Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File Nos. PR-2010-049, PR-2010-050 and PR-2010-056 to PR-2010-058

Siemens Enterprise Communications Inc., formerly Enterasys Networks of Canada Ltd.

v.

Department of Public Works and Government Services

Determination issued
Thursday, December 23, 2010

Reasons issued
Tuesday, April 19, 2011

Canada

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IN THE MATTER OF five complaints filed by Siemens Enterprise Communications Inc., formerly 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

SIEMENS ENTERPRISE COMMUNICATIONS INC., FORMERLY ENTERASYS NETWORKS OF CANADA LTD. **Complainant**

AND

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES **Government Institution**

DETERMINATION OF THE TRIBUNAL

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaints are valid in part. Each party will bear its own costs in this matter.

Serge Fréchette
Serge Fréchette
Presiding Member

Stephen A. Leach
Stephen A. Leach
Member

Jason W. Downey
Jason W. Downey
Member

Gillian Burnett
Gillian Burnett
Acting Secretary

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

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	November 29 and 30, 2010
Tribunal Members:	Serge Fréchette, Presiding Member Stephen A. Leach, Member Jason W. Downey, Member
Director:	Randolph W. Heggart
Investigation Manager:	Michael W. Morden
Senior Investigator:	Michelle N. Mascoll
Counsel for the Tribunal:	Nick Covelli
Complainant:	Siemens Enterprise Communication Inc., formerly Enterasys Networks of Canada Ltd.
Counsel for the Complainant:	Claude-Alain Burdet
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	David M. Attwater Susan D. Clarke Ian McLeod Roy Chamoun David Covert

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STATEMENT OF REASONS

BACKGROUND

1. The inquiry into these complaints is the sixth in a series of inquiries dealing with complaints filed by Enterasys Networks of Canada Ltd. (Enterasys) 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 Discounts (RVDs) for the supply of networking equipment by the Department of Public Works and Government Services (PWGSC) on behalf of various government departments under Networking Equipment Support Services (NESS) National Master Standing Offer (NMSO) No. EN578-030742/000/EW.[2] This particular inquiry concerns five RVDs arising from two sets of complaints.

2. Enterasys filed the first of these two sets of complaints on August 13, 2010, in relation to Solicitation Nos. HT218-100143/A (RVD 767), 5Z011-110019/A (RVD 768), 39903-110093/A (RVD 773) and W8486-114791/A (RVD 781).[3] Enterasys alleged that PWGSC:

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

(2) did not honour Enterasys' requests, during the enquiry periods for each RVD, that it obtain proof that the installed base of products was purchased through a competitive procurement process;

(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;

(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;

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

(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;

(7) was fully capable of providing bidders with a description of the operational requirements without the use of a brand name or product codes, which allegedly justified the purchase of specific brand name products; and

(8) 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.

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1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. Prior to the filing of the current complaints, Enterasys filed 69 other complaints concerning other RVDs issued under the same NMSO that were accepted for inquiry by the Tribunal. See *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) [*Enterasys PR-2009-080*]; *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (9 August 2010), PR-2009-132 to PR-2009-153 (CITT) [*Enterasys PR-2009-132*]; *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (10 September 2010), PR-2010-004 and PR-2010-006 (CITT) [*Enterasys PR-2010-004*]. The Tribunal notes that six of the eight grounds of complaint submitted in the current complaints were also raised and examined by the Tribunal during the course of its previous inquiries.
3. The four RVDs in question were each considered to be separate procurement processes and were assigned separate file numbers (i.e. PR-2010-047 to PR-2010-050).

3. As a remedy, Enterasys requested that:

- all contracts awarded pursuant to the four RVDs be cancelled and new solicitations be issued or, in the alternative, that Enterasys be compensated for its lost profit and 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;
- damages be paid to West Atlantic Systems, its representative agent, given 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; and
- its complaint costs be paid to West Atlantic Systems.

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. On August 23, 2010, the Tribunal informed the parties that it had accepted the complaints concerning RVD 773 and RVD 781 (File Nos. PR-2010-049 and PR-2010-050), in part, for inquiry, as certain grounds met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[4]. On September 1, 2010, the Tribunal advised Enterasys that the complaints concerning RVD 767 and RVD 768 (File Nos. PR-2010-047 and PR-2010-048) had not been filed within the time limits specified in section 6 of the *Regulations* and were not therefore accepted for inquiry.[5] Regarding File Nos. PR-2010-049 and PR-2010-050, the Tribunal advised the parties that it would limit its inquiry to the following allegations:

- that PWGSC was not justified in identifying products by brand name and product code in view of the provisions of the applicable trade agreements;
- that equipment was being purchased that was not part of the permitted category 1.2 specifications; and
- that there was insufficient information and insufficient time available to bid Enterasys equipment that was equivalent to the equipment identified by brand name and product code in the subject RVDs.[6]

6. The Tribunal requested that PWGSC include with the Government Institution Report (GIR) all information, including all technical justifications and related correspondence, that underlay the description of the procurement requirements with reference to particular trademarks or brand names that it had received from the client departments.

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4. S.O.R./93-602 [*Regulations*].
5. *Re Complaints Filed by Enterasys Networks of Canada Ltd.* (20 August 2010), PR-2010-047 and PR-2010-048 (CITT).
6. Neither party challenged the Tribunal's decision to reformulate the grounds of complaint as such.

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

8. The second set of complaints was filed on August 31, 2010, concerning Solicitation Nos. W0106-10818B/A (RVD 783), 51019-109035/A (RVD 784) and W010S-11D100/A (RVD 785).[7] Enterasys alleged the following:

(1) the time to respond to the RVDs was insufficient and PWGSC had no justification for not providing Enterasys with additional time;

(2) in not answering Enterasys' questions during the enquiry periods, PWGSC had not done its due diligence, thus breaching Article 1007(3) of the *North American Free Trade Agreement*;[8]

(3) PWGSC did not confirm that the established base of equipment had been procured competitively;

(4) given PWGSC's unfamiliarity with Enterasys' equipment, it demonstrated bad faith and bias against Enterasys by not forwarding Enterasys' questions to the client departments; and

(5) the RVDs, which were to be limited to category 1.2 LAN switches, attempted to purchase items that were outside the scope of category 1.2 switches, as defined by the NMSO through mandatory technical specifications.

9. Enterasys sought the same remedies that it sought in File Nos. PR-2010-047 to PR-2010-050, with the following addition:

- that the "Equivalents" clause in article 14 of the NMSO be removed, given what Enterasys claimed was PWGSC's demonstrated, continued misuse of the clause.

10. 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.

11. On September 9, 2010, the Tribunal informed the parties that it had accepted the complaints concerning RVD 783, RVD 784 and RVD 785, 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 *Regulations*. The Tribunal advised that it would limit its inquiry (File Nos. PR-2010-056 to PR-2010-058) to the allegations concerning the length of the bidding periods and PWGSC's procurement of equipment outside of category 1.2 on RVDs that were to be limited to category 1.2 LAN switches. The Tribunal did not issue postponement of award of contract orders. The Tribunal advised the parties that it would not initiate an inquiry into the other allegations.

12. Regarding grounds 2 and 4 of the complaints, i.e. that PWGSC did not respond to the questions that Enterasys posed during the solicitation periods and did not forward the questions to the relevant client department, the Tribunal notes that PWGSC did in fact provide answers to the questions posed by Enterasys, but it seems clear that those answers did not satisfy Enterasys. However, Enterasys did not, in any way, even begin to demonstrate how PWGSC's behaviour could lead to a violation of Article 1007(3)

7. The three RVDs in question were each considered to be separate procurement processes and were assigned separate file numbers (i.e. PR-2010-056 to PR-2010-058).

8. *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*].

of *NAFTA*, which deals with the use of brand names. In addition, Enterasys did not explain how PWGSC's behaviour reasonably indicated preferential or bias treatment on the part of PWGSC. These alleged grounds of complaint were nothing but mere allegations and did not merit further inquiry.

13. Regarding ground 3 of the complaints and the competitiveness of previous solicitations, the Tribunal finds that this situation does not automatically lead to a violation of a trade agreement because Enterasys did not, in this case, provide any reasonable indication as to how it could constitute a violation, the Tribunal did not find it appropriate to inquire into the matter.

14. The Tribunal further advised the parties that, given the similarities between File Nos. PR-2010-049, PR-2010-050, PR-2010-56, PR-2010-057 and PR-2010-058, it had decided, pursuant to rule 6.1 of the *Canadian International Trade Tribunal Rules*,[9] to combine the proceedings into a single inquiry.

15. On October 1, 2010, the Tribunal advised the parties that, pursuant to rule 105 of the *Rules*, it would hold an oral hearing on October 25 and 26, 2010, to clarify the material issues underlying the complaints. The hearing was subsequently postponed to November 29 and 30, 2010, at Enterasys' request.

16. On October 4, 2010, PWGSC filed a GIR responding to all five complaints, which included the technical justifications and relevant correspondence with the client departments relating to the description of the procurement requirements by reference to particular trademarks or brand names.[10]

17. On October 6, 2010, the Tribunal forwarded a copy of the GIR to Enterasys and, on October 7, 2010, the Tribunal advised Enterasys that it had until October 18, 2010, to file comments that it wished to make on the GIR and the additional documentation filed by PWGSC with the GIR. The Tribunal later extended this deadline to November 16, 2010, in part to accommodate a change in counsel for Enterasys.[11] Enterasys sought a further extension of time, which the Tribunal denied on the ground that Enterasys already had more than enough time.[12] Enterasys filed its comments on the GIR on November 16, 2010.

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9. S.O.R./91-499 [*Rules*].
10. On November 16, 2010, the Tribunal transferred confidential exhibits 10, 11 and 12 of the GIR relating to two subsequent complaints filed by Enterasys—File Nos. PR-2010-068 and PR-2010-069—to the record of the current proceedings.
11. The Tribunal was first advised of this change on October 8, 2010, and received formal notification of the change of counsel on October 13, 2010. Another factor was the fact that, on October 4, 2010, Enterasys filed complaints regarding two additional RVDs issued under the same NMSO at issue in the current set of complaints, which were accepted for inquiry (File Nos. PR-2010-068 and PR-2010-069) and combined with the present inquiry on October 15, 2010. During the course of the proceedings, PWGSC advised the Tribunal that these two RVDs had been cancelled and either had been or were soon to be re-tendered. The Tribunal considered this to be the essential remedy sought by Enterasys in both cases. The Tribunal considered that the complaints had therefore been rendered trivial and it ceased its inquiry in accordance with subsection 30.13(5) of the *CITT Act*. See *Re Complaint Filed by Enterasys Networks of Canada Ltd.* (8 November 2010), PR-2010-068 (CITT); *Re Complaint Filed by Enterasys Networks of Canada Ltd.* (10 November 2010), PR-2010-069 (CITT). On November 10, 2010, the Tribunal advised the parties that it had decided to transfer certain documents from File Nos. PR-2010-068 and PR-2010-069 to the current proceedings. The Tribunal advised that it found these documents "... highly relevant to its continuing parallel inquiry into RVDs 773, 781, 783, 784 and 785, having regard to the overlapping nature of the complaints, the identical procurement processes and practices at issue, and the potential for these documents to assist the Tribunal in its resolution of the combined proceedings."
12. Siemens requested the extension on November 8, 2010, citing the filing on November 5, 2010, by PWGSC of a GIR in relation to File Nos. PR-2010-068 and PR-2010-069 and asserting that its experts required additional time to review it before Siemens could file its comments on the GIR. On November 10, 2010, PWGSC objected to the extension request, noting that the inquiry with respect to File Nos. PR-2010-068 and PR-2010-069 had ceased and that the GIR concerning File Nos. PR-2010-049, PR-2010-050 and PR-2010-056 to PR-2010-058 had been in Siemens's possession since early October 2010.

18. On October 21, 2010, West Atlantic Systems, the representative agent that had initially filed the complaints on Enterasys' behalf, was replaced as counsel for Enterasys by Mr. Claude-Alain Burdet of the Nelson Street Law Offices.

19. On November 1, 2010, the Tribunal was made aware that, as of October 1, 2010, Enterasys amalgamated with two other corporations, Siemens Enterprise Communications Inc. (Siemens), the name under which the new corporation would be conducting business, and Chantry Networks Inc. PWGSC submitted that, therefore, Enterasys neither existed when complaints PR-2010-068 and PR-2010-069 were filed or when Mr. Burdet was engaged as counsel regarding the files at issue in this inquiry. On November 19, 2010, after discussion with Mr. Burdet, the Tribunal directed him to refile Form I (Notice of Participation – Party), Form II (Notice of Representation – Counsel) and Form III (Declaration and Undertaking) using the correct corporate name of the complainant, i.e. Siemens. Siemens provided the updated forms on November 23, 2010. The Tribunal considers that all submissions made subsequent to October 1, 2010, were made on behalf of Siemens, and not Enterasys, which had ceased to exist on its own.

20. On October 8, 2010, West Atlantic Systems requested leave to intervene. This request was made by Mr. Philip Weedon.

21. On October 22, 2010, PWGSC submitted that West Atlantic Systems should be denied leave to intervene on the following grounds: that West Atlantic Systems did not have an interest in the proceedings independent of Siemens; that Mr. Weedon had himself prepared and filed Siemens' complaints; and that Mr. Weedon was expected as one of Siemens' expert witnesses. PWGSC submitted that, given these circumstances, West Atlantic Systems' participation would not assist in the determination of a factual or legal issue relating to the inquiry.

22. On that same day, the Tribunal requested West Atlantic Systems to justify its request to intervene, highlighting the Tribunal's desire to avoid interventions that would unnecessarily waste the time and expense of the parties and of the Tribunal itself.

23. The Tribunal asked West Atlantic Systems why Siemens would not be able to adequately represent West Atlantic Systems' interests in the case and how the intervention could assist the Tribunal in the resolution of these matters. In addition, the Tribunal asked that Mr. Weedon clarify his relationship with West Atlantic Systems, noting that, during a previous hearing, he testified that he was acting as Vice-President of West Atlantic Systems.[13] The Tribunal also requested that Mr. Weedon clarify whether he intended to represent West Atlantic Systems as counsel and also appear as an expert witness for Siemens.

24. On October 27, 2010, Mr. Weedon responded to the Tribunal's request by stating that the request to intervene was made on behalf of West Atlantic Systems and not him personally. Mr. Weedon further stated that he had made the request for intervener status on the basis of his current role as Vice-President of West Atlantic Systems because of the material and direct interest that West Atlantic Systems had in the matters before the Tribunal. He also argued that the remedies, if granted, could affect future NESS procurements and RFPs outside of the NESS construct, which would be of interest to West Atlantic Systems and beyond the interests of Siemens. Mr. Weedon otherwise noted that, at the previous hearing regarding *Enterasys PR-2009-080*, another reseller had been granted leave to intervene. Mr. Weedon advised that his role as counsel for West Atlantic Systems was distinct from his role as an expert witness for Siemens, but that, if the Tribunal required West Atlantic Systems to retain counsel, it would need time to make such arrangements.

13. *Enterasys PR-2009-080*, *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 113.

25. On October 28, 2010, Siemens commented on West Atlantic Systems' request to intervene. Siemens submitted that the circumstances of West Atlantic Systems were similar to those of the reseller in the previous hearing and that, in the interests of natural justice, Siemens did not oppose West Atlantic Systems' request any more than it would have opposed the other reseller's request, given that both have an interest in the matter before the Tribunal. Siemens also confirmed that it would call Mr. Weedon as an expert witness but that it saw no conflict between Mr. Weedon's position with West Atlantic Systems and his role as an expert witness for Siemens.

26. On October 29, 2010, PWGSC replied that West Atlantic Systems did not have a material or direct interest independent of Siemens and that the multiple roles already played, and to be played, by Mr. Weedon, as expert witness for Siemens, created a conflict. PWGSC distinguished the circumstances of the intervener in the previous hearing from those of West Atlantic Systems, noting that the OEM of that reseller's goods was not the complainant and that counsel for the reseller was truly independent. That same day, Mr. Weedon filed a response to PWGSC's arguments, reiterating West Atlantic Systems' right to intervene.

27. On November 4, 2010, the Tribunal denied West Atlantic Systems' request to intervene. The Tribunal determined that West Atlantic Systems did have a material and direct interest in the proceedings and that, therefore, it was an interested party within the meaning of section 30.1 of the *CITT Act*. However, the Tribunal considered that it had to be mindful of certain additional considerations in exercising its discretion to grant or deny West Atlantic Systems' request, specifically:

a. the desire that the Tribunal's proceedings be timely and cost-effective, and not unnecessarily complicated by the intervention of persons whose participation would unnecessarily consume the time or add expense to the parties and to the Tribunal itself;

b. whether the would-be interveners' interests would be adequately represented by a party to the proceedings; and

c. whether and how the participation of the would-be intervener could assist the Tribunal in the resolution of the issues raised in the proceedings.

28. In applying the above-noted principles to the circumstances of these complaints, the Tribunal determined that West Atlantic Systems' participation was not warranted. Siemens and West Atlantic Systems had the same interest in the RVDs at issue, given their close business and legal relationships. West Atlantic Systems appeared to be the sole reseller of Siemens' products for these RVDs and, in its complaints, Siemens requested that any damages or costs be paid to West Atlantic Systems as Siemens' "representative agent". Therefore, the interests of West Atlantic Systems would be adequately represented by Siemens, the complainant in the proceedings.

29. It was also difficult for the Tribunal to conceive how West Atlantic Systems could assist the Tribunal in the resolution of these complaints. Through its intervention, West Atlantic Systems would largely duplicate the submissions and evidence of its principal, Siemens, much of which Mr. Weedon had prepared himself.

30. On November 12, 2010, Siemens alleged that PWGSC had breached section 46 of the *CITT Act*, referring to the curriculum vitae of PWGSC's expert witness and redacted information filed with the GIR, including correspondence between PWGSC and the client departments.

31. Siemens claimed that, as a result of this redacted or missing information, it was having difficulty performing a complete technical analysis of the documents and that, therefore, it could not provide complete feedback to its counsel, which, Siemens claimed, put it at a significant disadvantage with regard to making effective comments on the GIR, as well as putting Siemens at a disadvantage at the hearing. On November 17, 2010, the Tribunal advised the parties that, when faced with similar circumstances in *Enterasys PR-2009-132*, it determined that PWGSC had complied with section 46 of the *CITT Act* and found no reason to depart from that determination in the present inquiry.

32. On November 19, 2010, Siemens and PWGSC both filed additional documents and, on November 22, 2010, Siemens filed further information. On November 23, 2010, the Tribunal excluded this last submission from the record, along with one of the documents that Siemens had filed on November 19, 2010. The Tribunal determined that they consisted of argument and that the latter submission was also filed late, without justification for its lateness being shown.

33. The hearing took place on November 29 and 30, 2010. The Tribunal heard from five witnesses. Mr. Weedon testified as a fact witness on behalf of Siemens. Three fact witnesses testified on behalf of PWGSC, namely, Mr. Steve Oxner, Manager, Network Infrastructure Engineering, Information Technology Services Branch (ITSB), PWGSC; Mr. Michel Perrier, Acting Director, Network Management, ITSB, PWGSC; and Ms. Joanne St-Jean Valois, Acting Manager, Network Equipment and Services, Information Technology Shared Services Procurement Directorate, Acquisitions Branch, PWGSC. Mr. Marcel Lemieux, a network consultant engaged by PWGSC, testified on behalf of PWGSC as an expert witness in category 1.1 and 1.2 switches, as well as in the area of LANs. The Tribunal heard argument from counsel for both parties.

PROCUREMENT PROCESS

34. The RVDs in question were all issued under an NMSO, which is the successor standing offer to a Departmental Individual Standing Offer (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.

35. On October 12 and 13, 2006, DISOs were issued to 23 companies, including Siemens. In Siemens' 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[14] and were converted to NMSOs.

36. 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.

14. DISO at 9.

37. 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 the following:

> **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.**[15]

38. 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.

39. 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.

15. DISO at 4.

40. 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.

41. 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.

42. 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. 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.**

43. 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.

44. 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[16] but all requirements greater than $25,000 must be sent to PWGSC for processing. According

16. "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 4 at 3.

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.

PRELIMINARY MATTERS

Treatment of Siemens' Evidence

45. The Tribunal recalls that, when it previously held a public hearing in relation to an earlier series of complaints by Enterasys, as Siemens was then known, concerning RVDs by PWGSC issued under the NMSO, it was handicapped by the lack of admissible expert evidence. Most notably, the Tribunal found that there was no expert evidence to support whether, in fact, certain required information was really necessary or whether the information provided in the RVDs allowed for an assessment or demonstration of the required elements of article 14 of the DISO.[17]

46. This time, Siemens filed letters from five purported experts with its complaints. These included a letter dated July 7, 2010, from Dr. Dan Ionescu of ARTIS Inc., letters dated August 19 and 31, 2010, from Mr. Mike Millar of Siemens, and the Expert Witness Statement of Philip Weedon of West Atlantic Systems. Siemens also filed letters dated June 22, 2010, from Ms. Erica Johnson of the University of New Hampshire's InterOperability Laboratory and February 2, 2010, from Mr. Kevin Tolly of The Tolly Group.

47. The filing of the aforementioned letters from five purported experts was the principal reason for the Tribunal to hold a hearing in the course of this inquiry, as it represented an opportunity to admit, test and weigh expert evidence pertaining to material issues left unresolved from the previous hearing. On October 1, 2010, the Tribunal therefore advised the parties of its intention to hold a hearing on October 25 and 26, 2010.

48. In the same correspondence, the Tribunal directed the parties to advise it in writing, by October 7, 2010, of the number of witnesses that they intended to call at the hearing, including the names thereof. The Tribunal noted, at the time, that Siemens had filed expert reports with its complaints, and required that, if Siemens intended to call any of these experts as witnesses at the hearing, it set out *inter alia* each expert's name, qualifications, curriculum vitae, and authorities or materials relied upon in the preparation of the expert's report, by October 7, 2010.

49. PWGSC was given the same parameters and deadline should it wish to call experts of its own to testify. On October 6, 2010, in response to a request from PWGSC, the Tribunal extended these deadlines to October 15, 2010.

50. On October 8, 2010, Siemens requested that the hearing be postponed to the week of November 29, 2010, as neither its new counsel nor Mr. Millar would be available on October 25 or 26, 2010. According to Siemens, PWGSC had consented to this proposed postponement.

51. On October 15, 2010, PWGSC advised the Tribunal that, although Siemens had in fact not consulted it on the postponement, it would not object to a postponement, on the understanding that Mr. Millar would be called to testify.

17. See *Enterasys PR-2009-080* at para. 180.

52. On October 15, 2010, the Tribunal postponed the hearing to November 29 and 30, 2010, and consequently further extended the deadlines for filing the witness information to November 9, 2010. The Tribunal reminded the parties of this new due date on October 29, 2010.

53. On October 15, 2010, PWGSC filed witness statements by Mr. Oxner, Mr. Perrier and Ms. St-Jean Valois, and an expert witness report by Mr. Lemieux. PWGSC later advised the Tribunal that Mr. Lemieux had relied solely on personal knowledge and first-hand experience in preparing his expert report.

54. On the same day, Siemens confirmed its intention of calling Dr. Ionescu, Mr. Millar and Mr. Weedon as expert witnesses at the hearing, but did not provide further information. This prompted PWGSC to ask the Tribunal to direct Siemens to file the requests that had been made to Dr. Ionescu and Mr. Millar for their expert reports, as well as any other materials upon which they had relied to prepare those reports.

55. On November 8, 2010, Siemens requested an extension to November 16, 2010, to file information in relation to Mr. Weedon and Mr. Millar. No information was submitted from Dr. Ionescu, and his name was not mentioned in this request for an extension of time. The Tribunal denied this request on November 10, 2010, on the ground that the time already allowed was more than sufficient and directed Siemens to file the information forthwith. The Tribunal also directed Siemens to advise it by November 12, 2010, if Siemens no longer intended to call Dr. Ionescu to testify.

56. On November 12, 2010, Siemens advised the Tribunal in writing of the following: with respect to Dr. Ionescu, Siemens would rely on the experience and professional education of Dr. Ionescu and his staff; Mr. Millar relied on the materials already on file; and Mr. Weedon relied on his own expert statements, including a new statement that Siemens had enclosed. Among other enclosures were a training certificate belonging to Mr. Weedon and Dr. Ionescu's curriculum vitae.

57. On November 17, 2010, the Tribunal reiterated, in a letter to the parties, its understanding that Dr. Ionescu would testify at the hearing, and again asked Siemens to inform the Tribunal forthwith if this was not the case. At no time prior to the hearing did Siemens correct the Tribunal's understanding in this regard.

58. At the start of the hearing on November 29, 2010, counsel for Siemens informed the Tribunal that Mr. Weedon was ready to testify, but that Mr. Millar was working and that Dr. Ionescu was busy with university courses.[18] Counsel for Siemens stated that Mr. Weedon's testimony would refer to all three of Siemens' expert reports, as he was familiar with Dr. Ionescu's report and had actually collaborated, with another Siemens employee and Mr, Millar, in the drafting of Mr. Millar's reports.[19]

59. In response to the Tribunal's expression of frustration that the witnesses were not available, Siemens' counsel advised that he was following the instructions of his client who had made the decision, over the weekend, not to call the witnesses.[20] Siemens then advised the Tribunal that Dr. Ionescu might be made available on the second day of the hearing; however, Dr. Ionescu did not appear.[21]

18. *Transcript of Public Hearing*, Vol. 1, 29 November 2010, at 4.
19. *Ibid.*, 28 November 2010, at 5.
20. *Ibid.* at 6.
21. The hearing took place on Monday and Tuesday.

60. Thus, despite having led the Tribunal into believing that Dr. Ionescu and Mr. Millar would appear to testify, and having even persuaded the Tribunal to postpone the hearing by five weeks to a date proposed by Siemens in order to accommodate Mr. Millar's schedule, Siemens did not produce either of these prospective expert witnesses. Moreover, by implicitly reassuring the Tribunal that these witnesses would appear to testify, Siemens denied the Tribunal the opportunity to subpoena them.

61. As a result of Siemens' conduct, the hearing was unnecessarily postponed, its fundamental purpose was frustrated, and its usefulness was substantially reduced. Moreover, the Tribunal's inquiry was unnecessarily complicated and expensive, facts which are reflected in the Tribunal's decision not to award costs to Siemens, as will be further discussed below.

62. In the overall context of this series of proceedings, and in the context of the litigation history between the parties with respect to the issues raised in this case, Siemens' conduct indicates a less-than-required level of engagement and seriousness and constitutes unacceptable behaviour on the part of a litigant that has made the kind of allegations raised in its complaints.

63. In light of the absence of Dr. Ionescu and Mr. Millar, as well as Ms. Johnson and Mr. Tolly at the hearing, Siemens failed to establish their credentials as experts. As a result, the Tribunal gives no weight to the opinions expressed in their respective letters. Furthermore, to the extent that such letters consist of factual evidence that was not sworn or affirmed under oath and subjected to cross-examination, the Tribunal gives them significantly less weight than the evidence of the witnesses who did appear and testified under oath: Ms. St-Jean Valois, Mr. Oxner, Mr. Perrier, Mr. Lemieux and Mr. Weedon.

Qualification of Mr. Weedon as an Expert Witness

64. At the hearing, Siemens sought to have Mr. Weedon qualified as an expert witness in layer 2 and layer 3 switches, network design and configuration, interoperability and PWGSC's bidding process.[22] During the lengthy qualification process, Siemens led Mr. Weedon through his credentials, followed by questions put to Mr. Weedon by PWGSC and the Tribunal. The Tribunal then received submissions from the parties on whether Mr. Weedon should be qualified as an expert witness in the aforementioned areas. All told, the qualification process took up the entire morning of the first day of the hearing.[23]

65. Siemens argued that Mr. Weedon ought to be qualified as an expert in light of his technical training and experience. However, PWGSC challenged Mr. Weedon's capacity to give expert evidence, on the grounds that his expertise was unsubstantiated and that he lacked independence because he had a pecuniary interest in the outcome of the proceedings. After careful consideration, the Tribunal ruled that, as a threshold matter, irrespective of his credentials, Mr. Weedon lacked the requisite objectivity to give helpful opinion evidence and that, therefore, his opinions would not be heard.

66. In the courts, expert evidence may be excluded if its probative value is outweighed by the danger that it will be misused or will distort the fact-finding process.[24] Such a danger may arise where the expert's opinion would be unreliable as a result of his or her bias.[25] Instead of being allowed to advocate for one of

22. *Transcript of Public Hearing*, Vol. 1, 29 November 2010, at 14-15.
23. The hearing started at 9:38 a.m. The Tribunal recessed at 11:51 a.m. to deliberate before rendering its decision at 12:14 p.m. on Mr. Weedon's capacity to give expert evidence. *Transcript of Public Hearing*, Vol. 1, 29 November 2010, at 1, 74.
24. *R. v. Mohan*, [1994] 2 S.C.R. 9.
25. *United City Properties Ltd. v. Tong*, 2010 BCSC 111 (CanLII).

the parties or to promote his or her own vested interest in the outcome of the case, the expert should be independent from the exigencies of litigation and provide assistance to the court by objective, unbiased opinion in relation to matters within his or her expertise.[26]

67. In the context of administrative tribunals, the technical rules of evidence are not strictly applicable.[27] Accordingly, especially for those tribunals that are the masters of their own procedure, an expert witness's lack of independence may not necessarily render his or her opinion evidence inadmissible; rather, the tribunal could simply give it less weight than the evidence of a more reliable expert.[28] However, even in an administrative tribunal setting, there are limits to the kind of opinion evidence that ought to be heard from an expert.[29]

68. When the Tribunal has no confidence in the reliability of an expert as a result of his or her lack of objectivity or bias, the Tribunal would be doing the parties and itself a disservice by giving that witness a pulpit from where he or she can express an opinion that could be misused or might distort the fact-finding process, thereby outweighing its probative value.

69. In the specific case of Mr. Weedon, the Tribunal has found that he is not only affiliated with one of the parties (i.e. Enterasys/Siemens) but also has been directly and intimately involved in the complaints and inquiry from the outset and has a pecuniary interest in the outcome of the inquiry.

70. Since December 2009, in his capacity as Network Consultant and Vice-President of West Atlantic Systems[30] and Enterasys' bidding agent regarding the procurement processes in question, Mr. Weedon has had an exclusive business relationship with Enterasys regarding the NMSO.[31] While this fact itself would not normally preclude the Tribunal from hearing Mr. Weedon's opinions, were it to qualify him as an expert witness, this relationship was established at Mr. Weedon's instigation for the express purpose of helping Enterasys win RVDs from PWGSC.[32] In his own words, Mr. Weedon approached Enterasys to help it ". . . open these [RVDs] up . . . ."[33]

71. As part of this enterprise, if Siemens fails to win an RVD, Mr. Weedon is responsible for filing complaints with the Tribunal.[34] Indeed, Mr. Weedon has filed an unprecedented number of complaints, over a hundred, on behalf of Enterasys/Siemens, including the complaints at issue in the present inquiry; typically in the capacity of counsel for Enterasys.

72. After he relinquished this responsibility as counsel to Siemens in the course of the present inquiry, he then, again in the role of counsel, this time for West Atlantic Systems, attempted to obtain leave for West Atlantic Systems to intervene in the inquiry.

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26. *Fellowes, McNeil v. Kansa General International Insurance Co.*, 40 O.R. (3d) 456 (ON S.C.), referring to *The Ikarian Reefer*, [1993] 2 Lloyd's Rep. 68 (Comm. Ct. Q.B. Div.).
27. R.W. Macaulay and J.L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, Vol. 2 (Scarborough: Carswell, 1988) at 17-3.
28. See, for example, *Barr v. Canada (Treasury Board)*, 2004 PSSRB 169 (CanLII) at para. 12.
29. See, for example, *Black Entertainment Television Inc. v. CTV Ltd.*, (2008) 66 C.P.R. (4th) 274 (T.M.O.B.); *Scenic Holidays (Vancouver) Ltd. v. Scenic Holidays Limited*, 2010 TMOB 64 (CanLII); *Re Toronto Transit Commission and A.T.U., Local 113*, [1995] O.L.A.A. No. 994, 38 C.L.A.S. 18.
30. Exhibits 7 and 8 of the GIR filed in *Enterasys PR-2009-080*.
31. *Transcript of Public Hearing*, Vol. 1, 29 November 2010, at 44, 47.
32. *Ibid.* at 46, 50, 59-61.
33. *Ibid.* at 62.
34. *Ibid.* at 52-53, 67.

73. Moreover, should Siemens be successful in this inquiry, Mr. Weedon's firm, West Atlantic Systems, would stand to benefit from any award, as the complaints, which Mr. Weedon himself authored and signed on behalf of Enterasys, request that any damages or costs be awarded to West Atlantic Systems as "representative agent". During the qualification process, Mr. Weedon even admitted having a written agreement with Enterasys/Siemens to this effect.

74. Furthermore, in the event that Mr. Weedon is successful in winning RVDs, including those that are the subject of this inquiry, on behalf of Siemens, West Atlantic Systems would purchase the products from a Siemens distributor at a discount price, resell them to PWGSC at the marked-up published list price and pocket the difference.[35] In other words, through his firm, West Atlantic Systems, Mr. Weedon has a vested pecuniary interest in Siemens succeeding in this inquiry.

75. The totality of these circumstances cast doubt on the impartiality and, therefore, reliability of any opinion evidence that Mr. Weedon would have provided to the Tribunal and, irrespective of whether his training and experience amount to expertise in the proposed areas of testimony, the Tribunal refused to hear his opinions. Instead, the Tribunal invited Siemens to call upon Mr. Weedon to testify solely about facts,[36] as he had done at the last hearing. Thus, Mr. Weedon testified as a lay witness.

Qualification of Mr. Lemieux as an Expert Witness

76. PWGSC presented Mr. Lemieux as an expert in category 1.1 and 1.2 switches and LANs generally. PWGSC pointed to Mr. Lemieux's years of professional experience and training in these areas, and his lack of personal interest in the outcome of the inquiry.

77. Siemens challenged Mr. Lemieux's credentials, calling into question the depth of his training and experience. Siemens also suggested that, as a consultant engaged by PWGSC, Mr. Lemieux lacks the impartiality to give expert opinions. The Tribunal considered the evidence with respect to Mr. Lemieux's qualifications (including his curriculum vitae and his answers to questions from the parties and the Tribunal itself) and the arguments presented by both parties and concluded that Mr. Lemieux could adduce opinion evidence as an expert in category 1.1 and 1.2 switches and LANs.

78. The Tribunal is satisfied that Mr. Lemieux has the requisite expertise through his work experience and training. Although Mr. Lemieux has a relationship with PWGSC, the Tribunal is comfortable from the totality of the circumstances, including Mr. Lemieux's candour, that this relationship is not to the degree that would cast serious doubt upon his objectivity and reliability or would otherwise render his opinion evidence inadmissible in the administrative tribunal context. Rather, the Tribunal decided to take the relationship into account when weighing Mr. Lemieux's opinions.

PWGSC's Argument That Siemens Is Not a Potential Supplier

79. In its GIR, PWGSC submitted that 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, while noting that West Atlantic Systems had submitted bids regarding RVD 783 and RVD 784, neither Siemens nor any of its agents, including West

35. *Ibid.* at 47-49, 56, 58.
36. *Ibid.* at 75-76.

Atlantic Systems, submitted a bid in response to RVD 773, RVD 781 or RVD 785 and, since the bidding period for these RVDs was closed, Siemens could not be considered either a bidder, or a prospective bidder, with standing to file a complaint in respect of these RVDs. In support of its position, PWGSC referred to the Tribunal's order in File No. PR-2009-026.[37]

80. PWGSC further submitted that there was no aspect of the subject solicitations that prevented Siemens, or any of its authorized agents, from bidding on RVD 773, RVD 781 or RVD 785. It referenced the Tribunal's June 21, 2010, determination regarding *Enterasys PR-2009-080*, noting that the Tribunal had found that ". . . no additional information is warranted for bidders to be able to submit responsive tenders"[38] in response to an RVD and that the RVD process had allowed bidders sufficient time to submit bids for equivalent products.[39]

81. At the hearing, PWGSC argued that an unstated premise to all of Siemens' complaints, and to the Tribunal's decision to recognize its jurisdiction over these complaints, is that Siemens has products equivalent to the brand name products requested in the subject RVDs.

82. PWGSC argued that, if Siemens did not have a product that was equivalent to the brand name products requested in the subject RVDs, it could not be a potential supplier of either the brand name product or an equivalent to that product. PWGSC noted that Siemens had only 204 products on its PPL, which, PWGSC claimed, Siemens asserted were equivalent to the 10,632 products that were on the other suppliers' PPLs.

83. PWGSC submitted that the fact that Siemens or West Atlantic Systems did not submit a proposal, or submitted a proposal for products that were not on Siemens' PPL,[40] could be fully explained by the fact that Siemens did not have an equivalent product.[41]

84. Siemens did not address this argument in its comments on the GIR but, at the hearing, Siemens submitted that whether Siemens' 204 PPL items (which it submitted was not the correct number) were equivalent to other suppliers' 10,000 PPL line items was irrelevant to the issue of whether Siemens had the necessary items for the five RVDs at issue.

85. Furthermore, Siemens argued that it has had success in competing against Cisco Systems in every part of the marketplace, except federal government procurement. It submitted that there was no evidence furnished during the proceedings to suggest that Siemens did not have equivalent products. It argued that, instead, Siemens was a potential supplier that had been thwarted in its attempts to supply its switches by the lack of information and time for bidding.[42]

86. The Tribunal notes that, at the hearing regarding *Enterasys PR-2009-080*, 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.

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37. *Re Complaint Filed by Flag Connection Inc.* (3 September 2009), PR-2009-026 (CITT) [*Flag Connection*].
38. *Enterasys PR-2009-080*, note 107.
39. *Ibid.* at para. 187.
40. According to PWGSC, this was the reason for which West Atlantic Systems' bids regarding RVD 784 and RVD 785 were found non-compliant.
41. *Transcript of Public Hearing*, Vol. 2, 30 November 2010, at 363-64.
42. *Ibid.* at 390-92.

87. 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.[43] 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.[44] PWGSC did not raise this issue or otherwise challenge Enterasys' standing in *Enterasys PR-2009-132*, whereas it did make arguments in connection with *Enterasys PR-2010-004*.

88. With respect to RVD 773, RVD 781 and RVD 785, the Tribunal agrees with PWGSC that Siemens did not submit a proposal and, therefore, was not a bidder. However, the Tribunal is unable to accept PWGSC's argument that Siemens is not a "prospective bidder" because it did not submit a proposal and the bidding period for each subject RVD has now expired.

89. 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.

90. These possible scenarios must be distinguished from the circumstances that arose in *Flag Connection*, the precedent cited 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.

91. To the contrary, regarding the current complaints, Siemens alleges that PWGSC did not provide it with sufficient information and time to submit a responsive tender in respect of the subject RVDs. Moreover, Siemens 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 that it claims that it needed in order to submit a proposal. These allegations, which indicate that Siemens intended to submit a proposal in response to the subject RVDs, provide a clear basis to distinguish the present case from *Flag Connection.*

92. In short, Siemens' position is that PWGSC's actions deprived it of the capacity to bid. In these circumstances, a finding that Siemens 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.

93. With respect to PWGSC's submission that no aspect of the subject solicitations prevented Siemens, or one of its authorized agents, from bidding on the subject RVDs, the Tribunal notes that the fact that Siemens made allegations to that effect in its complaints is sufficient for the purposes of determining whether Siemens is a "prospective bidder" and thus able to submit a complaint that is within the Tribunal's jurisdiction.

43. *Enterasys PR-2009-080*, *Transcript of Public Argument*, 14 May 2010, at 66.
44. *Enterasys PR-2009-080* at paras. 87-88.

94. 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.

95. As noted in *Enterasys PR-2010-004*, 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.

96. 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.

97. Similarly, the fact that the Tribunal found, in previous inquiries concerning *other* RVDs issued under the NMSO, that Enterasys, as it was then known, 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 Siemens' 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 *Enterasys PR-2009-080*, 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.[45]

98. 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 Siemens 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 Siemens from bidding on the subject RVDs.

99. 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, Siemens 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

100. 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

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

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*,[46] *NAFTA*, the *Agreement on Government Procurement*,[47] the *Canada-Chile Free Trade Agreement*[48] and the *Canada-Peru Free Trade Agreement*[49] depending on the value of each RVD.[50]

101. While the complaints include general references to the provisions of the *AIT*, *NAFTA* and the *AGP*, Siemens' specific allegations of breaches of applicable trade agreements focus on the relevant provisions of *NAFTA* and one reference to a provision of the *AIT*. The Tribunal notes that Siemens did not provide separate analyses or make specific arguments in order to demonstrate the existence of breaches of *AGP* provisions. Given that *NAFTA* and the *AIT* apply to the five RVDs at issue, the Tribunal will limit its analysis to Siemens' claims of breaches under *NAFTA* and the *AIT*.

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

103. In accordance with its notice of inquiry letters of August 23 and September 9, 2010, the Tribunal considers that the grounds of complaint that make up the subject matter of this inquiry can be divided into the following three main grounds:

a. PWGSC was not justified in identifying products by brand name and product code;

b. there was insufficient information and insufficient time available to bid Siemens equipment that was equivalent to the equipment identified by brand name and product code, and, regarding RVD 783 and 784, the four-day or less response time was not justified; and

c. equipment was being purchased that is not part of the permitted category 1.2 specifications.

104. Given that Siemens' arguments, the alleged PWGSC shortcomings and the information filed by the parties regarding the current complaints are similar to Enterasys', as it was then known, previous complaints concerning other RVDs issued under the same NMSO that were accepted for inquiry and for which the

46. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
47. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
48. *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.
49. *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*].
50. 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). The *AGP* applies to RVDs valued at more than $221,000 ($604,500 for Crown Corporations).

Tribunal has already issued its determination and statement of reasons,[51] the Tribunal therefore deems it appropriate, where applicable, to rely on the analysis developed in the context of its inquiries concerning Siemens' previous complaints.[52]

Use of Brand Names

Siemens' Position

105. Siemens submitted that the procurements were not conducted in accordance with Articles 1007(3) and 1008(1) of *NAFTA* and Article 504(3)(b) of the *AIT*, as 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 and therefore avoided technical specifications which favoured incumbent suppliers.

106. Siemens 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 *Enterasys PR-2009-080*, 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 brand names and product codes. Siemens also submitted that, at that same hearing, PWGSC admitted to avoiding tendering RVDs that do not use a brand name and product code. In Siemens' 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.

107. Siemens submitted that a universally accepted principle of network design is "standard-based modularity", which it claimed is key to interoperability and reliability. It submitted that the issue is not, as argued in the GIR, whether the use of brand names is permitted, or was agreed to by Siemens, or is appropriate. Siemens stated that networking norm is standard-based designs and procurements and that brand name or not, functional modules in a network typically conform to the norm and the appropriate network standards. It submitted that the use of brand names is then only justified to serve as an expedient way to describe the module, within which the appropriate industry standards will be implemented.

108. In other words, it claimed that, given a standard-based functionality of the network, whether it is implemented on a brand name product, or its competition, ought to make little difference. It further submitted that the question of brand name is thus really one of standards compliance and the justification of procurements that refer to brand names rather than appropriate industry standards. Siemens submitted that the standards implemented, or to be implemented, in existing or future networks are not properly specified by the use of a brand name product, except if further details of the actual implementation are provided.

109. Siemens submitted that, by way of an example, if product X has features A, B and C, and product Y has features B, C and D, they clearly are not "equivalent", but if the network only uses features B and/or C, then the products *are* equivalent. It submitted that, as is the case under the subject NMSO, when the requirement is defined by brand name X, product Y is excluded by any comparative selection on the basis of PPLs, and the procurement process is thus biased and discriminatory, to the detriment of other OEMs and PWGSC.

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51. *Enterasys PR-2009-080*.
52. In this regard, the Tribunal notes that Siemens' complaints included references to the evidence filed by the parties in *Enterasys PR-2009-080* and to the testimony heard by the Tribunal at the hearing that was held in the context of those previous complaints. In considering Siemens' 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.

110. Siemens submitted that this disguised sole-sourcing process is economically disadvantageous for PWGSC, as it results in an increased restriction of the offer, which always causes the price to be higher (or equal), but never lower. Siemens argued that, if the client department only requires features B and C, then whether the requirement is identified by brand name X or not is less relevant, since PPL comparisons will yield both product X and product Y. It argued that the identification of a brand name product implicitly adds requirements which are unnecessary for the end user.

111. Siemens submitted that the award of brand name-based procurement to the OEM itself and its resellers logically implies that that particular NMSO holder was privy to network information which was not released to other NMSO holders and potential bidders.

112. Siemens submitted that the critical elements of category 1.2 switches are that they are configurable devices, meaning that the brand name out-of-the-box product is not interoperable until it is configured to perform the required network functions, through settings of a multitude of parameters, which are themselves dependent on network operating conditions. The device is thus a complex combination of hardware, firmware, software, and parameter settings and configurations. Siemens claimed that neither the PPL lists nor brand name products are *per se* capable of reflecting this level of complexity in the definition of the required deliverable.

113. Siemens submitted that even the supplier of a brand name product is not in a position to provide an interoperable "equivalent product" without having additional information with respect to the network within which it must operate. Hence, when a category 1.1 or 1.2 brand name product is purchased, either PWGSC assumes interoperability or the brand name supplier has obtained additional information which was not shared with the competition. Siemens argued that, in either case, the contract award is discriminatory and unfair, unless extremely exceptional circumstances dictate otherwise and are expressly disclosed as to comply with trade agreements and the NMSO. Siemens submitted that the subject RVDs were in fact disguised directed contracts.

114. Siemens submitted that language such as "support for (or compatibility with)" a particular requirement should have been used, as had been recommended by the Tribunal in File No. PR-2001-048.[53] Siemens submitted that the Tribunal has previously determined that there is a heavy onus on PWGSC, and the end user department, to demonstrate why a function or feature is legitimately required.

115. Siemens submitted that, in cases where a brand name was specified, PWGSC receives information from the client department, which it does not forward to bidders. Siemens claimed that PWGSC used a Technical Justification (TJ) for this process. Siemens submitted that, if the TJs had been properly reviewed by the PWGSC procurement officers, they should have determined that use of a brand name was not justified and ensured that the technical requirements were properly prepared in a manner that does not require the use of a brand name.

PWGSC's Position

116. 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 good faith, in the course of administering the five solicitations.

53. *Re Complaint Filed by Foundry Networks Inc.* (12 March 2002), PR-2001-048 (CITT).

117. PWGSC submitted that, when considering whether PWGSC has acted consistently with its trade agreement obligations in the administration of the NESS NMSO, 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 within a range of possible, acceptable outcomes when considered on an objective standard, even if the Tribunal had made different decisions.

118. PWGSC referenced previous inquiries[54] in which the Tribunal applied a reasonableness standard of review. PWGSC submitted that it administered the NESS NMSO in good faith and consistently with its terms and the trade agreements.

119. PWGSC submitted that, in accordance with earlier findings of the Tribunal where PWGSC made use of the subject RVD procurement process,[55] 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 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.

120. 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.

121. PWGSC submitted that, during the original NESS RFSO process, no potential supplier, including Siemens, 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.

122. In referencing the Tribunal's decision in *Enterasys PR-2009-080*, PWGSC submitted that, although the Tribunal acknowledged that procuring entities need not compromise their "legitimate operational requirements" to accommodate bidders, the majority's interpretation of the trade agreements and, in particular, Article 1007 of *NAFTA*, failed to recognize the means by which the Government can justify the use of design or descriptive characteristics to acquire the goods and services that it needs.

123. PWGSC submitted that it examined 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), it is PWGSC's practice to source the required equipment using generic specifications.

124. 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; and the risks inherent in relying on generic specifications and the impact of compromise to Crown networks.

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54. For example, *Re Complaint Filed by Joint Venture of BMT Fleet Technology Limited and Notra Inc.* (5 November 2008), PR-2008-023 (CITT) at para. 25; *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005), PR-2005-004 (CITT) at paras. 51-52; *Re Complaints Filed by NETGEAR, Inc.* (15 May 2008), PR-2007-075 to PR-2007-077 (CITT) at para. 53.
55. *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.

125. PWGSC further 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.

126. PWGSC finally argued that a reasonable interpretation of the trade agreements allows for the use of brand names in appropriate circumstances and that, consistent with the trade agreements, it was appropriate to use brand names in the subject RVDs.

Analysis

127. 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 *Enterasys PR-2009-080*, the majority of the Tribunal provided the following analysis of the meaning of this provision.

128. Article 1007(3) of *NAFTA* requires the following:[56]

> 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.

129. In interpreting the provisions of *NAFTA*, the Tribunal is mindful of Article 31(1) of the *Vienna Convention on the Law of Treaties*,[57] 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.

130. 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.[58] 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*.

131. In this regard, Article 1007(3) must be read in light of Article 1017, which indicates that one of the purposes 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.

56. Similar language is found in Article Kbis-07(3) of the *CCFTA*, Article 1407(3) of the *CPFTA* and Article VI(3) of the *AGP*.
57. (1969) 1155 U.N.T.S. 331, entered into force on 27 January 1980.
58. *Re Complaint Filed by Georgian College of Applied Arts and Technology* (3 November 2003), PR-2001-067R (CITT) at 4.

> 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 . . . .

132. 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.

133. The Federal Court of Appeal recently held, in *Almon Equipment Ltd. v. Canada (Attorney General)*,[59] that the purposes of the federal procurement regime include (1) ensuring fairness to competitors in the procurement system and (2) maximizing the probability that the Government will get good quality goods and services that meet its needs.

134. 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 purposes of the *NAFTA* chapter on procurement.

135. Given the procurement disciplines are intended to strike a balance between the interests of potential suppliers to have fair and transparent access to procurement opportunities and interest of the government institutions to procure required goods and services, Article 1007(3) of *NAFTA* prohibits government entities from relying on a particular trademark or name, patent, design or type, or request products from a specific supplier ". . . unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements . . . ."[60] Article 1007(3) therefore limits the use of brand name specifications to situations where generic specifications would not accurately describe the technical requirements and ensure that such requirements are comprehensible.

136. Thus, PWGSC cannot resort to identifying products by brand name whenever it considers that it would simply be more efficient or less risky to do so. Rather, PWGSC must assess whether generic specifications would describe the technical requirements in a sufficiently precise or intelligible way and, if it finds that they would, then it must use them. PWGSC may only use brand name specifications when it reasonably concludes from this assessment that generic specifications would not describe the technical requirements in a sufficiently precise and intelligible way.

137. Where an assessment of whether generic specifications would describe the technical requirements in a sufficiently precise and intelligible way has been made, the burden is on PWGSC to explain why it concluded from such assessment that there was no "sufficiently precise or intelligible way" of describing the technical requirements. Whether this justification is provided by way of an internal document, such as a TJ, 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.[61]

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59. [2010] F.C.J. No. 948.
60. 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".
61. *Re Complaints Filed by NETGEAR, Inc.* (10 July 2008), PR-2008-003 to PR-2008-006 (CITT) at para. 45.

138. 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 statement of reasons in *Enterasys PR-2009-080*. During the present inquiry, the parties did not file any evidence that would indicate that a substantially 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 *Enterasys PR-2009-080* 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.

139. In summary, the decision regarding whether 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.

140. 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, 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.

141. 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 notice of inquiry letters do not indicate otherwise in the case of the subject RVDs.

142. At the hearing, when testifying about similar RVDs issued under the same NMSO,[62] Mr. Perrier acknowledged that, in his group, a brand name RVD is, "for the most part" considered a "regular RVD".[63]

143. 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 deemed necessary.

144. The evidence does suggest that ITSB is exercising its challenge function in a more robust manner than previously. For example, regarding the TJs for RVD 773, RVD 783 and RVD 784, ITSB advised the client department that it would have to justify the use of any brand name in the TJ.[64] In relation to RVD 773 and RVD 784, the TJs evolved from a few paragraphs to multiple pages with very specific technical requirements and protocols listed.

62. Hearing held in Ottawa, Ontario, on May 13 and 14, 2010, regarding *Enterasys PR-2009-080*.
63. *Enterasys PR-2009-080*, *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 338.
64. See, for example, regarding RVD 773, documents filed by PWGSC in response to the Tribunal's notice of inquiry letters at 33.

145. In the case of RVD 785, upon receipt of the TJ specifying the brand name, ITSB asked the client department to confirm whether it would be capable of providing a sufficiently precise or intelligible way of describing its procurement requirements in a way other than using a brand name, although it then accepted a response lacking an adequate explanation of why not.[65]

146. On balance, however, 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.

147. Overall, the Tribunal considers that the documents provided by PWGSC in response to the Tribunal's notice of inquiry letters do not demonstrate that PWGSC performed a meaningful assessment of whether generic specifications would have described the technical requirements in a sufficiently precise or intelligible way.

148. 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. Indeed, the balance of the evidence suggests that brand names are the default and that the TJs are made to suit this default choice without any meaningful consideration normally being given to generic specifications.

149. Thus, the Tribunal rejects PWGSC's assertion that generic specifications could not have described the technical requirements of the subject RVDs in a sufficiently precise or intelligible way. Indeed, PWGSC's own expert, Mr. Lemieux, testified that, while it would be difficult and risky, it would take a "couple of days" to list every single protocol that the client needs for a generic TJ and that ". . . for a data centre it would take a week at least to come up with a good Technical Justification that is fail-safe."[66]

150. PWGSC has in practice turned the entire process contemplated by Article 1007(3) of *NAFTA* on its head by applying the NMSO regime in such a way that the use of brand names has become the rule rather than the exception, simply because it is easier and less risky.

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65. The Tribunal also notes that the client department advised that it could not do so and that the RVD was apparently allowed to proceed unimpeded. See, for example, regarding RVD 785, documents filed by PWGSC in response to the Tribunal's notice of inquiry letters at 273. Previously, the e-mail sent by ITSB's analyst to the client departments requesting TJs did not ask the client departments to justify the use of brand names. It simply explained the following: ". . . we request a solid Technical Justification for your category [1.2/1.1] 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]. See, for example, regarding RVD 742 found in *Enterasys PR-2009-132*, documents filed by PWGSC in response to the Tribunal's May 28, 2010, order for the production of documents at 195. This language implied that, at the time at which the request for a TJ was sent, PWGSC had already determined that the use of brand names was appropriate and would not call into question the client departments' decisions to request specific brand name products; otherwise, it would not have been necessary to refer, in the e-mail requesting a TJ, to the eventual proposal of an "equivalent bid". The Tribunal also noted that many of these TJs described 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. Indeed, the proposal of equivalent products under the NMSO is only a relevant consideration to the extent that a decision had already been made by PWGSC to go ahead with an RVD which specifies products with brand names.

66. *Transcript of Public Hearing*, Vol. 2, 30 November 2010, at 312.

151. Again, PWGSC's own expert, Mr. Lemieux, testified that, as the person who is installing the equipment into existing networks for PWGSC, he always wants the brand name product that is already installed on the network.[67] The brand name product is easier to install and less risky than another vendor's product because, among other reasons, no additional effort or testing is required and the vendor of the brand name product will not have another vendor to blame in the event of a problem.[68]

152. The apparent purpose of this practice is to make the procurement process more efficient or to respond to urgent needs, but, however commendable this may be from an administrative point of view, the effect of this practice is to create an exception to the relevant provisions of the trade agreements where none exists.

153. Accordingly, the Tribunal concludes that PWGSC's conduct regarding these RVDs was inconsistent with Article 1007(3) of *NAFTA*.

154. This finding does not, in and of itself, mean that PWGSC's conduct, as alleged by Siemens, also violated Article 1008(1) of *NAFTA* and Article 504(3)(b) of the *AIT*, which prohibit discriminatory tendering procedures.

155. Article 1008(1) of *NAFTA* reads as follows:

> Each Party shall ensure that the tendering procedures of its entities are:
>
> a. applied in a nondiscriminatory manner.

156. Article 504(3)(b) of the *AIT* provides that the federal government shall not discriminate between suppliers by:

> (b) the biasing of technical specifications in favour of, or against, particular goods or services, including those goods or services included in construction contracts, or in favour of, or against, the suppliers of such goods or services for the purpose of avoiding the obligations of this Chapter.

157. Siemens made certain allegations regarding Article 504(3)(b) of the *AIT*. In the first set of complaints, Siemens merely provided a listing of articles of the *AIT*, *NAFTA* and the *AGP* that, it alleged, PWGSC breached. The listing included Article 504(3)(b), but it did not provide any further explanation. Siemens included the same listing in the second set of complaints, this time including an elaboration of its allegation relating to Article 504(3)(b) of the *AIT*. Siemens alleged that PWGSC showed bad faith and bias against it by not answering the questions that it posed during the solicitation periods, thus denying Siemens the information necessary for it to submit a compliant bid. This, Siemens alleged, proved PWGSC's bias for the OEMs of the requested brand name products and bias against Siemens, which was contrary to the requirement in Article 504(3)(b) that specifications shall not be biased in favour of or against particular goods or services.

158. After having carefully considered the evidence in respect of these allegations, the Tribunal could not find anything that could amount to anything more than just allegations. Although it is possible that the relationship between PWGSC and Siemens may have been tense as a result of the multitude of complaints brought by Enterasys/Siemens over the previous months, nothing in what was submitted in support of the present complaints even begins to support allegations of a "bias" conduct on the part of PWGSC. Therefore, the Tribunal sees no reason to condemn the actions of PWGSC under Article 504(3)(b) of the *AIT*.

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67. *Ibid.* at 308, 311.
68. *Ibid.* at 207, 312-14.

159. Article 1007(3) of *NAFTA* specifically governs the preparation, adoption or application of technical specifications and does not address the issue of discrimination in the tendering procedures. In the absence of a clear demonstration by Siemens as to how, as a matter of law and on the facts of these complaints, PWGSC's conduct amounts to the application of tendering procedures in a discriminatory manner, the Tribunal is unable to conclude that PWGSC's conduct also breached Article 1008(1) of *NAFTA* or Article 504(3)(b) of the *AIT*.

Sufficient Information and Time to Allow Suppliers to Demonstrate Equivalency

Siemens' Position

160. Siemens 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 applicable conditions indicating what equipment is being proposed and how that equipment is "equivalent" to the requested products.

161. Siemens submitted that PWGSC has made it clear that it would not consider a bid for equivalent products unless the bidder submitted sufficient interoperability and performance test reports, 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 Siemens, 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.[69]

162. Siemens 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.

163. Siemens submitted that each of these category 1.2 RVDs 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". Siemens submitted that 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. Siemens submitted that PWGSC is not trained in Siemens products and is not qualified to determine how much time is needed by Siemens to respond to the RVDs.

164. Specifically regarding RVD 783 and RVD 784, Siemens claimed that RVD 783 was issued on Friday, August 13, 2010, and only three full working days elapsed (August 16, 17 and 18, 2010) before the RVD solicitation period closed on Thursday, August 19, 2010. With respect to RVD 874, Siemens

69. Siemens did note that RVD 650 (not at issue in these complaints), which requested Hewlett-Packard products, was awarded to a company offering another brand name of equipment. In his witness statement submitted in relation to *Enterasys PR-2009-132* and incorporated into the current proceedings, Mr. Weedon stated that this occurred because the company, a reseller of both Hewlett-Packard and the other brand name, had obtained additional information that had allowed it to propose the alternate products.

submitted that it was issued on Thursday, August 19, 2010, and only two full working days elapsed (August 20 [Friday] and August 23 [Monday], 2010) before the RVD solicitation period closed on Tuesday, August 24, 2010.

165. Siemens submitted that PWGSC has admitted that it is avoiding tendering RVDs that do not use a brand name, which, it claims, is clearly biased in favour of the companies where brand names were used and discriminates against Siemens.

166. Siemens also submitted that PWGSC had been using the four-day RVD response period and deliberately refusing to answer Siemens' questions to ensure that the brand name product would always win. Siemens stated that incumbent suppliers were provided with additional information to which other bidders were not privy, including some of the information that it had requested during each of the RVD solicitation periods.

167. Siemens argued 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 unique to each network, such as hardware and firmware revision numbers, software versions and configuration commands.

168. Regarding publicly available information, Siemens 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 Siemens to provide proof of equivalence on the basis of those documents in an average of four days per RVD, without precise network information. Siemens submitted that Mr. Perrier's witness statement[70] confirms that these are complex requirements and substantially more than the 59 criteria in the technical specification requirements that PWGSC stated are sufficient and that, therefore, more than four working days and more information is required to establish equivalence.

169. Siemens alleged that PWGSC is therefore 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 . . .", and Article 1013 of *NAFTA*, which, according to Siemens, requires that tender documentation contain all information necessary to permit suppliers to submit responsive bids.

70. Paragraphs 8 and 9 of exhibit 6 to the GIR state as follows:

> 8. 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 of the host network.
> 9. It is my professional opinion that, in the particular circumstances of the RVDs in issue where products were identified by brand name, and having regard to the host networks involved, the use of generic specifications would have created an unacceptable risk of procuring products lacking full compatibility and interoperability with host networks.

PWGSC's Position

170. PWGSC submitted that sufficient information was made available to Siemens to proposed equivalent products to the brand names specified in each RVD. PWGSC recalled that, after a lengthy analysis of this same issue in *Enterasys PR-2009-080*, the Tribunal found that the information provided in RVDs is sufficient.[71]

171. 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 . . . ."

172. PWGSC claimed 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. It argued 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.

173. It further 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 name product.

174. PWGSC argued against Siemens' allegations, to the effect that 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.

175. PWGSC submitted that all of the information required by Siemens to propose equivalent products to the items in the RVDs at issue is publicly available. It submitted that information on the specifications, performance, etc., of competing products is provided by the OEMs as a means of marketing their products. PWGSC noted that Siemens acknowledges this in its complaints by alleging there is actually too much publicly available information.

176. PWGSC submitted that, given that the mandatory performance specifications of the LAN switches in issue are well understood in the industry and publicly available, and that the designation of a particular product provides a convenient point of reference for the industry, all bidders had equal access to information with respect to the procurement. It further submitted that it does not use the TJs to evaluate equivalent bids.

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71. *Enterasys PR-2009-080* at para. 184:

> . . . the Tribunal considers that 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. The Tribunal is of the view that additional information would only have been required had the evaluation of any proposed equivalent products in the solicitations at issue been based on requirements or technical specifications other than those of the identified brand name products.

PWGSC also noted that, in another previous decision, the Tribunal found that, ". . . by providing a brand name, as well as model and serial numbers, companies involved in supplying network equipment should be able to make determinations as to which of their products, if any, would be fully compatible with, interchangeable with and seamlessly interoperable with the items specified in the RVDs." *Re Complaints Filed by NETGEAR, Inc.* (12 December 2008), PR-2008-038 to PR-2008-043 (CITT) at para. 7.

177. PWGSC denied Siemens' allegation 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 noted that the Tribunal found, in *Enterasys PR-2009-080*, that a comparative table and narrative explanations in a separate document were sufficient to demonstrate equivalency and that article 14 does not require a bidder to provide an extensive interoperability and performance test report.[72]

178. PWGSC also noted that, despite Siemens' assertion that it required information regarding operating software versions and configurations, this information was *not* needed to establish equivalence; rather, the functionalities of the incumbent switch and proposed equivalent switch had to be compared. PWGSC submitted that, to establish equivalency, the requirements to be compared between the requested brand name product and the proposed equivalent product would be logically connected to the requirements set out in the relevant category, in the case of these RVDs category 1.2, of Appendix A to Annex A of the NESS RFSO and NESS DISO, which were used to qualify bidders for a standing offer in that particular category.

179. PWGSC submitted that, to be awarded a DISO for category 1.2, bidders were required to propose one switch supporting no greater than 59 mandatory requirements. PWGSC asserted that a comparison between the requested brand name product and the proposed equivalent product of functionalities similar to those considered when qualifying for a DISO would suffice (i.e. the 59 criteria dealing with physical size, redundancy, port density, access speeds and interfaces, performance, standards, IP routing, QoS features, management features and security features).

180. PWGSC argued that neither Siemens nor any of its authorized agents, including West Atlantic Systems, submitted proposals in response to three of the subject RVDs. It 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 Siemens 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. Regarding the two RVDs for which Siemens did submit a bid, PWGSC argued that the record reveals that Siemens had sufficient evidence to prepare and submit a response.

181. PWGSC argued that there was also sufficient time for Siemens to compare the functionalities of the requested brand name products with those of its own products and to prepare a comparative table and narrative explaining how the technical specifications of its proposed equivalent product matched those of the brand name product.

182. PWGSC noted that article B.14 of the NESS RFSO and article 14 provide for four working days as the standard response time to an RVD and that the Tribunal found, in *Enterasys PR-2009-080*, that four days were sufficient.[73] PWGSC submitted that three of the five RVDs in issue, RVD 773, RVD 783 and RVD 785, had bidding periods of at least four working days and that RVD 784 had a bidding period of five days, which included three working days. It noted that West Atlantic Systems was fully able to prepare and submit a proposal in response to RVD 784, which it described as being "compliant". PWGSC submitted that RVD 781 also had a bidding period of five days, including three working days, and that, as with RVD 784, bidders had sufficient time to prepare a response if they intended to participate in the

72. *Enterasys PR-2009-080* at 187.
73. *Ibid.*

solicitation.[74] PWGSC submits that in all solicitations, Siemens was provided sufficient time to perform the basic analysis of equivalency and to provide the documents required by PWGSC.

183. PWGSC noted that Siemens claimed sufficient knowledge of the technical specifications of the brand name equipment specified in each of the RVDs to allege they failed to meet all of the technical specifications for category 1.2 LAN switches. PWGSC submitted that the first enquiry Siemens made during each of the RVD solicitation periods made this allegation, yet, while claiming this knowledge, Siemens continued to allege that it lacked sufficient information and time to identify its own equivalent equipment, if it existed.

Analysis

Adequacy of Information in the RVDs

184. In its disposition of this issue in *Enterasys PR-2008-080*, the Tribunal observed that the complaints were supported by unqualified opinion, rather than established facts or expert opinion. Therefore, when the complaints that form the basis of the present inquiry purported to include expert evidence in support of this ground, the Tribunal was willing to review the issue and hear from the experts. Unfortunately, Siemens' subsequent failure to produce these experts at the hearing has put the Tribunal back to square one.

185. In *Enterasys PR-2008-080*, 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 determination. The Tribunal's interpretation of the requirements imposed by relevant provisions in the context of the RVDs issued under the NMSO is summarized below.

186. 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.

187. Article 1013 of *NAFTA* reads as follows:[75]

> 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.

74. As noted above, Siemens challenged these bidding period calculations.
75. Similar language is found in Article Kbis-06(1) of the *CCFTA*, Article 1704(6) of the *CPFTA* and Article XII(2) of the *AGP*.

188. 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 . . . ."

189. The Tribunal notes that article 14 of the NMSO 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;
>
> 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.

190. 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.

191. PWGSC submitted that the brand name or model number and information publicly available was sufficient in all cases. On the other hand, Siemens 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.[76] Siemens submitted that PWGSC is withholding the information in respect of technical requirements and that this information is necessary for a bidder to demonstrate equivalency.

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

193. In all cases where brand name products were requested, 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.

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76. The Tribunal notes that Siemens' witness, at the hearing held in *Enterasys PR-2009-080*, stated that the information provided by PWGSC amounts to approximately 50 to 60 percent of the information required. See *Enterasys PR-2009-080, Transcript of Public Hearing*, 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, it is reasonable to conclude that this statement remains accurate.

194. Siemens claimed that the questions that it asked to PWGSC during the solicitation period that were designed to allow Siemens to obtain information beyond the minimum generic specifications (i.e. software version and configuration commands of the requested equipment) 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 whether PWGSC would consider changing the solicitation process itself.[77]

195. The Tribunal also notes that, for reasons already discussed, there was no admissible 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.

196. 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 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 Siemens.

197. The Tribunal is confronted with two "non-expert" opposing views: Mr. Perrier, who asserted that each RVD is verified to ensure that it is properly categorized; and Mr. Weedon, who claims that at least one line item of each RVD is miscategorized.

198. 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 attachments to Siemens' complaints, 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.[78]

199. 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.

200. 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.

201. 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 Siemens on the lack of information in order for it to proceed

77. In this regard, see, for example, complaints PR-2010-056 to PR-2010-058, exhibit A at 7-19 and exhibit B at 7-17.
78. Siemens claimed that the winning bidder had received additional information that allowed it to win the contract.

with a bid, in the case of one RVD, that 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.[79]

202. During this inquiry, Siemens made additional submissions and filed evidence in the form of Cisco's 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.

203. The Tribunal notes, however, that Siemens did not attempt to comply with 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.[80] In the Tribunal's opinion, this suggests that Siemens might have wrongly assumed that it was an impossible task to submit a responsive tender.

204. In these circumstances, the Tribunal considers that Siemens 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. Accordingly, the Tribunal is satisfied that PWGSC conducted itself in accordance with Article 1013 of *NAFTA*.

205. As for Siemens' allegation that PWGSC provided incumbent suppliers with additional information to which other bidders were not privy, the Tribunal notes that there is no evidence to demonstrate that such was the case. The Tribunal considers that Article 1008(2) of *NAFTA* requires equal access to information for bidders. However, there is insufficient evidence to establish misconduct or wrongdoing by PWGSC or the client departments in this regard. The Tribunal therefore concludes that this allegation is not valid.

Adequacy of Time

206. Turning to the issue of whether bidders of equivalent products were not provided with enough time to prepare the necessary equivalency reports, the Tribunal notes that 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 . . . ."

207. This issue is intrinsically linked to the issue of availability of information necessary to submit bids. In earlier decisions on this very specific issue, the Tribunal stated that it was 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.[81]

79. *Enterasys PR-2009-080*; *Re Complaints Filed by NETGEAR, Inc.* (10 July 2008), PR-2008-003 to PR-2008-006 (CITT).
80. The Tribunal does note that, regarding the two RVDs that were the basis for the dismissed complaints PR-2010-068 and PR-2010-069, Siemens used such a table in each of its bids.
81. *Enterasys PR-2009-080* at para. 187.

208. The Tribunal stated that it was of the opinion that this provision pertained to post-bid discretionary testing for new equipment that PWGSC may waive in certain circumstances at its discretion. It also stated that the complainants 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.

209. In *Enterasys PR-2009-080*, 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 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.[82] On the basis of that evidence, the Tribunal expressed the view that a 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 essence, this evidence was reiterated during the hearing of this case[83] and Siemens did not provide any evidence that would convince the Tribunal to change it view in this regard.

210. In summary, Siemens 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 and that the bidders therefore required additional time. 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 standard four-day period provided in the NMSO, as was requested by Siemens during the bidding period.

211. However, the Tribunal also heard evidence that led it to believe that the "paper equivalency" process referred to above may not be the end of the equivalency process. According to PWGSC's expert witness, Mr. Lemieux, it appears he would not recommend installing any product, brand name or equivalent, in a client's existing network without conducting laboratory tests.[84] What this means is that even if a bidder passed the "paper equivalency" process, it is highly likely that further laboratory tests would be conducted by a person like Mr. Lemieux before the product would be installed in an existing network. In other words, this evidence suggests that there may also be a *de facto* technical equivalency test. The exact nature of that test is not entirely clear since it has never been performed, but Mr. Lemieux's testimony suggests to the Tribunal it is reasonable to conclude that it would be more stringent than what is required under the "paper equivalency" process.

212. From a practical point of view, this may have consequences potential suppliers that propose an equivalent product. What would happen, for instance, if someone like Mr. Lemieux, after having conducted the *de facto* technical test, recommended to the client department that the product not be installed in the existing network? Would the product be returned to the bidder and the bill unpaid because it was now deemed not to be an equivalent product, or would PWGSC tell the client department that since it passed the "paper equivalency" test, they are stuck with it?[85]

213. Given the circumstances of the present inquiry, the Tribunal is left to wonder what the possible consequences are, of the above questions, on the application and interpretation of the obligation in the trade agreements regarding the issue of "adequacy of time". The Tribunal heard no evidence, expert or otherwise,

82. *Enterasys PR-2009-080*, *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 108, 257-61, 379-83.
83. *Transcript of Public Hearing*, Vol. 2, 30 November 2010, at 222, 244-46.
84. *Ibid.* at 256-59, 269, 300, 301, 303, 305, 307, 314, 324.
85. *Ibid.* at 333-35.

with respect to the question posed above. The purpose of posing those questions is to provide guidance to the parties with regard to what the Tribunal believes are material issues that remain unresolved by this or the previous hearing.

214. Siemens 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 and that the bidders therefore required additional time. 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 standard four-day period provided in the NMSO, as was requested by Siemens during the bidding period.

215. However, the bidding periods for RVD 783 and RVD 784 were less than the four working days specified in the NMSO. PWGSC acknowledges this regarding RVD 784, but claims that it needed to procure the items on a priority basis.[86] The client department had indicated, as early as August 6, 2010, that there was a high priority requirement for the switches at issue, claiming that these particular switches failed at a rate of two per month and that it only had a single spare. Yet the RVD was released on August 19, 2010, the solicitation period closed on August 24, 2010, the contract was awarded September 13, 2010, and delivery, according to the RVD, was to be within 20 calendar days of contract award, or as late as October 3, 2010. The Tribunal fails to understand how, in this time frame, reducing the RVD bidding process by one day was justified.

216. The Tribunal also notes that PWGSC offered no explanation as to why the solicitation period for RVD 783 was limited to two partial and two full working days.

217. Accordingly, PWGSC did not respect the solicitation period of "four (4) working days from the date of RVD issuance" specified in the NMSO with regard to RVD 783 and RVD 784, thereby acting contrary to Article 1012 of *NAFTA*.

Categorization of Goods Under Category 1.2

Siemens' Position

218. Siemens submitted that the RVDs included products from multiple categories despite the terms of article 14, which require that separate RVDs be issued for each applicable category (in this case, category 1.2). Siemens submitted that this is the case because some items in each RVD do not meet all 59 technical specifications listed in Appendix A to Annex A for category 1.2.[87] Siemens characterized these 59 criteria as minimum mandatory technical specifications, which products must meet to be classified under category 1.2. Siemens submitted that some of the RVDs in issue include products from category 1.1, as well as products that have capabilities from other classes and categories, and therefore these RVDs should have been issued as separate requests for proposals outside of the NESS process.

219. Siemens argued that, if it had been provided with the relevant TJs it requested during the RVD bidding periods enquiries phases, it would have been able to point out these miscategorizations to PWGSC.

86. *Ibid.* at 228.
87. Siemens' specific allegations regarding each RVD are found below in the "Individual RVD Analysis" section.

220. Referring to PWGSC's submission that the 59 technical requirements of category 1.2 are sufficient for comparing the requested brand name item and the proposed equivalent item, Siemens submitted that PWGSC's statement contradicts its previous position that categorization is determined by whether proposed equipment meets the "technical definition" (i.e. the general narrative description of the category), not the technical specifications listed after the technical definition.

221. Siemens also relied on documents prepared by Mr. Millar, Mr. Weedon and another employee of Siemens, which, on an RVD-by-RVD basis, purported to identify particular items requested on the deliverables lists of most RVDs that were not compliant with the alleged mandatory technical specifications set out in Appendix A to Annex A of the NMSO for category 1.2.[88] As noted above, however, none of the authors of the reports were qualified to give expert evidence and therefore the Tribunal gives no weight to the opinions expressed in these documents.

PWGSC's Position

222. PWGSC submitted that Siemens' allegations of inappropriately categorizing equipment are based on its misunderstanding of how products are placed on a PPL within a given category and are available for requisition by RVD. It submitted that Siemens wrongly alleges 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. PWGSC submitted that the technical definition of a category is distinct from, and does not encompass, the technical specifications for that category and that the technical specifications of a category are not, as stated by the Tribunal in its determination regarding *Enterasys PR-2009-080*, "an integral part" of the technical definition of that category.

223. PWGSC further submitted that the technical definitions and technical specifications serve different purposes. PWGSC submitted that the technical specifications in Appendix A to Annex A of the NMSO were applicable only for bidders seeking to pre-qualify under the DISO as a prospective supplier of products in a particular category. Bidders were required to propose a product model and/or family of models (depending on the category) that met all the technical specifications for that category. With respect to category 1.2, bidders were required to provide only one chassis-based device that complied with all 59 technical specifications. PWGSC submitted that the obligation to propose a single switch that fully complied with the 59 technical specifications ensured that only bidders with good, reliable network equipment would receive a standing offer for category 1.2. PWGSC submitted that the technical definition serves a different purpose. 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." In other words, for the purposes of the RVD, it is the technical definition that matters, not the technical specifications.

224. PWGSC further submitted in this regard that a basic principle 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 different terms have different meanings. It noted that in *Tercon Contractors Ltd.*[89] a majority of the Supreme Court of Canada rejected a claim that different terms in solicitation documents were used to express the same meaning.

88. Exhibit 1 of complaint regarding PR-2010-047 to PR-2010-050 and exhibit 1 of complaint regarding PR-2010-056 to PR-2010-058.

89. *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 75.

225. 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 or access speeds). PWGSC submitted that, as an example, an NMSO holder qualified in category 1.2 may offer for sale all of the devices in its PPL that provide both Layer 2 LAN switching and Layer 3 LAN IP routing and may include hardware and software modules, blades, etc., with functionality up to Layer 7.

226. PWGSC submitted that, if it were otherwise, the inventory of category 1.2 LAN switches on bidders' PPLs would be limited to large and expensive network appliances that did not include stand-alone chassis-based switches without network modules or an individual network module as, alone, either does not support all technical specifications of category 1.2. It claimed that this would be contrary to the purpose of the NESS standing offer, which is to allow user departments "to upgrade, replace and augment the existing network infrastructures" and not just large enterprise chassis-based switches.

227. PWGSC also submitted that Siemens' category 1.2 PPL includes equipment that does not meet all technical specifications of the category.

Analysis

228. As the Tribunal has stated in the past, the trade agreements, including Article 1013 of *NAFTA*, require that a government institution be governed by the terms set out in the tender documentation for any particular solicitation.[90]

229. 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.

230. 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.

231. 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.
>
> . . .

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

> **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 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]

232. 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. Siemens alleged that all of the RVDs at issue contained requirements for at least one item 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.

233. In response, PWGSC submitted that Siemens 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.

234. Thus, as indicated in the statement of reasons for its determination in *Enterasys PR-2009-080*, 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.

235. Should the Tribunal accept PWGSC's interpretation on this threshold issue, it would not have to further examine most of Siemens' 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 cases before the Tribunal are limited to category 1.2.

236. 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 *Enterasys PR-2009-080*. 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.

237. 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***

238. 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).[91]
>
> [Emphasis added]

239. 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*.[92]
>
> [Emphasis added]

240. 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.

241. 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.

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

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.

242. In support of PWGSC's position, the Tribunal heard testimony from PWGSC's witness, Mr. Oxner, during which he described the manner that the technical specifications were drafted as well as their intended function within the NESS construct:

> For [category 1.1 and 1.2] what we established was a technical definition around that category to simply describe what that product was all about. Attached to that then -- and this is all done as means of evaluating potential offers -- we established the number of technical requirements against each of those categories.
>
> So we had a technical definition -- roughly this is what is expected that would go into this category -- and in addition to that we had many of these mandatory technical specifications that you are hearing about today. You can recognize of course by virtue of the discussion that is taking place that there are many products that are available by offer[or]. When this was posted up on MERX [Canada's electronic tendering service], the idea behind the evaluation -- and it was clearly explained within that -- is that they had to offer up one of their Cadillac products, if you want to call it that, so that it can meet these stringent technical requirements that we had within the Annex A Appendix A.
>
> The idea here was if an offer[or] can could demonstrate to us that they can meet all of these technical requirements then obviously they had a quality product that could beat almost any requirement that the Government of Canada would have in that particular category. This was one of the only ways we could do this because at the end of the day we had a clause that said if you can meet all these stringent requirements, they clearly had to demonstrate those capabilities to us. They either had to do that with technical spec[ification] sheets that were available to the public or lab test results or whatever the case, it was laid out in the technical evaluation criteria.
>
> ...

> So if you had a product that could meet all these technical requirements and if it also met the typical configuration from a technical perspective as well as in the financial parameters, then you were accepted as a standing offer within that particular category. Standing offers were issued for particular categories.
>
> Now at the end of the day if you were successful as an offer you had a standing offer that was given to you for say Category 1.1, there was a clause in there that all of your products that fall within that technical definition -- and that's clearly stated within article I think A-14 -- that all of your products would then be accepted that are on your PPL by the Government of Canada for procurement. Certainly not every one of our customers require the Cadillac product; they may require something less, but this is the only way we could insure that we had a good catalogue of products to offer our customers. It was never intended that the technical specifications would be used for the evaluation of every RVD that came through. Certainly they are a bench mark. When you are putting together generic specifications and that type of thing, but it is not what our customers always required when we put this together.[93]

243. Mr. Oxner also confirmed that a LAN switch that falls within the technical definition of one category may possess a technical specification listed for another category.[94]

244. In view of the provisions of Appendix A to Annex A of the NMSO, and despite Mr Oxner's explanation, the Tribunal is unable to accept PWGSC's interpretation of the NMSO, which limits the technical definition of each category to the general description.

245. First, it is clear from the language that the general description of each 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 1.1, the general description concludes with the following words before listing the mandatory requirements: "Propose one L2 switch model compliant with requirements below . . ." and, similarly, the general description for category 1.2 concludes by stating the following: "Switch requirements consist of . . . ."

246. 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.

247. Mr. Oxner testified that the technical specifications represented the "Cadillac" product, and that not every one of the client departments would require such a product. According to Mr. Oxner, the client departments may require something less, but that this solicitation strategy was the only way to ensure that PWGSC had a good catalogue of products to offer the client departments.

248. The Tribunal, without the benefit of expert advice and explanation as to what the following criteria represent, notes that, in order to qualify, bidders had to meet eight "minimum" requirements in category 1.2: 3 (a), (b) and (c) as well as 5 (a), (b), (c), (d) and (e). This appears to imply that, in fact, bidders had to exceed the standards of the so-called "Cadillac" product, as opposed to them representing a maximum capability.

93. *Transcript of Public Hearing*, Vol. 2, 30 November 2010, at 250-52.
94. GIR, exhibit 5, affidavit of Mr. Oxner at para. 31.

249. In addition, the Tribunal notes no language in the NMSO indicating that the technical specifications, which bidders had to meet or exceed to be issued a standing offer, would represent the capability ceiling of that category the day after the standing offers were issued.

250. It also appears that bidders were requested to prove their abilities in category 1.2 by bidding a product that would typically never be requested. The Tribunal does not question the good faith of Mr. Oxner, or that this may have been the intent when the RFSO was originally drafted. However, PWGSC did not provide any contemporaneous evidence to support Mr Oxner's statements nor does the wording of the NMSO support such an interpretation.

251. 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.

252. This conclusion is reinforced by examples that are used in the definition of the concept of "non-compliance" quoted in the NMSO, i.e. "less than mandatory number of ports; less than mandatory communication speed; less than mandatory expansion slots; cannot support mandatory protocol(s)."

253. 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.

254. Therefore, the Tribunal agrees with Siemens 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

255. Before it examines Siemens' specific allegations of product miscategorization and whether 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, the Tribunal notes that, as the complainant, Siemens bears the burden of demonstrating that products were mischaracterized. Yet most of its allegations rest solely on assertions and unqualified opinions to which, for the reasons already discussed, the Tribunal ascribes no weight. Consequently, the Tribunal considered whether there was other evidence on the record to corroborate Siemens' assertions.

256. Siemens provided various data sheets and publicly available lists of specifications which, in its view, described the features and functionalities of the brand name products identified in the subject RVDs.[95] However, without the assistance of an expert who could decipher this large amount of technical information in order to determine whether any given item described in these data sheets complied with the mandatory

95. Complaints PR-2010-047 to PR-2010-050, exhibits EE and FF and complaints PR-2010-056 to PR-2010-058, exhibits EE and FF.

requirements of category 1.2, the Tribunal was unable to determine whether in fact certain items in the RVDs are outside the scope of that category. Ultimately, the Tribunal is left with the reassurance from Mr. Perrier who testified that RVDs are reviewed to ensure that they are properly categorized.[96]

File No. PR-2010-049—RVD 773—Category 1.2

257. Siemens alleged that item 7 of RVD 773 was a Cisco seven-slot chassis but that the RVD did not indicate in what manner items 1 to 6 and 8 to 10 were going to be installed or configured. It speculated that, given the lack of indication of where the various modules were to be installed in the chassis, some of the modules could either be for new, or existing, chassis. Mr. Weedon testified that, in his view, item 6 (the operating system software) did not meet one of the minimum category 1.2 mandatory requirements (item 7[c] of the specifications listed above).[97] The Tribunal notes, however, that Mr. Weedon's opinions are not admissible. Thus, the Tribunal has been provided with conflicting non-expert points of view, those of Mr. Weedon and Mr Perrier. As a result, Siemens has failed to demonstrate on the balance of probabilities that any item in RVD 773 was miscategorized.

PR-2010-050—RVD 781—Category 1.2

258. Siemens submitted that items 3 and 4 of RVD 781 did not meet the requirement of a Layer 2-3 chassis-based LAN switch product because they did not have modular chassis and were, therefore, outside of the scope of category 1.2. It also alleged that items 3 and 4 did not meet the mandatory minimum port density or the necessary layer 3 IP routing requirements. Siemens submitted that item 1 of the RVD did not meet the minimum category 1.2 mandatory switching fabric requirements and that it is a module for which access speeds and interfaces are only available under category 2.2. However, Siemens did not substantiate these allegations. Therefore, the Tribunal cannot conclude that any item in RVD 781 was in fact miscategorized.

PR-2010-056—RVD 783—Category 1.2

259. Siemens submitted that item 4 of the RVD did not meet the requirement of a Layer 2-3 chassis-based LAN switch product because it did not have a modular chassis and was, therefore, outside of the scope of category 1.2. It also alleged that item 4 did not meet the category 1.2 mandatory minimum port density requirements. However, Siemens did not substantiate these allegations. Therefore, the Tribunal cannot conclude that any item in RVD 783 was in fact miscategorized.

PR-2010-057—RVD 784—Category 1.2

260. Siemens submitted that item 4 of the RVD did not meet the requirement of a Layer 2-3 chassis-based LAN switch product because it did not have a modular chassis and was, therefore, outside of the scope of category 1.2. It also alleged that item 4 did not meet the mandatory minimum port density requirements and that it did not meet some of the minimum category 1.2 mandatory requirements (item 7[c] and [g] of the specifications listed above) and the RVD was, therefore, outside of the scope of category 1.2. Siemens also alleged that item 1 did not support the category 1.2 minimum forwarding rate found in section 5 of the above-noted specifications. Finally, Siemens submitted that items 1, 2, 3, 5, 6, 7 and 8 would not work without a chassis that was not found in the RVD. Given this, it argued that the RVD does not qualify as a category 1.2 switch. However, Siemens did not substantiate these allegations. Therefore, the Tribunal cannot conclude that any item in RVD 784 was in fact miscategorized.

96. *Transcript of Public Hearing*, Vol. 2, 30 November 2010, at 232.
97. *Transcript of Public Hearing*, Vol. 1, 29 November 2010, at 108.

PR-2010-058—RVD 785—Category 1.2

261. Siemens submitted that none of the items in the RVD meet the minimum category 1.2 specifications or are a layer 2-3 chassis-based Ethernet LAN switch. Specifically, it argued that none of the items meet the category 1.2 minimum port density requirements; that items 3, 4 and 5 did not meet the Layer 3 requirements regarding IP routing; that items 3, 4 and 5 did not support the minimum category 1.2 switching fabric requirements; and that items 10, 11, 12. 13, 14, 15 and 16 did not meet the minimum category 1.2 forwarding rates. However, Siemens did not substantiate these allegations. Therefore, the Tribunal cannot conclude that any item in RVD 785 was in fact miscategorized.

Summary

262. The Tribunal is unable to accept Siemens' claims of product miscategorization regarding any of the RVDs in issue.

REMEDY AND COSTS

Siemens' Position

263. Siemens requested that West Atlantic Systems, as the representative agent of Siemens, be compensated for its lost profits regarding all five RVDs. This request was premised on the technical requirements being described on the basis of generic specifications or Siemens having had the additional information and time it alleged were necessary for it to make fully responsive bids. According to Siemens, it would have been awarded the contracts as its prices were lower.[98]

264. Siemens submitted that, if the Tribunal were instead to order that the RVDs be re-tendered, it 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.

265. Siemens 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. Siemens 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.

266. Given Siemens' belief that PWGSC has demonstrated that it will continue to misuse article 14 if allowed to do so, Siemens requested that the Tribunal rule that the article 14 "Equivalents" clause be removed from the NESS standing offer.

98. Exhibit 1 of complaint regarding PR-2010-047 to PR-2010-050 and exhibit 1 of complaint regarding PR-2010-056 to PR-2010-058. The Tribunal does note that, regarding File Nos. PR-2010-056 to PR-2010-058, Siemens claimed the following: "... [Siemens] switches would have been lower priced than Cisco and Nortel, and in the case of RVD757 and RVD761 where the Cisco brand was used, and RVD758(2) where the Nortel brand was used, [Siemens] would have won all RVD solicitations that are the subject of these complaints." The RVD numbers listed refer to RVDs at issue in *Enterasys PR-2010-004*, but the Tribunal assumes that Siemens meant in reference to the RVDs at issue in the current complaints.

267. Siemens 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 Siemens.

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

PWGSC's Position

269. PWGSC submitted that the subject complaints are without merit and should be dismissed. In the event the complaints are dismissed, it requested its costs and, in the event that success is divided between the parties, no party should be awarded costs.

Remedy

270. Given the similarities between the Tribunal's findings and determination in these complaints and its determination in *Enterasys PR-2009-080*, 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.

271. 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.

272. 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. However, the Tribunal does not consider that PWGSC was acting in bad faith or that Siemens itself was targeted or prejudiced by PWGSC's actions.

273. The Tribunal notes that, despite its conclusion that PWGSC failed to comply with Article 1007(3) of *NAFTA* in certain instances, it found that Siemens did not establish that additional information from PWGSC was required in order to permit bidders to submit responsive tenders.

274. In the Tribunal's opinion, this means that PWGSC's actions did not have the effect of ensuring that no compliant equivalent bid could be submitted. In other words, the Tribunal considers that PWGSC's action did not preclude Siemens from submitting a bid and, possibly, being awarded a contract. Therefore, there is no basis to recommend compensation for any lost opportunity to bid or lost profits.

275. On the basis of the evidence before it, particularly in view of Siemens' decision to either bid products not on its PPL or to not bid at all, the Tribunal is not in a position to conclude that Siemens could have been awarded a contract in any circumstances in the cases of these RVDs. As such, the Tribunal cannot assess the likelihood that Siemens could even have been successful. Therefore, the degree to which Siemens was prejudiced could have been minimal or even non-existent.

276. With respect to other remedies claimed by Siemens, 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 Siemens. In addition, given its view that 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

277. Section 30.16 of the *CITT Act* permits the Tribunal to award costs to complainants or government institutions. As a general principle, the Tribunal will not award costs where success is divided, unless some factor dictates a different result.[99] Where a complaint is only partially valid, the Tribunal may advise that the parties bear their own costs.[100]

278. Although conscious that it has awarded costs to Siemens, known at that time as Enterasys, in previous similar circumstances (i.e. where its complaints were found to be valid in part), the Tribunal is of the opinion that it would be inappropriate to do so this time. For the reasons noted earlier, this inquiry was unnecessarily complicated and expensive as a result of Siemens' unacceptable conduct during these proceedings, namely, its failure to produce Mr. Millar and Dr. Ionescu as witnesses at the hearing, despite the expectations of the Tribunal and PWGSC.

279. Therefore, each party should assume its own costs in this inquiry.

DETERMINATION OF THE TRIBUNAL

280. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaints are valid in part. Each party will bear its own costs in this matter.

Serge Fréchette
Serge Fréchette
Presiding Member

Stephen A. Leach
Stephen A. Leach
Member

Jason W. Downey
Jason W. Downey
Member

99. *Canada (Attorney General) v Georgian College of Applied Arts and Technology*, 2004 FCA 285.
100. *Prudential Relocation Canada Ltd.* (30 July 2003), PR-2002-070 (CITT).