGSC refused to provide information regarding the results of the RVDs, as well as to provide a debriefing to explain why Netgear's proposals were deemed non-compliant, the Tribunal can find no reasonable indication that PWGSC did not conduct the solicitations in accordance with both the NESS DISO and *NAFTA*.

15. Article 1015(6) of *NAFTA* states the following:

An entity shall:

- a. on request, promptly inform suppliers participating in tendering procedures of decisions on contract awards and, if so requested, inform them in writing; and
- b. on request of a supplier whose tender was not selected for award, provide pertinent information to that supplier concerning the reasons for not selecting its tender, the relevant characteristics and advantages of the tender selected and the name of the winning supplier.

16. The NESS DISO states the following:

...

Notification of RVD Results: All Offerors who respond to an RVD will be notified in writing regarding the outcome of the RVD process. This notice will include the following information:

- (A) RVD Number (e.g., RVD # 12345-012345);
- (B) Offeror selected for Call-up (e.g., XYZ Inc.);
- (C) Value of Call-up (e.g., \$000,000.00, GST/HST Included);
- (D) Number of RVD responses received by PWGSC (e.g., 5); and
- (E) Evaluated RVD Price of the Offeror to whom the notification is being sent and the Evaluated RVD Price of the Offeror selected for Call-up.

Unless required to do so by a court or other body of competent jurisdiction, Canada will not disclose the unit prices quoted by an Offeror in response to an RVD. Nor will Canada identify in the notification of RVD results the specific quantities of items subject to the Call-up.

...

17. In its complaints, Netgear provided information that indicates that, for a number of the complaints in issue, PWGSC informed it of why its proposals were not selected. In addition, Netgear made the unsubstantiated assertion that "...PWGSC ha[d] consistently refused to provide [the above-mentioned 'Notification of RVD Results']..." However, the Tribunal can find nothing in the complaints to indicate that such requests were made with respect to the RVDs or that PWGSC refused to provide this information.

18. Regarding the final ground of complaint, which is that Netgear alleged that PWGSC refused to amend the NESS DISO as requested by Netgear and, as a result, did not issue a NESS DISO to Netgear for the period of October 31, 2008, to October 31, 2010, it is not in relation to the RVDs, as they were issued prior to the end of the initial NESS DISO period. Therefore, this ground of complaint does not provide a reasonable indication that PWGSC was acting in a manner contrary to the trade agreements with respect to the RVDs.

19. In general terms, relating to this final ground of complaint, the Tribunal notes that the NESS DISO reads as follows:

...

12) Extension of the Standing Offer Period

- i) Canada has the right to request the Offeror to extend the period for placing call-ups against this Standing Offer.
- ii) Should the Standing Offer be authorized for use beyond the initial period, the Offeror hereby offers to provide the good/services herein for up to forty eight (48) additional months, in 24 month increments, under the terms, conditions and prices and rates, detailed herein.

...

It is clear to the Tribunal that PWGSC therefore has the right to request all offerors, including Netgear, to extend their NESS DISOs under the existing terms and conditions. The Tribunal does not interpret this clause to mean that, at this juncture, offerors are able to suggest or request amendments to the NESS DISO.

20. It is also clear to the Tribunal, from the exchange of e-mails between the two parties regarding this issue, that Netgear did not sign the NESS DISO extension as it was when it was received from PWGSC, but instead opted to attempt to make changes to the document. When sending the extension amendment to Netgear, PWGSC was clear that, if the signed amendment was not received by PWGSC by October 31, 2008, Netgear's NESS DISO would expire on that day. The Tribunal cannot, therefore, find any indication that PWGSC acted inappropriately in not extending Netgear's NESS DISO when it did not receive the signed copy of its amendment by the stated deadline.

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

DECISION

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

Serge Fréchette

Serge Fréchette
Presiding Member