

Ottawa, Thursday, August 30, 2001

File No. PR-2001-009

IN THE MATTER OF a complaint filed by Foundry Networks under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

ORDER

The Canadian International Trade Tribunal determines that the complaint was not filed within the prescribed time limit and, therefore, pursuant to paragraph 10(c) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, dismisses the complaint.

Ellen Fry
Ellen Fry
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

The statement of reasons will follow at a later date.

Date of Order:	August 30, 2001
Date of Reasons:	October 2, 2001
Tribunal Member:	Ellen Fry, Presiding Member
Investigation Officer:	Paule Couët
Investigation Manager:	Randolph W. Heggart
Counsel for the Tribunal:	Philippe Cellard
Complainant:	Foundry Networks
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	David M. Attwater

Ottawa, Tuesday, October 2, 2001

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IN THE MATTER OF a complaint filed by Foundry Networks under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF a decision to conduct an inquiry into the complaint under subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

STATEMENT OF REASONS

On April 19, 2001, Foundry Networks (Foundry) of Nepean, Ontario, filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ concerning Solicitation No. V1828-00083/A by the Department of Public Works and Government Services (PWGSC) for the provision of 3COM network switches, or equivalent, for the Department of Human Resources Development.

Foundry alleged that PWGSC violated the *Agreement on Internal Trade*² and the *North American Free Trade Agreement*³ by specifying 3COM products or equivalent and failing to provide sufficient information to permit the submission of a competitive response to the Request for Proposal (RFP). Foundry requested, as a remedy, that the awarded contract be cancelled and that the solicitation be retendered as an open RFP. In the alternative, if the awarded contract was not to be cancelled, Foundry requested compensation in the amount of the value of the contract.

On April 24, 2001, the Tribunal informed the parties that the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*⁴ had been met and that it had decided to conduct an inquiry into the complaint.

On May 10, 2001, PWGSC filed a request with the Tribunal that the complaint be dismissed, alleging that it was filed outside the time limit set out in section 6 of the Regulations. On May 23, 2001, Foundry filed a submission on the request with the Tribunal. On May 28, 2001, PWGSC filed comments in response. On June 1, 2001, the PWGSC request was denied, and PWGSC was requested to file a Government Institution Report (GIR).

On June 13, 2001, PWGSC filed a GIR with the Tribunal in accordance with rule 103 of the *Canadian International Trade Tribunal Rules*.⁵ On June 26, 2001, Foundry filed a request to extend the date for submitting its comments. The Tribunal extended the date to June 29, 2001. On July 9, 2001, Foundry filed comments with respect to the GIR.

1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>>.
3. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
4. S.O.R./93-602.[hereinafter Regulations].
5. S.O.R./91-499.

As a result of information contained in the GIR that was not present either in the complaint, the request filed by PWGSC or subsequent submissions filed by both parties, the Tribunal reviewed the question of timeliness again and determined that the complaint was not filed with the Tribunal in accordance with section 6 of the Regulations.

TRIBUNAL'S DECISION

Section 6 of the Regulations, which sets out the time frames that govern the making of objections to government institutions and the filing of complaints with the Tribunal, reads in part as follows:

6. (1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

Furthermore, section 10 of the Regulations provides that the Tribunal may, at any time, order the dismissal of a complaint where “the complaint is not filed within the time limits set out in these Regulations or in any rules made pursuant to subsection 39(1) of the [CITT] Act”.

Prior to the receipt of the GIR, the Tribunal had understood that the following was the relevant sequence of events concerning the issue of timeliness: On February 16, 2001, a Notice of Proposed Procurement for 3COM network switches was published by PWGSC on MERX.⁶ In correspondence dated February 27, 2001, and subsequent telephone conversations, Foundry challenged the requirement for 3COM switches and requested additional technical information in order to bid. On March 14, 2001, PWGSC issued an amendment to the RFP adding “or equivalent” to the brand name 3COM contained in the specification and providing additional information on the compatibility required. PWGSC did not indicate to Foundry whether this amendment was intended to be its full response to Foundry's correspondence of February 27, 2001. On March 22, 2001, PWGSC extended the closing date for bids to March 23, 2001. On March 23, 2001, two hours before the bid receipt deadline, Foundry again objected to PWGSC that it had not been provided with the information requested on February 27, 2001, and did not have sufficient information to bid. Foundry requested that the deadline to submit proposals be extended. PWGSC did not respond to this communication until April 2, 2001. On March 29, 2001, Foundry became aware that a contract had been awarded in relation to the solicitation in issue.

In its request for dismissal filed on May 10, 2001, PWGSC stated that Foundry should reasonably have been aware that its objection had been rejected at the time of bid closure, i.e. on March 23, 2001. On June 1, 2001, the Tribunal denied PWGSC that request. In the Tribunal's view, since no clear answer had been provided to Foundry's request for further information and the deadline for the filing of proposals had already been extended once at the last minute (on March 22, 2001, the day on which it was supposed to close), it was not unreasonable for Foundry to think that the deadline for the filing of proposals might be extended again. According to Foundry's complaint, it was only on March 29, 2001, that it became aware that a contract had been awarded. Given this information, the Tribunal determined that Foundry had knowledge of the denial of relief on March 29, 2001.

6. Canada's Electronic Tendering Service.

Foundry filed information with respect to its complaint on April 11, 2001, on the ninth working day after March 29, 2001. On April 18, 2001, the Tribunal requested that Foundry submit supplementary information by April 19, 2001. Foundry did so. On that basis, the Tribunal decided that both Foundry's objection to PWGSC of February 27, 2001, relating to the need for additional information and its complaint to the Tribunal, considered to be filed on April 19, 2001, when the additional information requested by the Tribunal was received, were submitted in a timely manner.

However, in the GIR, the Tribunal learned for the first time that, prior to the bid-closing deadline, a proposal had been received by PWGSC from West Atlantic Systems. This proposal, the full text of which was attached to the GIR, stated that it was submitted "on behalf of Foundry Networks". Although Foundry stated that the proposal was submitted without input by Foundry, Foundry did not deny that West Atlantic Systems was acting on its behalf. According to the GIR, PWGSC left voice mail messages for West Atlantic Systems on March 26, 2001, and sent facsimile correspondence on March 27, 2001, to seek clarification of the proposal. Foundry did not challenge the evidence that those communications took place. Moreover, Foundry indicated that West Atlantic Systems and Foundry provided clarifications to PWGSC.

The Tribunal finds that West Atlantic Systems was acting as Foundry's agent in submitting the offer in response to the RFP. Accordingly, the communication by PWGSC to West Atlantic Systems constituted communication to Foundry. The Tribunal also notes that Foundry and West Atlantic Systems were operating from the same address and facsimile number. The Tribunal is therefore of the view that Foundry, through its agent, West Atlantic Systems, was aware on or before March 27, 2001, that the proposals for the subject contract had been opened and should have, therefore, inferred that the period to submit proposals had not been extended.

In light of this new information that was not previously on the record, the Tribunal now determines that Foundry had constructive knowledge of the denial of relief by PWGSC on or before March 27, 2001, and not on March 29, 2001, as previously determined. The 10-day time limit to file a complaint before the Tribunal, therefore, expired on or before April 10, 2001. Consequently, the complaint was filed outside of the time limit set by subsection 6(2) of the Regulations. Accordingly, pursuant to paragraph 10(c) of the Regulations, the Tribunal dismisses the complaint.

In the GIR, PWGSC requested that costs be awarded to it. PWGSC submitted that the complaint was based on the "spurious and misleading allegation" that Foundry was denied an opportunity to submit a proposal in response to the RFP, given that West Atlantic Systems actually submitted a proposal on behalf of Foundry. The fact that West Atlantic Systems submitted a proposal on behalf of Foundry is important information that, as discussed above, has been pivotal in the Tribunal reaching its decision in this case. The Tribunal considers that Foundry should have provided this information when it filed its complaint on April 19, 2001. The Tribunal also considers that PWGSC should have provided information concerning the West Atlantic Systems proposal when it filed its request to dismiss the complaint for lack of timeliness, on May 10, 2001. If either party had done this, the Tribunal would have been able to render its decision on this case more expeditiously. In the circumstances, the Tribunal does not award any costs.

Ellen Fry
Ellen Fry
Presiding Member