Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File Nos. PR-2010-004 to PR-2010-006

Enterasys Networks of Canada Ltd.

v.

Department of Public Works and Government Services

Determination issued
Friday, September 10, 2010

Reasons issued
Wednesday, December 22, 2010

Canada

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IN THE MATTER OF three complaints filed by Enterasys Networks of Canada Ltd. pursuant to 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 pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

ENTERASYS NETWORKS OF CANADA LIMITED	**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 following complaint is valid in part:

- PR-2010-006—Solicitation No. 5Z011-100230/A (RVD 761)

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal (Member Vincent dissenting) determines that the following complaints are valid in part:

- PR-2010-004—Solicitation No. EN869-104363/A (RVD 757)
- PR-2010-005—Solicitation No. 31026-090066/B (RVD 758[2])

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal (Member Vincent dissenting) awards Enterasys Networks of Canada Ltd. its reasonable costs incurred in preparing and proceeding with the complaints, which costs are to be paid by the Department of Public Works and Government Services. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for these complaint cases is Level 3, and its preliminary indication of the amount of the cost award is $3,500. 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.

Serge Fréchette
Serge Fréchette
Presiding Member

Diane Vincent
Diane Vincent
Member
(Dissenting in part)

Stephen A. Leach
Stephen A. Leach
Member

Dominique Laporte
Dominique Laporte
Secretary

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

Tribunal Members:	Serge Fréchette, Presiding Member Diane Vincent, Member Stephen A. Leach, Member
Director:	Randolph W. Heggart
Investigation Manager:	Michael W. Morden
Investigator:	Josée B. Leblanc
Counsel for the Tribunal:	Georges Bujold
Complainant:	Enterasys Networks of Canada Ltd.
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STATEMENT OF REASONS

BACKGROUND

1. On April 28, 2010, Enterasys Networks of Canada Ltd. (Enterasys) filed three complaints with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] concerning Requests for Volume Discount (RVDs) for Solicitation Nos. EN869-104353/A (RVD 757), 31026-090066/B (RVD 758[2]) and 5Z011-100230/A (RVD 761)[2] by the Department of Public Works and Government Services (PWGSC) on behalf of itself (RVD 757), the National Research Council of Canada (RVD 758[2]) and the Library and Archives of Canada (RVD 761) for the supply of networking equipment. All RVDs were issued under National Master Standing Offer (NMSO) No. EN578-030742/000/EW.

2. There were 10 grounds of complaint submitted by Enterasys, alleging that PWGSC:

(1) sought to purchase items that were outside the scope of category 1.2 Local Area Network (LAN) switches, as this category of equipment is defined by the NMSO through mandatory technical specifications, on RVDs that were to be limited to category 1.2 LAN switches (ground 1);

(2) sought to purchase items that were outside the scope of category 1.1 LAN switches, as this category of equipment is defined by the NMSO through mandatory technical specifications, on RVDs that were to be limited to category 1.1 LAN switches (ground 2);

(3) sought to purchase category 1.1 LAN products, as well as other products, that have the capabilities of other classes and categories set out in the NMSO on RVDs that were to be limited to category 1.2 LAN switches (ground 3);

(4) issued RVDs that included industry-standard transceivers and other related fibre or copper modules with company-specific product codes, thus precluding "best-of-breed" transceivers from competing companies being proposed (ground 4);

(5) did not provide adequate time for potential bidders to prepare their bids (ground 5);

(6) misused the provisions of the "Equivalents" section of article 14 of the NMSO by not describing the requirement without the use of a specific brand name, model or part number (ground 6);

(7) unfairly limited competition and discriminated against Enterasys and other potential bidders of equivalent products by not providing information from the client departments that described the installed base, operating software and other technical and operational requirements which allegedly justified the purchase of specific brand name products (ground 7);

(8) sought to purchase items that were outside the scope of products (i.e. LAN switch hardware) allowed to be purchased under the NMSO (ground 8);

(9) allowed certain original equipment manufacturers (OEMs) to add items that were outside the scope of products allowed to their respective Published Price Lists (PPLs), while not allowing Enterasys to update its PPL (ground 9); and

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. The three RVDs in question were each considered to be separate procurement processes and were assigned separate file numbers (i.e. PR-2010-004 to PR-2010-006).

(10) did not respond to questions asked by Enterasys during the bidding period for RVD 757 and allowed this solicitation to close without providing any answers in order to ensure that only products from one specific OEM could be proposed (ground 10).

3. As a remedy, Enterasys requested that:

- all contracts awarded pursuant to the three RVDs in question be cancelled and that new solicitations be issued or, in the alternative, that Enterasys be compensated for its lost profit and that the compensation be paid to West Atlantic Systems, as the representative agent of Enterasys;
- PWGSC be required to provide responses to bidders during the RVD enquiry period and to provide all standing offer holders with the identical wording of client departments' technical requirements that PWGSC receives in all cases, including, in addition to the brand name and model of the switches, all other information sufficient to ascertain interoperability, including providing a copy of the "running configuration" and "firmware version";
- PWGSC be required to extend the due date for the receipt of bids if so requested, in order to give bidders time to perform testing so that they could include interoperability reports with their bids;
- that the Tribunal rule that additional damages be awarded to Enterasys, given Enterasys' position that the integrity of the Government's procurement system had been compromised by the manner in which PWGSC had been running the standing offer procurement processes. It requested that these damages be paid to West Atlantic Systems, as the representative agent of Enterasys; and
- it receive its complaint costs, to be paid to West Atlantic Systems, as the representative agent of Enterasys.

4. Enterasys also requested that the Tribunal issue a ruling to stop the award of any contract relating to the above-noted RVDs or any other RVD issued under the subject NMSO until it had determined the validity of these complaints.

5. This is the fifth set of complaints in a series of similar complaints filed by Enterasys that were accepted for inquiry by the Tribunal.[3] On May 5, 2010, the Tribunal informed the parties that it had accepted the complaints, in part, 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*

3. Prior to the filing of the current complaints, Enterasys filed 66 other complaints concerning other RVDs issued under the same NMSO that were accepted for inquiry by the Tribunal (File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153). On June 21 and August 9, 2010, the Tribunal determined that 62 of the 66 complaints were valid in part (Member Vincent dissenting in the case of 55 complaints) and provided its statements of reasons to the parties on July 21, 2010 (regarding File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128) and on November 4, 2010 (regarding File Nos. PR-2009-132 to PR-2009-153). The Tribunal notes that 8 of the 10 grounds of complaint submitted by Enterasys in the current complaints were also raised and examined by the Tribunal during the course of its inquiry in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and that 9 of the 10 grounds of complaint were also raised and examined by the Tribunal during the course of its inquiry in File Nos. PR-2009-132 to PR-2009-153. However, ground 10 in the current complaints was not included in the previous 66 complaints concerning RVDs issued under the NMSO.

Procurement Inquiry Regulations.[4] The Tribunal advised the parties that it had not accepted grounds 2, 9 and 10 for inquiry; ground 2 was not accepted, as none of the RVDs at issue relate to category 1.1; ground 9 was determined to relate to contract administration and to be outside the Tribunal's jurisdiction; ground 10 was not accepted, as there was no reasonable indication that PWGSC's conduct in dealing with the questions submitted by Enterasys during the bidding period for RVD 757 was contrary to the applicable trade agreements. The Tribunal also advised the parties that ground 8 was only accepted with respect to the allegation that PWGSC attempted to purchase products outside the scope permitted by the standing offer and not in the broader context in which Enterasys had framed its allegation.

6. The Tribunal did not issue postponement of award of contract orders, either for the RVDs individually or for the NMSO as a whole.

7. On May 6, 2010, Enterasys requested that, in accordance with subrule 6.1 of the *Canadian International Trade Tribunal Rules*,[5] the Tribunal combine File Nos. PR-2010-004 to PR-2010-006 with a previous series of complaints filed by Enterasys concerning other RVDs issued under the same NMSO that were accepted for inquiry by the Tribunal on April 6, 2010 (File Nos. PR-2009-132 to PR-2009-153). On the same day, PWGSC asked that the Tribunal deny Enterasys' request on the grounds that it would be wholly inappropriate to combine the two proceedings, given that the Government institution Report (GIR) for File Nos. PR-2009-132 to PR-2009-153 had already been filed on May 3, 2010. On May 17, 2010, the Tribunal advised the parties that the circumstances did not permit the combining of proceedings and denied Enterasys' request.

8. Also on May 6, 2010, Enterasys filed a motion with the Tribunal, requesting that the Tribunal order PWGSC to produce the following classes of documents and that it be granted an extension of time for filing its comments on the GIR if the following documents were ordered to be provided:

- Class 1—Copies of the PPLs for Cisco Systems Canada Co. (Cisco), Nortel Networks (Nortel) and Hewlett Packard (HP) that show all product codes and categories that PWGSC had approved since November 1, 2006
- Class 2—Copies of all correspondence relating to the solicitations between PWGSC and the government departments, and the resellers and/or manufacturers, prior to and after the solicitation closing dates
- Class 3—Copies of the all of technical justifications (TJs) sent between PWGSC and the client departments regarding these RVDs.

9. PWGSC provided its comments on Enterasys' motion on May 6, 2010. It submitted that the request should be denied. Regarding the Class 1 documents, PWGSC submitted that the request was part of a "fishing expedition" and that any alleged miscategorization (which it expressly denied) in a PPL would be a matter of contract administration but that, if a switch was miscategorized on an RVD, Enterasys could object to PWGSC or file a complaint at that time. PWGSC submitted that finding a miscategorized product on a PPL is not evidence that the product would be miscategorized in an RVD. PWGSC argued that these PPLs would provide no evidence that the subject RVDs included miscategorized products. Regarding the Class 2 documents, PWGSC submitted that Enterasys failed to explain how the correspondence might support its case and, more specifically, how it might support the specific complaint that the subject RVDs include miscategorized networking equipment. Regarding the Class 3 documents, PWGSC submitted that,

4. S.O.R./93-602 [*Regulations*].
5. S.O.R./91-499 [*Rules*].

although it is relevant to Enterasys' complaints that the TJs are not provided to bidders, the actual content of those TJs is not relevant. PWGSC also submitted that, having regard to Enterasys' request for an extension of time if the requested documents are provided, producing the TJs would unnecessarily complicate the subject inquiry for no purpose.

10. On May 12, 2010, Enterasys filed its reply to PWGSC's response, arguing that the information that it requested was important discovery evidence in direct support of its grounds of complaint and that some of the facts presented by PWGSC in its response to the motion were incorrect.

11. On May 18, 2010, Enterasys filed an addendum to its motion, requesting that the Tribunal order PWGSC to produce a report which, Enterasys claimed, would demonstrate ". . . the extent to which competition has been limited since the NESS [Networking Equipment Support Services] DISO [Departmental Individual Standing Offer] started on November 1st, 20[06]."[6]

12. Specifically, it requested that the report contain the following information:

- since November 1, 2006, in chronological order, the number, issue date and value of "Brand name or equivalent" RVDs issued, identifying the brand name and the name of the DISO holder that won each RVD; and
- since November 1, 2006, in chronological order, the number, issue date and value of ''Generic" RVDs issued for each of category 1.1 and category 1.2, and the name of the DISO holder that won each RVD.

13. Enterasys argued that this statistical information was highly relevant and provided important discovery evidence in direct support of its grounds of complaint, including the misuse of article 14 of the NMSO to avoid competition.

14. On May 20, 2010, PWGSC provided its comments on Enterasys' addendum. PWGSC submitted as follows:

- The information sought by Enterasys was information not already in existence in the form specified by Enterasys and that some of the information did not exist in any form. It argued that it would be required to review each of the more than 750 RVD files to identify the winning bidder (typically an authorized agent of a DISO or NMSO holder), determine what equipment was proposed and identify the relevant DISO or NMSO holder. It submitted that it would require up to four weeks to produce the requested reports.
- The Tribunal lacked the authority to order the preparation and filing of information in a documentary form not already in existence.
- The reports lacked probative value and, at best, Enterasys could ask the Tribunal to make tenuous, immaterial inferences from the statistical data that it hoped to obtain.
- Enterasys failed to establish how an alleged limitation on competition is evidence to support its particular grounds of complaint. It submitted that, for example, an alleged limitation on competition would not result in a miscategorization of equipment, an insufficient bidding period, insufficient information for bidders or a limitation on proposing "best-of-breed" equipment.

6. Enterasys' addendum dated May 18, 2010, at 1.

- The request should be dismissed and, in the event that PWGSC was required to prepare the reports, it should be entitled to recover its costs on a full cost recovery basis, regardless of the outcome of the inquiry.

15. On May 21, 2010, Enterasys replied to PWGSC's comments. It submitted that it was only seeking information regarding category 1.1 and category 1.2. It further submitted that, in contravention of Article 1015 of the *North American Free Trade Agreement*,[7] PWGSC had not provided contract award information. It also submitted that it was requesting certain information, not necessarily reports, and that, therefore, the information did not have to be in the particular format it requested.

16. Counsel for Enterasys submitted that he had been an employee of two companies that had been NESS standing offer holders and had spoken to other NESS standing offer holders and resellers (not Cisco, HP or Nortel resellers) and that all were ". . . upset, and [felt] that competition [had] been restricted . . . and that the problem is systemic."[8] Enterasys requested that PWGSC be ordered to answer the following questions: "For Categories 1.1 and 1.2, since the inception of the NESS DISO, how many of the [RVDs] were brand name [RVDs], and how many [RVDs] were won by DISO holders that did not respond with the requested brand name?"; and "For Categories 1.1 and 1.2, since the inception of the NESS DISO, how many of the [RVDs] were generic [RVDs]?"[9]

17. On May 25, 2010, PWGSC provided additional comments on Enterasys' reply by advising that all contract award information was posted on Contracts Canada's Web site or on the Web sites of the NMSO client departments.

18. On May 26, 2010, Enterasys responded to PWGSC's May 25, 2010, correspondence by advising that the data that it sought could not be found on the Web sites noted by PWGSC and that the information that it could find was frequently incorrect. It requested that, as a remedy to this issue, the Tribunal rule that PWGSC correct the Contracts Canada Web site to publish the RVD contract awards correctly, in compliance with Article 1015 of *NAFTA*, from November 1, 2006, onwards.

19. On May 28, 2010, in response to Enterasys' motion of May 6, 2010, and addendum dated May 18, 2010, the Tribunal issued an order requiring PWGSC to produce ". . . all information, including all technical justifications and related correspondence, that underlies the description of the procurement requirements with a reference to particular trademarks or brand names that were sent by client departments to the Department of Public Works and Government Services with respect to the [solicitations at issue in these complaints] . . . ." The Tribunal advised PWGSC that it had until June 11, 2010, to provide the documents and that it was to file the GIR by close of business on June 25, 2010. The Tribunal also advised Enterasys that it would be informed of the due date for its comments on the GIR and any comments that it had on the documents to be provided by PWGSC in response to the order, when the Tribunal forwarded the GIR to Enterasys.

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7. *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*].
8. Enterasys' letter dated May 21, 2010, at 3.
9. *Ibid.*

20. On June 1, 2010, the Tribunal advised Enterasys and PWGSC that Enterasys' claim in its correspondence of May 21 and 26, 2010, that, in contravention of Article 1015 of *NAFTA*, PWGSC had not properly published contract award notices, was considered a new ground of complaint and was not part of either File Nos. PR-2009-132 to PR-2009-153 or File Nos. PR-2010-004 to PR-2010-006.

21. The Tribunal advised that this new ground of complaint had not been included in the list of grounds of complaint that the Tribunal accepted for inquiry on April 6[10] and May 5, 2010.[11] The Tribunal noted that, although Article 1015(7) of *NAFTA* may have been cited in the complaints, such a reference does not amount to a ground of complaint. The onus is on a complainant to describe fully and completely its grounds in its complaint and the mere raising of questions or citing of provisions is not sufficient. The Tribunal further noted that paragraph 30.11(2)(*c*) of the *CITT Act* requires that the complaint "contain a clear and detailed statement of the substantive and factual grounds of the complaint".

22. The Tribunal therefore considers it to have been incumbent upon Enterasys to have fully explained its grounds of complaint when the complaints were filed and that a complainant should not be allowed to amend its complaints by adding specific grounds after the complaints have been accepted for inquiry. If the Tribunal were to accept a new ground of complaint under such circumstances, it would, in effect, be allowing Enterasys to bypass the formal complaint process, which, among other things, requires that the information submitted in the original complaint disclose a reasonable indication that the procurement was not conducted in accordance with the trade agreements and that the Tribunal decide, within five working days after the day on which a complaint is filed, whether to conduct an inquiry into a ground of complaint.

23. On June 11, 2010, PWGSC filed with the Tribunal a confidential version of documents in response to the Tribunal's May 28, 2010, order and provided a public version to counsel for Enterasys. On that same day, Enterasys advised the Tribunal that it had not been provided with a PDF version of the documents, which, it claimed, hindered its ability to send the document via e-mail to Enterasys' offices in other cities. Enterasys also claimed that, on the basis of documentation that PWGSC had provided in previous inquiries,[12] it believed that PWGSC had improperly redacted information for which, Enterasys claimed, confidential designation was not justified. It requested that the Tribunal order PWGSC to comply with section 46 of the *CITT Act*, which provides direction on the treatment and redaction of confidential information, and that Enterasys be provided with both paper and PDF versions of the 1,250 pages that PWGSC provided in response to the Tribunal's order.[13]

24. On June 14, 2010, Enterasys advised the Tribunal that, after a brief review of the documents, it believed significant sections of the documents had been improperly redacted. It also noted that certain documents had been provided in French. It requested that the Tribunal order PWGSC to provide Enterasys with a PDF copy of documents that did not have what it claimed was public domain information redacted and that all documentation be provided in English.

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10. The date of the letters sent to PWGSC and Enterasys advising that the complaints in File Nos. PR-2009-132 to PR-2009-153 had been accepted in part for inquiry.
11. The date of the letters sent to PWGSC and Enterasys advising that the complaints in File Nos. PR-2010-004 to PR-2010-006 had been accepted in part for inquiry.
12. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT).
13. Of the 1,250 pages, approximately 1,000 related to File Nos. PR-2009-132 to PR-2009-153 and 250 related to File Nos. PR-2010-004 to PR-2010-006.

25. On June 21, 2010, the Tribunal issued its determination, without reasons, in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128, in which Enterasys had raised similar grounds of complaint regarding other RVDs issued under the same NMSO. The Tribunal found 40 of the 44 RVDs at issue valid in part.

26. On June 24, 2010, PWGSC submitted that, as the statement of reasons had not been issued for File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and since those reasons could have a direct and significant impact on the inquiry into the current complaints, as a matter of fairness, PWGSC should have access to those reasons before filing its GIR in relation to the current complaints. It requested a delay of one week after the issuance of those reasons to file the GIR in the current complaints. On June 25, 2010, the Tribunal agreed to the request.

27. On July 21, 2010, the Tribunal issued the statement of reasons in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128.

28. On July 27, 2010, PWSGC asked for a further extension for the filing of the GIR, until August 3, 2010. On the same day, the Tribunal granted the requested extension.

29. On July 28, 2010, Enterasys submitted that its counsel had not been provided with the confidential version of the documents provided by PWGSC, that the public version of the documents was incomplete and that significant portions had been improperly redacted. In addition, it alleged that certain documents were missing. Enterasys provided the Tribunal with a listing, on a page-by-page basis, of all the information that it claimed PWGSC had improperly redacted in its June 11, 2010, submission. It requested that the Tribunal issue PWGSC a directive calling for it to follow the requirements of section 46 of the *CITT Act*. Enterasys further requested, regarding certain French e-mails relating to one of the RVDs, that it be provided with that information in English.

30. On August 3, 2010, PWGSC submitted the GIR.

31. On August 4, 2010, the Tribunal advised Enterasys that, as it was not represented by independent counsel, it was not entitled to the confidential version of the documents.[14] The Tribunal also advised that it did not have the authority to order PWGSC to produce documents in anything but their original language.

32. Also on August 4, 2010, the Tribunal advised PWGSC that it did not consider that PWGSC had complied with section 46 of the *CITT Act*, as PWGSC had neither provided an explanation as to why certain information had been designated confidential nor had it provided a non-confidential edited version of the information in sufficient detail to convey a reasonable understanding of the substance of that information. In

14. Counsel for Enterasys was affiliated with West Atlantic Systems, a company that is an authorized reseller of Enterasys products and was the authorized agent for Enterasys in the case of all the RVDs that were the subject of these complaints. The Tribunal, therefore, did not consider counsel to be independent from Enterasys. On this issue, the Tribunal notes that subsection 45(3) of the *CITT Act* provides that information that has been designated as confidential *may be disclosed* by the Tribunal to counsel for any party subject to any conditions that the Tribunal considers reasonably necessary to ensure that the information will not be disclosed in a manner that is likely to make it available to, among others, a party that is represented by that counsel or any business competitor of the person to whose business the information relates. The Tribunal interprets this provision as conferring on it the discretion to refuse to grant disclosure of confidential information to counsel in its proceedings in certain circumstances.

accordance with section 48, the Tribunal directed PWGSC to comply with section 46. The Tribunal also directed PWGSC to confirm that it had fully complied with the Tribunal's May 28, 2010, order and had provided the Tribunal with all required information.

33. On August 5, 2010, the Tribunal provided the GIR to Enterasys and advised that August 16, 2010, was the due date for the filing of any comments that Enterasys wished to make on the GIR and the documents provided by PWGSC.

34. On August 11, 2010, PWGSC submitted the revised public documentation. It advised that the public version of documents had been prepared by redacting the following from the confidential documents: financial information; PWGSC's internal control numbers; financial codes and special instructions; personal information; and information on the particular use to be made of the networking equipment and its location of use. It submitted that this information was designated confidential, as its disclosure could be detrimental to the Crown's interests or would reveal personal information. It also confirmed that it had fully complied with the Tribunal's order of May 28, 2010.

35. On August 12, 2010, Enterasys advised the Tribunal that it had retained additional counsel to aid in the preparation of its response to the GIR. It requested that the Tribunal provide a copy of the confidential record to the new counsel and, as the new counsel was out of town and unable to meet with the existing counsel for Enterasys until August 18, 2010, that the Tribunal grant an extension for the filing of its comments of the GIR until August 25, 2010. It also noted that the Tribunal had granted PWGSC two extensions for the filing of the GIR and advised that it expected that the new counsel would be filing another motion on its behalf.

36. On August 16, 2010, the Tribunal advised Enterasys that, given the tight schedule for the inquiry and the limited amount of time remaining before the September 10, 2010, due date for the issuance of the Tribunal's determination,[15] the Tribunal would not grant the requested extension. The Tribunal noted that Enterasys had been in possession of the GIR since August 5, 2010, and was provided with the additional documentation by PWGSC on August 11, 2010. However, the Tribunal granted an extension to Enterasys, until August 20, 2010, to file its comments. The Tribunal also advised Enterasys as follows:

> . . . the Tribunal will not grant requests for extension as of right. Henceforth, extensions will only be granted in exceptional circumstances, with the underlying consideration being whether such an extension was necessary in order to do justice between the parties. Any request for extension must be accompanied by an explanation. Whether or not an explanation justifies an extension will depend on the facts of each particular case. *Requests relating to workload or other internal concerns, or to changes in counsel, are, in the Tribunal's opinion, matters within a party's control and therefore will not ordinarily be considered as justifying an extension.*[16]
>
> [Emphasis added]

37. On August 17, 2010, after receipt of the necessary notice of representation and declaration and undertaking, the Tribunal provided the new counsel for Enterasys with a copy of the confidential record.

38. On August 20, 2010, Enterasys filed its comments on both the GIR and the documentation provided by PWGSC in response to the Tribunal's order.

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15. As required by paragraph 12(*c*) of the *Regulations*, the Tribunal must consider all the evidence and arguments presented by the parties and issue its findings and recommendations within 135 days after the filing of these complaints, that is, in this inquiry, on September 10, 2010, at the latest.
16. Tribunal's Web site at http://www.citt.gc.ca/publicat/prdcomp_e.asp.

39. On August 25, 2010, the Tribunal provided a copy of these comments to PWGSC.

40. On August 26, 2010, PWGSC filed a motion requesting that Exhibits 1, 2 and 3 to Enterasys' comments on the GIR be removed from the record. PWGSC submitted that, in previous complaint cases (File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153), the Tribunal had removed substantively identical documents from the record. PWGSC argued that, in the context of the current complaints, the information provided in Exhibit 1 by a solutions engineer with Enterasys constituted additional allegations and claims that supported Enterasys' grounds of complaint and did not constitute a reply to the GIR. Regarding Exhibits 2 and 3, PWGSC submitted that Enterasys was attempting to place expert evidence on the record in a manner inconsistent with subrule 22(1) of the *Rules* and that the exhibits did not constitute a response to the GIR, but merely provided additional evidence that should have been filed with the complaints.

41. On August 31, 2010, Enterasys responded to PWGSC's motion by claiming that the evidence was directly and entirely responsive to the matters raised in the GIR and the documentation. Enterasys argued that Exhibit 1 was a response to the additional documentation provided by PWGSC in response to the Tribunal's order of May 28, 2010. It submitted that the exhibit was directly responsive to the concerns raised by PWGSC in the GIR. Regarding Exhibits 2 and 3, Enterasys argued that the letters were not, as claimed by PWGSC, substantively identical to the letters removed from the record in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128, but that the letters were more current, addressed comments made in the GIR and provided assurances that the complaints could be substantiated. Enterasys also argued that rule 22, which requires that the expert evidence be provided 20 days before a hearing, was not applicable to the current inquiry, as there was no hearing.

42. On September 10, 2010, Enterasys submitted that certain witness statements attached to the GIR should be removed from the record, as none of the statements were specific to the three RVDs at issue and Enterasys had not been given the opportunity to cross-examine the witnesses. Enterasys also requested that the Tribunal rule that PWGSC was in breach of the Tribunal's order of May 28, 2010, because, Enterasys alleged, PWGSC had not provided certain documents that were clearly referenced in some of the information that had been provided in response to the Tribunal's order.

43. Also on September 10, 2010, the Tribunal issued its determination and granted PWGSC's motion by ordering that the following documents be removed from the record:

- Exhibit 1 of Enterasys' comments on the GIR, specifically, the letter signed by Mr. Mike Millar from Enterasys, dated August 20, 2010;
- Exhibit 2 of Enterasys' comments on the GIR, specifically, the letter signed by Ms. Erica Johnson from the University of New Hampshire InterOperability Laboratory, dated June 22, 2010; and
- Exhibit 3 of Enterasys' comments on the GIR, specifically, the letter signed by Dr. Dan Ionescu from ARTIS, dated July 7, 2010

44. On September 22, 2010, the Tribunal responded to Enterasys' September 10, 2010, letter by noting that Enterasys had been in possession of the GIR since August 5, 2010, and PWGSC's affirmation that it had provided all documents in accordance with the Tribunal's May 28, 2010, order since August 11, 2010. The Tribunal stated that, despite this, Enterasys submitted its requests on the due date for the Tribunal's determination, i.e. at the conclusion of the Tribunal's inquiry, on September 10, 2010. The Tribunal advised that it considered that Enterasys' requests had not been filed in a timely manner, as they were received too late for the Tribunal to consider them before issuing its determination on the validity of the complaints.

Accordingly, the Tribunal advised that it had not considered Enterasys' September 10, 2010, requests and found that it was unnecessary to do so, given that the Tribunal's inquiry into the current complaints had been completed on September 10, 2010.

45. Given the similarities between these complaints and the previous series of complaints filed by Enterasys concerning RVDs issued under the same NMSO that were the subject of File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153, the Tribunal decided that a hearing was not required and disposed of the complaints on the basis of the information on the record.

PROCUREMENT PROCESS

46. The RVDs in question were all issued under an NMSO, which is the successor standing offer to a DISO that had been issued subsequent to a competitive Request for a Standing offer (RFSO) process. The NESS RFSO competition ran from June 24 to July 11, 2006. Appendix A to Annex A of the NESS RFSO contained generic specifications for various categories of LAN switches. Bidders had to demonstrate that they could provide products that met these generic specifications in order to be issued a DISO for a particular category. On October 12 and 13, 2006, DISOs were issued to 23 companies, including Enterasys. In Enterasys' case, its DISO included both category 1.1 Layer 2 LAN switches and category 1.2 Layer 2-3 LAN switches. On April 1, 2009, the DISOs were extended as provided by article 12(i) of the DISO[17] and were converted to NMSOs.

47. The Tribunal notes that at no time during the RFSO solicitation process did any potential supplier file any complaints with the Tribunal regarding the content of the RFSO, the proposed content of the resulting DISOs or the manner in which PWGSC was conducting the procurement process. The Tribunal also notes that article 13(c) of the DISO/NMSO reads as follows:

> The Offeror acknowledges and agrees that the terms and conditions set out in this Standing Offer apply to every Call-up made under this Standing Offer.

48. The Tribunal also notes that the title page of the DISO/NMSO, immediately after the title, i.e. "Departmental Individual Standing Offers (DISO) for the provision of Networking Equipment (NESS)", advises that:

> **All of the terms and conditions and procedures contained in this Departmental Individual Standing Offer document will form part of any call-ups against the standing offer as if they were laid out in full in the call-up.[18]**

49. According to the process described in the NMSO, subject to certain limitations (discussed below), PWGSC could issue call-ups directly to a company for the supply of equipment or open the requirements to competition by sending Requests for Quotations, in the form of RVDs, to the applicable NMSO holders. The NMSO holders could then make a best and final offer for the specific requirement. PWGSC is obligated by the terms of the NMSO to issue an RVD for requirements that exceed $100,000. Moreover, the NMSO provides that PWGSC may, at its discretion, issue an RVD for any networking equipment requirements valued over $25,000.

17. DISO at 9.
18. DISO at 4.

50. In the use of RVDs, the NMSO allows PWGSC to describe its technical requirements in one of two ways, either by using the generic specifications already included as Annex A of the NMSO or by specifying particular brand name products. If brand name products are specified, bidders may propose equivalent products, as long as the following conditions, found in article 14 of the NMSO (article 14), are met:

> **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.

51. The NMSO 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.

52. Article 14 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. . . 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:
>
> . . .
>
> Once an Offeror has qualified in a Category, all equipment offered by that Offeror as listed in the OEM's Canadian Published Price List ***that falls within that Category's technical definition*** will be available for call-up.
>
> . . .
>
> **Recipients of [RVDs]**: The RVD will be sent by PWGSC to all Offerors who hold a Standing Offer in the relevant Category and are listed in the selected Category at the date and time of RVD issuance. No RVD shall include products from multiple Categories. Where equipment is required from multiple Categories, a separate RVD will be sent to each Offeror in each applicable Category.
>
> **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.

53. Each subject RVD contains 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.
>
> . . .
>
> 7. The terms and conditions of National Master Standing Offer (NMSO) **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 NMSO **#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 NMSO 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.

TESTING:

In the event that a demonstration and/or compatibility sub-test is requested by PWGSC and/or the client, the terms and conditions of **EN578-030742/000/EW** - shall apply to any testing.

. . .

	RVD Annex "A" - LIST OF DELIVERABLES
. . .	
Requirement:	**For the supply and delivery of the following [CISCO SYSTEMS CANADA CO./NORTEL NETWORKS.][19] products or equivalent. Note: Any equivalent products must be fully substantiated as indicated in the NESS NMSO document. List equivalent products by OEM and part number with a cross reference to the list below.**

54. The Statement of Work for the NMSO, found at Annex A, reads as follows:

> The new Network Equipment procurement strategy encompasses the consolidation of previous Network Equipment procurement vehicles into a single set of Departmental Individual Standing Offers (DISOs) that will be coordinated by ITSB. The NESS Equipment DISOs will be used by ITSB on behalf of the Government of Canada (GoC) to procure Network Equipment from qualified Offerors. . . .
>
> . . . The NESS Equipment DISOs will provide PWGSC/ITSB with the ability to upgrade, replace and augment the existing network infrastructures of Clients with Network Equipment on an "as and when requested" basis.

55. According to article 9 of the NMSO, any authorized representative of a federal government organization is permitted to requisition supplies and services in accordance with the terms and conditions of the NMSO[20] but all requirements greater than $25,000 must be sent to PWGSC for processing. According to articles 6(a), (b) and (c) of the NMSO, PWGSC fulfills the roles of contracting, technical and administrative authority. It is therefore responsible for all matters, including technical ones, concerning the call-ups and RVDs issued under the NMSO.

GROUNDS OF COMPLAINT NOT ACCEPTED FOR INQUIRY

Ground 2

56. Ground 2 alleged that PWGSC sought to purchase items that were outside the scope of category 1.1 LAN switches, as this category of equipment is defined by the NMSO through mandatory technical specifications, on RVDs that were to be limited to category 1.1 LAN switches. As none of the three RVDs

19. Cisco was referenced in RVD 757 and RVD 761, and Nortel was referenced in RVD 758(2).
20. "User" and "Identified User" are defined in article B.2(b) of the NMSO as ". . . any authorized representative of a Canadian Government Department, Departmental Corporation or Agency, as identified in Schedules I, I.1, II or III, VI or V of the Financial Administration Act, or such other party for which the Department of Public Works and Government Services Canada has been authorized to act pursuant to section 16 of the *Department of Public Works and Government Services Act*. **However, the Identified User for the purpose of issuing call-ups are defined as per the following: Call-ups from $0.00 to $25,000.00 (GST/HST Included) will be made by Client Department and Agencies; Call-ups from $25,000.01 to $100,000.00(GST/HST Included) will be made by ITSB on behalf of the departments and Agencies; Call-ups from $100,000.00 (GST/HST Included) will be made through the Request for Volume Discount (RVD) by the PWGSC Contracting Authority.**" DISO at 5, Complaint, Exhibit J as amended by Amendment No. 6 to the DISO; GIR, Exhibit 3 at 3.

at issue related to category 1.1, this ground of complaint was clearly not applicable in these complaints. Consequently, the information provided by Enterasys did not indicate that PWGSC inappropriately attempted to purchase products that were outside the scope of category 1.1 through the RVDs at issue. Put another way, the information before the Tribunal did not disclose a reasonable indication that the procurements were not conducted in accordance with the applicable trade agreements in this regard. For this reason, the Tribunal did not accept this ground of complaint for inquiry.

Ground 9

57. Ground 9 alleged that PWGSC allowed certain OEMs to add products that were outside the scope of category 1.1 and category 1.2 to their PPLs, but would not allow Enterasys to update its PPL. The same ground of complaint was raised by Enterasys in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153 and was not accepted for inquiry in these previous cases.

58. The Tribunal's decision not to accept this ground in the context of the current complaints is based on the same reasons as those explained in the statement of reasons for its determination in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153. As the Tribunal has noted in the past,[21] it is of the view that processes followed by PWGSC concerning the addition of products to a supplier's PPL 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 begins after an entity has decided on its procurement requirement up to and including contract award.[22] Contract administration issues, however, are considered outside the Tribunal's jurisdiction. In the Tribunal's opinion, Enterasys' allegations concerning the alleged failure of PWGSC regarding PPLs raised issues relating to the administration of the NMSO, as opposed to aspects of the procurement processes that are at issue, namely, the processes that led to the award of a "designated contract" as defined in section 30.1 for each subject RVD, individually considered.

59. The Tribunal therefore did not accept this ground of complaint for inquiry.

Ground 10

60. Ground 10 alleged that PWGSC did not respond to questions raised by Enterasys during the bidding period for RVD 757 and allowed the solicitation to close without providing any responses. In addition, Enterasys alleged that PWGSC was misusing the RVD process by reducing the four-day RVD response time specified in the NMSO[23] to ensure that only one specific OEM could be proposed.

61. With respect to the allegation that PWGSC did not respond to questions raised by Enterasys, the Tribunal noted that the terms of RVD 757 indicated that responses to questions from potential suppliers could not be guaranteed if queries were received later than noon, two business days prior to the closing date for the RVD. In the case of RVD 757, the bid closing date was April 16, 2010. While Enterasys submitted its questions on April 14, 2010, it did so at 2:09 p.m., that is, later than 12:00 p.m. on that day.[24] Accordingly, the Tribunal found that PWGSC did not act in a manner inconsistent with the terms of the

21. *Re Complaints Filed by NETGEAR, Inc*. (12 December 2008), PR-2008-038 to PR-2008-043 (CITT) at para. 10.
22. *Re Complaint Filed by Airsolid Inc.* (18 February 2010), PR-2009-089 (CITT) at 3.
23. DISO at 9, 10.
24. Complaint, Exhibit A.

solicitation documents or the applicable trade agreements, by not responding to the questions submitted by Enterasys. With respect to Enterasys' other allegation under this ground of complaint, the Tribunal noted that there was no evidence to substantiate that ground. The Tribunal therefore considered that the ground of complaint amounted to pure speculation and concluded that the information provided by Enterasys did not disclose a reasonable indication that PWGSC's conduct was inconsistent with the applicable trade agreements.

Ground 8

62. Enterasys submitted the following as its eighth ground of complaint:

> We request that the Tribunal review the various other grounds of complaint described in more detail within the emails at the end of Exhibits A, B and C which also form part of this complaint. We carefully worded our objections to explain the grounds for complaint if our requests for amendments were rejected, and we included references to the trade agreements and trade agreement articles. Since our requests were rejected the grounds then became clear.
>
> RVD 636 in Exhibit I, is an example of an RVD where PWGSC came closer to running a fair procurement in keeping with the trade agreements, however, in the end PWGSC refused to answer relevant questions.
>
> It should be noted that this is a "hardware only" standing offer and as explained in Ground 1 of our complaint many items in Annex A of these [RVDs] are outside of the scope of the category, including some Storage Area Network (SAN) and Server software items, and as a result this is another ground for complaint, since Category 1.1 and 1.2 are supposed to be strictly for LAN hardware that is within the scope of the Category specifications. Just one of many examples is RVD 710 Item 2 and 3. Also, this NESS Standing Offer is not a cabling standing offer, and yet several [RVDs] include cables, which are outside of Categories 1.1 and 1.2, which is another example, such as RVD 678 Items 2, 3 and 4. Companies like Enterasys honour the terms and conditions and do not include items outside of the scope of categories, like cables and software, on their NESS Published Price List (PPL), and yet PWGSC is allowing companies like Cisco to do this, which is discriminatory and in breach of the terms and conditions of the Standing Offer, and the trade agreements.[25]

63. The Tribunal notes that Enterasys' eighth ground of complaint included a request that the Tribunal review various other grounds of complaint allegedly described in e-mail correspondence between Enterasys and PWGSC that was filed with the complaints.

64. However, paragraph 30.11(2)(*c*) of the *CITT Act* requires that the complaint ". . . contain a clear and detailed statement of the substantive and factual grounds of the complaint . . . ." The Tribunal therefore considers that there is an onus on a complainant to describe its grounds of complaint with precision. A complainant's failure to do so makes it impossible for the Tribunal to determine whether there exists a reasonable indication of a breach and, if so, to frame the subject matter of the inquiry. In addition, the acceptance of a broad statement on the existence of various other grounds such as the one made by Enterasys would prevent the government entity from knowing the precise allegations against which it must defend. It is therefore the responsibility of the complainant to describe fully and completely and to properly frame its ground(s) of complaint and not leave to the Tribunal the task of identifying additional grounds of complaint or inferring the existence of such grounds upon its review of the information provided by the complainant. In view of this onus on the complainant, the Tribunal advised the parties that ground 8 of the complaints was only accepted with respect to the clear and detailed allegation concerning attempts to purchase products outside the scope permitted by the standing offer, and not in the broader context in which Enterasys had framed its allegation.

25. Complaint at 27.

PRELIMINARY MATTERS

Enterasys' Motions for the Production of Documents

65. Enterasys' motion and addendum filed on May 6 and 18, 2010, respectively, sought an order requiring PWGSC to produce certain documents. The motion requested as follows:

> 1. This directive would be for PWGSC to provide to the Tribunal and to the complainant, copies of the Published Price Lists ([PPLs]), from Cisco, Nortel and Hewlett Packard, that shows the product codes and categories that PWGSC has approved these product codes into. All of the pricing in these [PPLs] should be redacted. It is apparent from the disclosure of documents received so far, that PWGSC is regularly receiving updated [PPLs] from Cisco, Nortel and HP, with products improperly categorized by these [OEMs], and PWGSC is improperly approving products in these categories, even though they are outside of the scope of the category. In order to properly show this pattern of abuse we are requesting copies of all [PPLs] from these [OEMs] that have been uploaded into PWGSC's NESS purchasing system since the Standing Offer began on November 1, 2006.
> 2. This directive would be for PWGSC to provide to the Tribunal and to the complainant, copies of all correspondence related to these Solicitations between PWGSC and the Government Departments, and the resellers and/or [manufacturers], prior to and after the solicitation closing dates. All of this correspondence must show the dates that this correspondence was sent and received.
> 3. This directive would be for PWGSC to provide to the Tribunal and to the complainant, copies of all Technical Justifications sent by PWGSC to the departments, and sent by the departments to PWGSC regarding these Solicitations.

66. The addendum requested the following reports:

- since November 1, 2006, in chronological order, a report showing the number, issue date and value of "Brand name or equivalent" [RVDs] issued, identifying the brand name, and the name of the DISO holder that won each RVD; and
- since November 1, 2006, in chronological order, a report showing the number, issue date and value of ''Generic" [RVDs] issued for each of category 1.1 and category 1.2, and the name of the DISO holder that won each RVD.

67. After consideration of the parties' arguments and submissions on the relevance and importance of these documents in assisting the Tribunal in its inquiry, the Tribunal ordered PWGSC to file the following: ". . . all information, including all technical justifications and related correspondence, that underlies the description of the procurement requirements with a reference to particular trademarks or brand names that were sent by client departments to [PWGSC] with respect to the [RVDs at issue] . . . ."

68. In the Tribunal's opinion, these documents would contain relevant information that may be necessary in order to determine whether PWGSC was justified in specifying products by brand name. Therefore, the Tribunal ordered PWGSC to file these documents. The Tribunal concluded that the production of the other requested documents was not justified for the reasons discussed in File Nos. PR-2009-132 to PR-2009-153, in which Enterasys filed identical motions.

69. In short, the production of additional material was not warranted primarily because, as was argued by PWGSC, the Tribunal found that the other information and documents requested by Enterasys were not relevant to the various grounds of complaint that the Tribunal accepted for inquiry. In this regard, the

Tribunal noted that a significant part of the materials requested by Enterasys did not even pertain to the RVDs at issue, but, rather, related to other RVDs issued by PWGSC since the inception of the DISO or to other standing offer holders' information. In particular, the Tribunal considered that there was no basis to order PWGSC to file general information pertaining to all RVDs issued since November 2006 or the PPLs of other standing offer holders. In this regard, the Tribunal notes that Enterasys' ground of complaint that PWGSC allowed certain OEMs to add products that were outside the scope of category 1.1 and category 1.2 to their PPLs was not accepted for inquiry. Moreover, the Tribunal was of the view that, other than for the TJs and related correspondence, Enterasys had not provided sufficient explanations as to how the requested documents might be relevant and assist the Tribunal in this inquiry. In the absence of compelling explanations and evidence establishing their relevance to the issues before the Tribunal, the Tribunal concluded that such documents were not necessary for the assessment of Enterasys' grounds that were accepted for inquiry regarding the subject solicitations.

70. The Tribunal further notes that, in its motions for the production of documents, Enterasys referred to the requested documents as ". . . important discovery evidence . . . ."[26] In this regard, the Tribunal has stated in the past that it will not allow complainants to have access to documents when the sole objective is to find evidence to use in a complaint.[27] In the Tribunal's opinion, the mere inclusion of general allegations in a complaint does not entitle complainants to have an unlimited access to documents in the possession of government institutions. This would open the door to impermissible fishing expeditions into the records of government institutions.

PWGSC's Motion to Strike Certain Documents From the Record

71. As noted above, on September 10, 2010, the Tribunal granted PWGSC's motion and ordered that the following documents attached to Enterasys' comments on the GIR be removed from the record:

- Exhibit 1 of Enterasys Networks of Canada Ltd.'s comments on the Government Institution Report, specifically the letter signed by Mr. Mike Millar from Enterasys Networks of Canada Ltd., dated August 20, 2010, which provided comments on each of the Requests for Volume Discount;
- Exhibit 2 of Enterasys Networks of Canada Ltd.'s comments on the Government Institution Report, specifically, the letter signed by Ms. Erica Johnson from the University of New Hampshire InterOperability Laboratory, dated June 22, 2010; and
- Exhibit 3 of Enterasys Networks of Canada Ltd.'s comments on the Government Institution Report, specifically, the letter signed by Dr. Dan Ionescu from ARTIS Inc., dated July 7, 2010.

72. The Tribunal granted PWGSC's motion on the grounds that these documents did not constitute a valid response to either the GIR or the documents filed by PWGSC in compliance with the Tribunal's May 28, 2010, order. In the Tribunal's opinion, despite Enterasys' submissions to the contrary, there was nothing in the contents of the above-noted letters that directly responded to the claims made by PWGSC in the GIR or that addressed the documents filed by PWGSC in response to the Tribunal's May 28, 2010, order.

26. Enterasys' letter dated May 6, 2010, at 1.
27. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT) at 16.

73. With respect to the letter signed by Mr. Millar (Exhibit 1), the Tribunal notes that it expressly indicated that its aim was to provide analysis and comments regarding the RVDs at issue, i.e. not to provide comments on the GIR or the documents filed by PWGSC to comply with the Tribunal's May 28, 2010, order). The contents of this letter provided Mr. Millar's analysis of the list of deliverables included in each of the subject RVDs, as well as his concurring opinions with statements made in other documents filed with the Tribunal by Enterasys (e.g. the letters signed by Ms. Johnson and Dr. Ionescu and the letter from Mr. Kevin Tolly filed as Exhibit M to the complaint). There was no indication that Mr. Millar needed to review the GIR or the documents filed by PWGSC concerning the RVDs at issue in order to prepare his analysis or that he actually reviewed them. In fact, Mr. Millar's letter includes a statement indicating that his comments were made after reviewing a large number of TJs in *previous* Tribunal files, including the documents filed by PWGSC on July 26, 2010, concerning the RVDs that were at issue in File Nos. PR-2009-132 to PR-2009-153. It does not indicate that Mr. Millar reviewed the documents filed by PWGSC on June 11 and August 11, 2010, which actually pertain to the RVDs at issue. Consequently, the Tribunal considers that this letter, which was prepared by an Enterasys employee, does not provide comments on the GIR or address the relevant documents filed by PWGSC in response to the Tribunal's May 28, 2010, order.

74. With respect to the letters signed by Ms. Johnson and Dr. Ionescu (Exhibits 2 and 3), the Tribunal notes that their contents indicate that the authors were asked to provide an opinion based on specific facts disclosed to them by counsel for Enterasys rather than to provide comments on the GIR or the documents filed by PWGSC. For example, Dr. Ionescu, in Exhibit 3, opines that Enterasys would need certain switch configuration information because Enterasys may have to propose a product that has differences, but can be configured in a manner that can still be compatible and interoperate. He then states that, in his expert opinion, an OEM name and part number is insufficient information for Enterasys to submit a proposal; that it is a simple matter for an end user to prepare a list of operational requirements for a switch, without referring to a specific OEM name and part number; and that it is impossible for any testing firm to perform tests and prepare an equivalency report within four days. As for Ms. Johnson, she provides an opinion, in Exhibit 2, which is based on the organizations' past experience, on the type of information that would be required to provide an equivalency and interoperability report and on the time period required to prepare such a report. The Tribunal further notes that the contents of both letters are similar to the content of a letter dated February 2, 2010, signed by Mr. Kevin Tolly, which was filed by Enterasys with its complaints.[28] In view of the above, the Tribunal considers that, as was the case in File Nos. PR-2009-132 to PR-2009-153, the previous inquiry during which Enterasys attached virtually identical letters from the same authors to its comments on the GIR, the letters signed by Ms. Johnson and Dr. Ionescu constitute additional opinion evidence in support of Enterasys' allegations, as opposed to a response to the GIR or the documents filed by PWGSC to comply with the Tribunal's May 28, 2010, order.

75. For these reasons, the Tribunal is of the view that Enterasys could and should have filed this evidence earlier. In the Tribunal's opinion, if it were to allow this evidence to be placed on the record at the time of the filing of the comments on the GIR, PWGSC would be left without a meaningful opportunity to respond to this opinion evidence. This would be contrary to the rules of procedural fairness.

76. Indeed, procedural fairness and natural justice considerations dictate that, as a general rule, a complainant should not be allowed to split its case by introducing additional evidence, in support of its allegations, which does not respond to the contents of the GIR when it files its comments on the GIR. In this regard, the Tribunal notes that, pursuant to the *Rules*, the GIR is the only opportunity for the procuring entity to respond in detail to the allegations made in a complaint and to the complainant's evidence. Accordingly,

28. Complaint, Exhibit M.

if it were to permit the above-noted documents to be placed on the record at such a late stage in the process, the Tribunal would be denying PWGSC the opportunity to make a full and complete response to the complaint.[29]

77. In light of the foregoing, the Tribunal ordered that the above documents be removed from the record.

New Grounds of Complaint in Enterasys' Comments on the GIR

78. The Tribunal notes that, in Enterasys' August 20, 2010, comments on the GIR and the documents filed by PWGSC in response to the Tribunal's May 28, 2010, order, including a witness statement from counsel for Enterasys, certain allegations and issues that are not contained in the complaints were raised for the first time. These include the following allegations: (1) that the requested products that were identified by brand names on an RVD and purchased do not meet the requirements set out in the TJs sent to PWGSC by client departments; (2) that PWGSC had failed to disclose crucial evaluation criteria information by not providing the TJs to potential suppliers; (3) that the documents provided by PWGSC demonstrate that it has been favouring Nortel (in the case of RVD 758 [2]) by providing the client department with a draft TJ referring to Cisco products;[30] and (4) that PWGSC has not provided documents to demonstrate that the installed base of products was purchased through a competitive process or that the alleged installed base of equipment existed at all.

79. The Tribunal considers these allegations to be new grounds of complaint, which were not included in the list of grounds of complaint found in the complaints that the Tribunal accepted for inquiry. The Tribunal notes that the grounds of complaint cannot simply be changed or supplemented after a complaint is accepted for inquiry. Indeed, the acceptance of new grounds of complaint would constitute a substantive amendment to the complaint in circumvention of section 7 of the *Regulations*, which directs the Tribunal to consider whether certain conditions are met before accepting to inquire into a particular ground of complaint.

80. For these reasons, the new grounds of complaint introduced by Enterasys in its comments on the GIR were not considered by the Tribunal.

PWGSC's Argument that Enterasys is not a Potential Supplier

81. In its GIR, PWGSC submitted that subsection 30.11(1) of the *CITT Act* grants standing to file a procurement complaint to a "potential supplier", a term which is defined in section 30.1 of the *CITT Act* as ". . . a bidder or prospective bidder on a designated contract." According to PWGSC, as Enterasys did not submit a bid in response to the subject RVDs and, since the bidding period for the subject RVDs is closed, it is neither a bidder nor a prospective bidder with standing to file a complaint in respect of the subject RVDs. In support of its position, PWGSC referred to the Tribunal's order in File No. PR-2009-026.[31]

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29. The Tribunal further notes that, in this inquiry, it granted Enterasys an extension to allow it to provide its comments on the GIR as a result of Enterasys engaging additional counsel subsequent to the filing of the GIR. In these circumstances, it was not possible for the Tribunal to allow PWGSC to file an addendum to the GIR in order to respond to the new evidence filed by Enterasys on August 20, 2010, and then provide Enterasys with an opportunity to reply to PWGSC's eventual response, given the limited period of time remaining, after August 20, 2010, for the Tribunal to assess all the evidence and arguments and render its determination within 135 days of the filing of these complaints, as is required by paragraph 12(*c*) of the *Regulations*.
30. The Tribunal notes that Enterasys did not explain how the provision of documents that refer to Cisco products could favour another manufacturer such as Nortel.
31. *Re Complaint Filed by Flag Connection Inc.* (3 September 2009), PR-2009-026 (CITT) [*Flag Connection*].

82. PWGSC further submitted that there was no aspect of the subject solicitations that prevented Enterasys, or any of its authorized agents, from bidding. It referenced the Tribunal's June 21, 2010, determination regarding File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128, noting that the Tribunal had found that ". . . no additional information is warranted for bidders to be able to submit responsive tenders"[32] in response to an RVD and that the RVD process had allowed bidders sufficient time to submit bids for equivalent products.[33]

83. Enterasys did not respond to this argument in its comments on the GIR.

84. The Tribunal notes that, at the hearing held in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128, PWGSC raised a similar issue of jurisdiction, arguing that, because Enterasys had not demonstrated any intention to submit a proposal in response to the brand name RVDs in those prior complaints, it was not a potential supplier with proper standing to file complaints with the Tribunal. At that time, PWGSC also submitted, however, that it would not want the Tribunal to dispose of the complaints only on this matter of jurisdiction.[34] The Tribunal did not accept this argument, primarily because it had not been raised in a timely manner. The Tribunal also noted that PWGSC had not filed, or directed the Tribunal to, any authority in support of its view that, in order to be a potential supplier, a complainant must establish that it had the intention to submit a proposal.[35] PWGSC did not raise this issue or otherwise challenge Enterasys' standing in File Nos. PR-2009-132 to PR-2009-154. Since PWGSC has, in these proceedings, properly raised this issue in its GIR, the Tribunal will address the merits of PWGSC's submissions in this regard.

85. The Tribunal agrees with PWGSC that Enterasys did not submit a proposal in response to any of the subject RVDs and, therefore, is not a bidder. However, the Tribunal is unable to accept PWGSC's argument that Enterasys is not a "prospective bidder" because it did not submit a proposal and the bidding period for each subject RVD has now expired. The Tribunal is of the view that there are circumstances in which a company will remain a potential supplier and must be considered a "prospective bidder" after the bid closing date, even if it did not submit a proposal. These circumstances include situations in which a complainant is alleging that it was effectively precluded from bidding by the actions of the relevant government institution, such as the imposition of restrictive specifications or other breaches of the trade agreements, during the procurement process. These possible scenarios must be distinguished from the circumstances that arose in *Flag Connection*, the precedent which is relied upon by PWGSC in support of its argument. In that case, the Tribunal emphasized that the complainant had *not* alleged that it had been effectively precluded from bidding by restrictive terms of the procurement itself. This was the key factual finding that led the Tribunal to conclude that the complainant ceased to be a prospective bidder in relation to the designated contract once the bidding period expired in that case.

86. To the contrary, in these complaints, Enterasys alleges that PWGSC did not provide it with sufficient information and time to submit a responsive tender in respect of the subject RVDs (grounds 5 and 7). Moreover, Enterasys filed objections with PWGSC during the bidding period for each of the subject RVDs and sought, before the bid closing date, to obtain the additional information and extension of time

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32. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT), note 107.
33. *Ibid.* at para. 187.
34. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT); *Transcript of Public Argument*, 14 May 2010, at 66.
35. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT) at paras. 87-88.

that it claims that it needed in order to submit a proposal. These allegations, which indicate that Enterasys intended to submit a proposal in response to the subject RVDs, provide a clear basis to distinguish the present case from *Flag Connection.* In short, Enterasys' position is that PWGSC's actions deprived it of the capacity to bid. In these circumstances, a finding that Enterasys ceased to be a prospective bidder with standing to file a complaint with the Tribunal once the bidding period for the subject RVDs expired would inappropriately preclude it from raising with the Tribunal its allegations that breaches of the trade agreements occurred during the procurement processes at issue.

87. With respect to PWGSC's submission that no aspect of the subject solicitations prevented Enterasys, or one of its authorized agents, from bidding on the subject RVDs, the Tribunal notes that the fact that Enterasys made allegations to that effect in its complaints is sufficient for the purposes of determining whether Enterasys is a "prospective bidder" and thus able to submit a complaint that is within the Tribunal's jurisdiction. In the Tribunal's opinion, an allegation that, but for a breach of the trade agreements, a company would or could have bid on a designated contract is sufficient for it to be considered a prospective bidder in the absence of clear evidence that would otherwise call into question its technical or financial capacity of fulfilling the requirements of the procurement. The issue of whether any breaches of the trade agreement actually occurred is for the Tribunal to determine during the course of its inquiry and has no bearing on the determination of a complainant's standing as a potential supplier.

88. This conclusion is consistent with the Tribunal's determination in *Flag Connection*, which contemplates that a company will not necessarily lose its status as a potential supplier after the bid closing date. To find otherwise would effectively narrow the Tribunal's jurisdiction by rendering virtually impossible the examination of claims that breaches of trade agreements by a government institution during a procurement process prevented a company from bidding. A finding that a company can no longer be considered a "prospective bidder" once the bidding period is closed, in such circumstances, would also curtail the ability of companies that were interested in supplying the government to complain about a procurement process. In the Tribunal's opinion, accepting PWGSC's argument would thus unduly reduce the access to the procurement review regime set out in the *CITT Act* and the *Regulations*. This would defeat an important purpose of this regulatory regime, namely, to increase participants' confidence in the procurement system and enhance their participation in it.

89. Similarly, the fact that the Tribunal found, in previous inquiries concerning *other* RVDs issued under the NMSO, that Enterasys had not established that additional information or time was required for bidders to be able to submit responsive tenders in the context of those *other* RVDs, is irrelevant to the question of Enterasys' standing to file complaints concerning the *subject* RVDs. In this regard, the Tribunal also notes that, contrary to PWGSC's submissions, it did not find, in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128, that no additional information or time was warranted for bidders to be able to submit responsive tenders. Rather, the Tribunal's conclusion in these prior proceedings was that Enterasys failed to demonstrate that the information and time provided by PWGSC were insufficient.[36] Thus, the Tribunal found only that Enterasys failed to discharge its burden of proof with regard to its allegations that PWGSC's action precluded it from submitting a proposal. This finding leaves open the possibility of finding that breaches of the trade agreements occurred and prevented Enterasys from submitting a proposal in subsequent cases. Accordingly, PWGSC cannot rely on prior Tribunal findings in support of its claim that no aspect of the subject solicitations prevented Enterasys from bidding on the subject RVDs.

36. *Ibid.* at paras. 188-89.

90. For these reasons, the Tribunal concludes that, as a holder of an NMSO authorized to submit proposals in response to the subject RVDs that claims that it could have been a bidder, were it not for alleged breaches of the trade agreements during the procurement processes, Enterasys is a "prospective bidder" and, therefore, a "potential supplier" with standing to file these complaints pursuant to subsection 30.11(1) of the *CITT Act*.

ANALYSIS

91. 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. In these cases, at the conclusion of the inquiry, the Tribunal must determine the validity of the complaints on the basis of whether the procedures and other requirements prescribed in respect of the designated contracts have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurements were conducted in accordance with the applicable trade agreements, which, in these cases, are the *Agreement on Internal Trade*,[37] *NAFTA*, the *Canada-Chile Free Trade Agreement*[38] and the *Canada-Peru Free Trade Agreement*[39] depending on the value of each RVD.[40]

92. While the complaints include general references to the provisions of the *AIT*, *NAFTA* and the *AGP*, Enterasys' specific allegations of breaches of applicable trade agreements focus almost entirely on the relevant provisions of *NAFTA*. The Tribunal notes that Enterasys only provided limited references to the *AIT* and did not provide separate analyses or make specific arguments in order to demonstrate the existence of breaches of *CCFTA* or *CPFTA* provisions. For this reason, and given that *NAFTA* applies to the three RVDs at issue, the Tribunal will limit its analysis to Enterasys' claims of breaches under *NAFTA*.

93. In any event, in the context of these complaints, the Tribunal is of the view that the provisions of the *AIT*, the *CCFTA* and the *CPFTA* are similar to, and do not impose on the government institution obligations that are more stringent than those contained in *NAFTA*. As such, the Tribunal's analysis under *NAFTA* would equally apply under the *AIT*, the *CCFTA* or the *CPFTA* and is sufficient to dispose of the complaints.

94. The Tribunal considers that the grounds of complaint that make up the subject matter of this inquiry can be divided into the following four main allegations: (1) PWGSC had no justification for specifying products by brand names; (2) PWGSC improperly refused to provide additional information and time to bidders in order to permit bidders of equivalent products to prepare their proposals; (3) PWGSC improperly coded industry-standard transceivers with company-specific product codes, thus precluding "best-of-breed" transceivers from other manufacturers to be proposed; and (4) PWGSC improperly purchased items that do

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37. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
38. *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile*, 1997 Can. T.S. No. 50 (entered into force 5 July 1997) [*CCFTA*]. Chapter K*bis*, entitled "Government Procurement", came into effect on September 5, 2008.
39. *Free Trade Agreement between Canada and the Republic of Peru*, online: Department of Foreign Affairs and International Trade <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/chapter-chapitre-14.aspx> (entered into force 1 August 2009) [*CPFTA*].
40. In addition to other requirements regarding coverage, the five trade agreements have separate monetary thresholds, above which a trade agreement applies to a procurement. In essence, the higher the dollar value, the more trade agreements apply. For RVDs valued at greater than $25,000 but less than $27,300, only the *AIT* applies. *NAFTA* coverage starts at $27,300 ($383,300 for Crown Corporations). The *CCFTA* and *CPFTA* cover RVDs valued at more than $76,600 ($383,300 for Crown Corporations). In its complaints, Enterasys estimated the values of the RVDs at $40,000 (RVD 757), $40,000 (RVD 758[2]) and $110,000 (RVD 761).

not meet the mandatory specifications of the relevant product category identified in the RVDs at issue (i.e. category 1.2 of Appendix A to Annex A of the NMSO). The Tribunal will address each of these allegations in turn.

95. Given that Enterasys' arguments, the alleged PWGSC shortcomings and the information filed by the parties regarding the current complaints are similar to Enterasys' previous complaints concerning other RVDs issued under the same NMSO that were accepted for inquiry and for which the Tribunal has already issued its determination and statement of reasons,[41] the Tribunal deems it appropriate, where applicable, to rely on the analysis developed in the context of its inquiries concerning Enterasys' previous complaints.[42]

Use of Brand Names—Ground 6 of Enterasys' complaints[43]

Enterasys' Position

96. Enterasys submitted that PWGSC could have easily provided a description of the operational requirements in the subject RVDs without the use of a specific brand name, model or part number. It provided information from The Tolly Group, which Enterasys characterized as "... a leading, global provider of independent testing and third-party validation services for the Information Technology industry",[44] in which the following is stated:

> It is our professional opinion that there are sufficiently precise and intelligible ways of describing these switch requirements without referring to a specific OEM name and product code. It has been our experience that defining the exact technical requirements does not represent a very high level of complexity.[45]

97. Enterasys submitted that PWGSC has adopted an unwritten policy of characterizing a "normal" RVD as one that describes products being ordered by brand name or model number and that, during the hearing held by the Tribunal regarding File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128, the PWGSC witnesses admitted to the fact that the NESS DISO/NMSO was designed by PWGSC to allow departments the option of purchasing products by using

41. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT); *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (9 August 2010), PR-2009-132 to PR-2009-153 (CITT).
42. In this regard, the Tribunal notes that Enterasys' comments on the GIR included references to the evidence filed by the parties in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153 and to the testimony heard by the Tribunal at the hearing that was held in the context of those previous complaints. Similarly, PWGSC filed, as attachments to its GIR, evidence upon which it also relied in the context of File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128, including the affidavit of Mr. Stephen Oxner and the witness statements of Ms. Joanne St-Jean Valois and Mr. Michel Perrier. In considering Enterasys' allegations in the present complaints, the Tribunal examined whether the parties filed additional evidence or made additional submissions that could convince the Tribunal to depart from its previous conclusions on similar allegations.
43. The Tribunal notes that ground 4 of the complaints also alleges that there was no justification for issuing RVDs that include industry-standard small form-factor transceivers (SFPs) and 10 gigabit small form-factor transceivers (XFPs) and other related fibre or copper modules with either a Cisco or a Nortel product code. The Tribunal's analysis regarding ground 6 also applies to this aspect of ground 4 of Enterasys' complaints. The other aspect of ground 4, namely, the use of company-specific product codes precluding "best of breed" transceivers, SFPs and XFPs from other manufacturers to be proposed is addressed below in a separate section of this statement of reasons.
44. Complaint at 5.
45. Complaint at 19.

brand names and product codes. In Enterasys' view, under the trade agreements, a normal RVD should, to the contrary, always be one for which the requirement is capable of being described with generic specifications.

98. Enterasys submitted that PWGSC improperly used brand name RVDs in the past to rush particular RVDs to meet March 31, 2010, year-end delivery requirements, but that the three RVDs at issue were not a rush requirement. Enterasys submitted that, despite this, PWGSC used the delivery date requirements of these three RVDs as a factor in its decision to order products using brand names. It submitted that PWGSC admitted during the Tribunal's inquiry in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 that it takes, on average, only one month to process an RVD that identifies products by brand name, compared to the much longer time period required to complete the procurement process when an RVD describes networking equipment without the use of brand names. Given this, Enterasys argued that this was the reason for PWGSC's use of brand names for the three RVDs at issue. It argued that, under the trade agreements, this is not a valid justification for the use of a specific brand name, model or part number on an RVD.

99. Enterasys submitted that PWGSC, in the case of an RVD not subject to these complaints—RVD 636—provided bidders with operational requirements without the use of a brand name and product codes. This, Enterasys claimed, demonstrated that it is easily possible for end-user departments, and PWGSC, to describe their requirements without referring to a specific brand name and model. Enterasys submitted that PWGSC did not explain why, Enterasys claims, all tenders involving network equipment prior to the NESS DISO were described without the use of brand names and product codes and why, Enterasys claims, during those enquiry periods, PWGSC always answered the questions asked by prospective bidders.

100. Enterasys submitted that, in cases where a brand name was specified, PWGSC receives information from the client department, which it does not forward to bidders. Enterasys claimed that PWGSC used a "NESS Fact Sheet"[46] for this process. It notes that the fact sheet states the following:

> If the requested OEM product set is deemed to be the only product set supporting a required feature meeting your operational requirements, a technical justification will be required in order to validate against an equivalent bid of another OEM product set.

Enterasys also submitted that the fact sheet is not part of the NMSO agreement and that Enterasys is not in agreement with it. It claimed that PWGSC had kept this document and procedure hidden from bidders.

101. Enterasys submitted that the disclosure documents provided by PWGSC in response to the Tribunal's May 28, 2010, order, prove that PWGSC could have described the requirement without referring to specific brand names. Enterasys submitted that it could have met the operational requirements of the requests (i.e. established equivalency) had PWGSC provided more accurate and candid information. Enterasys further submitted that the use of brand names created the false impression that operational requirements were more robust than was actually the case. Moreover, Enterasys submitted that a review of the documents disclosed by PWGSC reveals that PWGSC always makes the assumption that an RVD that identifies products by brand name is reasonable, even where (as Enterasys alleged was the case in RVD 757) no proof was provided of a contract that proved that there was an existing installed base of category 1.2 Cisco switches. Mr. Weedon noted, in his witness statement provided in File Nos. PR-2009-132 to PR-2009-153 and incorporated into Enterasys' submissions in these proceedings, that the GIR does not include any witness statements from PWGSC or the client departments, or from anyone that could be considered a networking expert, to provide evidence in support of PWGSC's statements that the use of brand names was justified.

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46. Complaint, exhibit K [fact sheet].

102. Finally, Enterasys submitted that, on the basis of PWGSC-approved NESS NMSO discounts that are already part of the NESS NMSO, Enterasys switches would have been priced lower than those requested from Cisco and Nortel in the subject RVDs, but that, because PWGSC refused to answer its questions and provide the TJs when requested, it could not select the appropriate products in order to submit proposals.

PWGSC's Position

103. PWGSC submitted that the appropriate standard of review in these cases is reasonableness and not correctness. It submitted that the Tribunal is being asked to overturn discretionary decisions made by PWGSC in the course of administering the three solicitations. PWGSC submitted that, when considering whether PWGSC has acted consistently with its trade agreement obligations in the administration of the NESS DISO, the issue is not whether the Tribunal would have exercised its discretion differently or made decisions different from those of PWGSC. Rather, it claimed that the proper issue is whether PWGSC's decisions were reasonable when considered on an objective standard. PWGSC referenced a previous case[47] in which it noted that the Tribunal framed the issue as whether PWGSC's determination ". . . was reasonable under the circumstances . . . ." Such circumstances, PWGSC claimed, recognize that no single outcome is correct and that a decision is not necessarily wrong because the reviewing body would have decided differently.

104. PWGSC submitted that it administered the NESS DISO in good faith and consistently with its terms and those of the applicable trade agreements. PWGSC submitted that it has given close consideration to the guidance provided by the Tribunal in its numerous determinations and decisions on previous complaints concerning the NESS DISO. It further submitted that, except for one instance[48] in the numerous complaints filed with respect to the NESS DISO, and save for the Tribunal's recent findings regarding other complaints filed by Enterasys,[49] all grounds of complaint have been dismissed after the conduct of an inquiry, or were not accepted for inquiry. PWGSC submitted that the subject complaints were without merit and should also be dismissed. PWGSC further submitted that Enterasys bears the burden of proof and that mere assertions are not proof upon which findings of fact can be made.

105. PWGSC submitted that, during the original NESS RFSO process, no potential supplier, including Enterasys, raised any objections or questions regarding the "equivalent products" provisions of the RFSO. According to PWGSC, by seeking a standing offer and participating in the solicitations, suppliers waived any right to complain about PWGSC's use of brand names in the RVDs.

106. PWGSC submitted that, in accordance with earlier findings of the Tribunal where PWGSC made use of the subject RVD procurement process,[50] the use of brand names to describe product requirements is fully consistent with the NMSO and the trade agreements. It submitted that the NESS RFSO, DISO and NMSO expressly authorize the use of brand names to describe networking equipment in an RVD. It argued

47. *Re Complaint Filed by Joint Venture of BMT Fleet Technology Limited and Notra Inc.* (5 November 2008), PR-2008-023 (CITT) at para. 25.
48. *Re Complaints Filed by NETGEAR, Inc.* (15 May 2008), PR-2007-075 to PR-2007-077 (CITT), regarding the purchase of software under one RVD.
49. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT).
50. *Re Complaints Filed by NETGEAR, Inc*. (15 May 2008), PR-2007-075 to PR-2007-077 (CITT) at para. 53; *Re Complaints Filed by NETGEAR, Inc*. (10 July 2008), PR-2008-003 to PR-2008-006 (CITT) at para. 49.

that the very structure of the NMSO, with offerors listing their specific equipment offerings on PPLs, contemplates the use of brand names to identify and procure equipment. PWGSC submitted that it would defeat the purpose of the NMSO for a client department to identify its specific equipment needs from a PPL and then be required to reverse engineer that equipment for purposes of developing generic specifications.

107. PWGSC submitted that it examines the option of using a brand name or generic specification in every case and, in circumstances where interoperability with an existing network is not an issue or not essential (for example, with the establishment of a new network), PWGSC will generally source the required equipment using generic specifications. It submitted that the decision to identify equipment using a brand name, with equivalents, is made having regard to the following: whether the equipment will be installed into an existing network; whether the integrity and reliability of the existing network are critically important to the host department or agency; the importance of interoperability with existing equipment supplies; the risks inherent in relying on generic specifications and the impact of compromise to Crown networks; and the urgency of the requirement. PWGSC argued that, regarding the three RVDs at issue, the use of generic specifications would have created an unacceptable risk of procuring products that lack full compatibility and interoperability with the host networks and that it was therefore appropriate to use brand names to describe the requirements.

108. It submitted that, where interoperability with an existing network is required, a precise description of the exact technical requirements presents a very high level of complexity, i.e. that there are literally hundreds of such factors that would need to be addressed in respect of product specifications and, more critically, in regard to specific interoperability requirements. PWGSC argued that, if it were limited to using generic specifications, it is possible that essential criteria might be inadvertently omitted, resulting in an unacceptable risk of procuring products lacking full compatibility and interoperability with host networks.

Majority's Analysis

109. In order to dispose of this ground of complaint, the Tribunal must first determine the meaning and scope of the obligation set out in Article 1007(3) of *NAFTA*. In File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153, the majority of the Tribunal provided the following analysis of the meaning of this provision.

110. Article 1007(3) of *NAFTA* requires the following:[51]

> 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.

111. In interpreting the provisions of *NAFTA*, the Tribunal is mindful of Article 31(1) of the *Vienna Convention on the Law of Treaties*,[52] which states the following:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

51. Similar language is found in Article Kbis-07(3) of the *CCFTA* and Article 1407(3) of the *CPFTA*.
52. (1969) 1155 U.N.T.S. 331, entered into force on January 27, 1980.

112. This principle is consistent with the modern contextual approach to statutory interpretation, which holds that the words of an enactment must be read in their entire context and in their grammatical and ordinary sense harmoniously with the sections of the act, the object of the act and the intention of Parliament.[53] Thus, Article 1007(3) of *NAFTA* must not be read in isolation, and its meaning must be ascertained in light of its entire context and the object and purpose of *NAFTA*.

113. Given the context of Article 1007(3) within *NAFTA* and the overall object of the procurement chapter in *NAFTA*, the Tribunal is of the view that Article 1007(3) must be construed narrowly rather than broadly. In this regard, Article 1007(3) must be read in light of Article 1017, which indicates that the purpose of the procurement chapter is to promote fair, open and impartial procurement procedures, and in light of Articles 1007(1) and 1007(2), which provide the following:

> 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.
>
> 2. Each Party shall ensure that any technical specification prescribed by its entities is, where appropriate:
>
> a. specified in terms of performance criteria rather than design or descriptive characteristics . . . .

114. In the Tribunal's opinion, these requirements indicate that, under *NAFTA*, the use of brand names or trademarks is not the preferred method to prescribe technical specifications. When they are read together, these provisions point towards the use of generic specifications described in terms of performance criteria in order to make a large pool of competitive bidders available to government buyers, thereby ensuring that the government receives the best value for its money. Thus, the Tribunal finds that, as a general rule, government entities must avoid discouraging potential bidders from full participation in the procurement process by imposing costs, onerous conditions or describing their requirements in a manner that could deter potential suppliers from submitting proposals. The Tribunal finds that unnecessarily describing the requirements by reference to a particular trademark or brand name would defeat the above-noted purpose of the *NAFTA* chapter on procurement.

115. The Tribunal also considers that procurement disciplines are intended to strike a balance between the interests of the government institutions to procure required goods and services and those of potential suppliers to have fair and transparent access to procurement opportunities. In the Tribunal's opinion, this explains why, in limited and carefully delineated circumstances (i.e. ". . . unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements . . ."), *NAFTA* authorizes government entities to rely on a particular trademark or name, patent, design or type, or request products from a specific supplier. The language of the applicable provisions must be interpreted in that light.

116. In summary, the Tribunal considers that Article 1007(3) of *NAFTA* sets out a prohibition—with an exception—on the use of a particular trademark or brand name. Specifically, in the context of the complaints at issue, the Tribunal interprets Article 1007(3) as meaning that an RVD cannot quote a brand name or product ". . . unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements . . . ." This means that PWGSC cannot identify products by brand name whenever it considers that it would simply be more efficient to do so. Rather, it must be demonstrated that there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements.

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53. *Re Complaint Filed by Georgian College of Applied Arts and Technology* (3 November 2003), PR-2001-067R (CITT) at 4.

Article 1007(3) clearly limits the use of brand names to situations where the use of generic specifications based on performance criteria would not be sufficient to allow government entities to accurately describe their requirements or to ensure that such requirements are comprehensible.[54]

117. The Tribunal finds that the burden is on PWGSC to demonstrate that such circumstances are applicable to the procurements that are the subject of these complaints and that the use of brand names is justified for the RVDs in question under the terms of Article 1007(3) of *NAFTA*. On this issue, the Tribunal has stated the following in previous determinations concerning the NESS DISO (now NMSO):

> 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.[55]

118. The Tribunal sees no reason to depart from this interpretation in the present inquiry. Accordingly, it examined whether PWGSC demonstrated, during these proceedings, that there was no sufficiently precise or intelligible way of otherwise describing the procurement requirements for the subject RVDs, since all of them identify products by brand name.

119. In a previous determination, the Tribunal also found that the DISO (now NMSO) and RVD operate on two separate levels and that, while working in tandem, circumstances could exist whereby the structure of the NMSO could be viewed as being in accordance with the trade agreement provisions, but that there may be a legitimate concern regarding the application of the NMSO regime in the context of individual RVDs. The Tribunal stated the following:

> . . . 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 section 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 that are used by the Government and that lead 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 . . . .[56]

120. The above findings make it clear that the Tribunal's previous determinations concerning other RVDs issued under the NESS DISO (now NMSO) are not to be taken as an indication that the RVDs at issue that identify products by brand name comply with Article 1007(3) of *NAFTA*. Moreover, they also indicate that it is open to PWGSC to justify the use of brand names through means other than the so-called "NESS Fact Sheet" referred to by Enterasys in its complaints when this issue becomes the subject of a complaint. In this regard, the Tribunal notes that PWGSC, in response to the Tribunal's May 28, 2010, order directing it to produce ". . . all information, including all technical justifications and related correspondence,

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54. The ordinary meaning of "precise", according to the *Canadian Oxford Dictionary* is "accurately expressed" or "definite, exact". According to the same source, the ordinary meaning of "intelligible" is "able to be understood; comprehensible". Second ed., *s.v.* "precise" and "intelligible".
55. *Re Complaints Filed by NETGEAR, Inc.* (10 July 2008), PR-2008-003 to PR-2008-006 (CITT) at para. 45.
56. *Re Complaint Filed by NETGEAR, Inc.* (26 May 2008), PR-2007-088 (CITT) at para. 35.

that underlies the description of the procurement requirements with a reference to particular trademarks or brand names . . .” did not provide any such NESS fact sheets. This appears to indicate that, contrary to Enterasys’ submissions, such fact sheets are not used by client departments and PWGSC to justify the use of brand names and are irrelevant in these complaints.

121. The process that led to PWGSC’s decision to identify products by brand name for any given RVD is described in detail in the Tribunal’s statements of reasons in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153. During the present inquiry, the parties did not file any evidence that would indicate that a different process was followed in the case of the RVDs at issue. Accordingly, the Tribunal considers that the following findings of fact made in the context of File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153 remain applicable and are relevant to PWGSC’s decisions in the case of the subject RVDs. In other words, the Tribunal can find no new set of facts that would justify modifying these findings.

122. In summary, the decision regarding whether or not an RVD is either a brand name or generic specification rests with PWGSC’s ITSB, which is the technical authority for the NMSO. The client department initiates the procurement process by logging on to an internal PWGSC Web site, choosing its required equipment and then sending a purchase request to PWGSC. According to PWGSC, the NMSO has been structured so that the department can request brand name products. Once PWGSC has received the purchase request, if the requirement is valued at more than $100,000 or if the request is made via the RVD process for a specific brand name product, it requires a TJ to support the client’s reason for wanting products of a particular manufacturer. If the client department has not provided such a justification, PWGSC e-mails the client department a TJ template and requests that the client justify its request. Once the ITSB is satisfied that the TJ adequately explains the client department’s requirements, a purchase request is sent to a PWGSC contracting officer, who subsequently releases the RVD to the NMSO holders.

123. It appears to the Tribunal that the initial step for virtually all client departments using the NMSO procurement process is for them to request brand name products. The documents filed by PWGSC in order to comply with the Tribunal’s May 28, 2010, order do not indicate otherwise in the case of the subject RVDs. At the hearing held regarding similar RVDs issued under the same NMSO,[57] the Acting Director of Network Management, Service Management and Delivery, at PWGSC’s ITSB, also acknowledged that, in his group, a brand name RVD is, “for the most part” considered a “regular RVD”.[58] It is also clear to the Tribunal that, on the basis of the evidence on the record, PWGSC considers the requirement of whether the equipment is for an existing network or part of a new system to be the critical factor in determining whether a brand name RVD will be issued. Typically, the use of brand names will be favoured over generic specifications where the requested equipment is to be integrated into an existing network. Accordingly, PWGSC’s default position is that, if the requested equipment is to be integrated into an existing network, a brand name RVD is justified.

124. However, the Tribunal notes that PWGSC has not provided evidence that could have convinced the majority of the Tribunal that, even in such situations, there was always no sufficiently precise or intelligible way of otherwise describing the procurement requirements. In the absence of adequate supporting evidence,

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57. Hearing held in Ottawa, Ontario, on May 13 and 14, 2010, regarding File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128.
58. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT), *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 338.

the majority of the Tribunal is also unable to accept PWGSC's statements that, with respect to the subject RVDs, the use of generic specifications would have created an unacceptable risk of procuring products that lacked full compatibility and interoperability with host networks. To the contrary, the majority of the Tribunal is of the view that, overall, the evidence on the record indicates that PWGSC, in providing its services to client departments, has established a system that does not allow for a meaningful assessment of whether the legal test required by Article 1007(3) of *NAFTA* was met. In particular, the majority of the Tribunal can find no evidence that could persuade it to depart from its previous conclusion, in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153, that PWGSC has, in practice, turned the entire process contemplated by Article 1007(3) on its head by applying the NMSO regime in such a way that the use of brand names has become the rule.

125. On the surface, while it appears that PWGSC's ITSB provides a check against client departments indiscriminately requesting brand name products, the evidence indicates that, in reality, client departments are not asked to examine whether there could be another sufficiently precise or intelligible way of describing the procurement requirements. The Tribunal further notes that, in the documents provided by PWGSC in response to the Tribunal's May 28, 2010, order, there is no document which would clearly indicate that the question of whether there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements was addressed by either the client departments or PWGSC.

126. It is true that the ITSB requires a TJ in which client departments must describe their requirements. In this regard, the ITSB often provides client departments with TJ templates, which it claims to use as guidance to define the project, i.e. large, small, existing, new, and assess whether the use of brand names is justified. PWGSC submitted that the information contained in a TJ, even if it may contain erroneous statements as to the technical specifications of the brand name equipment requested, is used by PWGSC to satisfy itself that the use of brand names is appropriate. The Tribunal notes that the TJs describe these requirements in terms of operational capabilities, i.e. equipment with which it must interface or functions which it must support or perform, as opposed to stating why it had to be a particular brand name product. This is not surprising, given that the e-mail sent by ITSB's analyst to the client departments requesting TJs does not ask the client departments to justify the use of brand names. It simply explains the following: ". . . we request a solid Technical Justification for your **Nortel category 1.2** in the RVD process *so that in the event that an equivalent bid is proposed, you are assured of obtaining equipment that will meet your requirements*. . . . The Technical Justification is only actually used if there is an equivalent bid" [emphasis added].[59] This language implies that, at the time at which the request for a TJ is sent, PWGSC has already determined that the use of brand names is appropriate and will not call into question the client departments' decisions to request specific brand name products; otherwise, it would not be necessary to refer, in the e-mail requesting a TJ, to the eventual proposal of an "equivalent bid". Indeed, the proposal of equivalent products under the NMSO is only a relevant consideration to the extent that a decision has already been made by PWGSC to go ahead with an RVD which specifies products with brand names.

127. The Tribunal is not convinced that the information provided by the client departments in the TJs adequately supports the use of brand names. In this regard, the relatively short and general operational requirements provided in the TJs belie PWGSC's argument that a precise description of the exact technical

59. See, for example, regarding RVD 758(2), the documents filed by PWGSC in response to the Tribunal's May 28, 2010, order at 564. See, also, regarding RVD 761, the documents filed by PWGSC in response to that order at 620.

requirements present a very high level of complexity because of the vast number of features and performance criteria involved and that there are literally hundreds of factors that would have to be addressed in order to describe the required products without referring to particular brand names.[60]

128. Furthermore, the Tribunal notes that, in its GIR, PWGSC acknowledged that the urgency of the procurement was a factor in its decision to identify equipment using brand names. In this regard, the Tribunal notes that PWGSC has not explained how the urgency of a procurement can be a relevant consideration in justifying the use of brand names, given the terms of Article 1007(3) of *NAFTA*. As noted above, the Tribunal considers that Article 1007(3) limits the use of brand names to situations where the use of generic specifications, based on performance criteria, would not be sufficient to allow government entities to accurately describe their requirements or to ensure that such requirements are comprehensible. There is no language in that provision that would suggest that the use of brand names is permissible in the case of urgent procurements. Thus, the Tribunal is of the view that Article 1007(3) cannot be reasonably interpreted as permitting the use of brand names in situations where a procurement process must be completed on an urgent basis. For this reason, the Tribunal finds that the urgency of the procurement requirements, as the case may be, is not a valid justification for the use of brand names under Article 1007(3).

129. On balance, the evidence found in the TJs and the limited related correspondence between PWGSC and the client departments underlying the decision to use brand names supports the Tribunal's conclusion that, in the case of the subject RVDs, PWGSC did not provide an adequate check against client departments indiscriminately requesting brand name products. Overall, the Tribunal considers that the documents provided by PWGSC in response to the Tribunal's May 28, 2010, order do not demonstrate that PWGSC performed a reasonable assessment of whether the legal test required by Article 1007(3) of *NAFTA* was met in the circumstances of the subject RVDs.

130. In summary, the Tribunal is of the view that PWGSC has not established that the conditions necessary for using brand names as required by Article 1007(3) of *NAFTA* have been met in the circumstances of the RVDs that specify products by brand name that are at issue. Accordingly, the Tribunal concludes that PWGSC's conduct regarding these RVDs was inconsistent with Article 1007(3).

131. Enterasys also claimed in its complaints that, by improperly specifying products by brand name in these cases, PWGSC failed to apply tendering procedures in a non-discriminatory manner, as required by Article 1008(1) of *NAFTA*. However, it did not make detailed submissions on this issue in its complaints or its comments on the GIR. In this regard, the Tribunal notes that a finding that PWGSC's conduct failed to meet the requirements of Article 1007(3) does not, in and of itself, mean that its conduct also violated Article 1008(1); otherwise, any breach of Article 1007(3), which specifically governs the preparation, adoption or application of technical specifications and does not address the issue of discrimination in the tendering procedures, would automatically result in a breach of Article 1008(1). In the absence of a clear demonstration by Enterasys as to how, as a matter of law and on the facts of these complaints, PWGSC's decision to specify products by brand name also amounts to the application of tendering procedures in a discriminatory manner, the Tribunal is unable to conclude that PWGSC's conduct also breached

60. The e-mail discussed above sent by PWGSC to client departments specifically asks them to outline the functionalities of the required equipment. As noted above, the Tribunal finds no documentary evidence on the record indicating that the particular circumstances of the RVDs at issue, where products were identified by brand names, the use of generic specifications would have created an unacceptable risk to the departments' networks.

Article 1008(1).[61] The Tribunal further notes that such a conclusion would automatically ascribe discriminatory behaviour to PWGSC and thereby relieve Enterasys of its burden of proof. Indeed, the Tribunal finds that Enterasys failed to provide positive evidence of discriminatory conduct by PWGSC in its tendering procedures and, as a result, dismisses this ground of complaint.[62]

Dissenting Opinion of Member Vincent Regarding Ground 6[63]

132. I respectfully disagree with my colleagues' view that PWGSC has not established that the conditions necessary for using brand names as required by Article 1007(3) of *NAFTA* have been met in the circumstances of two of the RVDs that are at issue and that PWGSC's conduct regarding these RVDs was inconsistent with Article 1007(3). In my view, PWGSC presented the necessary justifications to specify products by "brand name or equivalent" for the RVDs at issue. However, I agree with my colleagues that PWGSC failed to provide the necessary justifications in the case of RVD 761.

133. Other than in this instance, it is my opinion that PWGSC's decision to specify products by brand name was reasonable, in view of the evidence and submissions presented by PWGSC on the circumstances surrounding the procurements at issue. As I explained in my dissenting opinion in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153 on this question, I find that the issue is not whether PWGSC's decision to specify products by brand name was correct. As submitted by PWGSC, the standard of review in these cases is reasonableness. Thus, the issue is whether PWGSC's decision to specify products by brand name was reasonable in the circumstances.

134. In previous cases, the Tribunal has determined that a reasonable decision is one that is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling.[64] On my review of the evidence on the record, except for RVD 761, I consider that PWGSC provided such a tenable explanation to justify its decisions to use brand names, with the mention "or equivalent", for the following reasons.

135. I provided my analysis of the framework established by the NMSO or DISO in the Tribunal's statement of reasons for its determination in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128[65]. Under this procurement framework which still applies in

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61. Regarding Enterasys' claims of discriminatory behaviour by PWGSC, as will be discussed in addressing Enterasys' other grounds of complaint, the Tribunal does not consider that Enterasys established that PWGSC's application of tendering procedures in these cases had the effect of ensuring that no responsive equivalent bids could be submitted.
62. With respect to Enterasys' allegation that PWGSC limited competition and discriminated against Enterasys and other potential bidders of equivalent products by not providing information from the client departments that described the installed base, operating software and other technical and operational requirements, which allegedly justified the purchase of specific brand name products, the Tribunal has already determined that government entities are not required to justify, *during* the procurement process, the use of brand names to describe procurement requirements. Thus, in the Tribunal's opinion, in and of itself, the failure to disclose the type of information requested by Enterasys does not amount to discrimination against any bidder.
63. Member Vincent's dissenting opinion concerns PR-2010-004 (RVD 757) and PR-2010-005 (RVD 758[2]).
64. *Re Complaint Filed by Northern Lights Aerobic Team, Inc.* (7 September 2005), PR-2005-004 (CITT) at paras. 51-52; *Re Complaint Filed by Joint Venture of BMT Fleet Technology Limited and NOTRA Inc.* (5 November 2008), PR-2008-023 (CITT) at para. 25.
65. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT) at paras. 131-37.

the RVDs at issue, PWGSC is the authority responsible for all matters concerning the DISO and must ensure compliance of each RVD with the terms of the DISO and the applicable trade agreements. PWGSC, not the client department, is therefore responsible for the technical analysis and decides ultimately how to proceed.

136. As mentioned in my previous decision on the same issue, PWGSC's decision to proceed with a generic description RVD or a "brand name or equivalent" RVD is the result of its analysis of whether the piece of equipment required will be used in an existing network or a new network.

137. In the RVDs at issue, the documentation requested from client departments by PWGSC and filed with the Tribunal included a question as to whether the equipment was going to be used in an existing or a new infrastructure. This indicates that each purchase request was examined by PWGSC before it decided on which basis the RVD would proceed. Accordingly, I am satisfied that PWGSC applied itself in the examination of clients' purchase requests before proceeding with a "brand name or equivalent" RVD.

138. The evidence indicates that, except for RVD 761, PWGSC decided that, for equipment that was considered to fall in category 1.2, when it needed to interoperate with an existing network infrastructure, and that the system was critical to clients, a brand name was required for the same reasons already provided by PWGSC and accepted by the Tribunal in previous complaints.[66] These reasons are also reflected in my dissenting opinion in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and reiterated in the GIR for this set of complaints. I do not find the approach followed by PWGSC to be less valid in the current sets of complaints.

139. PWGSC submitted in the GIR that when switches are to be installed and integrated into existing networks, whose integrity and reliability are essential to the host department or agency, failure of the switches to properly integrate into those networks could compromise those networks. PWGSC submitted the following:

> Where interoperability with an existing network is required, 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 need to be addressed not only in respect of product specifications but, also, and more critically, in regard to specific interoperability requirements. If PWGSC were limited to using generic specifications, it is possible that essential criteria might be inadvertently omitted, resulting in the purchase of a product that does not completely interoperate with existing devices.[67]

140. I see no reason to depart from my earlier finding regarding the explanations provided by PWGSC that a generic description is not sufficiently[68] precise to ensure the procurement of the right product when installed and used in existing infrastructure, i.e. a product that will properly integrate into those networks. In

66. *Re Complaints Filed by NETGEAR, Inc.* (15 May 2008), PR-2007-075 to PR-2007-077 (CITT) at para. 51.
67. GIR at para. 84.
68. See Merriam-Webster Online Dictionary at www.merriam-webster.com, *s.v.* "sufficient": ". . . enough to meet the needs of a situation or a proposed end . . . ." As well, this dictionary provides the following comment on the two terms "sufficient" and "enough": "sufficient suggests a close meeting of a need . . ." and "enough is less exact in suggestion than sufficient . . . ." In other words, in this instance, the generic specifications need to have the necessary precision to ensure that the product procured will work within an existing network. Otherwise, the product could be specified by brand name, provided the words "or equivalent" were added.

the circumstances of the present case and the cases earlier examined by the Tribunal,[69] Article 1007(3) of *NAFTA* authorizes PWGSC to identify products by brand name when using an RVD, to the extent that it can provide to the Tribunal a reasonable explanation to the effect that generic specifications are not sufficiently precise to allow it to ensure that the requested product will properly integrate into the existing network. In such circumstances, my opinion is that PWGSC presented a reasonable explanation that there is no other sufficiently precise or intelligible way to identify the products, since the use of generic specifications would risk compromising the Government's networks and prevent it from purchasing the products effectively required.

141. The circumstances of this case surrounding the use by PWGSC of RVDs specifying products by "brand names or equivalent" are very similar to the RVDs examined by the Tribunal in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128. In these previous complaints, after reviewing the evidence on the record and the testimony during the hearing, I concluded as follows: ". . . in the circumstances of this case, as reviewed above, the risk and the consequences of not procuring the right product when a switch is to be used in an existing system/infrastructure constitute sufficient and reasonable justifications for PWGSC to require a 'brand name or equivalent'"[70].

142. I note that there are no new circumstances, set of facts or evidence on the record concerning RVD 757 and RVD 758(2) that would justify a re-examination of, or modification of, the conclusions I reached on the same matter in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153, nor is there information on the record concerning these RVDs that would call into question the reasonableness of PWGSC's decision to specify products by brand names where interoperability with an existing network is required.

143. However, this justification is not applicable in the case of RVD 761. In this instance, a review of the documents provided by PWGSC would seem to indicate that the requested products were to be installed at a new remote site and would be connected to an existing network. I do not consider that the evidence provided by PWGSC clearly demonstrates that the products that are to be installed at a different location would be integrated into or would have to seamlessly interoperate within an existing network; the evidence merely refers to the possibility of the products being "connected" to an existing network. I cannot find any evidence to suggest that any additional exchanges took place between the client department and PWGSC to justify the use of a brand name RVD for this new location. In the absence of additional explanations from PWGSC as to the technical reasons that could have justified the decision to proceed with a "brand name or equivalent" RVD in such circumstances, I am unable to conclude that PWGSC's decision regarding RVD 761 was reasonable.

144. In light of the above, in my view, PWGSC presented the necessary justifications to specify products by "brand name or equivalent" for RVD 757 and RVD 758(2), but it did not do so for RVD 761, in terms of the requirements of Article 1007(3) of *NAFTA*. I consider that, in the case of RVD 761, PWGSC's decision to specify products by brand name was not reasonable in the circumstances.

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69. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT) at paras. 137-41; *Re Complaints Filed by NETGEAR, Inc*. (15 May 2008), PR-2007-075 to PR-2007-077 (CITT) at paras 46-54.
70. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT) at paras. 146-51. I reached a similar conclusion in File Nos. PR-2009-132 to PR-2009-153.

Sufficient Information and Time to Allow Suppliers to Demonstrate Equivalency—Grounds 5 and 7 of Enterasys' complaints

Enterasys' Position

145. Enterasys stated that article 14 requires that, where an equivalent to a brand name product is proposed, the equivalent be considered where the bidder has met the following conditions:

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.

146. Enterasys submitted that PWGSC has made it clear that it would not consider a bid for equivalent products unless the bidder submitted a comprehensive interoperability and performance test report, on the basis of testing done between the identical OEM equipment, hardware and firmware versions provided in the RVD solicitation and the equipment proposed by a competitive bidder. According to Enterasys, since the issuance of the DISO/NMSO, virtually all bidders that have attempted to submit equivalent bids, including bidders that have submitted interoperability and compatibility reports, had their bids declared non-compliant because the reports were not sufficient.[71]

147. Enterasys submitted that it is impossible for bidders to demonstrate the equivalence of their products with the equipment identified by brand name in the subject RVDs without having access to information such as host network operational requirements, network diagrams, configuration commands that are going to be entered into each switch, the configuration commands that are entered into each existing switch and the version of firmware which would be running on the requested equipment.[72] According to Enterasys, PWGSC's refusal to provide this type of information made it impossible for it to select the appropriate products in order to submit proposals in response to the subject RVDs.

148. Enterasys submitted that nobody at PWGSC or any of the client government departments had training at the level of Enterasys Systems Engineer or the more advanced Enterasys Certified Internetworking Engineer and that, as a result, PWGSC had no idea of the information that it was necessary for Enterasys to have in order to submit bids for products which were equivalent to the brand name products listed in the subject RVDs. Moreover, Enterasys argued that, without configuration information, publicly

71. Mr. Weedon noted, in his witness statement provided in File Nos. PR-2009-132 to PR-2009-153 and incorporated into the present proceedings, that RVD 650 (not at issue in these complaints), which required HP products, was awarded to a company offering another brand name of equipment. Enterasys stated that this occurred because the company, a reseller of both HP and the other brand name, had obtained additional information that had allowed it to propose the alternate products.

72. Enterasys noted that it requested PWGSC to provide the information that it considered necessary to demonstrate equivalence during each of the RVD enquiry periods, but that PWGSC refused to provide such information in each case.

available manufacturers' datasheets and performance specifications are meaningless and that, as a result, PWGSC's comments that Enterasys did not need the information that it requested during the enquiry periods in order to submit bids in response to the subject RVDs are without merit and not credible. In this respect, Enterasys submitted that the information published by networking equipment manufacturers, such as Cisco, concerning their switches and products can amount to more than 2,000 pages and that, consequently, it was clearly impossible for Enterasys to provide proof of equivalence on the basis of those documents in four days per RVD, without precise configuration information.

149. Enterasys therefore submitted that PWGSC has consistently refused to provide bidders with sufficient information and time to prepare bids in a manner compliant with article 14. It alleged that PWGSC is in breach of Article 1012 of *NAFTA*, which requires it to provide bidders with ". . . adequate time to allow suppliers . . . to prepare and submit tenders before the closing of the tendering procedures . . . ."

150. Enterasys further submitted that article 14 provides bidders with a standard four-day period to submit an RVD response, but that PWGSC can extend the deadline for more complex requirements:

> **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.

151. Enterasys submitted that each RVD that requested a brand name or equivalent would fall into the definition of "complex" and that, for those RVDs, including the RVDs at issue, the bidding period should be extended upon request by bidders that wish to prepare bids for "equivalent products". Enterasys submitted that, according to a "professional opinion letter" provided by the founder of the Tolly Group,[73] all the solicitation periods for brand name RVDs should be extended to at least 20 working days so that all the necessary testing information can be requested from PWGSC and received, and the appropriate testing can be completed to substantiate compliance with the operational requirements.

PWGSC's Position

152. PWGSC submitted that, in the Tribunal's determination in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128, it concluded that Enterasys had sufficient information to propose equivalent products to brand named products specified in an RVD. Specifically, it noted that the Tribunal determined as follows:

> . . . Enterasys 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 compliant equivalent bids.[74]

153. PWGSC submitted that the Tribunal's analysis and conclusions are equally applicable to the three RVDs at issue.

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73. Complaint at 16.
74. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT) at para 184. As noted above, the Tribunal considers that PWGSC erroneously interpreted the Tribunal's finding that Enterasys failed to discharge its burden of proof in this regard as a definitive conclusion that Enterasys had sufficient information to submit compliant equivalent bids in previous cases.

154. PWGSC submitted that, in a previous determination relating to complaints about the same standing offer,[75] the Tribunal stated as follows: ". . . 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."

155. PWGSC submitted that, when an RVD identifies a brand name, bidders are entitled to propose equivalents to that brand name equipment, as per article 14, which defines an equivalent product as being ". . . equivalent in form, fit, function and quality that are fully compatible with, interchangeable with and seamlessly interoperate with the items specified in the RVD . . . ." PWGSC submitted that an assessment of equivalence is based on the specific brand name equipment as presented in an RVD, unless otherwise provided for in an RVD and that, for the subject RVDs, there were no mandatory performance requirements other than those of the identified brand name products. PWGSC submitted that a need for equivalency with the "items specified in the RVD" does not require bidders to address larger network issues and the operational requirements, device connections, configurations and other particulars of the host network to demonstrate equivalence. It submitted that an equivalent product, for example, must be interchangeable with and interoperate with the brand name product and not with devices from the host network. It submitted that when a requirement is specified by reference to a brand name, the focus is exclusively on that brand-named product.

156. PWGSC submitted that, contrary to Enterasys' allegations, bidders do not require the TJ provided to PWGSC by the client department to bid an equivalent product and that the terms of the NMSO do not require PWGSC to produce such information with an RVD. PWGSC submitted that the identification of a particular brand name product provides notice that the mandatory performance requirements for the RVD are the performance specifications of that particular product. PWGSC submitted that such specifications are well understood in the industry and that the designation of a particular product provides a convenient point of reference for the industry. It submitted that information on the specifications, performance, configuration, etc., of competing products is provided by OEMs as a means of marketing their products and that all the information required by Enterasys to propose equivalent products is posted on publicly available Web sites and is updated regularly. PWGSC submitted that, therefore, in being provided with a reference to a brand name, bidders are provided with all the information necessary to submit responsive bids for an equivalent product.

157. PWGSC submitted that neither Enterasys nor any of its authorized agents, including West Atlantic Systems, submitted proposals in response to any of the subject RVDs. PWGSC argued that failing to submit proposals could be explained by a lack of products equivalent to those identified by brand name in the RVDs. PWGSC submitted that Enterasys failed to establish that it was unable to properly bid without additional information or that the tendering procedures otherwise prevented it from submitting a compliant proposal.

158. PWGSC submitted that article B.14 of the NESS RFSO and article 14 provide for four working days as the standard response time to an RVD, but that, on average, the bidding periods are longer.[76] It further submitted that offerors seeking, and subsequently awarded, a standing offer were fully aware of the

75. *Re Complaints Filed by NETGEAR, Inc.* (12 December 2008), PR-2008-038 to PR-2008-043 (CITT) at para. 7.
76. The Tribunal does note that, in the case of the current three complaints, the solicitation periods were three days (RVD 757), three days (RVD 758[2]) and four days (RVD 761).

four-day bidding period and waived any right to challenge the sufficiency of that time. It also submitted that, as had been previously determined by the Tribunal in another decision,[77] the 10-working-day deadline imposed by section 6 of the *Regulations* had long passed. The Tribunal stated as follows:

> 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*.

159. Enterasys alleged that PWGSC will not consider a bid for equivalent products unless that bidder submits a comprehensive interoperability and performance test report based on testing done between the identical OEM equipment, hardware and firmware versions provided in the RVD solicitation and the proposed equivalent equipment. PWGSC denied that this was the case, noting that article 14 defines the evidentiary obligations on a bidder that proposes an equivalent product and that it does not *require* an interoperability and performance test report from a recognized independent third-party testing firm acceptable to Canada. It submitted that the NMSO provides that testing of new networking equipment may be waived where a bidder submits such a report. It submitted that the NMSO does not require that the report be included with a proposal in response to an RVD.

160. PWGSC noted that the Tribunal accepted this proposition in its determination in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 which reads as follows:

> . . . it is clear from the evidence that demonstrating equivalence under article 14 does not require a bidder to provide the extensive interoperability and performance test report contemplated by article 9.2 of Appendix A to Annex A of the NMSO.[78]

161. In addition, PWGSC rejected the inference that Enterasys takes from the Tolly letter that extensive testing, using a test plan developed having regard to the host network, is necessary to meet the obligation on bidders that propose equivalent products.[79] PWGSC submitted that the report proposed by The Tolly Group is more in the nature of the interoperability and performance test report upon which Canada may waive testing of new equipment. PWGSC also notes that The Tolly Group was asked for its opinion on what it would require in order to prepare an interoperability and compatibility report. PWGSC submitted that Enterasys had framed its question to The Tolly Group incorrectly.

162. PWGSC submitted that all the RVDs at issue had a bidding period consistent with the NMSO. It argued that, given that reference to a brand name provides sufficient information for a bidder to propose an equivalent product, the NMSO bidding period is sufficient for a bidder to propose equivalent products.

Analysis

163. The Tribunal discussed the extent of a government entity's obligations under *NAFTA* regarding (i) the disclosure of information in order to permit suppliers to submit responsive tenders, and (ii) the time period to be allowed to suppliers to prepare and submit tenders in the statement of reasons for its

77. *Re Complaints Filed by NETGEAR, Inc*. (12 December 2010), PR-2008-038 to PR-2008-043 (CITT).
78. *Re Complaints Filed by Enterasys Networks of Canada Ltd*. (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT) at para 187.
79. Enterasys disagreed with PWGSC's characterization of the Tolly letter and Enterasys' interpretation of that letter.

determination in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153. The Tribunal's interpretation of the requirements imposed by relevant provisions in the context of the RVDs issued under the NMSO is summarized below.

164. Article 1007 of *NAFTA* requires the following:

> 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.

165. With respect to this element of the complaints, the Tribunal also considers that Article 1013 of *NAFTA* also specifically applies. It reads as follows:[80]

> 1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders, including information required to be published in the notice referred to in Article 1010(2), except for the information required under Article 1010(2) (h). The documentation shall also include:
>
> . . .
>
> f. a statement of any economic or technical requirements and of any financial guarantees, information and documents required from suppliers;
>
> 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.

166. The Tribunal considers that Article 1013 of *NAFTA* requires good faith and, when read in light of Article 1007(3), represents the effective implementation of a mechanism that allows for the submission of proposals regarding "equivalent" products. In tandem with Article 1007(3), Article 1013, in particular paragraphs (f) and (g), specifically requires the provision of ". . . all information necessary to permit suppliers to submit responsive tenders . . . ."

167. With respect to the allegation that PWGSC did not allow suppliers that sought to propose an equivalent product with sufficient time to prepare responsive tenders, Article 1012(1) of *NAFTA* provides that an entity shall ". . . in prescribing a time limit, provide adequate time to allow suppliers . . . to prepare and submit tenders . . ." and that, in determining a time limit, consistent with its reasonable needs, an entity shall ". . . take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated . . . ."

168. The Tribunal notes that article 14 creates a mechanism whereby pre-qualified suppliers can establish equivalency. It prescribes the following:

> 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;

80. Similar language is found in Article Kbis-06(1) of the *CCFTA* and Article 1704(6) of the *CPFTA*.

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.

169. The Tribunal also notes that the terms of article 14 are not *per se* contested, but that the application of that regime in the case of the RVDs at issue is contested in terms of the information provided, and time granted, by PWGSC for the demonstration of equivalency in each instance. In essence, the question is whether PWGSC, in the circumstances of the subject RVDs, provided the information that was "necessary" for the supplier to assess and demonstrate equivalency and accorded sufficient time to the suppliers to demonstrate equivalency.

170. PWGSC submitted that the brand name or model number and information publicly available was sufficient in all cases. On the other hand, Enterasys maintains that important additional specific information is required for it to be in a position to submit a winning proposal in response to "brand name or equivalent" RVDs.[81] According to Enterasys, brand names or model numbers are insufficient to establish equivalency. Enterasys submitted that PWGSC is withholding information in respect of technical requirements and that that information is necessary for a bidder to demonstrate equivalency.

171. The Tribunal considers that, as the complainant, Enterasys bears the burden of demonstrating that it was not provided with the necessary information.

172. Regarding these three RVDs, PWGSC provided bidders with the requested brand names and model numbers and refused to provide additional information. According to PWGSC, the information included on each subject RVD provides potential suppliers with sufficient information because only the publicly available (i.e. through the Internet) technical specifications of the products specified in the RVDs are used to evaluate bids for equivalent products. Enterasys claimed that the questions that it asked PWGSC during the solicitation period that were designed to allow Enterasys to obtain configuration information and other related information required working with The Tolly Group to prepare and include a Tolly interoperability report, but that the questions were not satisfactorily answered or that PWGSC advised that the NMSO did not require that certain information be provided. The Tribunal notes that, typically, the same set of questions was asked for each RVD and that many of those questions did not relate to the equipment being requested, but related instead to the administrative construct of the solicitations or asked for changes to the solicitation process itself.[82]

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81. The Tribunal notes that Enterasys' witness at the hearing held in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 concerning similar RVDs issued under the same NMSO stated that the information provided by PWGSC amounts to approximately 50 to 60 percent of the information required. See *Transcript of Public Hearing*, File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128, Vol. 1, 13 May 2010, at 221. Given that the type of information provided by PWGSC in the case of the subject RVDs is virtually identical to that provided in previous similar instances, the Tribunal considers it reasonable to conclude that this statement remains accurate.

82. Complaint, Exhibit A at 7-10, Exhibit B at 7-12, Exhibit C at 7-13.

173. The Tribunal notes that there was no expert evidence to support whether, in fact, the allegedly required information is indeed necessary or whether the information provided in the RVDs allowed for an assessment or demonstration of the required elements of article 14. In this regard, the Tribunal also notes that the signatory of a letter, which Enterasys filed in evidence and purportedly aimed at demonstrating that bidders needed more information and time to prepare responsive tenders for an equivalent product,[83] was not qualified as an expert and that the opinion expressed in his letter is premised on selected facts that were disclosed to him by Enterasys on the basis of Enterasys' interpretation of the NMSO requirements. Therefore, the Tribunal cannot give much weight to this evidence.

174. The Tribunal believes that it remains necessary for the potential supplier to be able to assess and demonstrate the equivalency requirements of article 14, i.e. that the proposed equivalent product is fully compatible with, interoperates with and is interchangeable with the items specified in the RVD. However, whether or not the information provided by PWGSC (i.e. the brand names/model numbers) is sufficient or whether, in fact, more information is required is a technical issue that the Tribunal cannot determine on the basis of the evidence submitted by Enterasys.

175. The Tribunal is confronted with two "non-expert" opposing views and, even if there was no actual evidence provided by PWGSC of an evaluation of an equivalent bid on the basis of article 14 criteria, the fact remains that, in at least one instance, which is referred to in Mr. Weedon's witness statement provided in the context of File Nos. PR-2009-132 to PR-2009-153 and incorporated into Enterasys' submissions in these proceedings, RVD 650 (not at issue in these complaints), a bid for an equivalent product was deemed compliant, apparently without PWGSC having provided bidders with any information beyond the requested brand names/model numbers. This suggests that it was possible for the bidder, in that case, to submit a responsive tender using the information that PWGSC provides with the RVDs, i.e. the brand names/model numbers, with no requirement for network diagrams or any other information contained in the TJ. This also constitutes evidence which tends to support PWGSC's position that responsive tenders can be submitted by potential suppliers using only the information included on an RVD.

176. The Tribunal is convinced that the obligations under Articles 1007(3) and 1013 of *NAFTA* are clear, in that PWGSC, if allowed to use a brand name, must ensure that it provides the necessary information for the supplier to assess and eventually demonstrate equivalency under the conditions set in article 14. As a result, it would seem reasonable that, concerning the demonstration that the proposed product is equivalent to the incumbent product in terms of "interoperability", PWGSC provide the technical information that would allow for an assessment or demonstration of interoperability. As noted above, it seems contrary to the allegations provided by Enterasys on the lack of information in order for it to proceed with a bid that, in the case of one RVD, the information was sufficient to allow an equivalent product by a competitor to be selected. On balance, the Tribunal sees no reason to depart from its previous findings on this issue.[84]

177. During this inquiry, Enterasys made additional submissions and filed evidence in the form of various manufacturers' publicly available product specifications, installation guides and manuals with a view to demonstrate the impossibility of establishing equivalency by comparing the specifications of its products with the large amount of publicly available information regarding the products identified by brand name in the subject RVDs. The Tribunal notes, however, that Enterasys did not attempt to comply with

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83. Complaint, Exhibit M.
84. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT); *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (9 August 2010), PR-2009-132 to PR0-2009-153 (CITT); *Re Complaints Filed by NETGEAR, Inc.* (10 July 2008), PR-2008-003 to PR-2008-006 (CITT).

article 14 by submitting proposals in response to the subject RVDs on the basis of its review of the publicly available technical specifications of the requested products. In the Tribunal's opinion, this suggests that Enterasys might have wrongly assumed that it was an impossible task to submit a responsive tender. The Tribunal is not prepared to accept the statements and opinions of counsel for Enterasys, who was not qualified as an expert witness, as establishing that, as a matter of fact, additional information from PWGSC was required. In these circumstances, the Tribunal considers that Enterasys has not established that, in the case of the subject RVDs, 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 compliant equivalent bids.

178. With respect to the allegation that bidders of equivalent products were not provided with enough time to prepare the necessary equivalency reports, Enterasys has argued that bidders of equivalent products would require a four-week extension to the standard four-day bidding period provided in the NMSO. PWGSC, on the other hand, has argued that the four-day time period was adequate in each case. PWGSC indicated that it neither requires nor requests the "extensive interoperability and compatibility reports" noted in Enterasys' complaints regarding the RVDs.[85]

179. This issue is intrinsically linked to the issue of availability of information necessary to submit bids. On this issue, it is clear from the evidence that demonstrating equivalence under article 14 does not require a bidder to provide the extensive interoperability and performance test report contemplated by article 9.2 of Appendix A to Annex A of the NMSO.[86] In the Tribunal's opinion, this provision pertains to post-bid discretionary testing for new equipment that PWGSC may waive in certain circumstances at its discretion. In other words, the Tribunal considers that Enterasys may have wrongly interpreted the nature of the demonstration that is required under article 14 and, as a result, overestimated the time that is reasonably necessary to make the demonstration that is actually required. In this regard, the Tribunal is of the view that a standard four-day period to perform the basic analysis of equivalency and provide the documents that PWGSC apparently requires, along with a bid, does not appear unreasonable. In this regard, the Tribunal notes that, in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128, PWGSC submitted evidence that indicates that there is no prescribed manner for the demonstration of equivalency and that the equivalency requirements can be met with a simple table that

85. Complaint at 13.

86. Article 9.2 of Appendix A to Annex A of the NMSO reads as follows:

> **9.2. Interoperability and Performance Testing**
>
> At the discretion of the Crown, any new networking equipment may be tested to demonstrate that the equipment will meet or exceed the Crown's current requirements of capacity, features, speed and interoperability with currently deployed infrastructure.
>
> At Canada's discretion, the Offeror shall deliver the equipment proposed and shall ensure that it is received by the third party testing firm no later than 15 working days following a written request by Canada.
>
> Required testing will be carried out with an industry recognized independent, mutually agreed to, third party testing firm. The Offeror must be fully available to answer questions and provide further information as requested. All of the associated costs related to this testing will be the responsibility of the Offeror.
>
> A formal methodology and test plan will be provided in advance of any testing. The testing will focus on the technical requirements identified in the SO or in a RVD where applicable. Interoperability will also be verified with any equipment identified as operationally necessary by Canada.
>
> At Canada's discretion the required testing can be waived provided the Offeror submits a relevant interoperability and performance test report from a recognized independent 3rd party testing firm acceptable to Canada. The report must be based on testing done on the identical equipment, hardware and firmware versions being proposed and include the appropriate interoperability testing.

compares the functionalities of the requested brand name product and those of the proposed equivalent product and a document that explains how the technical specifications of the proposed equivalent product match those of the requested products.[87] Enterasys has not submitted any additional evidence in these complaints that could lead the Tribunal to conclude that PWGSC required more than this basic analysis and documents in the case of the subject RVDs.

180. While the Tribunal notes that, as is contemplated by the NMSO, PWGSC reduced the bidding periods to less than four full working days in the case of the RVDs at issue, it does not consider that Enterasys demonstrated that this exercise of PWGSC's discretion was unreasonable in the circumstances. In particular, the Tribunal finds that there is insufficient evidence on the record to conclude that Enterasys or other potential suppliers that sought to propose equivalent products could not have performed the analysis of equivalency described above and prepared a responsive proposal within the bidding period provided in each of the subject RVDs.

181. As to the issues of information and time in the case of the RVDs that specify products with brand names, the Tribunal therefore concludes that Enterasys has failed to demonstrate that the information and time provided were insufficient. Consequently, the Tribunal cannot accept the argument that PWGSC has not complied with the requirements of Article 1012(1) of *NAFTA* by not extending the time allocated to bidders to submit proposals beyond the bidding period provided in each of the subject RVDs, as was requested by Enterasys.

182. In summary, the Tribunal finds that Enterasys has not met its burden of demonstrating that, in the context of the RVDs in question, the information provided is not sufficient in order to permit suppliers to submit responsive tenders or that the RVD bidding periods were not sufficient.

183. Enterasys also submitted that incumbent suppliers had additional information regarding the procurement requirements, or else they would not have been able to recommend the products listed in the RVDs, and that PWGSC has not provided other suppliers with equal access to that information. This allegation was primarily supported by assertions made by counsel for Enterasys in the form of a witness statement attached to Enterasys' comments on the GIR provided in File Nos. PR-2009-132 to PR-2009-153 and incorporated into Enterasys' submissions in these proceedings. However, the Tribunal notes that the documents filed by PWGSC in response to the Tribunal's May 28, 2010, do not indicate that representatives of either PWGSC or the client department had any contact with employees of incumbent networking equipment manufacturers while preparing or reviewing the TJs or the list of deliverables attached to the subject RVDs. Thus, the Tribunal considers that Enterasys' allegations are insufficient to establish misconduct or wrongdoing by PWGSC or the client departments in this regard. For these reasons, the Tribunal is unable to conclude that PWGSC has failed to provide all suppliers with equal access to information with respect to the procurements, as required by Article 1008(2) of *NAFTA*. The Tribunal therefore concludes that these grounds of complaint are not valid.

87. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128; *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 108, 257-61, 379-83.

Precluding "Best-of-Breed" Transceivers—Ground 4 of Enterasys' complaints

Enterasys' Position

184. Enterasys submitted that PWGSC should be fully aware that certain SFPs, XFPs and other related fibre or copper modules requested in a number of the RVDs are industry standard and will work in switches from OEMs other than Cisco or HP. It argued that, in specifying these transceivers using Cisco and HP coding, PWGSC did not allow "best-of-breed" industry-standard SFPs, XFPs and other related modules that are available from Enterasys to be proposed.

PWGSC's Position

185. PWGSC submitted that Enterasys provided no evidence to support its allegation. It also submitted that each RVD clearly contemplated RVD responses that include equivalent products from different OEMs. Specifically, it noted that the instructions to bidders in the RVDs stated the following:

> An individual price must be provided for each line item in Annex "A". If the bid is for an equivalent product, [the bidder] must indicate the equivalent OEM and OEM model number for each line item.

186. PWGSC submitted that the RVD imposed no limit as to the number of OEMs whose equivalent equipment may be offered. PWGSC submitted that bidders that proposed equivalent equipment would have had to identify the OEM and OEM model number for each piece of equipment being proposed.

Analysis

187. The Tribunal notes that Enterasys did not reply to the response to this ground of complaint that was provided by PWGSC in its GIR. The Tribunal is of the view that PWGSC's submissions to counter Enterasys' allegations are persuasive and indicate that, contrary to Enterasys' assertions, bidders were not precluded from proposing "best-of-breed" equipment in response to the subject RVDs. Therefore, the Tribunal accepts PWGSC's submissions in this regard.

188. Moreover, the Tribunal notes that, for the RVDs at issue, PWGSC allowed for equivalent products to be proposed, as required by article 14 and Article 1007(3) of *NAFTA*. Thus, the Tribunal is of the view that it was possible for potential suppliers to propose transceivers and devices other than the requested Cisco or Nortel products. The subject RVDs do not impose restrictions on any manufacturers' ability to offer equipment equivalent to the Cisco or Nortel transceivers, SFPs, XFPs and other related products identified by brand name or code. All that is required is that the equivalence of the so-called "best-of-breed" products with the products specified in an RVD be demonstrated.

189. For these reasons, the Tribunal finds that this ground of complaint is not valid.

Categorization of Goods Under Category 1.2—Grounds 1, 3 and 8

Enterasys' Position

190. Enterasys submitted that article 14 states the following:

> **Recipients of [RVDs]**: The RVD will be sent by PWGSC to all Offerors who hold a Standing Offer in the relevant Category and are listed in the selected Category at the date and time of RVD issuance. No RVD shall include products from multiple Categories. Where equipment is required from multiple Categories, a separate RVD will be sent to each Offeror in each applicable Category.

191. Enterasys submitted that, in all instances, the products listed in the deliverables lists of the subject RVDs were not compliant with one or more of the mandatory technical specifications set out in Appendix A to Annex A of the NMSO for category 1.2. Enterasys also submitted that certain RVDs included products from category 1.1, as well as products that have capabilities from other classes and categories.[88] Enterasys claimed that this represented a breach of the terms and conditions of the NESS DISO and the trade agreements.

192. Enterasys submitted that, throughout all the complaints to date regarding the NESS DISO/NMSO, this is the first time that PWGSC has attempted to make a distinction between the "technical specifications" and "technical definition" of the categories.[89] It submitted that the listing for category 1.2 in Appendix A to Annex A of the NMSO clearly explains the included specifications that must be met, as a minimum, in order for a bidder to be issued a standing offer and that the other term used for these minimum specifications is "generic specifications".

193. Enterasys further submitted that, although the NMSO is only for LAN switch hardware, many of the items requested in these RVDs are outside the scope of the categories, including some storage area network and server software items. [90] In its complaints, Enterasys submitted, as examples, that items 2 and 3 of RVD 710[91] and items 2, 3 and 4 of RVD 678[92] were items outside the proper scope of the RVDs. Enterasys claimed that it had honoured the terms and conditions of the NMSO and had not included items outside the scope of the categories, such as cables and software, on its PPL, but that PWGSC had allowed other companies to do so. It argued that PWGSC's behaviour is discriminatory and breaches the terms and conditions of the NMSO and the trade agreements.

194. In its comments on the GIR, Enterasys provided an in-depth analysis of each line item of the three RVDs,[93] explaining why particular items requested on the deliverables lists were not compliant with the alleged mandatory technical specifications set out in Appendix A to Annex A of the NMSO. The Tribunal has considered this document, which provides details regarding Enterasys' position on product categorization issues, in its analysis of these grounds of complaint.

PWGSC's Position

195. PWGSC submitted that Enterasys' allegations of inappropriately categorizing equipment were not supported by any particulars, sample RVDs or evidence and were based on its misunderstanding of how products are placed on a PPL within a given category and available for requisition by RVD. It submitted

88. The Tribunal notes that the allegations regarding the procurement of category 1.1 items in RVDs limited to category 1.2 were found in the original complaints, but when Enterasys provided its more in-depth analysis of the line items of the RVD in its comments on the GIR, no mention was made of any of the items being part of category 1.1.
89. This statement was included in the assertions made by counsel for Enterasys in a witness statement attached to Enterasys' comments on the GIR provided in File Nos. PR-2009-132 to PR-2009-153 and incorporated into Enterasys' submissions in these proceedings.
90. The Tribunal notes that these were found in the original complaints, but when Enterasys provided its more in-depth analysis of the line items of the RVD in its comments on the GIR, no mention was made of any of the items being related to storage area network and server software items.
91. RVD 710 did not form part of the current set of complaints.
92. RVD 678 did not form part of the current set of complaints.
93. Comments on the GIR at 11-14.

that the flawed basis of Enterasys' grounds of complaint is its claim that a product on a PPL within a given category must possess all the technical specifications identified in Appendix A to Annex A of the NMSO for that category.

196. PWGSC submitted that, to be qualified in an equipment category, bidders were required to propose a product model and/or family of models (depending on the category) that met (i) the technical definition and (ii) the technical specifications of that category as specified in Appendix A to Annex A of the NMSO. It submitted that, if the evaluated equipment in a given category met the technical definition and technical requirements of that category, and the bidder satisfied other listed mandatory requirements, that bidder received a standing offer for that category.

197. PWGSC submitted that, for a NESS NMSO holder qualified in a specific category, all networking equipment on its PPL that falls within that category's technical definition may be requisitioned by or on behalf of a DISO user. It submitted that, in accordance with article 14, "[o]nce an Offeror has qualified in a Category, all equipment offered by that Offeror as listed in the OEM's Canadian Published Price List ***that falls within that Category's technical definition*** will be available for call-up".

198. PWGSC submitted that the technical *definition* of a category is different from the technical *specifications* of that category. PWGSC submitted that the feature that distinguishes LAN switches in category 1.2 is the inclusion of Layer 3 IP routing. Thus, according to PWGSC, a LAN switch with Layer 3 IP routing functionality is included in category 1.2 regardless of the other technical specifications of the switch (for example, port densities, access speeds, etc.). PWGSC submitted that, as an example, a NMSO holder qualified in category 1.2 may offer for sale all devices on its PPL that provide both Layer 2 LAN switching and Layer 3 LAN IP routing. It also submitted that a LAN switch that falls within the technical definition of one category may possess a technical specification listed for another category.

199. In the Tribunal's determination in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128, the Tribunal determined the following:

> Therefore, the Tribunal agrees with Enterasys and will consider the entire definition, including the list of mandatory technical specifications, in order to assess whether PWGSC complied with the terms of the solicitation documents in categorizing network equipment for the purposes of the RVDs at issue.[94]

In response, PWGSC submitted that it is unnecessary for networking equipment to meet all the mandatory technical specifications of a category of networking equipment in order to be placed on a PPL for that category and be available for call-up from that category. It submitted that the technical specifications were relevant or applicable to a bidder seeking to qualify for a DISO, but not relevant or applicable for purposes of placement on a PPL in a given category and determining the availability of products for call-up from that category. It submitted that nowhere does the NMSO state or imply that the technical definition of an equipment category includes the technical specifications.

200. PWGSC submitted that, given Enterasys' complaints, the proper question is whether the technical specifications are relevant or applicable to placement of networking equipment on a PPL in a given category and available for call-up from that category. It argued that the Tribunal's analysis, and its consideration of the provisions of the NMSO, are applicable to the question of whether the technical specifications are relevant or applicable to offerors seeking to qualify for a DISO and that PWGSC's position is consistent

94. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT) at para. 220.

with what it claimed was the uncontroverted testimony of Mr. Stephen Oxner, Manager of the Network Infrastructure Engineering Group, within the Directorate of Solutions Engineering, Chief Technology Office of the Information Technology Services Branch of PWGSC, specifically:[95]

> All equipment within a Category offered by a DISO holder must be consistent with the technical definition of the Category. However, the equipment need not support all of the mandatory technical specifications stipulated in the NESS RFSO, Annex A-Appendix A. These specifications were used only for the purpose of carrying out the original evaluation process for qualifying Offerors in a given Category.[96]

201. PWGSC submitted that the standard of review regarding this item is reasonableness and that the Tribunal should have considered whether this interpretation of the NMSO falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law.

202. PWGSC submitted that, in the Tribunal's statement of reasons for its determination in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128, a distinction was made between what the Tribunal called the "general description" and a category's technical specifications.[97] PWGSC further submitted that a basic rule of interpretation is that a term or expression that has multiple uses within a legal instrument should be given a similar or common meaning in its various applications and that different terms have different meanings. It submitted that the Supreme Court of Canada had previously rejected a claim that different terms in solicitation documents were used to express the same meaning.[98] PWGSC argued that, on this basis, the use of different terms, i.e. "technical definition" and "technical specification", within the NESS RFSO, DISO and NMSO are reasonably understood to refer to different things.

203. In the GIR, PWGSC submitted that Enterasys had alleged "many examples" of RVDs where software had been procured, but had only referenced a single RVD that was not one of the three RVDs at issue in these complaints. It submitted that none of the RVDs at issue procured any software.

204. Regarding Enterasys' allegations that PWGSC is procuring cables, which it claims are outside of the scope of the category 1.2, PWGSC noted again that Enterasys had only referenced an RVD that was not one of the three at issue.[99] PWGSC submitted that the NMSO contemplates the acquisition of certain additional items, including cables, to provide for an operational piece of equipment. Specifically, PWGSC noted that article 29 of the NMSO provides the following:

> ii) The proposed product(s) shall contain all ancillary equipment, such as a power supply, cabinetry, cables and connectors required to enable the product to satisfy the requirements called up herein and be operable in a standard office environment.

95. Hearing held on May 13 and 14, 2010, in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and supported by his affidavit filed regarding those complaints and attached as Exhibit 4 to the GIR in the present complaints.
96. GIR, Exhibit 4 at para. 13.
97. At paras. 215, 216.
98. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, [2010] 1. S.C.R. 69 at para.75.
99. In its comments in the GIR, Enterasys provided a more complete listing regarding the three RVDs at issue in which the RVD line items, it contended, fell outside of the scope of category 1.2, as this category of equipment is defined in the NMSO. These allegations are addressed in the "Individual RVD Analysis" section below.

205. PWGSC noted that the Tribunal had previously found that cabling is considered "allowable ancillary equipment".[100] PWGSC submitted that such equipment may be bundled with a proposed product or, for administrative convenience, presented as a separate product item in an RVD. It noted that cables cannot be procured independently of NESS hardware. It also noted that Enterasys' category 1.2 PPL includes separate line items for cables.

Analysis

206. As the Tribunal has stated in the past, the trade agreements, including *NAFTA*, require that a government institution be governed by the terms set out in the tender documentation for any particular solicitation. Accordingly, a government institution will conduct a procurement process in a manner inconsistent with *NAFTA* if it does not act in accordance with the terms of the solicitation documents.[101]

207. In these complaints, the solicitation documents include the RVDs that are at issue and the NMSO. The relevance of the NMSO is made clear by the terms of all RVDs which, as noted above, provide that the terms and conditions of the NMSO shall apply to the evaluation of each RVD and that proposals (in response to an RVD) must comply with all mandatory conditions and technical requirements of the NMSO.

208. Therefore, the Tribunal must determine whether PWGSC acted in accordance with the relevant terms of the RVD and the NMSO in categorizing equipment for the purposes of the RVDs at issue. In order to make this determination, the Tribunal is of the view that it must examine the applicable terms and conditions set out in the NMSO and those of the specific RVDs at issue in their entirety.

209. In this regard, the Tribunal notes the wording of provisions of the NMSO, which indicates that RVDs are to specify only products from one category (i.e. PWGSC shall not "cross" categories) and that bidders are required to propose products meeting all the specifications listed on a specific RVD. Article 14 reads as follows:

> **14) Call-up Process/Limitations**
>
> Individual Call-Ups made by the ITSB 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.*
>
> . . .
>
> Once an Offeror has qualified in a Category, all equipment offered by that Offeror as listed in the OEM's Canadian Published Price List **that falls within that Category's technical definition** will be available for call-up.
>
> . . .
>
> **Recipients of [RVDs]**: The RVD will be sent by PWGSC to all Offerors who hold a Standing Offer in the relevant Category and are listed in the selected Category at the date and time of RVD issuance. *No RVD shall include products from multiple Categories*. Where *equipment is required from multiple Categories, a separate RVD will be sent to each Offeror in each applicable Category*.
>
> . . .

100. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (21 June 2010), PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 (CITT) at para. 253.

101. *Re Complaints Filed by NETGEAR, Inc.* (15 May 2008), PR-2007-075 to PR-2007-077 (CITT) at 21.

> **RVD Response Requirements**: Only responses to RVDs that meet all the following requirements will be considered by PWGSC for a Call-up:
>
> (A) The products proposed for delivery in the RVD response must be identical to the specifications listed in the RVD.
>
> [Emphasis added]

210. In view of the above provisions, it is clear that each RVD issued under the NMSO must require the delivery of products from only one category, that is, the category identified in the RVD, and that such products must fall within that category's technical definition. Enterasys alleged that all three of the RVDs at issue contained requirements for items that did not fall within the ambit of the relevant category of the RVD. The implication being that, even if only one item was not from the particular category indicated on any given RVD, a bidder would be unable to bid on that RVD, as its PPL for that category could not contain the item(s) that were not within the scope of that category. Its argument is based on the proposition that, in order to meet the technical definition of the relevant category, products must comply with all the technical specifications set out in Appendix A to Annex A of the NMSO. In response, PWGSC submitted that Enterasys has misinterpreted the relevant provisions and that the technical definition of a category is different from the technical specifications of that category. In PWGSC's view, equipment offered within a category offered by a holder of an NMSO need not support all the technical specifications stipulated in Appendix A to Annex A of the NMSO in order to be consistent with the technical definition of the category.

211. Thus, as indicated in the statement of reasons for its determination in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153, in order to dispose of these grounds of complaint, the Tribunal must first address the question of whether the technical specifications listed in Appendix A to Annex A of the NMSO are relevant or applicable in order to determine whether the items required by each RVD fall within the technical definition of the relevant category. Indeed, should the Tribunal accept PWGSC's interpretation on this threshold issue, it would not have to further examine most of Enterasys' specific allegations, since those allegations require the Tribunal to accept that the technical specifications listed in Appendix A to Annex A of the NMSO are mandatory and define each category. The present cases before the Tribunal are limited to category 1.2.

212. On this issue, the Tribunal sees no reason to depart from its analysis and findings set out in the statement of reasons for its determination in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153, despite the additional submissions presented by PWGSC in order to address the Tribunal's previous analysis. In this regard, the Tribunal is not persuaded that the terms of the NMSO can be reasonably interpreted to mean that the technical specifications were relevant or applicable only to a bidder seeking to qualify for a DISO, but not relevant or applicable for purposes of placement of products on a PPL in a given category and available for call-up from that category. In the absence of a clause in the solicitation documents establishing that the technical specifications for a given category do not form part of that category's technical definition or defining category 1.2 switches simply as "devices with main purpose to perform L2-3 Ethernet switching/IP routing with functionality in higher layers, up to L7" (without reference to specific technical specifications), the Tribunal is unable to accept PWGSC's submissions on this issue.

213. In the Tribunal's opinion, the NMSO does not state that the technical definition of a category excludes the technical specifications of that category and, contrary to PWGSC's assertions, the terms of the NMSO imply that such technical specifications are an integral part of the technical definition. The fact that Appendix A to Annex A of the NMSO, as discussed below, defines each category of products, including category 1.2, by reference to precise technical requirements supports this interpretation.

214. For ease of reference, the Tribunal's previous analysis of the relevant provisions of the solicitation documents, that are identical to the provisions at issue in the present complaints, is reiterated in the following paragraphs, since the Tribunal has determined that its analysis remains applicable in this inquiry.

215. The Tribunal notes that, while article 14 provides that ". . . all equipment . . . **that falls within that Category's *technical definition* will be available for call-up**" [emphasis added], there is no specific provision entitled "technical definition" in the NMSO. Article 14 refers however to the "generic specifications" found at Annex A in defining requirements:

> …
>
> **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***

216. The NMSO also defines the concept of "Non-Compliance" in the following manner:

> ***Non-Compliance***: Any product that fails to meet the Call-up/RVD *technical specifications*. Examples of non-compliance include: less than mandatory number of ports; less than mandatory communication speed; less than mandatory expansion slots; cannot support mandatory protocol(s).[102]
>
> [Emphasis added]

217. Annex A of the NMSO is the NESS Statement of Work (SOW), which includes an appendix (Appendix A) entitled "NESS – Equipment DISO, Classes and Categories of Equipment, Technical Specifications". Clause 1.3 of the SOW, found on pages 1 and 2, entitled "Approach", states the following:

> (M) This Statement of Work (SOW) identifies the *Mandatory requirements that Offerors shall fulfill to qualify as NESS Equipment DISO Offerors*; and shall comply with to maintain their status throughout the period of the DISO.
>
> (M) Clients will have access to the Network Equipment available through the NESS Equipment DISOs by sending their requirements to ITSB for processing. All call-ups resulting from these DISOs will be approved and issued by PWGSC/ITSB or PWGSC/ITSPD exclusively. Offerors shall not accept call-ups from any other entity under these DISOs.
>
> (I) Through consolidation, the Crown will ensure that it receives best value through economies of scale. The management of technology and pricing will be simplified because all call-ups will be managed by ITSB and because the overall procurement, including all Requests for Volume Discounts (RVDs), will be managed by PWGSC.
>
> (I) This NESS DISO will allow the addition of new Classes and Categories of Network Equipment when new technology becomes available. It also allows more flexibility for the purchase of any Network Equipment available from an Original Equipment Manufacturer (OEM) *within a specific Category*. Effectively, *the OEM's Canadian published price list (PPL) forms an integral part of the DISO within each Category of Network Equipment for which that OEM has qualified*.[103]
>
> [Emphasis added]

218. Appendix A to Annex A of the NMSO provides direction regarding the nature of mandatory requirements. It reads as follows:

> 2. To be eligible for a DISO award in a given Network Equipment Category, a technical offer must be compliant with all Mandatory requirements in that category.

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102. Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 194.
103. Tribunal Exhibit PR-2009-092-01, Administrative Record, Vol. 1 at 216.

219. Appendix A to Annex A of the NMSO then defines category 1.2 by providing both a general description of equipment (i.e. different types of switch) and by listing, immediately afterward, the precise requirements with which the switches must comply as follows:

> **1.2. Category - L2-3 LAN switches**
>
> Devices with main purpose to perform L2-3 Ethernet switching/ IP routing. The device may include hardware and software modules, blades etc. with functionality in higher layers, up to L7.
>
> Propose one Layer 2-3 chassis based LAN Switch product. Switch requirements consist of:
>
> 1) Physical specifications:
>   a. 19" Rack mountable unit
> 2) Redundancy:
>   a. Optional: Add on modules for hot swappable redundant CPU and Power supply.
> 3) Port Density. Propose chassis model numbers, modules, etc. supporting min. configuration below (port density requirements not simultaneous):
>   a. Min 160 10/100Base-T ports
>   b. Min 100 Gigabit ports
>   c. Min 2 10Gigabit ports
> 4) Access Speeds & Interfaces
>   a. 10Base-T / 100Base-TX - Speed and duplex auto-sensing
>   b. 10Base-T / 100Base-TX / 1000Base-T - Speed and duplex auto-sensing
>   c. 1000Base-T
>   d. 1000Base-LX/SX
>   e. 10GBase-SR//LR
>   f. Optional : 10 Gbase-LX4
> 5) Performance:
>   a. Switching fabric: Min. 80 Gbps.
>   b. Forwarding: Min. 60Mpps
>   c. Number of MAC addresses supported: min 16000
>   d. Number of VLAN Configured: min 1024
>   e. Number of VLAN ID Supported: min 4094
>   f. Support for Jumbo Frames better than: 4000 bytes
> 6) Standards Support Provided:
>   a. Link Aggregation as per IEEE 802.3 - 2002
>   b. 10Base-T as per IEEE 802.3 - 2002
>   c. 100Base-TX as per IEEE 802.3 - 2002
>   d. Gigabit Ethernet 1000Base-T/SX/LX as per IEEE 802.3 - 2002
>   e. Ten Gigabit Ethernet 10GBase-SR/LR as per IEEE 802.3ae
>   f. Optional: 10GBase-LX4 as per IEEE802.ae
>   g. Auto-negotiation of speed and duplex mode for all data rates - IEEE 802.3 - 2002 (Except 10GE data rate)
>   h. Manual setting for speed and duplex mode for 10/100data rates - IEEE 802.3 - 2002
>   i. Full duplex mode, flow control as per IEEE 802.3 - 2002
>   j. Ethernet prioritization and CoS as per IEEE 802.1Q - 2003, IEEE 802.lp
>   k. VLAN Tagging as per IEEE 802.1Q - 2003
>   1. STP, RSTP, as per IEEE 802.1D, IEEE 802.1w
>   m. Optional: MSTP as per IEEE 802.1Q - 2003
>   n. Security: IEEE 802.1x
> 7) IP routing
>   a. Inter VLAN IP routing
>   b. Static Routes, RIPv1, RIPv2, as per RFC1058, RFC 2453
>   c. OSPFv2 as per RFC 2328
>   d. Optional BGPv4 as per RFC 1771

e. IGMP RFC 11 12, RFC 2236
f. DHCP Relay -RFC 1541, RFC 1542
g. Protocol Independent Multicasting (PIM) -RFC 2362

8) QoS Features
   a. 802.1Q-2003 CoS classification/ reclassification based on
      i. incoming physical port
      ii. source/ destination IP address
      iii. Optional: source/ destination MAC address
      iv. TCP/UDP port number
   b. DSCP marking (if L3 switching enabled)
      i. incoming physical port
      ii. source/ destination IP address
      iii. TCP/UDP port number
   c. ACL based per input port rate limiting
9) Management Features:
   a. CLI support (command line interface)
   b. SNMPvl as per RFCs 1157, 1155, 1212, 1215 and SNMPv2c as per RFCS 1901, 2578-2580, 3416-3418
   c. Optional: SNMPv3 as per WCs 3410 - 3415, 3584
   d. RMON I as per RC 2819;
   e. Optional: RMON II as per RJC 2021
   f. Telnet (RFC 854)
   g. TFTP (RFC 783)
   h. DNS Support (may be implemented in management software item k.)
   i. SNTP as per RFC 2030 or NTP as per RFC 1305
   j. Port Mirroring
   k. A port must be provided for management and diagnostics
   1. Switch configuration must be stored in NVRAM
   m. Required management software and SNMP MIB II support must be proposed.
   n. Visual indication of the status of the device and components is required
10) Security Features
   a. Support user authentication as per IEEE 802.1X
   b. Support user authentication via Radius or TACACS+
   c. MAC address filtering, MAC Learning and Locking
   d. Password Encryption, Secured Shell
11) Optional: POE support on all access ports - as per IEEE 802.af, Class 3
12) Informational: Propose available network interface cards and hw/sw modules with specialized functionality.

220. In view of these provisions, the Tribunal is unable to accept PWGSC's interpretation of the NMSO, which limits the technical definition of each category to the general description. First, it is clear from the language that the general description of the category cannot be dissociated from the listed mandatory requirements. Those requirements are an integral part of the definition of the products that can be included in the PPL and for which an offer can be made in response to an RVD. The language is quite specific. For category 1.2 the general description concludes by stating the following: "Switch requirements consist of . . . ." In the Tribunal's opinion, these provisions cannot be reasonably interpreted to mean, as PWGSC submitted, that any switch on a PPL in a given category need not meet all of the technical specifications listed in Appendix A to Annex A of the NMSO in order to fall within that category's technical definition.

221. The Tribunal considers that an RVD can only comply with the terms of the NMSO if it is in respect of an item that is within the ambit of the category listed in Appendix A of the RVD and, by necessary implication, an item that meets the mandatory requirements of that category. It follows logically that the only way by which an assessment of compliance may be performed is by referring to the entirety of the definition, including the list of mandatory requirements.

222. Non-compliance is determined by referring to the applicable technical specification of an RVD (i.e. whether a brand name product is requested or if the RVD uses the generic specifications). In either case, ultimately, the technical specifications are those that are found in category 1.2 of Appendix A to Annex A of the NMSO. The brand name product is one that must be included in an offeror's PPL and, therefore, one that must meet the technical specifications of that category. A generic RVD specifically refers to the technical specification of the applicable category. In both cases, non-compliance is determined on the basis of those technical specifications.

223. Therefore, the Tribunal agrees with Enterasys and will consider the entire definition, including the list of mandatory technical specifications, in order to assess whether PWGSC complied with the terms of the solicitation documents in categorizing network equipment for the purposes of the RVDs at issue.

Individual RVD Analysis

224. Before it examines Enterasys' specific allegations of product miscategorization, the Tribunal notes that most of these allegations rest solely on assertions and opinions offered by Enterasys in its comments on the GIR, which incorporated a witness statement prepared by counsel for Enterasys in relation to File Nos. PR-2009-132 to PR-2009-153, that the products listed in the deliverables lists of the subject RVDs are not compliant with one or more of mandatory technical specifications set out in Appendix A to Annex A of the NMSO.

225. The Tribunal notes that no one who aided in the production of Enterasys' comments on the GIR or counsel for Enterasys has been qualified as an expert in the area of networking equipment in these proceedings. Consequently, the Tribunal cannot simply accept their opinions on the matter of product categorization as establishing facts. There is an onus on the complainant to prove its case and substantiate its allegations. In other words, mere assertions are not proof upon which findings of fact can be made. Thus, in examining Enterasys' specific allegations, the Tribunal considered whether there was evidence on the record to corroborate the employee's assertions.

226. On this issue, the Tribunal further notes that Enterasys provided various data sheets and publicly available lists of specifications which, in its view, described the features and functionalities of the Cisco or Nortel products identified by brand name in the subject RVDs.[104] However, without the benefit of expert evidence, the Tribunal was unable to determine how this evidence leads to the conclusion that the relevant products are outside the scope of category 1.2. Specifically, the Tribunal was not able to decipher this large amount of technical information in order to determine whether any given product described in these data sheets complied with the mandatory requirements of category 1.2. The Tribunal considers that, as the complainant, Enterasys bears the burden of demonstrating that products were mischaracterized by PWGSC and, thus, should have provided additional evidence and explanation in order to demonstrate how these documents supported its allegations.

227. With these considerations in mind, the Tribunal examined each RVD with regard to the following three types of allegedly miscategorized equipment:

- ancillary equipment, such as power cords, power supplies and cables;
- software; and
- items that should not have been included, as they do not fall within the scope of the category of the RVD.

104. See, for example, Exhibit EE attached to Enterasys' comments on the GIR.

File No. PR-2010-004—RVD 757

228. The Tribunal notes that item 1 of the RVD was a power cord, which it considers an allowable ancillary item. The Tribunal considers that article 29 of the NMSO allows for the procurement of ". . . all ancillary equipment, such as a power supply, cabinetry, cables and connectors required to enable the product to satisfy the requirements called up herein . . . ." It also notes that even Enterasys' PPL contains such ancillary items. The Tribunal considers that all allegations regarding the procurement of such ancillary items to be unfounded, unless Enterasys submitted evidence that, for example, an RVD was being used to purchase additional ancillary equipment beyond what could reasonably be considered to be in support of the equipment being procured. It has not submitted such evidence in the case of this RVD.

229. Enterasys alleged that all four items on the RVD were outside the scope of category 1.2. It claimed that item 1 did not meet the minimum switching fabric requirements. It also claimed that item 2 was an industry standard optics module and that there was therefore no justification for the use of a Cisco product code. It also claimed that items 3 and 4 did not have a modular chassis, did not meet the mandatory minimum port density requirements and did not meet the Layer 3 IP routing requirements.

230. The Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2010-005—RVD 758(2)

231. Enterasys alleged that both items on the RVD were outside the scope of category 1.2. It claimed that item 1 was an industry standard optics module and that there was therefore no justification for the use of a Nortel product code. It also claimed that item 2 did not have a modular chassis, did not meet the mandatory minimum port density requirements and did not meet the Layer 3 IP routing requirements.

232. The Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2010-006—RVD 761

233. The Tribunal notes that item 1 of the RVD was a power supply, which it considers an allowable ancillary item.

234. The Tribunal could not discern any Enterasys allegation regarding any particular item of the RVD as not being within the scope of category 1.2; however, Enterasys alleged that, as the RVD had not listed an operating software system, none of the items, separately or configured together, could meet the technical specifications for category 1.2.

235. The Tribunal considers that, regarding the allegation that the items being procured are not within the scope of the category as a whole, the Tribunal has been provided with conflicting non-expert points of view. However, it is the complainant that must demonstrate to the Tribunal that PWGSC has not acted in a manner required by the trade agreements. The Tribunal does not consider that Enterasys has met this burden. Accordingly, with regard to Enterasys' allegation that the items are not within the scope of the category on this RVD, the Tribunal considers Enterasys' submissions to be mere allegations and cannot find, on the basis of those statements, evidence that the items were not appropriately categorized.

REMEDY AND COSTS

Remedy

Enterasys' Position

236. Enterasys requested that the Tribunal recommend that all contracts awarded in relation to the RVDs at issue be cancelled and the requirements re-tendered in compliance with the trade agreements or, in the alternative, that West Atlantic Systems, as the representative agent of Enterasys, be compensated for its lost profits regarding all three RVDs. Enterasys submitted that, according to the information that it received during the Tribunal's inquiry process, it had products that it could have proposed and that, on the basis of NMSO discounts already approved by PWGSC that are already part of the NMSO, Enterasys' switches would have been priced lower than those of Cisco and Nortel. Specifically, it submitted that, according to the contract value listed on the Contract Canada's Web site regarding RVD 757, Enterasys would have won that particular contract.

237. Enterasys submitted that, if the RVDs were re-tendered, the Tribunal should ensure that they are within the scope of the technical specifications of the categories and that PWGSC include all the information regarding the client departments' operational requirements. Enterasys further requested that the operational requirements be properly explained and justified and that any information requested by bidders be provided as part of the "Enquiries" process, encompassing any information sufficient to ascertain interoperability, including providing a copy of the "running configuration" and "firmware version" of the product being requested. Enterasys submitted that PWGSC should also be required to extend the due date of RVDs, upon request, in order to give time to bidders to perform testing so that they can include an interoperability report with their bids.

238. Enterasys submitted that the integrity of the Government's procurement system has been compromised by the way that PWGSC has been running the NESS standing offer and that, therefore, additional damages should be awarded to West Atlantic Systems, as the representative agent of Enterasys.

239. Enterasys also requested its complaint costs and that such costs be awarded to West Atlantic Systems, as the representative agent of Enterasys.

PWGSC's Position

240. PWGSC requested that, in the event that the complaints are dismissed, it be awarded its costs.

241. PWGSC submitted that, recognizing that Enterasys' various grounds of complaint have been addressed by the Tribunal in earlier determinations, in the event that a ground of complaint is upheld, compensation for lost profits or lost opportunity should not be recommended. Instead, PWGSC submitted that the Tribunal's recommendation should be limited to proposing a change to the way that PWGSC administers the NESS NMSO and resulting RVDs.

242. Having found the complaints to be valid in part, the Tribunal must now recommend the appropriate remedy. Given the similarities between the Tribunal's findings and determination in these complaints and its determination in File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128 and File Nos. PR-2009-132 to PR-2009-153 concerning other RVDs issued under the NMSO, the Tribunal considers that the analysis of the issue of remedy developed in the context of its previous inquiry into similar matters remains applicable.

243. In this regard, subsection 30.15(3) of the *CITT Act* provides as follows:

> (3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including
>
> (*a*) the seriousness of any deficiency in the procurement process found by the Tribunal;
>
> (*b*) the degree to which the complainant and all other interested parties were prejudiced;
>
> (*c*) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
>
> (*d*) whether the parties acted in good faith; and
>
> (*e*) the extent to which the contract was performed.

244. The Tribunal considers that PWGSC's conduct regarding brand name RVDs amounts to a serious deficiency in the procurement process and prejudices the integrity and efficiency of the competitive procurement system. That being the case, the Tribunal does not consider that PWGSC was acting in bad faith or that Enterasys itself was targeted or prejudiced by PWGSC's actions. The Tribunal notes that, regarding all the subject RVDs, Enterasys stated that it was unable to respond because ". . . PWGSC would not update [its] published price list in their system in time to respond to these [RVDs] . . . ."[105] As noted above in the "Preliminary Matters" section, the manner in which PWGSC and the suppliers manage their respective PPLs is a matter of contract administration and beyond the Tribunal's jurisdiction.

245. The Tribunal notes that, despite its conclusion that PWGSC failed to comply with Article 1007(3) of *NAFTA* in the case of the RVDs at issue, it found that Enterasys did not establish that additional information from PWGSC was required in order to permit bidders to submit responsive tenders. This means that the Tribunal cannot conclude that PWGSC's actions had the effect of ensuring that no compliant equivalent bid could be submitted. In these circumstances, there is no evidentiary basis to find that PWGSC's actions deprived Enterasys of the opportunity to bid or to eventually profit from these solicitations.

246. In other words, since the Tribunal considers that it was not established during these proceedings that PWGSC's actions precluded Enterasys from submitting a bid and possibly being awarded a contract, there is no basis to recommend compensation for any lost opportunity to bid or lost profits. Indeed, on the basis of the evidence before it, particularly in view of Enterasys' decision not to submit a bid in all cases and its failure to discharge the burden of demonstrating that this decision resulted from PWGSC's action in conducting the procurement processes at issue, the Tribunal is not in a position to conclude that Enterasys could have been awarded a contract in any circumstances in the cases of these RVDs that were the subject of the complaints. As such, the Tribunal cannot assess the likelihood that Enterasys could even have been successful, had it bid. Therefore, the degree to which Enterasys was prejudiced could have been minimal or even non-existent.

247. With respect to other remedies claimed by Enterasys, including its claim for additional damages and the cancellation of contracts that have already been awarded, the Tribunal is of the view that such remedy recommendations are not warranted in light of its conclusion that the complaints are valid only in part and its finding on the limited degree of prejudice, if any, suffered by Enterasys. In addition, given its view that

105. Complaint at 25.

PWGSC acted in good faith at all times during the procurement processes at issue, the deficiencies in these procurement processes and the prejudice to the integrity and efficiency of the competitive procurement system found by the Tribunal do not warrant upsetting the procurements or recommending any monetary compensation.

Costs

248. In accordance with the Tribunal's *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), the Tribunal awards Enterasys its reasonable costs incurred in preparing and proceeding with the complaints.

Majority Analysis Regarding Complaint Costs

249. 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 complexity of the procurements was, on their face, low, in that they involved the procurement of standard items or simply defined items. The complexity of the complaints was high, in that, although the complaints involved ambiguous or overly restrictive specifications (normally indicative of a medium level complexity), each of the three complaints contained multiple grounds of complaint. Finally, the complexity of the complaint proceedings was high because, although there was neither an intervener nor a public hearing, there were two motions, parties submitted additional information beyond the normal scope of the proceedings and the proceedings required the use of the 135-day time frame. Accordingly, the Tribunal considers the complexity of these cases to be high, as referred to in Appendix A of the *Guideline* (Level 3). The Tribunal reserves jurisdiction to establish the final amount of the award.

Analysis of Member Vincent Regarding Complaint Costs

250. While the Tribunal has only found that certain of the three complaints are valid in part and, regarding which, I only agree that one is valid in part, I am of the view that each party should assume its own costs in this matter.

DETERMINATION OF THE TRIBUNAL

251. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the following complaint is valid in part:

- PR-2010-006—Solicitation No. 5Z011-100230/A (RVD 761)

252. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal (Member Vincent dissenting) determines that the following complaints are valid in part:

- PR-2010-004—Solicitation No. EN869-104363/A (RVD 757)
- PR-2010-005—Solicitation No. 31026-090066/B (RVD 758[2])

253. Pursuant to section 30.16 of the *CITT Act*, the Tribunal (Member Vincent dissenting) awards Enterasys its reasonable costs incurred in preparing and proceeding with the complaints, which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for these complaint cases is Level 3, and its preliminary indication of the amount of the cost award is $3,500. 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.

Serge Fréchette
Serge Fréchette
Presiding Member

Diane Vincent
Diane Vincent
Member
(Dissenting in part)

Stephen A. Leach
Stephen A. Leach
Member