



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File Nos. PR-2008-014 and
PR-2008-015

NETGEAR, Inc.

*Decision made
Wednesday, May 21, 2008*

*Decision and reasons issued
Friday, May 30, 2008*

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

BY

NETGEAR, INC.

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.

Diane Vincent
Diane Vincent
Presiding Member

Hélène Nadeau
Hélène Nadeau
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. Moreover, 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. NETGEAR, Inc. (Netgear) of Santa Clara, California, alleged that the Department of Public Works and Government Services (PWGSC), in regard to Requests for Volume Discount (RVD), i.e. RVD 297 and RVD 300:

- improperly limited the procurements to products of particular suppliers and applied tendering procedures in a discriminatory manner;
- disclosed, in bad faith, confidential information to competitors and end-user departments, thus demonstrating bias and discriminatory behaviour toward Netgear;
- provided information to bidders too close to the solicitation closing time, thus favouring those resellers of the identified brand-name products; and
- ignored Netgear's requests to update its price list, thus demonstrating discriminatory behaviour toward Netgear.

3. Paragraph 7(1)(c) of the *Regulations* requires that the Tribunal determine whether the information provided by the complainant discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of Chapter Ten of the *North American Free Trade Agreement*,³ Chapter Five of the *Agreement on Internal Trade*⁴ or the *Agreement on Government Procurement*⁵ applies. In this case, only *NAFTA* applies.

4. On April 22 and May 2, 2008, PWGSC issued RVD297 and RVD300 respectively. The RVDs were issued to the eight Departmental Individual Standing Offer (DISO) holders that had qualified as suppliers of Category 1.1⁶ networking equipment to the federal government under a competitive procurement process that occurred in 2006.

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

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

3. *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*].

4. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm>.

5. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm>.

6. Netgear was issued a DISO for Category 1.1 equipment only, which consists of Layer 2 LAN switches. The competitive process that led to the issuance of Netgear's DISO also had multiple categories of equipment for which DISOs were awarded to other companies.

5. During both solicitation periods, PWGSC was asked the following questions and responded as follows:

Question 1:

This question is directed to the end user. Will PWGSC ask the end user to provide to us a network diagram that shows the devices that are currently installed and how they are configured in this network, and where and how the new switches described in this solicitation will be installed and configured into the existing network?

Answer 1:

Due to security reasons, the Crown will not provide a client network diagram. In addition, there is nothing in the DISO which obligates the Crown to provide such a diagram. The Crown will not change the terms and conditions of the DISO.

Question 2:

Will the client provide their Category 1.1 L2- LAN switch operational requirements with justification, without referring to . . . part numbers? The Crown is obligated to conduct all solicitations in an unbiased way and referring to . . . part numbers is clearly biased towards . . . products. No party may prepare, design or otherwise structure any procurement contract, including attempting to use DISO terms and conditions that are discriminatory, in order to avoid fair and open competition for a particular solicitation.

Answer 2:

Section 14 of the DISO allows for equivalents to be proposed where brand names have been specified. The Crown will not change the terms and condition of the DISO, which was the subject of a fair and open competition. Furthermore, given the very large number of features and performance criteria involved that ensure complete interoperability with existing supplies, there is no sufficiently precise way of describing the procurement requirement other than specifying the . . . parts or equivalents.

Question 3:

DISO Article 14 states that the first option for handling RVDs is based on the generic specifications found at Annex A . . . and the second option under the section entitled "Equivalents", which states that "these equivalent conditions only apply when a Client has specified a product by Brand Name.["] In the case of the second "Brand Name" option there is a potential for the end user client to breach the Trade Agreements depending on how the RVD solicitation is handled and how the bid is evaluated. Will the Crown amend Article 14 of the DISO for the purposes of this RVD solicitation to remove the second RVD solicitation option called "Equivalents" and will the Crown provide the requested tender documentation including all information necessary to permit suppliers to submit responsive tenders, including technical specifications and plans?

Answer 3:

The Crown will not change the terms and conditions of the DISO. Furthermore, given the very large number of features and performance criteria involved that ensure complete interoperability with existing supplies, there is no sufficiently precise way of describing the procurement requirement other than specifying the . . . parts or equivalents.

Question 4:

We are specifically concerned in the DISO where it states that Canada is not obligated to request bidders to demonstrate their proposed products. It may be difficult to evaluate the products proposed by a bidder based on an evaluation of a product datasheet without a demonstration of a capability. If the client is questioning a capability prior to a contract award, they should be obligated to request this demonstration prior to any contract award, and this should not be optional. The client may make

incorrect assumptions about a capability, such as the ability to interoperate with an existing infrastructure, and not allowing a bidder to demonstrate the capability of a proposed product is discriminatory to the bidder. Most manufacturers design their products to interoperate within a network infrastructure that includes Nortel . . . equipment or they would not be in business in the first place. Will the client confirm that testing will be an obligation and not optional, so that we are not restricted from being allowed to demonstrate the products that we plan to demonstrate?

Answer 4:

The Crown will not change the terms and conditions of the DISO.

6. On May 14, 2008, Netgear filed its complaints with the Tribunal.
7. Netgear submitted that there was absolutely no justification for specifying products by brand name in the case of the solicitations at issue. Netgear also submitted that additional information was required to allow bidders of equivalent products to properly prepare their bids and that, by not providing that information, PWGSC discriminated against those bidders that could have proposed equivalent products.
8. The Tribunal notes that Netgear has made virtually identical allegations in 16 other complaints, concerning the issuance of RVDs for similar networking equipment, that were accepted for inquiry by the Tribunal.⁷ As of the date on which its decision regarding whether it would conduct an inquiry into the current complaints was made, the Tribunal had already issued 2 determinations covering 7 of those complaints.⁸ Given that the Tribunal determined, in the context of those inquiries, that Netgear's complaints with respect to these same allegations were not valid, and given that Netgear has not submitted any information that persuades the Tribunal to rule differently, the Tribunal is unable to conclude that the evidence presented in the current complaints discloses a reasonable indication that the procurements have not been carried out in accordance with the applicable trade agreements.
9. Netgear also alleged that PWGSC had disseminated confidential Netgear information to end-user departments and other DISO holders. Netgear alleged that the disclosure made it impossible for it to partner with DISO holders in other categories, resulting in a loss of a large amount of potential revenue. It also claimed that other government departments may have a vested interest in contacting other potential suppliers to inform them of the information in order to develop strategies to block Netgear's attempts to compete for business.
10. The Tribunal can find no evidence that PWGSC inappropriately disseminated any confidential Netgear information. The complaints contain nothing other than accusations and alleged repercussions about the loss of business without any supporting evidence. The Tribunal does not consider that these mere accusations are substantive enough to commence an inquiry, as they, in and of themselves, do not disclose a reasonable indication that the procurements have not been carried out in accordance with the applicable trade agreements.
11. As a further example of discrimination, Netgear also alleged that PWGSC had ignored its requests to update its price list on PWGSC's internal system, which, Netgear claimed, it was entitled to do under the terms of the DISO. Netgear submitted that it was aware that other suppliers were able to update their lists on a regular basis. PWGSC's actions, it claimed, were designed to limit the number and type of products that Netgear could propose.

7. File Nos. PR-2007-075 to PR-2007-077, File Nos. PR-2007-080 to PR-2007-083, File No. PR-2007-088, File Nos. PR-2007-091 to PR-2007-094, and File Nos. PR-2008-003 to PR-2008-006.

8. See File Nos. PR-2007-075 to PR-2007-077 and File Nos. PR-2007-080 to PR-2007-083.

12. The Tribunal can find no evidence in the complaints that Netgear has requested to update its price list on PWGSC's internal system or that PWGSC has refused or ignored this request. As with the above allegation regarding the divulgence of confidential information, the Tribunal does not find that the complaints provide anything other than unsubstantiated allegations which, in and of themselves, do not disclose a reasonable indication that the procurements have not been carried out in accordance with the applicable trade agreements.

13. Finally, regarding RVD300, Netgear alleged that PWGSC responded to the questions too late in the solicitation process to allow it and other bidders of equivalent products to properly prepare their bids. It submitted that this favoured the resellers of the specified brand-name products, as they already had all the necessary information to bid.

14. The Tribunal notes that RVD300 contains the following clause regarding PWGSC's responses to any enquiries submitted by potential suppliers:

...

ENQUIRIES: (Mandatory)

It is mandatory that all enquiries concerning this RVD be submitted by e-mail to the Contracting Officer specified herein . . . Responses to queries cannot be guaranteed if they are not received by the Contracting Officer no later than noon (12:00 p.m.), two (2) business days prior to the RVD closing date and time.

...

15. The closing date and time for RVD300 was specified as 2:00 p.m. on May 7, 2008, meaning that enquiries had to be submitted to the contracting officer by 12:00 p.m. on May 5, 2008, if they were to be answered. The Tribunal notes that the questions that were sent to PWGSC were sent at 1:51 p.m. on May 5, 2008, which was not by the specified time, therefore a response could not be guaranteed. The Tribunal notes that, despite this, PWGSC was able to respond to the questions. The Tribunal also notes that there is nothing in Netgear's DISO that guarantees that responses will be provided within a pre-defined time period. Accordingly, the Tribunal is of the view that the information submitted with respect to this allegation does not disclose a reasonable indication that the procurement has not been carried out in accordance with the applicable trade agreements.

16. In light of the foregoing, the Tribunal will not conduct an inquiry into the complaints and considers the matter closed.

DECISION

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

Diane Vincent
Diane Vincent
Presiding Member