



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2012-006

Secure Computing LLC

v.

Department of Public Works and
Government Services

*Determination and reasons issued
Tuesday, October 23, 2012*

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IN THE MATTER OF a complaint filed by Secure Computing LLC 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 complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

SECURE COMPUTING LLC

Complainant

AND

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

**Government
Institution**

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the complaint is not valid. Each party will bear its own costs in this matter.

Serge Fréchette
Serge Fréchette
Presiding Member

Dominique Laporte
Dominique Laporte
Secretary

Tribunal Member: Serge Fréchette, Presiding Member

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Complainant: Secure Computing LLC

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STATEMENT OF REASONS

1. On June 15, 2012, Secure Computing LLC (Secure Computing) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.¹ The complaint relates to a procurement (Solicitation No. W8474-126119/B) by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for the provision of networking equipment.

2. Secure Computing alleged that the contract was improperly awarded to a bidder that offered products that did not comply with the mandatory requirements of the solicitation. As a remedy, Secure Computing requested that PWGSC cancel the contract and award it to the next lowest compliant bidder. Secure Computing also requested that an order postponing the award of the contract be issued.

3. This is the third complaint filed with the Tribunal by Secure Computing concerning this procurement process and including the same allegation. The first complaint was not accepted for inquiry, since the Tribunal found that it had been filed prematurely.² The second complaint filed with the Tribunal on April 4, 2012, within the prescribed time limits, was also not accepted for inquiry, as the Tribunal found that the evidence did not disclose a reasonable indication that the procurement had not been conducted in accordance with the relevant trade agreements.³

4. Secure Computing filed this third complaint with the Tribunal on the grounds that it found new information and evidence, which it could not have discovered before, that allegedly established that DND accepted products that were not compliant with the requirements of the solicitation. Further to a telephone conversation with the Secretary of the Tribunal on June 14, 2012, Secure Computing requested that the documents from the two previous complaints, File Nos. PR-2011-062 and PR-2012-001, be incorporated in the present complaint.

5. On June 22, 2012, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.⁴ The Tribunal determined that Secure Computing was not estopped from bringing this complaint by the doctrine of *res judicata*.⁵ In the Tribunal's opinion, the exception to the doctrine of *res judicata* concerning the discovery of new evidence that could not, by reasonable diligence, have been produced in the first litigation involving the same issue and the same parties applies in the present circumstances.

6. As the evidence in the complaint indicated that the contract had already been awarded and the goods had already been delivered, the Tribunal did not issue a postponement of award of contract order. The information and documents from the two previous complaints concerning this matter were placed on the administrative record. On July 13, 2012, PWGSC requested an extension of time to file the Government Institution Report (GIR). The Tribunal granted the extension.⁶ On August 8, 2012, PWGSC filed a GIR

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

2. *Re Complaint Filed by Secure Computing LLC* (29 March 2012), PR-2011-062 (CITT).

3. *Re Complaint Filed by Secure Computing LLC* (11 April 2012), PR-2012-001 (CITT).

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

5. Pursuant to that doctrine, where a final judicial decision has been pronounced, a party is estopped from disputing the merits of the decision in a re-litigation before the same court.

6. As a result, pursuant to paragraph 12(c) of the *Regulations*, the Tribunal issued its findings in respect of the complaint within 135 days after the filing of the complaint.

with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁷ On August 15, 2012, Secure Computing filed its comments on the GIR.

7. Given that there was sufficient information on the record to determine the validity of the complaint, the Tribunal decided that a hearing was not required and disposed of the complaint on the basis of the written information on the record.

PROCUREMENT PROCESS

8. On March 5, 2012, the solicitation was posted on MERX.⁸ The solicitation superseded a previous procurement (Solicitation No. W8474-126119/A) dated February 23, 2012, for the provision of the same equipment, which was cancelled. The deadline for the receipt of bids was March 15, 2012.

9. The solicitation contained the following mandatory criteria:

EVALUATION AND SELECTION METHODOLOGY: (Mandatory)

During any steps of the evaluation, if a mandatory requirement is not complied with, the [Request for Volume Discount (RVD)] response will be deemed **non-compliant** and will not receive further consideration. A RVD response will be deemed **non-compliant** if it is not supported by proper and adequate information detailing how the response complies with the mandatory requirements.

The following steps will be employed in evaluating the RVD responses received. The evaluation process is subdivided into the following steps:

Step 1: Technical Evaluation - Mandatory Technical Criteria

Each RVD response bid will be reviewed to determine whether it meets the mandatory requirements of the bid solicitation (See Annex B - Technical Requirement for RVD 1082 Form).

Step 2: Evaluation of Financial Bid

The Total Bid Evaluation Value of the RVD response will be based on the sum of all total prices for the deliverables specified in Annex "A", GST/HST extra.

Step 3: Basis of Selection

The lowest compliant bidder who has successfully passed the evaluation will be recommended for award.

...

7. S.O.R./91-499.

8. Canada's electronic tendering service.

ANNEX "B"

TECHNICAL REQUIREMENT FOR RVD 1082**Instructions to Bidders:**

- 1) All of the proposed products must meet the technical definition in the National Master Standing Offer (NMSO) for Category 6.4.
- 2) For each additional requirements listed in column A below, the bidders must indicate a response, which must consist of one of the following two choices:
 - **Comply:** Where the proposed product complies with the requirement in all respects. With the exception of the technical substantiation referred in columns C, D and E herein, no further explanation is necessary.
 - **Do Not Comply:** Where the proposed product does not comply with the requirement in all respects. Failure to comply with a mandatory requirement will result in the proposal being declared non-compliant.
- 3) The word "Yes" in the column C means that the bidders must provide a technical substantiation for the requirement listed in column A. The technical substantiation may take the form a technical brochure, technical data sheet, manual or any other document providing evidence that proposed product meet requirement.

| A Technical Requirements | B Statement of Compliance | C Bidders must complete columns D and E and provide Substantiation | D Mandatory requirements that requires substantiation by the bidder | E Reference to additional Substantiating Materials Included in Bid |
|--|---------------------------------|---|--|---|
| SSL Proxy Configuration | | | | |
| Must not exceed 2U | | YES | | |
| Must be rack-mountable | | YES | | |
| Must include 6GB of RAM | | YES | | |
| Must include 2, 10/100/1000 copper ports | | YES | | |
| Must support RAID1 | | YES | | |
| Must include 6 300GB SAS hard drives | | YES | | |
| ... | | | | |

10. On March 14, 2012, Secure Technologies International Inc. submitted a proposal in response to the solicitation on behalf of Secure Computing.⁹ On March 22, 2012, PWGSC advised Secure Computing's agent that, although Secure Computing's bid was technically compliant, it was not the winning bidder, as it was not the lowest bidder. In the same e-mail, PWGSC also informed Secure Computing's agent that a contract had been awarded to another bidder, Conexsys Communications Ltd. (Conexsys).

11. On March 26, 2012, Secure Computing made a formal objection regarding the results of the evaluation of the proposals in an e-mail to PWGSC. Secure Computing alleged that the solution proposed by the winning bidder did not meet the mandatory technical requirements of the solicitation and requested that a contract not be awarded until a full investigation into the matter was completed.

12. Secure Computing's specific concerns were that the solution proposed by the winning bidder did not meet the requirements that the requested equipment (SSL Proxy Configuration) (i) not exceed 2U and (ii) include six 300 GB SAS hard drives. According to Secure Computing, the manufacturer of the equipment proposed by the winning bidder is not capable of supplying a solution that is compliant with these mandatory technical requirements.

13. On March 29, 2012, PWGSC responded to the objection in a letter that was sent to Secure Technologies International Inc., which, as noted above, was Secure Computing's duly authorized agent for the purposes of this solicitation and the company that submitted a proposal on its behalf. In that letter, PWGSC advised that the technical evaluation team had reviewed Secure Computing's concerns and confirmed the following:

- the technical documentation submitted with the winning bidder's RVD response clearly demonstrated that the device proposed did not exceed 2U;
- the technical documentation submitted by the winning bidder also clearly demonstrated that the device proposed included a total of six 300 GB SAS hard drives, as required by Annex B of the RVD; and
- all the products proposed by the winning bidder were identical to the ones that appeared on the approved published price list for this offeror, as required by the NESS NMSO.

14. Given that the technical evaluation team confirmed that the equipment proposed by the winning bidder complied in all respects with the relevant technical requirements, PWGSC also indicated that it was maintaining its decision to award the contract to Conexsys.

15. On April 24, 2012, Secure Computing made a request pursuant to the *Access to Information Act*¹⁰ for a detailed list of the deliverables under the contract that was awarded to Conexsys. On May 15, 2012, Secure Computing was informed that an extension of up to an additional 90 days before a response can be provided applied to its access to information request.

16. On June 6, 2012, while it was still waiting for a reply to its access to information request, Secure Computing met with DND, the end-user department that received the goods from Conexsys, and was

9. The solicitation is an RVD for the supply of networking equipment by PWGSC under Networking Equipment Support Services (NESS) National Master Standing Offer (NMSO) No. EN578-030742/000/EW. Under this procurement process, NMSO holders (offerors) can have bids submitted on their behalf by authorized agents. According to the information provided with the complaint, Secure Computing is an NMSO holder and Secure Technologies International Inc. is its authorized agent.

10. R.S.C. 1985, c. A-1.

provided with a copy of the packing slip of the goods that DND received pursuant to the contract that was awarded upon the completion of the procurement process, as well as physical access to the equipment that was delivered. Pictures of some of this equipment were also provided to Secure Computing at that time.

17. On June 15, 2012, Secure Computing filed the present complaint and provided the Tribunal with this new information and evidence. It alleged that the evidence that it obtained on June 6, 2012, demonstrated that, as it argued in its previous complaints, the goods delivered to DND were in fact non-compliant with the mandatory technical requirements.

18. Specifically, it submitted that there was now clear evidence that the goods delivered to DND were in fact non-compliant with the mandatory technical requirements, as, on their face, the photographs taken on site show that Conexsys delivered 10 items of networking equipment known as the Websense v10000 G2 appliances, that each has a total of four hard drives, comprised of two 600GB and two 146 GB SAS hard drives, for a total of 1.492TB of hard disk space per appliance, whereas the requirement in Annex “B” of the solicitation clearly states that each appliance “[m]ust include 6 300GB SAS hard drives”, for a total of 1.8TB hard disk space per appliance.

POSITIONS OF PARTIES

PWGSC

19. In the GIR, PWGSC submitted that the procurement process was conducted in conformity with the applicable trade agreements, as it evaluated all proposals, as submitted at bid closing, in full accordance with the terms of the solicitation documents. According to PWGSC, the decision to award the contract to Conexsys was based on the fact that its bid was fully compliant with all the solicitation requirements and represented the best value for the Crown at the time of the evaluation of the proposals.

20. Regarding the allegation that Conexsys’ products exceeded 2U, PWGSC submitted that the requirement established the maximum thickness of the proposed units. With respect to this type of networking equipment, the size is measured in “U”, with a “U” equating to 4.445 cm in thickness. Therefore, in this solicitation, to be compliant, it was required that each proposed unit measure no more than 8.89 cm in thickness. According to PWGSC, further to the receipt of this complaint, an investigation was initiated, which revealed that the 10 units delivered by Conexsys met the size 2U requirement.

21. With respect to Secure Computing’s allegation that Conexsys’ bid did not meet the mandatory requirement of including “6 300GB SAS hard drives”, PWGSC submitted that Conexsys’ bid indicated that it would add two 300GB SAS hard drives to the standard configuration of four hard drives of its products, at no additional cost. As a result, PWGSC submitted that Conexsys’ bid was compliant on its face and that it complied with its obligations under the tender documentation and the applicable trade agreements in its evaluation of the proposals.

22. However, PWGSC conceded that the units delivered did not meet the requirement of having “6 300GB SAS hard drives” for each unit. PWGSC submitted that, although each of the 10 units that were delivered had six slots, in which hard drives could be inserted, all the units as delivered were only equipped with four hard drives and two empty slots. PWGSC further submitted that, having become aware that the products, as delivered by Conexsys, did not meet the mandatory requirements of the solicitation documents and of the contract, as administrator of the contract, it would be contacting Conexsys to put it on notice that it has not delivered products that meet the terms of the contract. PWGSC submitted that it would require Conexsys to remedy this breach of contract by supplying compliant products, as required.

23. PWGSC submitted that, as the allegations contained in the complaint relate to matters that fall under contract administration, an area which is beyond the Tribunal's jurisdiction, and given that PWGSC has advised the Tribunal that it intends to enforce the terms of the contract and require Conexsys to deliver compliant products that meet all the requirements of the solicitation documents and of the contract, the Tribunal ought to dismiss this complaint.

24. PWGSC also submitted that each party should bear its own costs.

Secure Computing

25. Secure Computing alleged that the solution proposed by the winning bidder did not meet the mandatory technical requirements of the solicitation and requested that a contract not be awarded until a full investigation into the matter was completed. Secure Computing submitted that, when it was notified on March 22, 2012, that its bid was not chosen for Solicitation No. W8474-126119/B, it did a search on the Internet and, according to the information available on the Websense Web site, Conexsys should not have been awarded the contract, as Websense does not manufacture or sell equipment that meets the following mandatory technical requirements:

- must not exceed 2U; and
- must include 6 300GB SAS hard drives.

26. Secure Computing submitted that there is clear evidence that PWGSC and DND accepted products that were not compliant with the solicitation requirements. This evidence includes a copy of the packing slip of the goods that DND received from Conexsys for this RVD, as well as several photographs of the goods that were delivered. According to Secure Computing, these photographs further justify its original complaint that the goods delivered to DND for RVD 1082-1 were in fact non-compliant with the mandatory technical requirements, as they demonstrate that Conexsys delivered 10 Websense v10000 G2 appliances which do not have the requisite SAS hard drives.

27. In response to the GIR, Secure Computing submitted that PWGSC admitted that the products delivered by Conexsys on March 30, 2012, were not compliant, as they only included four hard drives instead of the required six hard drives.¹¹

28. According to Secure Computing, PWGSC's statement that "[b]oth Secure Technologies and Conexsys submitted technically compliant Proposals in response to the RVD" is an acknowledgement that, in fact, only Secure Technologies submitted a technically compliant proposal and that, therefore, Conexsys should not have been awarded a contract.

29. Secure Computing submitted that PWGSC, by allowing Conexsys to remedy the breach, is giving an unfair competitive advantage to Conexsys. According to Secure Computing, since the evidence demonstrates that Conexsys did not provide a compliant proposal, it should not have been awarded a contract and should not have the opportunity to remedy this breach of contract, but rather the contract should be cancelled by PWGSC and awarded to the lowest compliant bidder. Secure Computing further submitted that it is clearly stated on Websense's Web site that Conexsys' products do not include six hard drives, unless these specifications have changed since March 30, 2012, which would be an unfair competitive advantage, as only products that were available at the time of the RVD should have been submitted with Conexsys' proposal.

11. Secure Computing referred to the GIR at 2, para. 7.

30. Finally, Secure Computing submitted that, with respect to the NESS contract held with PWGSC under the category 6.4 SSL Proxy (which is the procurement vehicle used for this RVD), part of the requirements of the NESS are for offerors to supply a regularly maintained list of available equipment on a price list with only previously approved products available for purchase to PWGSC. Secure Computing submitted that PWGSC's decision to allow Conexsys to remedy its breach by supplying additional products in order to repair its bid goes against the rules of the NESS and, again, results in an unfair advantage to Conexsys. According to Secure Computing, the NESS process does not allow offerors to modify what they have available on their price list in order to comply with the mandatory requirements of a contract. For example, if the available equipment on Conexsys' price list is comprised of Websense's V10000 G2 device (which is stated publicly on the Internet to have a capacity of four hard drives), it should not be allowed to simply add two hard drives unless the models of equipment with additional hard drives were on its price list at the relevant time and part of its original bid.

TRIBUNAL'S ANALYSIS

31. 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. Furthermore, at the conclusion of the inquiry, the Tribunal must determine the validity of the complaint on the basis of whether the procedures and other requirements prescribed in respect of the designated contract have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements, which, in this case, are the *Agreement on Internal Trade*,¹² the *North American Free Trade Agreement*,¹³ the *Agreement on Government Procurement*,¹⁴ the *Canada-Chile Free Trade Agreement*,¹⁵ the *Canada-Peru Free Trade Agreement*¹⁶ and the *Canada-Colombia Free Trade Agreement*.¹⁷

32. However, since only the *AIT* and the *AGP* are invoked in the complaint and that, in its *GIR*, PWGSC did not dispute that the *AIT*, the *AGP* and *NAFTA* were applicable to the procurement process at issue, the Tribunal will limit its considerations to the relevant provisions of those agreements.

33. Article 506(6) of the *AIT* provides as follows:

The tender documents shall clearly identify the requirements of the procurement, the criteria that will be used in the evaluation of bids and the methods of weighting and evaluating the criteria.

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12. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
 13. *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*].
 14. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
 15. *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 *Kbis*, entitled "Government Procurement", came into effect on September 5, 2008.
 16. *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*].
 17. *Free Trade Agreement between Canada and the Republic of Colombia*, online: Department of Foreign Affairs and International Trade <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/anc-colombia-toc-tdm-can-colombie.aspx>> (entered into force 15 August 2011).

34. Article 1015(4) of *NAFTA* provides as follows:

An entity shall award contracts in accordance with the following:

(a) to be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and have been submitted by a supplier that complies with the conditions for participation;

...

(d) awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation

35. Article XIII(4) of the *AGP* provides as follows:

4. (a) To be considered for award, a tender must, at the time of opening, conform to the essential requirements of the notices or tender documentation and be from a supplier which complies with the conditions for participation. . . .

...

(c) Awards shall be made in accordance with the criteria and essential requirements specified in the tender documentation.

36. The Tribunal also notes that, under subsection 30.11(1) of the *CITT Act*, a complaint that is filed with the Tribunal must concern the procurement process that relates to a designated contract. According to the Tribunal, that process, i.e. the procurement process within its jurisdiction, begins after an entity has decided on its procurement requirement and continues through to the award of the contract. The provisions of the relevant trade agreements support this interpretation.

37. For example, Article 514(2) of the *AIT* provides as follows:

2. In order to promote fair, open and impartial procurement procedures, the Federal Government shall adopt and maintain complaint procedures for procurement covered by this Chapter that:

(a) allow suppliers to submit complaints concerning any aspect of the *procurement process*, which for the purposes of this Article *begins after an entity has decided on its procurement requirement and continues through to the awarding of the contract*.

[Emphasis added]

38. In turn, Article 1017(1)(a) of *NAFTA* provides as follows:

1. In order to promote fair, open and impartial procurement procedures, each Party shall adopt and maintain bid challenge procedures for procurement covered by this Chapter in accordance with the following:

(a) each Party shall allow suppliers to submit bid challenges concerning any aspect of the *procurement process*, which for the purposes of this Article *begins after an entity has decided on its procurement requirement and continues through the contract award*.

[Emphasis added]

39. The first issue before the Tribunal is whether PWGSC properly evaluated Conexsys' proposal when it determined that the equipment proposed by Conexsys met the mandatory technical requirements set out in Annex "B" of the solicitation. In essence, the debate is whether, in view of the information included in Conexsys' bid, the evaluators could reasonably find that the equipment proposed by the winning bidder

complied with the requirements that the equipment “[m]ust not exceed 2U” and “[m]ust include 6 300GB SAS hard drives”.

40. The Tribunal notes that it typically accords a large measure of deference to evaluators in their evaluation of proposals. In File No. PR-2005-004,¹⁸ the Tribunal indicated that it “. . . will interfere only with an evaluation that is *unreasonable*”¹⁹ and will substitute its judgment for that of the evaluators “. . . only when the evaluators have not applied themselves in evaluating a bidder’s proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria or have otherwise not conducted the evaluation in a procedurally fair way.”²⁰

41. Moreover, as it stated in its statement of reasons in File No. PR-2012-001, the issue is whether PWGSC erred in its assessment of the information contained in the winning bidder’s proposal. Extraneous materials, such as information concerning the line of products sold by Conexsys, which is publicly available on the Internet, are irrelevant to the evaluation process and could not be considered by the evaluators.

42. It is in light of these principles that the Tribunal will assess whether the evaluation of Conexsys’ proposal complied with the requirements of the trade agreements. In this regard, Conexsys addressed the requirements that the equipment proposed not exceed 2U and include six 300GB SAS hard drives both in the text of its bid and in the product literature that was submitted with its bid as technical substantiation.²¹ On its face, this information indicates that the equipment offered was of a dimension that did not exceed 2U. Moreover, it is explained in Conexsys’ proposal that two additional 300GB SAS hard drives would be added to the standard configuration of four hard drives of the equipment offered, at no additional cost.

43. On the basis of the evidence before it, the Tribunal therefore agrees with PWGSC that it evaluated Conexsys’ proposal, as it was submitted at the time of bid closing, in accordance with the terms of the solicitation documents. Accordingly, the decision to award the contract to Conexsys was reasonable because, on its face, Conexsys’ proposal was fully compliant with the technical requirements of the solicitation.

44. With respect to Secure Computing’s allegation that PWGSC improperly considered products that did not appear on Conexsys’ price list, the Tribunal finds that there is no evidence indicating that the equipment offered by Conexsys did not appear on its price list. To the contrary, as explained by PWGSC in a letter dated August 24, 2012, the SSL Proxy Appliance (Websense V10000G2 model) that was proposed by Conexsys is a product that is on Conexsys’ price list and that meets the technical definition of Category 6.4 of the NESS NMSO.²² There is no requirement with respect to the number of hard drives that an SSL Proxy Appliance listed on an offeror’s price list must contain.

18. *Re Complaint Filed by Northern Lights Aerobatic Team, Inc.* (7 September 2005) (CITT) [*Northern Lights*].

19. *Northern Lights* at para. 51.

20. *Northern Lights* at para. 52.

21. GIR, confidential exhibit 7. The Tribunal notes that, since Secure Computing was not represented by independent counsel in this inquiry, it could not have access to the confidential documents pertaining to Conexsys’ bid that were filed by PWGSC in this inquiry. Pursuant to the *CITT Act*, a director, servant or employee of a party cannot obtain access to information that is designated as confidential.

22. Tribunal Exhibit PR-2012-006-15. PWGSC also filed with the Tribunal, as confidential attachments to this letter, documents demonstrating that Conexsys offered equipment that appears on its price list. Tribunal Exhibit PR-2012-006-15A.

45. Thus, the Tribunal is of the view that it was open to Conexsys to offer equipment that is listed on its price list and to configure it in order to respond to the specific technical requirements of the solicitation, especially if the modification to the equipment is made at no additional cost for the procuring entity. What matters is that, at the time of bid closing, PWGSC had information before it which indicated that the equipment offered by Conexsys appeared on its price list, complied with the technical definition of Category 6.4 of the NESS NMSO and could, at no cost to PWGSC, be configured to include the requisite number of hard drives.

46. In summary, after having carefully examined the evidence before it, the Tribunal sees no reason to interfere with the judgment of the evaluators. The Tribunal considers that they evaluated Conexsys' compliance with the technical requirements of the solicitation thoroughly and strictly in accordance with the terms of the RVD and the relevant provisions of the trade agreements. Accordingly, the Tribunal finds that PWGSC conducted the procurement process in conformity with Article 506 of the *AIT* and the analogous provisions of *NAFTA* and the *AGP*.

47. Despite the foregoing, the Tribunal cannot ignore that PWGSC has admitted that, after the award of the contract to Conexsys, the equipment that was delivered by Conexsys did not comply with the technical requirement pertaining to the requisite number of hard drives. In such situations, the general rule is that, if it becomes known, *after* the award of the contract, upon delivery of the procured goods, that the latter does not meet a mandatory requirement, the issue then becomes one of contract administration or contract performance and, therefore, does not fall within the Tribunal's jurisdiction.²³

48. However, it is not a simple matter of contract administration if, by accepting products that are different from those that were proposed in a bid and that do not comply with the requirements of the solicitation, the procuring entity effectively initiates a new procurement process with different mandatory criteria without a proper call for tenders. In this regard, the following findings made by the Tribunal in File No. PR-2010-074²⁴ bear repeating:

37. The Tribunal must decide if it has jurisdiction over this matter. In doing so, it is important to understand what actually occurred in this procurement process. The parties agree that the original specifications were for 24,000 stainless steel USB drives and that DND, instead of insisting on the delivery of stainless steel USB drives, agreed to accept the same number of plastic USB drives. Where the parties disagree is on their respective characterization of this decision.

38. PWGSC submitted that, because the contract had already been awarded to Brymark, the decision to accept the plastic USB drives was a matter of contract administration and that, therefore, the Tribunal had no jurisdiction in this matter.

39. AMS submitted that, because the USB drives accepted by DND completely contradicted the specifications in the original procurement, this decision, in effect, created a new procurement, which is within the Tribunal's jurisdiction.

40. The Tribunal finds that, on March 19, 2010, Brymark provided DND with a pre-production sample that did not meet the specifications. At that time, DND had a decision to make, either reject the sample and insist upon a sample that met the specifications or accept the plastic sample, which, it knew, would result in the delivery of plastic rather than stainless steel USB drives.

41. On the basis of the facts noted in the preceding paragraph, the Tribunal makes two findings.

42. First, PWGSC evaluated Brymark's bid in accordance with the tender documents, and Brymark's bid, on its face, was fully compliant. In accordance with the terms of the RFP, PWGSC

23. *Re Complaint Filed by Airsolid Inc.* (18 February 2010), PR-2009-089 (CITT).

24. *Re Complaint Filed by AdVenture Marketing Solutions Inc.* (31 March 2011) (CITT) [*AdVenture Marketing*].

awarded the contract to Brymark, the responsive bidder that proposed the largest quantity of stainless steel USB drives without exceeding the budget. Accordingly, the Tribunal finds that PWGSC conducted the procurement process in conformity with Article 506(6) of the *AIT* and the analogous provisions of *NAFTA*, the *CCFTA* and the *CPFTA*.

43. Second, this is not a simple matter of contract administration, but is, in effect, a new procurement process. As PWGSC submitted, the procurement process begins after an entity has decided on its procurement requirement and continues through to the award of the contract. Thus, DND's procurement of plastic USB drives from Brymark is within the purview of the Tribunal for the purposes of examining whether DND conducted the procurement in accordance with the procedures specified in the trade agreements.

44. The circumstances of this procurement are similar to those in File No. PR-2009-016,²⁵ where the Tribunal found as follows:

25. In the end, the changes that were made to the requirement were substantial and they completely contradicted the original specifications. It is not a simple matter of contract administration if a mandatory term of a procurement is changed after bids are received or even after a contract is awarded. In effect, in this case, a new procurement was initiated after Parks Canada decided to accept, in lieu of I-beam aluminum support posts, aluminum round poles in compacted gravel. When it was discovered that the original specifications were not workable or that a much cheaper alternative could meet the desired standards (even though the alternative would not meet the mandatory specifications), Parks Canada should have terminated any awarded contract and re-tendered the requirement.

26. By proceeding in the manner that it did, Parks Canada effectively negotiated a sole source contract for a different requirement. Accordingly, the Tribunal finds that Parks Canada breached the *AIT* by not following the procedures for procurement contained in Article 506 of the *AIT*, which reads as follows:

...

1. Each Party shall ensure that procurement covered by this Chapter is conducted in accordance with the procedures set out in this Article.
2. A call for tenders shall be made through one or more of the following methods:
 - (a) the use of an electronic tendering system that is equally accessible to all Canadian suppliers;
 - (b) publication in one or more predetermined daily newspapers that are easily accessible to all Canadian suppliers; or
 - (c) the use of source lists

27. In light of the foregoing, the Tribunal determines that Canyon's complaint is valid.

Essentially the same happened in this case. By accepting plastic instead of stainless steel USB drives in contradiction with the original mandatory specifications, without a new call for tenders from other potential suppliers, DND failed to conduct the procurement in accordance with Articles 506(1) and (2) of the *AIT*, Article 1015(4) of *NAFTA*, Article Kbis-10 of the *CCFTA* and Article 1410(4) of the *CPFTA*.

49. The Tribunal must therefore determine whether the same happened in this case. The question is whether there is sufficient evidence for the Tribunal to conclude that DND accepted equipment that did not comply with the original mandatory specifications, without a new call for tenders from other potential suppliers.

25. *Re Complaint Filed by Canyon Contracting* (19 September 2006), PR-2006-016 (CITT).

50. On this issue, the Tribunal notes that the facts of this case are different, in that PWGSC stated in its GIR that, now that it is aware of the deficiencies of the equipment that it purchased from Conexsys, it will not accept it without objection. PWGSC also informed the Tribunal that none of the delivered units of the required equipment were in use and that it intended to enforce the terms of the contract by requiring Conexsys to supply compliant equipment.

51. According to PWGSC, DND's administrative process for receiving products at its warehouse and paying invoices results in products being initially accepted on the basis of an initial review of their packaging and invoices. It argued that, in this case, this administrative process, which, for operational reasons, does not include the physical testing of the products prior to their acceptance, resulted in DND inadvertently accepting the delivery of non-compliant equipment from Conexsys, but that, as administrator of the contract, PWGSC was in the process of requiring Conexsys to remedy its breach of contract and was committed to taking the necessary measures to ensure that compliant equipment is delivered.

52. On August 27, 2012, the Tribunal requested PWGSC to provide additional information and evidence in support of its statements that PWGSC would not, "without objection", accept products that did not comply with the requirements of the solicitation and intended to require Conexsys to supply products that comply with such requirements. On August 30, 2012, PWGSC provided a confidential and a public response to the Tribunal's request and filed a confidential document to substantiate its statements concerning the steps that it has taken to enforce the contract. In particular, PWGSC confirmed that it sent a notice of default to Conexsys regarding the contract into which it entered with the Crown and publicly stated that, in the event that the default is not remedied and the contract is cancelled, it would consider the issuance of a new solicitation for the requirement.²⁶ Subsequently, on September 19, 2012, PWGSC informed the Tribunal that Conexsys had remedied its default and delivered equipment that complied with its initial proposal and the terms of the contract.

53. In light of this evidence, the Tribunal is satisfied that PWGSC took the necessary steps to enforce the contract that was awarded to Conexsys and that this matter must be treated as one of contract administration or contract performance over which the Tribunal does not have jurisdiction. The facts in this case are distinguishable from those that were at issue in *AdVenture Marketing*, in that it cannot be said that the procuring entity accepted products that completely contradicted the original specifications. To the contrary, the preponderant evidence indicates that PWGSC ultimately refused to accept the products that were initially delivered.

54. In view of the foregoing, the Tribunal concludes that, in this case, PWGSC's did not in effect create a new procurement process or improperly negotiate a sole source contract for a different requirement with Conexsys. This is not a situation in which the procuring entity appears to have changed the original requirements by accepting the delivery of products that did not meet the mandatory conditions set out in the solicitation documents.

55. Finally, the Tribunal notes that, on October 1, 2012, Secure Computing sent an e-mail to the Tribunal and alleged that PWGSC's actions in this matter improperly permitted Conexsys to repair its initial bid. The Tribunal is unable to accept this argument. Bid repair is a term used to describe the improper alteration or modification of a bid either by the bidder or by the procuring entity after the deadline for the receipt of bids has passed. In this case, there was no such alteration or modification of Conexsys' bid. This is not a situation in which PWGSC allowed Conexsys to supplement its bid to make it compliant with the requirements of the solicitation after the deadline for the receipt of bids had passed. Indeed, the Tribunal has

26. Tribunal Exhibits PR-2012-006-18 and PR-2012-006-18A.

already found that, on its face, Conexsys' proposal, as it was submitted at the time of bid closing, was fully compliant with the technical requirements of the solicitation.

56. Accordingly, the Tribunal finds that the complaint is not valid.

57. The Tribunal wishes to add that, although there is no evidence before it that would cast doubt on PWGSC's assurances that Conexsys has now delivered equipment that is fully compliant with the requirements of the solicitation, the fact remains that Secure Computing may later discover new evidence that could not, by reasonable diligence, have been produced in this inquiry and that may indicate otherwise. In this regard, the Tribunal notes that PWGSC does not appear to have responded to Secure Computing's access to information request. In that event, it may not be estopped from bringing another complaint concerning this matter by the doctrine of *res judicata*. Whether or not the doctrine of *res judicata* would apply is an issue that would depend on the nature of the new evidence that may eventually be discovered.

COST ISSUES

58. Section 30.16 of the *CITT Act* allows the Tribunal to award costs to complainants or government institutions. In determining whether costs should be awarded to the successful party in this case, the Tribunal considers that, although it concluded that the complaint was not valid for the reasons given above, as a practical matter, the complaint process could have been avoided had DND not inadvertently initially accepted the delivery of non-compliant equipment from Conexsys. Moreover, PWGSC did not request to be awarded its reasonable costs in this matter. Therefore, in these circumstances, no costs will be awarded.

DETERMINATION OF THE TRIBUNAL

59. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid. Each party will bear its own costs in this matter.

Serge Fréchette
Serge Fréchette
Presiding Member