



Ottawa, Wednesday, March 19, 2003

File No. PR-2002-064

IN THE MATTER OF a complaint filed by Foundry Networks Inc. under 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 under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

ORDER OF THE TRIBUNAL

The Canadian International Trade Tribunal hereby dismisses the complaint.

Consequently, the order made on February 25, 2003, to postpone the award of any contract in relation to this procurement until the Canadian International Trade Tribunal determines the validity of the complaint is hereby rescinded.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Date of Order and Reasons: March 19,2003

Tribunal Member: James A. Ogilvy, Presiding Member

Senior Investigation Officer: Daniel Chamaillard

Counsel for the Tribunal: Reagan Walker
John Dodsworth

Complainant: Foundry Networks Inc.

Government Institution: Solicitor General of Canada

Counsel for the Government Institution: Isabelle Chartier



Ottawa, Wednesday, March 19, 2003

File No. PR-2002-064

IN THE MATTER OF a complaint filed by Foundry Networks Inc. under 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 under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

COMPLAINT

On February 14, 2003, Foundry Networks Inc. (Foundry) 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 CITT Act) with respect to the procurement (Solicitation No. SGC0001963) by the Solicitor General of Canada (SGC) for the supply of networking equipment.

Foundry submitted that, although Nortel Networks (Nortel) products were stipulated in the technical specifications of the Invitation to Tender (ITT), the SGC had informed it that it would accept equivalent products. Allegedly, the SGC misled Foundry in that it was considering only Nortel products, while it had led Foundry to believe that its products would be fairly considered. According to Foundry, this resulted in a violation of the *North American Free Trade Agreement*² and the *Agreement on Internal Trade*.³ Foundry also alleged that the SGC did not allow it to demonstrate that its products could meet or exceed the technical specifications of the ITT and that the SGC did not respond to its telephone calls and requests for a meeting. Foundry submitted that it was thereby excluded from the procurement process.

As a remedy, Foundry requested that the Tribunal recommend that the existing contract be cancelled and that all the proposals be re-evaluated in accordance with the applicable trade agreements. In the meantime, it requested that an order be issued postponing the award of the contract. In the alternative, it requested compensation for the lost opportunity to participate in and profit from the competition.

On February 21, 2003, 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 On February 25, 2003, the Tribunal issued a postponement of award order.

On March 11, 2003, the SGC filed letters dated March 7 and March 10, 2003, requesting that the Tribunal dismiss the complaint on the basis that the Federal Government had invoked the national security exception provided for in the applicable trade agreements.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
3. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [hereinafter AIT].
4. S.O.R./93-602.

TRIBUNAL'S DECISION

Article 1018(1) of NAFTA and Article 1804 of the AIT allow exceptions to the provisions of these trade agreements where national security is involved.

The Tribunal does not have jurisdiction to deal with a determination by the Government that a particular matter relates to national security. However, as the bid challenge authority under these trade agreements, it must be satisfied that a national security exception has actually been invoked by a party to the applicable agreement.

The Tribunal notes that the ITT in this case does not indicate that the procurement is not subject to the procurement provisions of the applicable trade agreements on the grounds that the procurement is covered by the national security exception. However, it is satisfied that the SGC's letters of March 7 and March 10, 2003, serve that purpose.

The Tribunal notes that, in its correspondence, the SGC has invoked the national security exception on the basis of the authority delegated to the SGC by the Minister of the Department of Public Works and Government Services. The Tribunal has also considered the position of the individual within the SGC who has invoked the exception. On this basis, the Tribunal is satisfied that the national security exception has been invoked by a party, for purposes of NAFTA, and by the Federal Government, for purposes of the AIT.

Therefore, the Tribunal is of the view that it does not have jurisdiction to continue its inquiry into this complaint. Consequently, the complaint is dismissed and the order made on February 25, 2003, to postpone the award of any contract in relation to the above-referenced procurement until the Tribunal determines the validity of the complaint is rescinded.

James A. Ogilvy
James A. Ogilvy
Presiding Member