



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File Nos. PR-2010-053 to
PR-2010-055

Enterasys Networks of Canada
Ltd.

*Decision made
Wednesday, September 1, 2010*

*Decision and reasons issued
Tuesday, September 21, 2010*

IN THE MATTER OF three complaints filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47

BY

ENTERASYS NETWORKS OF CANADA LTD.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

STATEMENT OF REASONS

1. Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal (the Tribunal) concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

2. The complaints relate to procurements (Solicitation Nos. EN869-104353/A [RVD 757], 31026-090066/B [RVD 758(2)] and 5Z011-100230/A [RVD 761])³ by the Department of Public Works and Government Services (PWGSC) on behalf of various government departments for the supply of networking equipment. All RVDs were issued under National Master Standing Offer (NMSO) No. EN578-030742/000/EW.

3. Enterasys Networks of Canada Ltd. (Enterasys) alleges that PWGSC (1) did not allow the required four-day bidding period and did not provide any evidence to demonstrate that the RVDs had to be “rushed” and therefore required a shorter bidding period; (2) did not confirm that the installed base of equipment was procured through a competitive procurement process; (3) favoured Cisco Systems Canada Co. (Cisco) by providing client departments with sample technical justifications (TJs) which refer to Cisco products instead of taking an unbiased approach; (4) failed to disclose crucial evaluation criteria information by not providing the TJs to Enterasys; and (5) did not forward questions posed by Enterasys during the “Enquiries” process to the client departments.

4. The Tribunal notes that it is already conducting an inquiry into complaints that Enterasys filed previously relating to the same three RVDs (File Nos. PR-2010-004 to PR-2010-006).⁴ According to Enterasys, the aforementioned allegations constitute new grounds of complaint relating to these procurements. However, the Tribunal is of the view that the substance of the latest grounds of complaint is substantially similar to that of the earlier grounds of complaint. In addition to other grounds unrelated to the alleged new grounds of complaint, the Tribunal accepted for inquiry the following grounds of complaint in the previous complaint cases:

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

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

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

3. The three RVDs in question were each considered to be separate procurement processes and were assigned separate file numbers (i.e. PR-2010-053 to PR-2010-055).

4. Enterasys filed the initial complaints on April 28, 2010.

5. Furthermore, even if these grounds of complaint could be considered substantially new, they are time-barred. Section 6 of the *Regulations* provides that a complainant has 10 working days from the date on which it became aware, or reasonably should have become aware, of its ground of complaint to file a complaint with the Tribunal or, alternatively, to object to the government institution and then file a complaint with the Tribunal within 10 working days from the date on which the government institution denies relief. Enterasys claims to have made an objection to the Tribunal on July 28, 2010, and received a denial of relief from PWGSC on August 11, 2010. If so, then the complaint, which was filed with the Tribunal on August 25, 2010, is timely. However, the Tribunal finds that the objection was not made to the proper government institution on time and that the complaint therefore needed to be filed with the Tribunal at an earlier date.

6. The alleged objection of July 28, 2010, was made by Enterasys to the Tribunal in the course of separate proceedings between Enterasys and PWGSC. The alleged objection took the form of a letter regarding the contents of documents that PWGSC provided in response to a Tribunal production order dated May 28, 2010. Enterasys claims that this letter resulted in a request by the Tribunal to PWGSC and that PWGSC's response to the Tribunal on August 11, 2010, constituted a denial of relief. The letter of July 28, 2010, however, is not a valid objection. It relates to PWGSC's alleged failure to comply with the Tribunal's order for the production of documents and with section 46 of the *CITT Act* regarding the designation of confidential information in the course of the inquiry in File Nos. PR-2010-004 to PR-2010-006. The letter does not raise any issues or grievances with the procurement processes at issue *per se*. Yet, as a matter of law, an objection must be sufficiently precise in identifying those aspects of the procurement process with which the objector takes issue. In *Cougar Aviation Ltd. v. Canada (Minister of Public Works and Government Services)*,⁵ the Federal Court of Appeal confirmed a finding of the Tribunal that a complainant's letter to PWGSC could only be considered an objection to those aspects of the procurement process to which it expressly referred.

7. Even if the letter of July 28, 2010, could be considered a valid objection, it was not addressed to the government institution that issued the solicitation documents, that is, PWGSC.

8. In addition to there being no timely objection to PWGSC, the complaint to the Tribunal had to be filed within 10 working days from the date when Enterasys knew or reasonably should have known of the grounds of complaint. Regarding the first ground of complaint, the Tribunal considers that Enterasys was aware of the lengths of the bidding periods at the time of the solicitations, i.e. in April 2010. Regarding the second, fourth and fifth grounds of complaint, the Tribunal considers that Enterasys was aware of the correspondence between PWGSC and the client departments on June 11, 2010, when PWGSC filed the documents in response to the Tribunal's May 28, 2010, order. Having only filed the complaint on August 25, 2010, well in excess of 10 working days, all these grounds of complaint are late.

9. With respect to the third ground of complaint, the Tribunal finds no reasonable indication pursuant to paragraph 7(1)(c) of the *Regulations* that the procurement has not been conducted in accordance with Chapter Ten of the *North American Free Trade Agreement*,⁶ Chapter Five of the *Agreement on Internal Trade*,⁷ the *Agreement on Government Procurement*,⁸ Chapter Kbis of the *Canada-Chile Free Trade*

5. 2000 CanLII 16572 (F.C.A.).

6. *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).

7. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.

8. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

*Agreement*⁹ or Chapter 14 of the *Canada-Peru Free Trade Agreement*.¹⁰ There is no indication that PWGSC provided the client department with any model TJ in either RVD 757 or 758(2). With respect to RVD 761, while PWGSC did provide a model TJ to the client department that refers specifically to Cisco equipment in the “Overall Requirement” section of the model TJ, the model TJ was sent to the client department under cover of an e-mail, which states the following:

In order to process your request, listing your equipment, we request a solid Technical Justification for your category 1.2 in the RVD process

. . .

Your justification should *include the technical requirements of the equipment you are looking to purchase* to ensure proper validation of proposed equivalent equipment. The Technical Justification is only actually used if there is an equivalent bid.

[Emphasis added]

The “Technical Requirements” section of the model TJ does not contain any reference to Cisco or any other brand name equipment.

10. Accordingly, the Tribunal finds that Enterasys’ grounds of complaint—to the extent that they could be considered novel and not *res judicata*—were either filed outside the time limits prescribed by section 6 of the *Regulations* or were not in accordance with the trade agreements as directed by paragraph 7(1)(c) of the *Regulations*. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaints and considers the matter closed.

DECISION

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

Serge Fréchette
Serge Fréchette
Presiding Member

9. *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). Chapter *Kbis*, entitled “Government Procurement”, came into effect on September 5, 2008.

10. *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).