Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

**CANADIAN INTERNATIONAL TRADE TRIBUNAL**

# Procurement

## DETERMINATION AND REASONS

File Nos. PR-2009-080 to PR-2009-087, PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128

Enterasys Networks of Canada Ltd.

v.

Department of Public Works and Government Services

*Determination issued*
*Monday, June 21, 2010*

*Reasons issued*
*Wednesday, July 21, 2010*

Canada

# TABLE OF CONTENTS

IN THE MATTER OF 44 complaints filed by Enterasys Networks of Canada Ltd. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND FURTHER TO the decisions to conduct inquiries into the complaints pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

**BETWEEN**

| | |
|---|---|
| **ENTERASYS NETWORKS OF CANADA LIMITED** | **Complainant** |

**AND**

| | |
|---|---|
| **THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES** | **Government Institution** |

## DETERMINATION OF THE TRIBUNAL

Pursuant to paragraph 10(*a*) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, the following complaints are dismissed for lack of a valid basis:

- PR-2009-108—Solicitation No. W0106-09613B/A (RVD 695)
- PR-2009-118—Solicitation No. W010S-10D282/A (RVD 711)
- PR-2009-121—Solicitation No. W6369-10P5GG/A (RVD 685)

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the following complaint is not valid:

- PR-2009-100—Solicitation No. B8217-090660/A (RVD 636)

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that the following complaints are valid in part:

- PR-2009-092—Solicitation No. 45045-090105/A (RVD 650)
- PR-2009-093—Solicitation No. 45045-090104/A (RVD 651)
- PR-2009-117—Solicitation No. A0416-094516/B (RVD 707)
- PR-2009-122—Solicitation No. B8219-090643/A (RVD 710)

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal (Member Vincent dissenting) determines that the following complaints are valid in part:

- PR-2009-080—Solicitation No. M9010-104482/A (RVD 631)
- PR-2009-081—Solicitation No. W8474-10BF32/A (RVD 640)
- PR-2009-082—Solicitation No. 31184-092762/B (RVD 641)
- PR-2009-083—Solicitation No. 45045-090096/A (RVD 643)
- PR-2009-084—Solicitation No. WA050-106225 (RVD 644)
- PR-2009-085—Solicitation No. 21120-108465/A (RVD 645)
- PR-2009-086—Solicitation No. 9K001-101037/A (RVD 647)
- PR-2009-087—Solicitation No. 9K001-101037/B (RVD 648)
- PR-2009-094—Solicitation No. C1111-090828/A (RVD 653)
- PR-2009-095—Solicitation No. 45045-090101/A (RVD 662)
- PR-2009-096—Solicitation No. W6369-10DE70/A (RVD 663)
- PR-2009-097—Solicitation No. 45045-090122/A (RVD 666)
- PR-2009-098—Solicitation No. T8086-090909/A (RVD 672)
- PR-2009-099—Solicitation No. U6158-097064/A (RVD 680)
- PR-2009-101—Solicitation No. EN869-103932/A (RVD 684)
- PR-2009-102—Solicitation No. M9010-105184/A (RVD 670)
- PR-2009-104—Solicitation No. M9010-105182/A (RVD 669)
- PR-2009-105—Solicitation No. 21120-104931/A (RVD 671)
- PR-2009-106—Solicitation No. A0416-094512/A (RVD 678)
- PR-2009-107—Solicitation No. W6369-10P5FF/A (RVD 688)
- PR-2009-109—Solicitation No. 59017-100012/A (RVD 691)
- PR-2009-110—Solicitation No. W6369-10P5GG/B (RVD 685)
- PR-2009-111—Solicitation No. W8484-108305/A (RVD 692)
- PR-2009-112—Solicitation No. W6369-10P5GM (RVD 693)
- PR-2009-113—Solicitation No. 23240-103042/A (RVD 697)
- PR-2009-114—Solicitation No. EN869-103849/A (RVD 702)
- PR-2009-115—Solicitation No. 23240-103817/A (RVD 704)
- PR-2009-116—Solicitation No. A0416-094516/A (RVD 706)
- PR-2009-119—Solicitation No. FP945-090053/A (RVD 712)
- PR-2009-120—Solicitation No. C1111-090957/A (RVD 714)
- PR-2009-123—Solicitation No. 84084-090232/A (RVD 708)
- PR-2009-124—Solicitation No. M9010-105183/A (RVD 717)
- PR-2009-125—Solicitation No. 24062-090345/A (RVD 719)
- PR-2009-126—Solicitation No. K7C20-090674/A (RVD 720)
- PR-2009-127—Solicitation No. C1111-090959/A (RVD 726)
- PR-2009-128—Solicitation No. 84084-090254/B (RVD 699)

Pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal (Member Vincent dissenting) awards Enterasys Networks of Canada Ltd. its reasonable costs incurred in preparing and proceeding with the complaints, which costs are to be paid by the Department of Public Works and Government Services. In accordance with the *Guideline for Fixing Costs in Procurement Complaint Proceedings*, the Canadian International Trade Tribunal's preliminary indication of the level of complexity for these complaint cases is Level 3, and its preliminary indication of the amount of the cost award is $4,100. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Canadian International Trade Tribunal, as contemplated by the *Guideline for Fixing Costs in Procurement Complaint Proceedings*. The Canadian International Trade Tribunal reserves jurisdiction to establish the final amount of the award.

Serge Fréchette
Serge Fréchette
Presiding Member

Diane Vincent
Diane Vincent
Member
(Dissenting in part)

Stephen A. Leach
Stephen A. Leach
Member

Dominique Laporte
Dominique Laporte
Secretary

| | |
|---|---|
| Place of Hearing: | Ottawa, Ontario |
| Dates of Hearing: | May 13 and 14, 2010 |
| Tribunal Members: | Serge Fréchette, Presiding Member<br>Diane Vincent, Member<br>Stephen A. Leach, Member |
| Director: | Randolph W. Heggart |
| Investigation Manager: | Michael W. Morden |
| Investigator: | Josée B. Leblanc |
| Counsel for the Tribunal: | Georges Bujold |
| Complainant: | Enterasys Networks of Canada Ltd. |
| Counsel for the Complainant: | Joseph W. L. Griffiths<br>Raymond A. Murray<br>Philip Weedon |
| Intervener: | CCSI Technology Solutions Corporation |
| Counsel for CCSI Technology Solutions Corporation: | Gordon LaFortune |
| Government Institution: | Department of Public Works and Government Services |
| Counsel for the Government Institution: | David M. Attwater<br>Susan D. Clarke<br>Ian McLeod<br>Karina Fauteux<br>David Covert |

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

# STATEMENT OF REASONS

## BACKGROUND

1. On February 5, 2010, Enterasys Networks of Canada Ltd. (Enterasys) filed eight complaints with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] concerning Requests for Volume Discount (RVDs) for Solicitation Nos. M9010-104482/A (RVD 631), W8474-10BF32/A (RVD 640), 31184-092762/B (RVD 641), 45045-090096/A (RVD 643), WA050-106225 (RVD 644), 21120-108465/A (RVD 645), 9K001-101037/A (RVD 647) and 9K001-101037/B (RVD 648)[2] 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.

2. There were eight grounds of complaint submitted by Enterasys, alleging that PWGSC:

(1) sought to purchase items that were outside the scope of category 1.2 Local Area Network (LAN) switches, as this category of equipment is defined by the NMSO through mandatory technical specifications, on RVDs that were to be limited to category 1.2 LAN switches (ground 1);

(2) sought to purchase items that were outside the scope of category 1.1 LAN switches, as this category of equipment is defined by the NMSO through mandatory technical specifications, on RVDs that were to be limited to category 1.1 LAN switches (ground 2);

(3) sought to purchase category 1.1 LAN switches and additional items that have capabilities of other classes and categories set out in the NMSO on RVDs that were to be limited to category 1.2 LAN switches (ground 3);

(4) split some departments' requirements into multiple RVDs, contrary to the terms of the NMSO (ground 4);

(5) did not provide adequate time for potential bidders to prepare their bids (ground 5);

(6) 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 (ground 6);

(7) 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 (ground 7); and

(8) would not update Enterasys' published price list (PPL) in time for Enterasys to respond to the RVDs (ground 8).

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].
2. The eight RVDs in question were each considered to be separate procurement processes and were assigned separate file numbers (i.e. PR-2009-080 to PR-2009-087).

3. As a remedy, Enterasys requested that:

- it be compensated for its lost profits on the subject solicitations and that the compensation be paid to West Atlantic Systems, as the representative agent of Enterasys;
- PWGSC be required to provide responses to bidders during the RVD enquiry period and to provide all standing offer holders with the identical wording of client departments' technical requirements that PWGSC receives in all cases, including, in addition to the brand name and model of the switches, all other information sufficient to ascertain interoperability, including providing a copy of the "running configuration" and "firmware version";
- PWGSC be required to extend the due date for the receipt of bids if so requested, in order to give bidders time to perform testing so that they could include interoperability reports with their bids; and
- it receive its complaint costs, to be paid to West Atlantic Systems, as the representative agent of Enterasys.

4. Enterasys also requested that the Tribunal issue a ruling to stop the award of any contract relating to the above-noted RVDs or any other RVD issued under the subject NMSO until it had determined the validity of these complaints.

5. On February 17, 2010, the Tribunal informed the parties that it had accepted the complaints, in part, for inquiry, as they met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.[3] The Tribunal advised the parties that it had not accepted either ground 4 or ground 8 for inquiry; ground 4 was not accepted, as there was no reasonable indication that PWGSC's conduct was contrary to the applicable trade agreements; ground 8 was determined to relate to contract administration and to be outside the Tribunal's jurisdiction. The Tribunal also advised the parties that a public hearing would be required in order to resolve the issues in the complaints.[4] The Tribunal did not issue postponement of award of contract orders, either for the RVDs individually or for the NMSO as a whole.

6. On February 22, 2010, Enterasys filed an additional 11 complaints with the Tribunal pursuant to subsection 30.11(1) of the *CITT Act* concerning RVDs for Solicitation Nos. 45045-090105/A (RVD 650), 45045-090104/A (RVD 651), C1111-090828/A (RVD 653), 45045-090101/A (RVD 662), W6369-10DE70/A (RVD 663), 45045-090122/A (RVD 666), T8086-090909/A (RVD 672), U6158-097064/A (RVD 680), B8217-090660/A (RVD 636), EN869-103932/A (RVD 684) and M9010-105184/A (RVD 670),[5] by PWGSC on behalf of various government departments for the supply of networking equipment. All RVDs were issued under the same NMSO noted above.

---

3. S.O.R./93-602 [*Regulations*].
4. The Tribunal indicated that the hearing would be held on April 1, 2010. However, as a result of the subsequent filing by Enterasys of additional complaints concerning RVDs issued by PWGSC for the procurement of networking equipment, the Tribunal's decision to combine the proceedings in all complaints (discussed below) and the Tribunal's decisions to grant various requests for extensions made by the parties for the filing of documents during the course of the proceedings which affected the inquiry schedule, the hearing date was postponed to April 20, 2010, on March 16, 2010, to April 28, 2010, on April 12, 2010, and, finally, to May 13, 2010, on April 30, 2010. As a result of these extensions, in accordance with paragraph 12(*c*) of the *Regulations*, the Tribunal issued its findings and recommendations in respect of the complaints within 135 days after the filing of the complaints.
5. The 11 RVDs in question were each considered to be separate procurement processes and were assigned separate file numbers (i.e. PR-2009-092 to PR-2009-102).

7. These complaints contained the same allegations as found in the first set of complaints, with one additional ground of complaint. Enterasys alleged that, regarding RVD 636, PWGSC improperly attempted to purchase network management software (ground 9). Enterasys submitted that such software is outside the scope of the category of equipment that can be purchased under the NMSO, as the NMSO is a hardware-only standing offer, which does not allow PWGSC to purchase network management software.

8. In addition to requesting the same remedy as that requested in the complaints in File Nos. PR-2009-080 to PR-2009-087, Enterasys requested the following:

- that the "Equivalents" clause in article 14 of the NMSO be removed, given what Enterasys claimed was PWGSC's demonstrated, continued misuse of the clause; and
- that the Tribunal rule that additional damages be awarded to Enterasys, given Enterasys' position that the integrity of the Government's procurement system had been compromised by the manner in which PWGSC had been running the standing offer procurement processes. It requested that these damages be paid to West Atlantic Systems, as the representative agent of Enterasys.[6]

9. On March 2, 2010, the Tribunal informed the parties that it had accepted the new set of complaints, in part, for inquiry, as they met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Regulations*. The Tribunal advised the parties that it had not accepted either ground 4 (referring to the same ground of complaint as indicated in the first set of complaints) or ground 9 (the new ground added) for inquiry;[7] ground 4 was not accepted, as there was no reasonable indication that PWGSC's conduct was contrary to the applicable trade agreements; ground 9 was determined to relate to contract administration and, therefore, to be outside the Tribunal's jurisdiction. The Tribunal advised the parties that, given the similarities between the two sets of complaints, pursuant to rule 6.1 of the *Canadian International Trade Tribunal Rules*,[8] it would combine the proceedings and conduct a single inquiry, including the above-noted public hearing, into all 19 complaints. The Tribunal did not issue postponement of award of contract orders, either for the RVDs individually or for the NMSO as a whole.

10. On March 9, 2010, Enterasys filed an additional 25 complaints with the Tribunal pursuant to subsection 30.11(1) of the *CITT Act* concerning RVDs for Solicitation Nos. M9010-105182/A (RVD 669), 21120-104931/A (RVD 671), A0416-094512/A (RVD 678), W6369-10P5FF/A (RVD 688), W0106-09613B/A (RVD 695), 59017-100012/A (RVD 691), W6369-10P5GG/B (RVD 685), W8484-108305/A (RVD 692), W6369-10P5GM (RVD 693), 23240-103042/A (RVD 697), EN869-103849/A (RVD 702), 23240-103817/A (RVD 704), A0416-094516/B (RVD 706), A0416-094516/B (RVD 707), W010S-10D282/A (RVD 711), FP945-090053/A (RVD 712), C1111-090957/A (RVD 714), W6369-10P5GG/A (RVD 685), B8219-090643/A (RVD 710), 84084-090232/A (RVD 708), M9010-105183/A (RVD 717), 24062-090345/A (RVD 719), K7C20-090674/A (RVD 720), C1111-090959/A (RVD 726), 84084-090254/B (RVD 699) by PWGSC on behalf of various government departments for the supply of networking equipment.[9] All RVDs were issued under the NMSO noted above.

---

6. By way of a letter dated March 1, 2010, Enterasys requested that this claim for additional damages be added to the list of remedies requested in the first set of complaints (File Nos. PR-2009-080 to PR-2009-087). Tribunal Exhibit PR-2009-080-09, Administrative Record, Vol. 1A at 26.
7. Ground 9 of the second set of complaints was identical to ground 8 of the first set of complaints, i.e. that PWGSC had not updated Enterasys' PPL.
8. S.O.R./91-499 [*Rules*].
9. The 25 RVDs in question were each considered to be separate procurement processes and were assigned separate file numbers (i.e. PR-2009-104 to PR-2009-128).

11. This third set of complaints contained the same allegations as those made by Enterasys in the second set of complaints (File Nos. PR-2009-092 to PR-2009-102). In addition to requesting the same remedy as that requested in File Nos. PR-2009-092 to PR-2009-102, Enterasys requested that all the contracts awarded in relation to the RVDs at issue be cancelled and new solicitations be issued.

12. On March 12, 2010, CCSI Technology Solutions Corporation (CCSI), the company to which the designated contracts were awarded for RVD 631 (File No. PR-2009-080), RVD 691 (File No. PR-2009-109), RVD 714 (File No. PR-2009-120) and RVD 720 (File No. PR-2009-126), requested that it be granted leave to intervene in the proceedings. On March 16, 2010, the Tribunal granted the request, as CCSI was deemed to have a material and direct interest in the matters that are the subject of the complaints and, therefore, an interested party within the meaning of section 30.1 of the *CITT Act*.[10]

13. On March 16, 2010, the Tribunal informed the parties that it had accepted the third set of complaints, in part, for inquiry, as they met the requirements of subsection 30.13(1) of the *CITT Act* and the conditions set out in subsection 7(1) of the *Regulations*. The Tribunal advised the parties that it had not accepted either ground 4 or ground 9 (referring to the same grounds of complaint as mentioned above) for inquiry;[11] ground 4 was not accepted, as there was no reasonable indication that PWGSC's conduct was contrary to the applicable trade agreements; ground 9 was determined to relate to contract administration and, therefore, to be outside the Tribunal's jurisdiction. The Tribunal also advised the parties that ground 8 of the third set of complaints was only accepted with respect to the allegation that PWGSC attempted to purchase products outside the scope permitted by the standing offer and not in the broader context in which Enterasys had framed its allegation. The Tribunal advised the parties that, given the similarities between this set of complaints and the previous two sets of complaints, pursuant to rule 6.1 of the *Rules*, it would combine the proceedings in all complaints and conduct a single inquiry, including the above-noted public hearing, into all 44 complaints. The Tribunal also advised the parties that it had decided not to order PWGSC to postpone the award of the contracts with respect to the 44 solicitations at issue.

14. On March 1 and 3, 2010, Enterasys filed motions with the Tribunal, requesting that the Tribunal order PWGSC to produce the following classes of documents:

- Class 1—Copies of all correspondence relating to the solicitations between PWGSC and the government departments, prior to the solicitation closing dates
- Class 2—Copies of all sole-source contracts, and all tenders, responses to tenders and contracts that resulted in the acquisition of the existing installed base of networking products, including the dates of purchase, the original equipment manufacturers' (OEM) names, product codes, product descriptions and warranty information, and the total value of these contracts
- Class 3—Copies of the original Networking Equipment Support Services (NESS) Request for a Standing Offer (RFSO) responses from all RFSO bidders in 2006, copies of the resulting NESS Departmental Individual Standing Offers (DISO) and all subsequent amendments to these DISOs, including copies of their respective PPLs that show the products listed in the various categories that have been approved by PWGSC, as well as all related correspondence between PWGSC and the DISO/NMSO holders related to these NESS DISOs/NMSOs

10. When CCSI was granted intervener status, only the complaints in File Nos. PR-2009-080 to PR-2009-087 and in File Nos. PR-2009-092 to PR-2009-102 had been accepted for inquiry. On March 30, 2010, CCSI was also granted intervener status with respect to the complaints in File Nos. PR-2009-104 to PR-2009-128.
11. Ground 9 of the third set of complaints related to PWGSC's updating of bidders' PPLs.

- Class 4—Copies of all of the "OEM Justifications" and "No Substitution Justifications" that are on PWGSC's internal Invoicing Support Information System (ISIS) Web site since the DISO started on November 1, 2006
- Class 5—Copies of all correspondence between PWGSC and the DISO/NMSO holders regarding any "OEM Justifications" and "No Substitution Justifications" since the DISOs started on November 1, 2006

15. PWGSC provided its comments on Enterasys' motions on March 8, 2010. It submitted that the request should be denied, as the documents requested were part of a "fishing expedition", were irrelevant to Enterasys' complaints (Classes 1, 2 and 3), not necessarily in PWGSC's possession (Class 2) and could reasonably be expected to cause harm to the competitive position of Enterasys' competition (Class 3). Regarding Classes 4 and 5, PWGSC submitted that, if the Tribunal found that this documentation was relevant, the Tribunal should limit its order to the RVDs at issue.

16. On March 8 and 10, 2010, Enterasys further requested that the Tribunal order PWGSC to allow a representative from West Atlantic Systems to conduct a site survey of the client department's premises in the case of RVD 636 (File No. PR-2009-100) so that digital pictures of the rack where the end user would be installing the requested equipment could be taken and filed in evidence in these proceedings.

17. On March 16, 2010, Enterasys filed its reply to PWGSC's response, arguing that the information that it requested was relevant to its grounds of complaint and that the information being withheld by PWGSC during the solicitation processes would provide proof of breaches of the trade agreements.

18. On March 29, 2010, PWGSC submitted the Government Institution Report (GIR).

19. On April 7, 2010, in response to Enterasys' motions of March 1 and 3, 2010, the Tribunal issued an order requiring PWGSC to produce ". . . all information, including all technical justifications and related correspondence, that underlies the description of the procurement requirements with a reference to particular trademarks or brand names that were sent by client departments to the Department of Public Works and Government Services with respect to the [solicitations at issue in these complaints] . . . ."

20. On April 12, 2010, CCSI filed its comments on the GIR. CCSI's comments included a request that the Tribunal declare the agent and counsel for Enterasys, Mr. Philip Weedon, a vexatious litigant and that it bar Mr. Weedon from filing any further procurement complaints.[12]

21. On April 14, 2010, Enterasys filed a letter regarding RVD 636 (File No. PR-2009-100) requesting that the Tribunal confirm that PWGSC, in response to the Tribunal's April 7, 2010, order for the production of documents, will be required to provide a copy of the test performed on certain equipment manufactured by Nortel Networks by a third-party laboratory, a copy of the complete technical proposal submitted by Nortel Networks and a copy of the list of deliverables, including all Nortel Networks products, with unit prices redacted. Enterasys further requested that the Tribunal confirm that its March 8, 2010, request to conduct a site survey and to take digital pictures of a rack would be granted.

12. By way of a letter filed on April 22, 2010, PWGSC supported CCSI's request and indicated that the Attorney General of Canada, as represented by its agent, Mr. David Attwater, consented to Mr. Weedon being declared a vexatious litigant with respect to the filing of complaints involving RVDs issued pursuant to the NMSO. PWGSC further requested that such a declaration be extended to include Trust Business Systems, West Atlantic Systems and their sole proprietor, Ms. Debra Lance. Tribunal Exhibit PR-2009-080-47, Administrative Record, Vol. 1B at 356.

22. On April 16, 2010, PWGSC provided a confidential version of the documents addressed in the Tribunal's April 7, 2010, order. In order to comply with the Tribunal's order, PWGSC filed more than 2,900 pages of documents. A public version of the documents was provided on April 30, 2010.

23. On April 19, 2010, the Tribunal informed the parties that the additional documents relating to RVD 636 (File No. PR-2009-100) identified in Enterasys' letter of April 14, 2010, were not subject to its order of April 7, 2010. The Tribunal further indicated that it would not order PWGSC to produce these documents nor would it order PWGSC to permit Enterasys to conduct a site survey at the premises of the end-user department identified in RVD 636 in order to take pictures.

24. On April 22, 2010, the Tribunal informed the parties that it had suspended the deadline for the submission of Enterasys comments on the GIR until such time as a public version of the documents addressed in the Tribunal's April 7, 2010, order was received and that, as a result, it had decided to postpone the hearing. The Tribunal also indicated that it would inform the parties of the new schedule in this respect in due course.

25. On April 30, 2010, upon receipt of the public version of the documents addressed in the Tribunal's April 7, 2010, order, the Tribunal informed the parties of the new dates for the filing of Enterasys' comments on the GIR and the documents filed by PWGSC in response to the Tribunal's order. The Tribunal further indicated that the hearing was scheduled to start on May 13, 2010.

26. On May 7, 2010, Enterasys filed its comments on the GIR and the documentation provided by PWGSC in response to the Tribunal's order.

27. On May 10, 2010, CCSI filed a motion seeking an order that the Tribunal strike from the record of these proceedings certain documentary evidence filed as exhibits attached to Enterasys' comments on the GIR on the grounds that these exhibits constituted expert evidence that Enterasys was attempting to place on the record in contravention of the procedure established under subrule 22(1) of the *Rules* and that the information provided in these exhibits did not constitute a response to the GIR. On the same date, PWGSC filed a letter indicating that it supported CCSI's motion and providing additional observations in this regard. Enterasys filed a letter opposing CCSI's motion.

28. On May 10, 2010, the Tribunal advised the parties that the hearing would be limited to the following issues:

- whether PWGSC was justified in identifying products by brand name and product code in the subject RVDs, issued pursuant to terms of the NMSO, in view of the provisions of the applicable trade agreements;
- the sufficiency or insufficiency of the information available to bid equipment equivalent to the equipment identified by brand name and product code in the subject RVDs; and
- the manner by which equipment is categorized, specifically regarding how an RVD is categorized as being for category 1.1 or category 1.2 equipment.

29. The Tribunal also advised the parties that, rather than examine each RVD individually, a sample of RVDs would be used for illustrative purposes during the hearing. On May 11, 2010, the Tribunal held a pre-hearing teleconference pursuant to subrule 18(1) of the *Rules* in order to address issues concerning the structure of the hearing and other preliminary matters. On May 12, 2010, after consultation with the parties during the pre-hearing teleconference, the Tribunal advised that RVD 636, RVD 640, RVD 650, RVD 651, RVD 653 and RVD 714 were to be used as sample RVDs during the hearing.

30. On May 12, 2010, the Tribunal granted CCSI's motion and ordered that the following documents be removed from the record:

- Exhibit 2 of Enterasys' comments on the GIR, specifically, the letter signed by Dr. Dan Ionescu from ARTIS, dated March 31, 2010;
- Exhibit 3 of Enterasys' comments on the GIR, specifically, the letter signed by Mr. Timothy Winters from the University of New Hampshire InterOperability Laboratory, dated April 9, 2010; and
- Exhibit 4 of Enterasys' comments on the GIR, specifically, the letter signed by Mr. Mike Millar from Enterasys, dated April 26, 2010, and the documents attached thereto (Exhibits A to W).

31. The Tribunal held a hearing on May 13 and 14, 2010. At the hearing, Enterasys called Mr. Weedon as a witness. PWGSC called Ms. Joanne St-Jean Valois, Mr. Michel Perrier and Mr. Steven Oxner as witnesses.

## PROCUREMENT PROCESS

32. The RVDs in question were all issued under an NMSO, which is the successor standing offer to a DISO that had been issued subsequent to a competitive RFSO process. The NESS RFSO competition ran from June 24 to July 11, 2006. Appendix A to Annex A of the NESS RFSO contained generic specifications for various categories of LAN switches. Bidders had to demonstrate that they could provide products that met these generic specifications in order to be issued a DISO for a particular category. On October 12 and 13, 2006, DISOs were issued to 23 companies, including Enterasys. In Enterasys' case, its DISO included both category 1.1 Layer 2 LAN switches and category 1.2 Layer 2-3 LAN switches. On April 1, 2009, the DISOs were extended as provided by article 12(i) of the DISO[13] and were converted to NMSOs.

33. The Tribunal notes that at no time during the RFSO solicitation process did any potential supplier file any complaints with the Tribunal regarding the content of the RFSO, the proposed content of the resulting DISOs or the manner in which PWGSC was conducting the procurement process. The Tribunal also notes that article 13(c) of the DISO/NMSO reads as follows:

> The Offeror acknowledges and agrees that the terms and conditions set out in this Standing Offer apply to every Call-up made under this Standing Offer.

34. The Tribunal also notes that the title page of the DISO/NMSO, immediately after the title, i.e. "Departmental Individual Standing Offers (DISO) for the provision of Networking Equipment (NESS)", advises that:

> **All of the terms and conditions and procedures contained in this Departmental Individual Standing Offer document will form part of any call-ups against the standing offer as if they were laid out in full in the call-up.[14]**

35. According to the process described in the NMSO, subject to certain limitations (discussed below), PWGSC could issue call-ups directly to a company for the supply of equipment or open the requirements to competition by sending Requests for Quotations, in the form of RVDs, to the applicable NMSO holders.

13. Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 174.
14. *Ibid.* at 170; Tribunal Exhibit PR-2009-080-27, Administrative Record, Vol. 1A at 310.

The NMSO holders could then make a best and final offer for the specific requirement. PWGSC is obligated by the terms of the NMSO to issue an RVD for requirements that exceed $100,000. Moreover, the NMSO provides that PWGSC may, at its discretion, issue an RVD for any networking equipment requirements valued over $25,000.

36. In the use of RVDs, the NMSO allows PWGSC to describe its technical requirements in one of two ways, either by using the generic specifications already included as Annex A of the NMSO or by specifying particular brand name products. If brand name products are specified, bidders may propose equivalent products, as long as the following conditions, found in article 14 of the NMSO (article 14), are met:

> **Equivalents:** ***These equivalents conditions only apply when a Client has [specified] a product by Brand Name. All other RVDs shall be based on the generic specifications found at Annex A***
>
> An RVD may include requirements to propose equipment that has been specified by brand name, model and/or part number. Products that are equivalent in form, fit, function and quality that are fully compatible with, interchangeable with and seamlessly interoperate with the items specified in the RVD will be considered where the Offeror:
>
> i. clearly designates in its RVD response the brand name, model and/or part number of the equivalent product being proposed;
>
> ii. demonstrates that the proposed equivalent is fully compatible with, interoperates with and is interchangeable with the items specified in the RVD;
>
> iii. provides complete specifications and descriptive technical documentation for each equivalent item proposed;
>
> iv. substantiates the compliance of its proposed equivalent by demonstrating that it meets all mandatory performance criteria that are specified in the RVD; and
>
> v. clearly identifies those areas in the specifications and descriptive technical documentation that demonstrate the equivalence of the proposed equivalent item.
>
> Upon request, the Offeror must submit a sample to the Contracting Authority for testing and may be required by the Contracting Authority to perform a demonstration of its proposed equivalent product. Proposed equivalent products will be considered non-compliant if:
>
> i. the RVD response fails to provide all the information required to allow the Contracting Authority to evaluate the equivalency of the proposed equivalent, including additional information requested during the evaluation;
>
> ii. the Contracting Authority determines that the proposed equivalent fails to meet or exceed the mandatory requirements specified in the RVD; or
>
> iii. the Contracting Authority determines that the proposed equivalent is not equivalent in form, fit, function or quality to the item specified in the RVD, or that the proposed equivalent is not fully compatible, interoperable and interchangeable with existing Crown equipment as described in the RVD.

37. The NMSO contains the following articles which pertain to the conduct of testing:

> **14) Call-up Process/Limitations**
>
> . . .
>
> **Demonstration or Compatibility Testing:** PWGSC may require that the Offeror demonstrate through testing (including compatibility testing) that any items that it proposes to deliver in response to an RVD meet the RVD specifications. . . .

. . .

**49) Demonstration or Compatibility Testing**

a. **GUIDELINES**

At the sole discretion of Canada, products offered under this DISO may be subject to a functional and performance evaluation prior to call-up/contract award.

. . .

b.13 Canada is not obligated to test any or all products or options proposed.

38. Article 14 also contains the following regarding the issuance of RVDs:

**Call-up Process/Limitations**

Individual Call-Ups made by the ITSB [PWGSC's Information Technology Services Branch] Administrative Authority . . . on behalf of identified users pursuant to this Standing Offer must not exceed the following limits. These limits are on a per-Category basis. Individual call-ups shall not cross Categories:

. . .

Once an Offeror has qualified in a Category, all equipment offered by that Offeror as listed in the OEM's Canadian Published Price List ***that falls within that Category's technical definition*** will be available for call-up.

. . .

**Recipients of [RVDs]**: The RVD will be sent by PWGSC to all Offerors who hold a Standing Offer in the relevant Category and are listed in the selected Category at the date and time of RVD issuance. No RVD shall include products from multiple Categories. Where equipment is required from multiple Categories, a separate RVD will be sent to each Offeror in each applicable Category.

**RVD Response Time**: The standard period for Offerors to submit an RVD response will be four (4) working days from the date of RVD issuance. This period may be reduced for urgent requirements, or extended for more complex requirements, at the discretion of the PWGSC Contracting Authority.

39. Each RVD contains the following provisions:

**BIDDER'S PROPOSAL: (Mandatory)**

. . .

3. . . . If the bid is for an equivalent product, it must indicate the equivalent OEM and OEM model number for each line item. If an equivalent product bid does not indicate the make and model number of the equipment bid, the bid will be deemed non responsive and will be given no further consideration.

. . .

7. The terms and conditions of National Master Standing Offer (NMSO) **EN578-030742/000/EW** shall apply to the evaluation of this RVD and to any resulting Contract/Call-up.

**EVALUATION CRITERIA: (Mandatory)**

1. Proposals must comply with all mandatory conditions and technical requirements of NMSO **#EN578-030742/000/EW** and this RVD.

2. Compliant proposals will be evaluated based on the lowest aggregate cost.

**EQUIVALENT BIDS:**

Equivalent bids must meet all of the requirements of the NMSO with regards to equivalent bids. An equivalent bid must include full substantiation of equivalency for each line item for which an equivalent product is being proposed.

**TESTING:**

In the event that a demonstration and/or compatibility sub-test is requested by PWGSC and/or the client, the terms and conditions of **EN578-030742/000/EW** - shall apply to any testing.

. . .

| | RVD Annex "A" - LIST OF DELIVERABLES |
|---|---|
| . . . | |
| **Requirement:** | **For the supply and delivery of the following [CISCO SYSTEMS CANADA CO./NORTEL NETWORKS/HEWLETT–PACKARD Co.][15] products or equivalent. Note: Any equivalent products must be fully substantiated as indicated in the NESS NMSO document. List equivalent products by OEM and part number with a cross reference to the list below.** |

40. The Statement of Work for the NMSO, found at Annex A, reads as follows:

> The new Network Equipment procurement strategy encompasses the consolidation of previous Network Equipment procurement vehicles into a single set of Departmental Individual Standing Offers (DISOs) that will be coordinated by ITSB. The NESS Equipment DISOs will be used by ITSB on behalf of the Government of Canada (GoC) to procure Network Equipment from qualified Offerors. . . .
>
> . . . The NESS Equipment DISOs will provide PWGSC/ITSB with the ability to upgrade, replace and augment the existing network infrastructures of Clients with Network Equipment on an "as and when requested" basis.

41. According to article 9 of the NMSO, any authorized representative of a federal government organization is permitted to requisition supplies and services in accordance with the terms and conditions of the NMSO[16] but all requirements greater than $25,000 must be sent to PWGSC for processing. According to articles 6(a), (b) and (c) of the NMSO, PWGSC fulfills the roles of contracting, technical and administrative authority. It is therefore responsible for all matters, including technical ones, concerning the call-ups and RVDs under the NMSO.

---

15. Cisco Systems Canada Co. was referenced in 35 of the RVDs, Nortel Networks in 5 and Hewlett-Packard Co. in 3. One RVD, RVD 636, did not specify a particular brand name.
16. "User" and "Identified User" are defined in article B.2(b) of the NMSO as ". . . any authorized representative of a Canadian Government Department, Departmental Corporation or Agency, as identified in Schedules I, I.1, II or III, VI or V of the Financial Administration Act, or such other party for which the Department of Public Works and Government Services Canada has been authorized to act pursuant to section 16 of the *Department of Public Works and Government Services Act*. **However, the Identified User for the purpose of issuing call-ups are defined as per the following: Call-ups from $0.00 to $25,000.00 (GST/HST Included) will be made by Client Department and Agencies; Call-ups from $25,000.01 to $100,000.00(GST/HST Included) will be made by ITSB on behalf of the departments and Agencies; Call-ups from $100,000.00 (GST/HST Included) will be made through the Request for Volume Discount (RVD) by the PWGSC Contracting Authority.**" Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 171 as amended by Amendment No. 6 to the DISO; Tribunal Exhibit PR-2009-080-32, Administrative Record, Vol. 1A at 348.

## GROUNDS OF COMPLAINT NOT ACCEPTED FOR INQUIRY

### File Nos. PR-2009-080 to PR-2009-087

Ground 4

42. Ground 4 alleged that PWGSC had split the requirements of the Department of National Defence (DND) and Statistics Canada into multiple RVDs, which Enterasys claimed was contrary to the terms of the NMSO and the trade agreements.

43. Article 505(3) of the *Agreement on Internal Trade*[17] reads as follows:

> No entity shall prepare, design or otherwise structure a procurement, select a valuation method or divide procurement requirements in order to avoid the obligations of this Chapter.

44. Article 1002(4) of the *North American Free Trade Agreement*[18] reads as follows:

> Further to Article 1001(4), an entity may not select a valuation method, or divide procurement requirements into separate contracts, to avoid the obligations of this Chapter.

45. Article Kbis-01(4) of the *Canada-Chile Free Trade Agreement*[19] reads as follows:

> No entity may prepare, design, or otherwise structure or divide, in any stage of the procurement, any procurement in order to avoid the obligations of this Chapter.

46. Article 1401 of the *Canada-Peru Free Trade Agreement*[20] reads as follows:

> 5. In estimating the value of a procurement for the purpose of ascertaining whether it is a procurement covered by this Chapter, a procuring entity shall:
>
> (a) neither divide a procurement into separate procurements nor select or use a particular valuation method for estimating the value of a procurement with the intention of totally or partially excluding it from the application of this Chapter.

47. Given that there was only one RVD in the subject group of RVDs for Statistics Canada and that the RVD was covered by one or more of the trade agreements, the Tribunal found that there was not an attempt to avoid the obligations of the trade agreements and that there was no evidence of contract splitting contrary to the terms of the NMSO.

48. Regarding DND, there were two RVDs at issue—RVD 640 and RVD 644, valued at $40,000 and $110,000 respectively.[21]

---

17. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <http://www.ait-aci.ca/index_en/ait.htm> [*AIT*].
18. *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*].
19. *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 K*bis*, entitled "Government Procurement", came into effect on September 5, 2008.
20. *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*].
21. The values listed in the "Preliminary Matters" section reflect the estimates provided in Enterasys' complaints.

49. The Tribunal considered that, given that the RVDs exceed the monetary thresholds for goods under the *AIT* (both RVDs), *NAFTA* (both RVDs), the *CCFTA* (RVD 644) and the *CPFTA* (RVD 644), there had been no attempt by PWGSC to avoid its obligations under the trade agreements or to split contracts in order to circumvent the "Call-up Process/Limitations" provisions of the NMSO. Indeed, by using its discretion to issue an RVD even for a requirement that is *below* the $100,000 mandatory value above which it is required to use the RVD process pursuant to the terms of the NMSO instead of proceeding, in that case, by way of a direct call-up to a supplier, PWGSC opened this requirement to competition. Accordingly, the Tribunal did not accept this ground of complaint for inquiry, as the information provided by Enterasys did not disclose a reasonable indication that the procurements had not been conducted in accordance with the applicable trade agreements.

Ground 8

50. Ground 8 alleged that PWGSC would not update Enterasys' PPL in time for it to respond to the RVDs in question. As the Tribunal has noted in the past,[22] it is of the view that such processes would constitute contract administration and would not be part of the procurement process *per se*. Subsection 30.11(1) of the *CITT Act* limits the Tribunal's jurisdiction to ". . . any aspect of the procurement process . . .", which begins after an entity has decided on its procurement requirement up to and including contract award.[23] Contract administration issues, however, are considered outside the Tribunal's jurisdiction. In the Tribunal's opinion, Enterasys' allegations concerning the alleged failure of PWGSC to update its PPL raised issues relating to the administration of the NMSO, as opposed to aspects of the procurement processes that are at issue, namely, the processes that led to the award of a "designated contract" as defined in section 30.1 for each subject RVD, individually considered.

51. Ground 8 also included a request that the Tribunal review the various other grounds of complaint described in e-mail correspondence between Enterasys and PWGSC that was filed with the complaint. The Tribunal considered that it was incumbent on Enterasys to describe fully and completely its grounds in its complaints. In this regard, the Tribunal notes the requirements of paragraph 30.11(2)(*c*) of the *CITT Act*, which provides that a complaint must ". . . contain a clear and detailed statement of the substantive and factual grounds of the complaint . . . ." The Tribunal is of the view that the mere raising of questions or a general reference in a complaint to the existence of other grounds that must be identified or inferred by the Tribunal is not sufficient. There is an onus on a complainant to describe its grounds of complaint with enough precision. A complainant's failure to do so makes it impossible for the Tribunal to determine whether there exists a reasonable indication of a breach and, if so, to frame the subject matter of the inquiry. In addition, the acceptance of a broad statement on the existence of various other grounds such as the one made by Enterasys would prevent the government entity from knowing the precise allegations against which it must defend.

52. The Tribunal, therefore, did not accept this ground of complaint for inquiry.

22. *Re Complaints Filed by NETGEAR, Inc*. (12 December 2008), PR-2008-038 to PR-2008-043 (CITT) at para. 10.
23. *Re Complaint Filed by Airsolid Inc.* (18 February 2010), PR-2009-089 (CITT) at 3.

**File Nos. PR-2009-092 to PR-2009-102**

Ground 4

53. Ground 4 again alleged that PWGSC had improperly split the requirements of some of the departments into multiple RVDs. In this second batch of complaints, only Statistics Canada had multiple RVDs—RVD 650, valued at $65,000; RVD 651, valued at $275,000; RVD 662, valued at $800,000; and RVD 666, valued at $55,000.

54. In considering that all four RVDs exceed the monetary thresholds of the *AIT* and *NAFTA* and that two of them (RVD 651 and RVD 662) exceeded the monetary thresholds of all the above-noted trade agreements, as well as that of the *Agreement on Government Procurement*,[24] which also prohibits the splitting of requirements for the purpose of avoiding application of that agreement,[25] the Tribunal did not accept this ground of complaint for inquiry on the basis of the reasons discussed above regarding the similar ground of complaint that was raised in the context of File Nos. PR-2009-080 to PR-2009-087.

Ground 9

55. Ground 9 alleged that PWGSC would not update Enterasys' PPL in time for it to respond to these RVDs. For the reasons noted above, the Tribunal considered this issue to be one of contract administration that is not within the scope of the Tribunal's jurisdiction and did not accept this ground of complaint for inquiry.

**File Nos. PR-2009-104 to PR-2009-128**

Ground 4

56. Ground 4 again alleged that PWGSC had improperly split the requirements of some of the departments into multiple RVDs. There were six departments/agencies that had multiple RVDs, all of which were covered by at least the *AIT* and *NAFTA*. On the basis of the reasons discussed above regarding the similar ground of complaint that was raised in the context of File Nos. PR-2009-080 to PR-2009-087, the Tribunal did not consider that PWGSC attempted to avoid its obligations under the trade agreements or to split contracts in order to circumvent the "Call–up Process/Limitations" provisions of the NMSO and, consequently, did not accept this ground of complaint for inquiry.

Ground 8

57. Enterasys submitted the following as its eighth ground of complaint:

> We request that the Tribunal review the various other grounds of complaint described in more detail within the emails at the end of Exhibits A, B, C, D, E, F, G, H, U, V, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK which also form part of this complaint. We carefully worded our objections to explain the grounds for complaint if our requests for amendments were rejected, and we included references to the trade agreements and trade agreement articles. Since our requests were rejected the grounds then became clear.

24. 15 April 1994, online: World Trade Organization <http://www.wto.org/english/docs_e/legal_e/final_e.htm> [*AGP*].
25. Article II(3) of the *AGP*.

> RVD636 in Exhibit I, is an example of an RVD where PWGSC came closer to running a fair procurement in keeping with the trade agreements, however, in the end PWGSC refused to answer relevant questions.
>
> It should be noted that this is a "hardware only" standing offer and as explained in Ground 1 of our complaint many items in Annex A of these [RVDs] are outside of the scope of the category, including some Storage Area Network (SAN) and Server software items, and as a result this is another ground for complaint, since Category 1.1 and 1.2 are supposed to be strictly for LAN hardware that is within the scope of the Category specifications. Just one of many examples is RVD 710 Item 2 and 3. Also, this NESS Standing Offer is not a cabling standing offer, and yet several [RVDs] include cables, which are outside of Categories 1.1 and 1.2, which is another example, such as RVD 678 Items 2, 3 and 4. Companies like Enterasys honour the terms and conditions and do not include items outside of the scope of categories, like cables and software, on their NESS Published Price List (PPL), and yet PWGSC is allowing companies like [Cisco Systems Canada Co.] to do this, which is discriminatory and in breach of the terms and conditions of the Standing Offer, and the trade agreements.[26]

58. As noted above, paragraph 30.11(2)(*c*) of the *CITT Act* requires that the complaint ". . . contain a clear and detailed statement of the substantive and factual grounds of the complaint . . . ." It is therefore the responsibility of the complainant to describe fully and completely and to properly frame its ground(s) of complaint and not leave to the Tribunal the task of identifying additional grounds of complaint or inferring the existence of such grounds upon its review of the information provided by the complainant. In view of this onus on the complainant, the Tribunal advised the parties that ground 8 of the complaints was only accepted with respect to the clear and detailed allegation concerning attempts to purchase products outside the scope permitted by the standing offer, and not in the broader context in which Enterasys had framed its allegation.

Ground 9

59. Ground 9 alleged that PWGSC would not update Enterasys' PPL and was allowing other manufacturers to add products to their PPLs that were outside the scope of that PPL's category. For the reasons noted above, the Tribunal did not accept this ground of complaint for inquiry because, in its view, such processes constitute contract administration, which is outside the Tribunal's jurisdiction.

## PRELIMINARY MATTERS

### Enterasys' Motions for the Production of Documents

60. Enterasys' motions on March 1 and 3, 2010, sought an order requiring PWGSC to produce certain documents. The motions requested the following:

> 1. This directive would be for PWGSC to provide to the Tribunal and to the complainant, copies of all correspondence related to these Solicitations between PWGSC and the Government Departments, prior to the solicitation closing dates. All of this correspondence must show the dates that this correspondence was sent and received.
> 2. This directive would be for PWGSC to provide to the Tribunal and to the complainant, copies of all sole source contracts, and all tenders, responses to tenders, and resulting contracts that resulted in the acquisition of the existing installed base of networking products. These documents must include the dates of purchase, the OEM names, product codes, product descriptions, and warranty information, and the total value of these contracts.

26. Tribunal Exhibit PR-2009-104-01, Administrative Record, Vol. 1 at 28.

3. This directive would be for PWGSC to provide to the Tribunal and to the complainant, copies of the original NESS Request for Standing Offer (RFSO) responses from all RFSO bidders in 2006, as well as copies of the resulting NESS Standing Offers and all subsequent Amendments to these Standing Offers, including copies of their Published Price Lists (PPL), that show the products listed in the various categories that have been approved by PWGSC, as well as all related correspondence between PWGSC, and the Standing Offer holders, related to these NESS Standing Offers.

4. This directive would be for PWGSC to provide to the Tribunal and to the complainant, copies of . . . all of the "OEM Justifications" and "No Substitution Justifications" that are on PWGSC internal ISIS website, that are part of a hidden process that PWGSC has been hiding from NESS Standing Offer Holders since the Standing Offer started on November 1st, 2006. Multiple requests for this information have been made by NESS Standing Offer Holders, including during the Enquiries process of these RVD Solicitations, and yet PWGSC refused to provide this information. It should be noted that "OEM Justifications" and "No Substitution Justifications" where not part of the NESS RFSO issued in 2006, and the use and abuse of this hidden process, which limits competition, is a major ground of complaint.

5. This directive would be for PWGSC to provide to the Tribunal and to the complainant, copies of all correspondence between PWGSC, and the Standing Offer holders, regarding any "OEM Justifications" and "No Substitution Justifications" since the Standing Offer started on November 1st, 2006.[27]

61. After consideration of the parties' arguments and submissions on the relevance and importance of these documents in assisting the Tribunal in its inquiry, the Tribunal ordered PWGSC to file the following: ". . . all information, including all technical justifications and related correspondence, that underlies the description of the procurement requirements with a reference to particular trademarks or brand names that were sent by client departments to [PWGSC] with respect to the [RVDs at issue] . . . ."

62. The Tribunal considered that the documents that it ordered PWGSC to produce were a subset, limited to the 44 RVDs at issue, of documents included in item 4 of Enterasys' motions. In the Tribunal's opinion, these documents would contain relevant information that may be necessary in order to determine whether PWGSC was justified in specifying products by brand name. Therefore, the Tribunal ordered PWGSC to file these documents.

63. The following are the Tribunal's reasons for dismissing the remainder of Enterasys' motions for the production of documents, e.g. its March 8 and 10, 2010, requests that the Tribunal order PWGSC to allow a representative from West Atlantic Systems to conduct a site survey of the client department's premises, in the case of RVD 636 (File No. PR-2009-100), so that digital pictures could be taken and filed in evidence, and its April 14, 2010, request that PWGSC produce additional documents relating to RVD 636.

64. In the Tribunal's opinion, the production of the other requested materials was not warranted primarily because, as was argued by PWGSC, most of the information and documents requested by Enterasys are not relevant to the various grounds of complaint that the Tribunal accepted for inquiry. In this regard, the Tribunal noted that a significant part of the materials requested by Enterasys did not even pertain to the RVDs at issue, but, rather, related to other RVDs issued by PWGSC since the inception of the NMSO or to the NMSO itself. In particular, the Tribunal considered that there was no basis to order PWGSC to file general information pertaining to the NMSO procurement process, information on the installed base of products and networks of the numerous government departments that are users of the NMSO, and

27. Tribunal Exhibit PR-2009-080-10, Administrative Record, Vol. 1A at 30-31.

information provided to PWGSC by companies other than Enterasys that are holders of a NESS NMSO. The Tribunal concluded that such documents were neither relevant to nor necessary for the assessment of Enterasys' grounds that were accepted for inquiry regarding the subject solicitations.

65. With respect to other documents, the production of which was requested by Enterasys in its motions, that appeared to relate to the 44 RVDs at issue, but that were not covered by the Tribunal's April 7, 2010, order,[28] the Tribunal accepted PWGSC's argument that Enterasys did not provide adequate explanations as to how these documents may be relevant to its specific grounds of complaint. In particular, the Tribunal was not convinced by the explanations provided by Enterasys in its March 16, 2010, comments on PWGSC's response to its motions as to the alleged relevance of the voluminous materials that it requested. In the absence of such explanations or other compelling evidence establishing the relevance of the requested documents, the Tribunal considered that it would be inappropriate to order PWGSC to produce them.

66. The Tribunal further notes that, in its motions for the production of documents, Enterasys referred to the requested documents as ". . . important discovery evidence . . . ." In this regard, the Tribunal has stated in the past that it will not allow complainants to have access to documents when the sole objective is to find evidence to use in a complaint.[29] In the Tribunal's opinion, the mere inclusion of general allegations in a complaint does not entitle complainants to have an unlimited access to documents in the possession of government institutions. This would open the door to impermissible fishing expeditions into the records of government institutions.

67. In any event, the Tribunal considered that the requested information was not necessary in order to resolve the complaints. For the same reasons, the Tribunal also denied Enterasys' additional request filed on April 14, 2010, concerning certain documents relating to RVD 636.

68. Finally, with respect to the request to conduct a site survey at the premises of PWGSC's client department in the case of RVD 636 for the purpose of taking pictures that could be filed in evidence, the Tribunal considered that such pictures were not necessary in order to resolve the complaint regarding RVD 636 (File No. PR-2009-100) and concluded that ordering PWGSC to permit Enterasys to conduct a site survey was therefore unnecessary.

**CCSI's Request That the Tribunal Declare Mr. Weedon a Vexatious Litigant**

69. As noted above, CCSI's comments on the GIR include a request that the Tribunal declare the agent and counsel for Enterasys, Mr. Weedon, a vexatious litigant and bar Mr. Weedon from filing any further procurement complaints. PWGSC subsequently supported CCSI's request that Mr. Weedon be declared a vexatious litigant with respect to the filing of complaints involving RVDs issued under the NMSO. PWGSC further requested that such a declaration be extended to include Trust Business Systems, West Atlantic Systems and their sole proprietor, Ms. Debra Lance.

70. After having considered the submissions made by CCSI and PWGSC on this issue, the Tribunal finds that there is no factual or legal basis to declare Mr. Weedon or the other persons identified by PWGSC as vexatious litigants. Assuming that the Tribunal has the authority to declare a person a vexatious litigant

28. These documents include those identified in item No. 1 of Enterasys' motions. Tribunal Exhibit PR-2009-080-10, Administrative Record, Vol. 1A at 30.
29. *Re Complaint Filed by EDS Canada Ltd.* (30 July 2003), PR-2002-069 (CITT) at 10.

pursuant to subsection 17(2) of the *CITT Act*, the Tribunal considers that it has not been demonstrated that Mr. Weedon and the other above-noted persons are vexatious litigants in the circumstances of these complaints. For the following reasons, the Tribunal also fails to see how such a demonstration could have been made in view of its decision to conduct an inquiry into these complaints.

71. Specifically, according to principles set out in the jurisprudence concerning vexatious litigants relied upon by CCSI, the word "vexatious" includes the bringing of one or more actions to determine an issue which has already been determined, as well as the bringing of actions which cannot succeed. In view of these principles, a person may be declared a vexatious litigant by persistently bringing proceedings to determine issues that have already been determined by a court of competent jurisdiction, if it is obvious that an action cannot reasonably succeed or does not raise a judiciable question of substance, or if an action is brought for an improper purpose, including the harassment of the other parties.[30] Thus, the Tribunal is of the view that, in order to be vexatious, a proceeding must be obviously devoid of merits, or instituted maliciously or with the intention to harass or annoy the other party.

72. However, this is not the case in these proceedings. While it is true that Mr. Weedon and the other persons identified by PWGSC have in the past been involved in numerous complaints filed on behalf of companies other than Enterasys or, in the case of Trust Business Systems and West Atlantic Systems, as complainants themselves, concerning other RVDs issued under the NESS DISO that were either not accepted for inquiry or determined not valid, the fact remains that, in the present complaints, the Tribunal has determined that an inquiry was warranted. Indeed, if the Tribunal had considered that, in light of its prior decisions, these complaints amounted to frivolous or vexatious litigation, it would not have accepted them for inquiry.

73. The Tribunal's decision to conduct an inquiry into the complaints also meant that, pursuant to subsection 7(1) of the *Regulations*, the Tribunal was satisfied that the information provided by the complainant disclosed a reasonable indication that the procurements had not been conducted in accordance with the applicable trade agreements. In view of this decision, Enterasys, Mr. Weedon and West Atlantic Systems, as the representative agent of Enterasys, have legitimate rights to assert and a proper cause of action. Therefore, it cannot be concluded that their complaints have absolutely no chance of success.

74. With respect to the argument that Mr. Weedon and the other persons identified by PWGSC continue to file complaints on behalf of various companies and clients repeating the same grounds which have already been examined and rejected by the Tribunal, it is important to recall that each RVD, individually considered, is a distinct process which can lead to the award of a "designated contract" as defined in section 30.1 of the *CITT Act* and must therefore comply with the requirements of the trade agreements. As a result, the Tribunal is of the view that its determinations in previous similar complaints only mean that the procedures that were used by PWGSC and that led to the award of contracts in *these previous instances* did not breach the applicable trade agreements. The Tribunal's previous decisions do not imply that PWGSC acts in a manner consistent with the trade agreements with respect to any other RVD that it issues, including the ones at issue, or that grounds of complaint that were found not valid in previous instances can no longer be raised by Mr. Weedon or West Atlantic Systems on behalf of Enterasys or other potential suppliers in the context of *other* procurement processes involving *other RVDs* issued under the NMSO. To the extent that the Tribunal determines that new complaints, based on similar grounds, but concerning other RVDs, meet the conditions for inquiry set out in section 7 of the *Regulations*, there is no

30. *L.K. v. Children's Aid Society of Lanark County* 1996 CanLII 461 (ON C.A.); *Re Lang Michener and Fabian*, 1987 CanLII 172 (ON S.C.).

basis to claim that the issues raised have already been determined and can no longer be litigated. Thus, the Tribunal cannot conclude that Mr. Weedon and the other persons identified by PWGSC persistently bring proceedings to determine issues that have already been determined by the Tribunal.

75. The Tribunal further notes the absence of evidence to suggest that Mr. Weedon or West Atlantic Systems, as the representative agent of Enterasys, did not act in good faith or brought these complaints maliciously for an improper purpose. In light of the foregoing, CCSI's and PWGSC's requests that Mr. Weedon, Trust Business Systems, West Atlantic Systems and their sole proprietor, Ms. Lance, be declared vexatious litigants is denied.

**CCSI's Motion to Strike Certain Documents From the Record**

76. As noted above, on May 12, 2010, the Tribunal granted CCSI's motion and ordered that the following documents attached to Enterasys' comments on the GIR be removed from the record:

- Exhibit 2 of Enterasys' comments on the GIR, specifically, the letter signed by Dr. Ionescu from ARTIS, dated March 31, 2010;
- Exhibit 3 of Enterasys' comments on the GIR, specifically, the letter signed by Mr. Winters from the University of New Hampshire InterOperability Laboratory, dated April 9, 2010; and
- Exhibit 4 of Enterasys' comments on the GIR, specifically, the letter signed by Mr. Millar from Enterasys, dated April 26, 2010, and the documents attached thereto (Exhibits A to W).

77. The Tribunal accepted CCSI's submission that Exhibits 2 and 3 constituted expert evidence which Enterasys filed in a manner inconsistent with subrule 22(1) of the *Rules*. Both documents clearly indicate that the authors have some expertise in the area of networking equipment, and a copy of their résumés was included in each exhibit.

78. Moreover, a review of their letters reveals that the authors were asked to provide an expert opinion based on specific facts and/or documents disclosed to them by Mr. Weedon rather than to provide factual evidence. For example, Dr. Ionescu, in Exhibit 2, opines that Enterasys would need network configuration information in order to select the most appropriate Enterasys switches that could be configured to interoperate with certain switches. He then states that, in his expert opinion, an OEM name and part number is insufficient information for Enterasys to submit a proposal, that it is a simple matter for an end user to prepare a list of operational requirements for a switch, without referring to a specific OEM name and part number, and that it is impossible for any testing firm to perform tests and prepare an equivalency report within four days. As for Mr. Winters, he provides an opinion, in Exhibit 3, which is based on his past experience, on the type of information that would be required to provide an equivalency and interoperability report and on the time period required to prepare such a report.

79. In the Tribunal's opinion, the contents of both letters is clearly in the nature of expert evidence and Enterasys had to comply with subrule 22(1) of the *Rules* in order to file this evidence and have Dr. Ionescu or Mr. Winters appear as a witness in these proceedings. In particular, pursuant to the *Rules*, these documents had to be filed not less than 20 days before the hearing. Noting that the letters in question are dated March 31, 2010, and April 9, 2010, respectively, the Tribunal is of the view that Enterasys could and should have filed them earlier. Furthermore, the Tribunal notes that there is nothing in the contents of the letters that directly responds to the claims made by PWGSC in the GIR or that relates to the documents filed by PWGSC to comply with the Tribunal's April 7, 2010, order.

80. Therefore, the Tribunal concluded that, if it were to allow this evidence to be placed on the record less than a week before the hearing, it would not provide PWGSC or CCSI with a meaningful opportunity to respond (i.e. by calling their own experts) and, as a result, likely breach the rules of procedural fairness. On this issue, it is also important to note that, by way of a letter dated May 5, 2010, the Tribunal informed Enterasys that granting another request for a postponement of the hearing would be prejudicial to the Tribunal and the public interest, as a further postponement would not leave sufficient time for the Tribunal to assess the evidence and the parties' arguments and render its determination within 135 days of the filing of the first set of complaints, as is required by paragraph 12(*c*) of the *Regulations*. In its May 5, 2010, letter, the Tribunal also indicated that, since Enterasys had been in the possession of the GIR since March 31, 2010, and that its counsel had been served with the confidential version of the documents filed by PWGSC in response to the Tribunal's April 7, 2010, order on April, 16, 2010, it considered that Enterasys already had sufficient time to have determined appropriate witnesses and to have taken the steps necessary to qualify any expert witness.

81. With respect to Exhibit 4 of Enterasys' comments on the GIR, the Tribunal considered that this document, which was prepared by an Enterasys employee, neither responds to the GIR nor addresses the documents filed by PWGSC in response to the Tribunal's April 7, 2010, order. Indeed, the document expressly indicates that its aim is to provide comments on "these RVDs" (i.e. not on the GIR). In the Tribunal's opinion, it therefore does not constitute a valid response to the GIR and should have been filed, at the latest, at the time at which Enterasys filed its third set of complaints. Procedural fairness and natural justice considerations dictate that, as a general rule, a complainant should not be allowed to split its case by introducing additional evidence, in support of its allegations, which does not respond to the contents of the GIR when it files its comments on the GIR. In this regard, the Tribunal notes that, pursuant to the *Rules*, the GIR is the only opportunity for the procuring entity to respond in detail to the allegations made in a complaint and to the complainant's evidence. Accordingly, if it were to permit Exhibit 4 to be placed on the record at such a late stage in the process, the Tribunal would deny PWGSC and CCSI the opportunity to make a full and complete response to the complaint.

82. In light of the foregoing, the Tribunal ordered that the above documents be removed from the record.

**New Grounds of Complaint in Enterasys' Comments on the GIR**

83. The Tribunal notes that, in Enterasys' May 7, 2010, comments on the GIR and the documents filed by PWGSC in response to the Tribunal's April 7, 2010, order, including Mr. Weedon's witness statement, certain allegations and issues that are not contained in the complaints were raised for the first time. These include the following allegations: (1) regarding RVD 651, PWGSC has supplied new specifications for category 1.2 LAN switches that are not part of the existing NMSO; (2) in certain instances, the requested products that were identified by brand names on an RVD and purchased do not meet the requirements set out in the technical justifications sent to PWGSC by client departments; (3) PWGSC has failed to disclose crucial evaluation criteria information by not providing the technical justifications to potential suppliers; (4) the documents provided by PWGSC demonstrate that it has been favouring Cisco Systems Canada Co. (Cisco) by providing various client departments with draft technical justifications which refer to Cisco products; and (5) PWGSC has not provided documents to demonstrate that the installed base of products was purchased through a competitive process. Some of these allegations were also discussed by Mr. Weedon during his testimony at the hearing.[31]

31. *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 56-59, 62, 77-89, 103.

84. The Tribunal considers these allegations to be new grounds of complaint, which were not included in the list of grounds of complaint found in the three sets of complaints that the Tribunal accepted for inquiry. The Tribunal notes that the grounds of complaint cannot simply be changed or supplemented after a complaint is accepted for inquiry. Indeed, the acceptance of new grounds of complaint would constitute a substantive amendment to the complaint in circumvention of section 7 of the *Regulations*, which directs the Tribunal to consider whether certain conditions are met before accepting to inquire into a particular ground of complaint.

85. For these reasons, the new grounds of complaint introduced by Enterasys in its comments on the GIR were not considered by the Tribunal.

**PWGSC's Jurisdictional Argument**

86. At the hearing, PWGSC submitted that, because Enterasys has demonstrated no intention to submit a proposal in response to any of the 43 brand name RVDs at issue in these complaints, it is not a potential supplier with proper standing to file these complaints.

87. The Tribunal is unable to accept this argument. First, the Tribunal notes that this argument was not included in the GIR and, therefore, does not consider that it has been raised in a timely manner in order to allow Enterasys to make meaningful submissions in reply. The Tribunal is of the view that, in these circumstances, it would be inconsistent with basic tenets of procedural fairness to dispose of these complaints on the matter of jurisdiction raised by PWGSC at the hearing.

88. In any event, the Tribunal further notes that, pursuant to the terms of the NMSO, as a standing offer holder, Enterasys is an "offeror" in the relevant categories to whom PWGSC must send all RVDs. This indicates to the Tribunal that Enterasys is authorized to submit proposals in response to RVDs issued under the NMSO. This suggests that it is a potential supplier, that is, a prospective bidder on these designated contracts, as defined in section 30.1 of the *CITT Act*. Finally, PWGSC has not filed, or directed the Tribunal to, any authority in support of its view that, in order to be a potential supplier, a complainant must establish that it had the intention to submit a proposal.

**Complaints Being Dismissed**

89. The following three RVDs, which were the subject of these complaints, were cancelled and subsequently retendered:

- RVD 695 (File No. PR-2009-108, Solicitation No. W0106-09613B/A), was retendered as Solicitation No. W0106-09613B/B, and a complaint was accepted for inquiry (File No. PR-2009-141);[32]
- RVD 711 (File No. PR-2009-118, Solicitation No. W010S-10D282/A), was retendered as Solicitation No. W010S-10D282/B, and a complaint was accepted for inquiry (File No. PR-2009-144); and
- RVD 685 (PR-2009-121, Solicitation No. W6369-10P5GG/A), was retendered as Solicitation No. W6369-10P5GG /B, and a complaint was accepted for inquiry (File No. PR-2009-110).

32. Enterasys subsequently filed additional complaints regarding the NESS NMSO in addition to the 44 complaints at issue.

90. Taking into account the particular circumstances surrounding the procurements in question, i.e. that all three were retendered and complaints were accepted for inquiry a second time, the Tribunal finds that the complaints, since their filing with the Tribunal, have been rendered moot and therefore have no valid basis. It is therefore the Tribunal's decision, pursuant to paragraph 10(*a*) of the *Regulations*, to cease conducting the inquiries into File Nos. PR-2009-108, PR-2009-118 and PR-2009-121.

## ANALYSIS

91. 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. In these cases, at the conclusion of the inquiry, the Tribunal must determine the validity of the complaints on the basis of whether the procedures and other requirements prescribed in respect of the designated contracts have been observed. Section 11 of the *Regulations* further provides that the Tribunal is required to determine whether the procurements were conducted in accordance with the applicable trade agreements, which, in these cases, are the *AIT*, *NAFTA*, the *AGP*, the *CCFTA* and the *CPFTA*, depending on the value of each RVD.[33]

92. While all complaints include general references to the provisions of the *AIT*, *NAFTA* and the *AGP*, Enterasys' specific allegations of breaches of applicable trade agreements and the arguments that it presented at the hearing focus on the relevant provisions of *NAFTA*. The Tribunal notes that Enterasys did not provide separate analyses or make specific arguments in order to demonstrate the existence of breaches of either *AIT* or *AGP* provisions. For this reason, and given that *NAFTA* applies to the 44 RVDs at issue, the Tribunal will limit its analysis to Enterasys' claims of breaches under *NAFTA*.

93. In any event, in the context of these complaints, the Tribunal is of the view that the provisions of the *AIT*, the *CCFTA*, the *CPFTA* and the *AGP* are similar to, and do not impose on the government institution obligations that are more stringent than, those contained in *NAFTA*. As such, the Tribunal's analysis under *NAFTA* would equally apply under the *AIT*, the *CCFTA*, the *CPFTA* or the *AGP* and is sufficient to dispose of the complaints.

94. The Tribunal considers that the grounds of complaint that make up the subject matter of this inquiry can be divided into the following three main allegations: (1) PWGSC had no justification for specifying products by brand names; (2) PWGSC improperly refused to provide additional information and time to bidders in order to permit bidders of equivalent products to prepare their proposals; and (3) PWGSC improperly purchased items that do not meet the mandatory specifications of the relevant product category identified in the RVDs at issue (i.e. category 1.1 or 1.2 of Appendix A to Annex A of the NMSO depending on each RVD). The Tribunal will address each of these allegations in turn. The Tribunal will then address Enterasys' allegations concerning RVD 636 (File No. PR-2009-100), which did not identify the requested products through the use of brand names.

33. In addition to other requirements regarding coverage, the five trade agreements have separate monetary thresholds, above which a trade agreement applies to a procurement. In essence, the higher the dollar value, the more trade agreements apply. For RVDs valued at greater than $25,000 but less than $27,300, only the *AIT* applies. *NAFTA* coverage starts at $27,300 ($383,300 for Crown Corporations). The *CCFTA* and *CPFTA* cover RVDs valued at more than $76,600 ($383,300 for Crown Corporations). The *AGP* applies to RVDs valued at more than $221,000 ($604,500 for Crown Corporations).

**Use of Brand Names—Ground 6**

Enterasys' Position

95. Enterasys submitted that PWGSC could have easily provided a description of the operational requirements in the subject RVDs without the use of a specific brand name, model or part number. It provided information from The Tolly Group, which Enterasys characterized as ". . . a leading, global provider of independent testing and third-party validation services for the Information Technology industry",[34] in which the following is stated:

> It is our professional opinion that there are sufficiently precise and intelligible ways of describing these switch requirements without referring to a specific OEM name and product code. It has been our experience that defining the exact technical requirements does not represent a very high level of complexity.[35]

96. Enterasys submitted that PWGSC, in the case of one RVD not subject to these complaints—RVD 325—and in the case of one RVD that is subject to these complaints—RVD 636[36]—provided bidders with operational requirements without the use of a brand name and product codes. This, Enterasys claimed, demonstrated that it is easily possible for end-user departments, and PWGSC, to describe their requirements without referring to a specific brand name and model.

97. Enterasys submitted that, in cases where a brand name was specified, PWGSC receives information from the client department, which it does not forward to bidders. Enterasys claimed that PWGSC used a "NESS Fact Sheet"[37] for this process. It notes that the fact sheet states the following:

> If the requested OEM product set is deemed to be the only product set supporting a required feature meeting your operational requirements, a technical justification will be required in order to validate against an equivalent bid of another OEM product set.

Enterasys also submitted that the fact sheet is not part of the NMSO agreement and that Enterasys is not in agreement with it. It claimed that PWGSC had kept this document and procedure hidden from bidders.

98. Enterasys submitted that client departments' technical justification statements for the use of brand names, provided by PWGSC in response to the Tribunal's April 7, 2010, order, demonstrate that PWGSC could have easily described the requested products without referring to specific brand names. In particular, Enterasys submitted that the operational requirements described in the client departments' technical justification statements are often for the minimum specifications for the relevant product category set out in Appendix A to Annex A of the NMSO and that Enterasys could have proposed products that would have met all those requirements, had the technical justifications been provided during the bidding period. Enterasys further submitted that the use of brand names created the impression that operational requirements were more robust than was actually the case.

PWGSC's Position

99. PWGSC submitted that the appropriate standard of review in these cases is reasonableness and not correctness. It submitted that the Tribunal is being asked to overturn discretionary decisions made by PWGSC in the course of administering the 44 solicitations. PWGSC submitted that, when considering

34. Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 6.
35. *Ibid.* at 243.
36. File No. PR-2009-100.
37. Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 223 [fact sheet].

whether PWGSC has acted consistently with its trade agreement obligations in the administration of the NESS DISO, the issue is not whether the Tribunal would have exercised its discretion differently or made decisions different from those of PWGSC. Rather, it claimed that the proper issue is whether PWGSC's decisions were reasonable when considered on an objective standard. PWGSC referenced a previous case[38] in which it noted that the Tribunal framed the issue as whether PWGSC's determination "... was reasonable under the circumstances ...." Such circumstances, PWGSC claimed, recognize that no single outcome is correct and that a decision is not necessarily wrong because the reviewing body would have decided differently.

100. PWGSC submitted that it administered the NESS DISO in good faith and consistently with its terms and those of the applicable trade agreements. PWGSC submitted that Enterasys has failed to provide any real evidence of a scientific or technical nature to the contrary and that Enterasys bears the burden of proof and that mere assertions are not proof upon which findings of fact can be made. PWGSC submitted that, save for one instance in the complaints filed with respect to the DISO,[39] all the grounds of complaint have been dismissed after the conduct of an inquiry or not accepted for inquiry. It submitted that the 44 subject complaints are equally without merit and should be dismissed.

101. PWGSC submitted that, during the original NESS RFSO process, no potential supplier, including Enterasys, raised any objections or questions regarding the "equivalent products" provisions of the RFSO.

102. PWGSC submitted that, in accordance with earlier findings of the Tribunal where PWGSC made use of the subject RVD procurement process,[40] the use of brand names to describe product requirements is fully consistent with the NMSO and the trade agreements. It submitted that the NESS RFSO, DISO and NMSO expressly authorize the use of brand names to describe networking equipment in an RVD. It argued that the very structure of the NMSO, with offerors listing their specific equipment offerings on PPLs, contemplates the use of brand names to identify and procure equipment. PWGSC submitted that brand names were used to describe networking equipment in 43 of the 44 subject RVDs because, in those circumstances, there was no other sufficiently precise or intelligible way of describing the client departments' requirements.

103. PWGSC submitted that the decision to identify equipment using a brand name, with equivalents, is made having regard to the following: whether the equipment will be installed into an existing network; whether the integrity and reliability of the existing network are critically important to the host department or agency; the importance of interoperability with existing equipment supplies; and the risks inherent in relying on generic specifications and the impact of compromise to Crown networks. It submitted that all 43 "brand name" RVDs involved networking equipment to be installed and integrated into existing networks whose integrity and reliability were essential to the host department or agency. PWGSC submitted that it was therefore vital that the equipment be interoperable with existing equipment, as a failure to do so could compromise those networks.

---

38. *Re Complaint Filed by Joint Venture of BMT Fleet Technology Limited and Notra Inc.* (5 November 2008), PR-2008-023 (CITT) at para. 25.
39. *Re Complaints Filed by NETGEAR, Inc.* (15 May 2008), PR-2007-075 to PR-2007-077 (CITT). The Tribunal found that, regarding File No. PR-2009-077, one of the four grounds of complaint was valid. The Tribunal determined "... that PWGSC, in attempting to purchase [a particular software package], has 'crossed categories' and has acted in contravention of the NESS DISO provisions and, therefore has not conducted this part of the procurement in accordance with *NAFTA*."
40. *Re Complaints Filed by NETGEAR, Inc.* (15 May 2008), PR-2007-075 to PR-2007-077 (CITT) at para. 53; *Re Complaints Filed by NETGEAR, Inc.* (10 July 2008), PR-2008-003 to PR-2008-006 (CITT) at para. 49.

104. It submitted that, where interoperability with an existing network is required, a precise description of the exact technical requirements presents a very high level of complexity, i.e. that there are literally hundreds of such factors that would need to be addressed in respect of product specifications and, more critically, in regard to specific interoperability requirements. PWGSC argued that, if it were limited to using generic specifications, it is possible that essential criteria might be inadvertently omitted, resulting in an unacceptable risk of procuring products lacking full compatibility and interoperability with host networks.

CCSI's Position

105. CCSI submitted that Enterasys provided no positive evidence in support of its claims and relied exclusively on speculation, conjecture, unsupported statements and bald assertions of fact. It further submitted that Enterasys failed to discharge its burden of proof and that, on that basis alone, the Tribunal should find the complaints not valid.

106. CCSI submitted that the Tribunal had previously determined that such brand name references by PWGSC were in accordance with article 14[41] and did not breach the *AIT*.[42] Given this, CCSI submitted that PWGSC acted properly in describing the requirements in the manner in which it did for the RVDs at issue.

**Majority's Analysis[43]**

107. Article 1007(3) of *NAFTA* requires the following:[44]

> Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as "or equivalent" are included in the tender documentation.

108. In interpreting the provisions of *NAFTA*, the Tribunal is mindful of Article 31(1) of the *Vienna Convention on the Law of Treaties*,[45] which states the following:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

109. This principle is consistent with the modern contextual approach to statutory interpretation, which holds that the words of an enactment must be read in their entire context and in their grammatical and ordinary sense harmoniously with the sections of the act, the object of the act and the intention of Parliament.[46] Thus, Article 1007(3) of *NAFTA* must not be read in isolation, and its meaning must be ascertained in light of its entire context and the object and purpose of *NAFTA*.

---

41. *Re Complaint Filed by Trust Business Systems* (12 June 2007), PR-2007-021 (CITT).
42. *Re Complaint Filed by West Atlantic Systems*, (6 November 2007), PR-2007-063 (CITT).
43. The majority's analysis concerns all the complaints at issue except those in File No. PR-2009-108—Solicitation No. W0106-09613B/A (RVD 695) and File No. PR-2009-118—Solicitation No. W010S-10D282/A (RVD 711) and File No. PR-2009-121—Solicitation No. W6369-10P5GG/A (RVD 685), for which the Tribunal found that there could be no valid basis, and File No. PR-2009-100—Solicitation No. B8217-090660/A (RVD 636) which, for the reasons discussed in paragraphs 284 and 285, the Tribunal found to be not valid.
44. Similar language is found in Article Kbis-07(3) of the *CCFTA* , Article 1407(3) of the *CPFTA* and Article VI(3) of the *AGP*.
45. (1969) 1155 U.N.T.S. 331, entered into force on January 27, 1980.
46. *Re Complaint Filed by Georgian College of Applied Arts and Technology* (3 November 2003), PR-2001-067R (CITT) at 4.

110. Given the context of Article 1007(3) within *NAFTA* and the overall object of the procurement chapter in *NAFTA*, the Tribunal is of the view that Article 1007(3) must be construed narrowly rather than broadly. In this regard, Article 1007(3) must be read in light of Article 1017, which indicates that the purpose of the procurement chapter is to promote fair, open and impartial procurement procedures, and in light of Articles 1007(1) and 1007(2), which provide the following:

> Article 1007: Technical Specifications
>
> 1. Each Party shall ensure that its entities do not prepare, adopt or apply any technical specification with the purpose or the effect of creating unnecessary obstacles to trade.
>
> 2. Each Party shall ensure that any technical specification prescribed by its entities is, where appropriate:
>
>  a. specified in terms of performance criteria rather than design or descriptive characteristics . . . .

111. In the Tribunal's opinion, these requirements indicate that, under *NAFTA*, the use of brand names or trademarks is not the preferred method to prescribe technical specifications. When they are read together, these provisions point towards the use of generic specifications described in terms of performance criteria in order to make a large pool of competitive bidders available to government buyers, thereby ensuring that the government receives the best value for its money. Thus, the Tribunal finds that, as a general rule, government entities must avoid discouraging potential bidders from full participation in the procurement process by imposing costs, onerous conditions or describing their requirements in a manner that could deter potential suppliers from submitting proposals. The Tribunal finds that unnecessarily describing the requirements by reference to a particular trademark or brand name would defeat the above-noted purpose of the *NAFTA* chapter on procurement.

112. The Tribunal also considers that procurement disciplines are intended to strike a balance between the interests of the government institutions to procure required goods and services and those of potential suppliers to have fair and transparent access to procurement opportunities. In the Tribunal's opinion, this explains why, in limited and carefully delineated circumstances (i.e. ". . . unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements . . ."), *NAFTA* authorizes government entities to rely on a particular trademark or name, patent, design or type, or request products from a specific supplier. The language of the applicable provisions must be interpreted in that light.

113. In summary, the Tribunal considers that Article 1007(3) of *NAFTA* sets out a prohibition—with an exception—on the use of a particular trademark or brand name. Specifically, in the context of the complaints at issue, the Tribunal interprets Article 1007(3) as meaning that an RVD cannot quote a brand name or product ". . . unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements . . . ." This means that PWGSC cannot identify products by brand name whenever it considers that it would simply be more efficient to do so. Rather, it must be demonstrated that there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements. Article 1007(3) clearly limits the use of brand names to situations where the use of generic specifications based on performance criteria would not be sufficient to allow government entities to accurately describe their requirements or to ensure that such requirements are comprehensible.[47]

47. The ordinary meaning of "precise", according to the *Canadian Oxford Dictionary* is "accurately expressed" or "definite, exact". According to the same source, the ordinary meaning of "intelligible" is "able to be understood; comprehensible". Second ed., *s.v.* "precise" and "intelligible".

114. The Tribunal finds that the burden is on PWGSC to demonstrate that such circumstances are applicable to the procurements that are the subject of these complaints and that the use of brand names is justified for the RVDs in question under the terms of Article 1007(3) of *NAFTA*. On this issue, the Tribunal has stated the following in previous determinations concerning the NESS DISO (now NMSO):

> The Tribunal does not interpret Article 1007(3) of *NAFTA* as necessarily requiring that government entities justify, *during* the procurement process, the use of brand names to describe procurement requirements. However, this is not to say that they are never required to do so. Evidently, when such an issue becomes the subject of an inquiry by the Tribunal, as it has in these cases, a government entity must be able to, at that time, provide the Tribunal with an explanation as to why there was no "sufficiently precise or intelligible way" of describing the procurement requirements. Whether this justification is provided by way of an internal document, such as PWGSC's NESS Fact Sheet, or any other means is, in the Tribunal's opinion, irrelevant as long as the Tribunal is capable of properly ascertaining the nature of the justification.[48]

115. Accordingly, the Tribunal examined whether PWGSC demonstrated, during these proceedings, that there was no sufficiently precise or intelligible way of otherwise describing the procurement requirements for the RVDs that identify products by brand name.

116. In a previous determination, the Tribunal also found that the DISO (now NMSO) and RVD operate on two separate levels and that, while working in tandem, circumstances could exist whereby the structure of the NMSO could be viewed as being in accordance with the trade agreement provisions, but that there may be a legitimate concern regarding the application of the NMSO regime in the context of individual RVDs. The Tribunal stated the following:

> . . . the Tribunal finds that, irrespective of whether the NESS DISO conforms to the requirements of the trade agreements, each RVD, individually considered, is a distinct process which can lead to the awarding of a "designated contract" as defined in section 30.1 of the *CITT Act* and must therefore comply with the requirements of the trade agreements. The Tribunal notes that potential suppliers may file complaints with the Tribunal concerning any aspect of the procedures that are used by the Government and that lead to the awarding of contracts. As a result, the Tribunal is of the view that the terms of the NESS DISO do not shield PWGSC from having to conform to the trade agreements with respect to any RVD . . . .[49]

117. The above findings make it clear that the Tribunal's previous determinations concerning other RVDs issued under the NESS DISO (now NMSO) are not to be taken as an indication that the RVDs at issue that identify products by brand name comply with Article 1007(3) of *NAFTA*. Moreover, they also indicate that it is open to PWGSC to justify the use of brand names through means other than the so-called "NESS Fact Sheet" referred to by Enterasys in its complaints when this issue becomes the subject of a complaint. In this regard, the Tribunal notes that PWGSC, in response to the Tribunal's April 7, 2010, order directing it to produce ". . . all information, including all technical justifications and related correspondence, that underlies the description of the procurement requirements with a reference to particular trademarks or brand names . . ." did not provide such NESS fact sheets. This appears to indicate that, contrary to Enterasys' submissions, such fact sheets are not used by client departments and PWGSC to justify the use of brand names and are irrelevant in these complaints.

48. *Re Complaints Filed by NETGEAR, Inc.* (10 July 2008), PR-2008-003 to PR-2008-006 (CITT) at para. 45.
49. *Re Complaint Filed by NETGEAR, Inc.* (26 May 2008), PR-2007-088 (CITT) at para. 35.

118. PWGSC attempted to justify the use of brand names through the evidence provided by its witnesses. According to the testimony of one of PWGSC's witnesses at the hearing, the decision regarding whether or not an RVD is either a brand name or generic specification rests with PWGSC's ITSB, which is the relevant technical authority.[50] The client department initiates the procurement process by logging on to PWGSC's internal ISIS Web site, choosing its required equipment and then sending a purchase request to PWGSC. According to PWGSC, the ISIS portal has been designed and built so that the department can request brand name products. Once PWGSC has received the purchase request, if the requirement is valued at more than $100,000, it requires a technical justification (TJ) to support the client's reason for wanting products of a particular manufacturer. If the client department has not provided such a justification, PWGSC e-mails the client department a TJ template and requests that the client justify its request. Also according to PWGSC, although the e-mail advises clients that the TJ will be used to evaluate equivalent equipment in the event that such equivalent equipment is proposed, this is actually not the case. According to its witnesses, PWGSC uses publicly available technical specifications of the supplier whose products are being requested in order to evaluate the proposals of bidders of equivalent products (if any) and determine if equivalence with the products identified by brand name in each RVD has been demonstrated.[51] This exchange occurs between the client department and PWGSC's ITSB, and once the ITSB is satisfied that the TJ adequately explains the client department's requirements, a purchase request is sent to a PWGSC contracting officer, who subsequently releases the RVD to the NMSO holders.

119. It appears to the Tribunal that, on the basis of the testimony of PWGSC's witnesses, the initial step for virtually all client departments using the NMSO procurement process is for them to request brand name products. One witness stated that she thought that two thirds of the RVDs released under the DISO/NMSO[52] were "brand name" RVDs, and another witness stated the following: ". . . the vehicle for NESS has been designed and built whereby the department can ask for a brand name [product]. . . . [I]n [the] first request . . . [the client department] goes in the [ISIS] portal, everything is listed and then [it] can request by brand name what they need."[53] The Acting Director of Network Management, Service Management and Delivery, at PWGSC's ITSB, also acknowledged that, in his group, a brand name RVD is, "for the most part" considered a "regular RVD".[54] It is also clear to the Tribunal that PWGSC considers the requirement of whether the equipment is for an existing network or part of a new system to be the critical factor in determining whether a brand name RVD will be issued. Typically, the use of brand names will always be favoured over generic specifications where the requested equipment is to be integrated into an existing network.[55]

120. Accordingly, PWGSC's default position is that, if the requested equipment is to be integrated into an existing network, a brand name RVD is deemed necessary. In fact, the Tribunal notes that, in one case, internal PWGSC correspondence between the ITSB and the contracting authority reads as follows: "This RVD has been re-sent [because] the status has been changed *from generic RVD to regular RVD*"[56]

---

50. *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 316.
51. *Ibid.* at 283.
52. This concerned RVDs of all categories of equipment. PWGSC was not able to provide a specific breakdown for categories 1.1 and 1.2 other than stating that it was around 200-250 RVDs since the DISO/NMSO started in 2006.
53. *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 292.
54. *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 338.
55. *Ibid.* at 328-29, 389-92.
56. *Ibid.* at 338; Tribunal Exhibit PR-2009-080-41 (protected), Administrative Record, Vol. 2.01 at 837.

[emphasis added]. The evidence also indicates that, in the case of RVD 650, PWGSC's ITSB suggested to the client department that it change its original technical justification, which indicated that the requested products would be integrated into an existing network, to indicate that the requested products would be used in the establishment of a new network.[57]

121. According to the evidence, PWGSC allowed certain practical considerations, such as time constraint issues and the inherent complexities of preparing an RVD using generic specifications, to influence the manner in which it proceeded with the procurements at issue. There can be no question that, for certain requirements, time is of the essence. One of PWGSC's witnesses noted the example of a procurement, which is not at issue, which required certain equipment in response to the recent earthquake in Haiti. However, as discussed above, such considerations do not exempt PWGSC, whenever it chooses to identify the required products with brand names, from ensuring that there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements. In these complaints, the Tribunal is not persuaded that PWGSC demonstrated that this was actually the case for the 40 RVDs at issue that specified products by brand name.[58] To the contrary, overall, the evidence on the record indicates that PWGSC, in providing its services to client departments, has established a system that does not allow for a meaningful assessment of whether the legal test required by Article 1007(3) of *NAFTA* was met. In the Tribunal's opinion, PWGSC has, in practice, turned the entire process contemplated by Article 1007(3) on its head by applying the NMSO regime in such a way that the use of brand names has become the rule.

122. On the surface, while it appears that PWGSC's ITSB provides a check against client departments indiscriminately requesting brand name products, the evidence indicates that, in reality, client departments are not asked to examine whether there could be another sufficiently precise or intelligible way of describing the procurement requirements.[59] One of PWGSC's witnesses also testified that, for the most part, client departments will be directed by their management to say that certain equipment is needed and to "... put some justification as to why [the department] should buy this particular brand name."[60] The Tribunal further notes that, in the documents provided by PWGSC in response to the Tribunal's April 7, 2010, order, there is no document which would clearly indicate that the question of whether there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements was addressed by either the client departments or PWGSC.

123. It is true that the ITSB requires a TJ in which client departments must describe their requirements. In this regard, the ITSB often provides client departments with TJ templates, which it claims to use as guidance to define the project, i.e. large, small, existing, new, and assess whether the use of brand names is justified.[61] The Tribunal notes that many of these TJs describe these requirements in terms of operational capabilities, i.e. equipment with which it must interface or functions which it must support or perform, as opposed to stating why it had to be a particular brand name product. This is not surprising, given that the e-mail sent by ITSB's analyst to the client departments requesting TJs does not ask the client departments to justify the use of brand names. It simply explains the following: "... we request a solid Technical Justification for your category [1.2/1.1] in the RVD process *so that in the event that an equivalent bid is*

57. Tribunal Exhibit PR-2009-080-41 (protected), Administrative Record, Vol. 2.01 at 809-10.
58. There were initially 43 RVDs that specified products by brand name. As a result of the Tribunal's decision to dismiss the complaints regarding 3 of these RVDs in view of the cancellation of the procurements by PWGSC, 40 RVDs remain at issue.
59. *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 292-93.
60. *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 282.
61. *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 328-29.

*proposed, you are assured of obtaining equipment that will meet your requirements*. . . . The Technical Justification is only actually used if there is an equivalent bid" [emphasis added].[62] This language implies that, at the time at which the request for a TJ is sent, PWGSC has already determined that the use of brand names is appropriate and will not call into question the client departments' decisions to request specific brand name products; otherwise, it would not be necessary to refer, in the e-mail requesting a TJ, to the eventual proposal of an "equivalent bid". Indeed, the proposal of equivalent products under the NMSO is only a relevant consideration to the extent that a decision has already been made by PWGSC to go ahead with an RVD which specifies products with brand names.

124. The Tribunal also notes that the ITSB also advises the client departments in this e-mail that the information in the TJ will be used to evaluate equivalent bids; however, as the Tribunal has learned through the testimony of PWGSC's witnesses, this is not actually the case. As stated by one of PWGSC's witnesses, ". . . revising the technical justification to the point where it could be used for equivalency would be a fairly long task" and some departments ". . . [do not] have all the expertise to do that."[63] However, the Tribunal is not convinced that the information provided by the client departments in the TJs adequately supports the use of brand names. In this regard, the relatively short and general operational requirements provided in the TJs belie PWGSC's argument that a precise description of the exact technical requirements present a very high level of complexity because of the vast number of features and performance criteria involved and that there are literally hundreds of factors that would have to be addressed in order to describe the required products without referring to particular brand names.[64]

125. The Tribunal further notes that, in the cases of RVD 650 and RVD 651, although PWGSC initially advised the client department that generic specifications were to be used, in the end, due to the complexity of preparing a generic RVD[65] and time constraints faced by the client department, both were issued as brand name RVDs. PWGSC provided testimony that, on the basis of the documents relating to RVD 650 provided by PWGSC in response to the Tribunal's April 7, 2010, order, the ITSB had suggested changes to the TJ which, in effect, changed it from a generic RVD to one that specified a brand name. These two particular processes, therefore, essentially rendered meaningless the protocol supposedly in place to ensure that adequate justification existed to require brand name products. In addition, during the procurement officer's testimony, numerous references were made to the additional time that is required to process a generic RVD compared to one that identifies the requested products by brand name and to the inherent complexity of generic RVDs. On the basis of the procurement officer's evidence, the Tribunal finds that PWGSC's decision to use brand names in the case of the RVDs at issue was influenced by factors other than the consideration of whether there was, in each instance individually considered, no sufficiently precise or intelligible way of otherwise describing the procurement requirements.

---

62. See, for example, Tribunal Exhibit PR-2009-080-41A, Administrative Record, Vol. 1.01 at 11.
63. *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 315, 316.
64. On this issue, the Tribunal notes that PWGSC's witnesses testified that there are often erroneous or incomplete TJs and that certain client departments lack the expertise to properly describe their requirements. However, the e-mail discussed above sent by PWGSC to client departments specifically asks them to outline the functionalities of the required equipment. It is not clear to the Tribunal on what basis PWGSC can claim that it has a better knowledge of the operational requirements than the client departments themselves. Moreover, there is no documentary evidence on the record that corroborates the statements of PWGSC's witnesses according to which, in the particular circumstances of the RVDs at issue where products were identified by brand names, the use of generic specifications would have created an unacceptable risk to the departments' networks.
65. One of PWGSC's witnesses stated the following: "It takes a month to prepare a brand name RVD, whereas a generic RVD is much more time-consuming" [translation]. *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 307-308.

126. In summary, the Tribunal is of the view that PWGSC has not established that the conditions necessary for using brand names as required by Article 1007(3) of *NAFTA* have been met in the circumstances of the RVDs that specify products by brand name that are at issue. Practical/operational and/or general systemic considerations, such as the ones taken into account by PWGSC, do not fall within the scope of the language set out in Article 1007(3), which provides for the use of brand names. Accordingly, the Tribunal concludes that PWGSC's conduct regarding these RVDs was inconsistent with Article 1007(3).

127. Enterasys also claimed in its complaints that, by improperly specifying products by brand name in these cases, PWGSC failed to apply tendering procedures in a non-discriminatory manner, as required by Article 1008(1) of *NAFTA*. However, it did not make detailed submissions on this issue in its comments on the GIR or at the hearing. In this regard, the Tribunal notes that a finding that PWGSC's conduct failed to meet the requirements of Article 1007(3) does not, in and of itself, mean that its conduct also violated Article 1008(1); otherwise, any breach of Article 1007(3), which specifically governs the preparation, adoption or application of technical specifications and does not address the issue of discrimination in the tendering procedures, would automatically result in a breach of Article 1008(1). In the absence of a clear demonstration by Enterasys as to how, as a matter of law and on the facts of these complaints, PWGSC's decision to specify products by brand name also amounts to the application of tendering procedures in a discriminatory manner, the Tribunal is unable to conclude that PWGSC's conduct also breached Article 1008(1).[66] The Tribunal further notes that such a conclusion would automatically ascribe discriminatory behaviour to PWGSC and thereby relieve Enterasys of its burden of proof. Indeed, the Tribunal finds that Enterasys failed to provide any positive evidence of discriminatory conduct by PWGSC in its tendering procedures and, as a result, dismisses this ground of complaint.

**Dissenting Opinion of Member Vincent Regarding Ground 6[67]**

128. I respectfully disagree with my colleagues' view that PWGSC has not established that the conditions necessary for using brand names as required by Article 1007(3) of *NAFTA* have been met in the circumstances of the RVDs that specify products by brand name that are at issue and that PWGSC's conduct regarding these RVDs was inconsistent with Article 1007(3). In my view, PWGSC presented the necessary justifications to specify products by "brand name or equivalent" for each of the 43 RVDs at issue, with the exception of RVD 650 and RVD 651, in terms required by Article 1007(3), and I see no substantive reason to depart from Tribunal jurisprudence on this same issue, except for RVD 650 and RVD 651 where documentary evidence suggests that there were no substantive reasons, other than time constraints, to proceed with an RVD that specified a "brand name or equivalent".

---

66. Regarding Enterasys' claims of discriminatory behaviour by PWGSC, it is also important to note that PWGSC allowed bids for equivalent products, as is required by Article 1007(3) of *NAFTA* in cases where it specified products by brand name. Moreover, as will be discussed in addressing Enterasys' other grounds of complaint, the Tribunal does not consider that Enterasys established that PWGSC's application of tendering procedures in these cases had the effect of ensuring that no responsive equivalent bids could be submitted.

67. PR-2009-080 (RVD 631), PR-2009-081 (RVD 640), PR-2009-082 (RVD 641), PR-2009-083 (RVD 643), PR-2009-084 (RVD 644), PR-2009-085 (RVD 645), PR-2009-086 (RVD 647), PR-2009-087 (RVD 648), PR-2009-094 (RVD 653), PR-2009-095 (RVD 662), PR-2009-096 (RVD 663), PR-2009-097 (RVD 666), PR-2009-098 (RVD 672), PR-2009-099 (RVD 680), PR-2009-101 (RVD 684), PR-2009-102 (RVD 670), PR-2009-104 (RVD 669), PR-2009-105 (RVD 671), PR-2009-106 (RVD 678), PR-2009-107 (RVD 688), PR-2009-109 (RVD 691), PR-2009-110 (RVD 685), PR-2009-111 (RVD 692), PR-2009-112 (RVD 693), PR-2009-113 (RVD 697), PR-2009-114 (RVD 702), PR-2009-115 (RVD 704), PR-2009-116 (RVD 706), PR-2009-119 (RVD 712), PR-2009-120 (RVD 714), PR-2009-123 (RVD 708), PR-2009-124 (RVD 717), PR-2009-125 (RVD 719), PR-2009-126 (RVD 720), PR-2009-127 (RVD 726) and PR-2009-128 (RVD 699).

129. Other than in these two instances, it is my opinion that PWGSC's decision to specify products by brand name was reasonable, in view of the evidence presented by PWGSC on the circumstances surrounding the procurements at issue. I therefore disagree with my colleagues' conclusion that PWGSC has not established that the conditions necessary for using brand names, as required by Article 1007(3) of *NAFTA* have been met. On this issue, I find that the issue is not whether PWGSC made such a demonstration or whether its decision to specify products by brand name was correct. As submitted by PWGSC, the standard of review in these cases is reasonableness. Thus, the issue is whether PWGSC's decision to specify products by brand name was reasonable in the circumstances.

130. In previous cases, the Tribunal has determined that a reasonable decision is one that is supported by a tenable explanation, regardless of whether or not the Tribunal itself finds that explanation compelling.[68] On my review of the evidence on the record, except for RVD 650 and RVD 651, I consider that PWGSC provided such a tenable explanation to justify its decisions to use brand names, with the mention "or equivalent", for the following reasons.

131. The general purpose of the NESS at issue is to provide PWGSC/ISTB ". . . with the ability to upgrade, replace and augment the existing network infrastructures of Clients with Network Equipment on an 'as and when requested' basis."[69] Enterasys agreed to all the terms and conditions of articles 13(a) and (c) of the DISO back in 2006, terms that apply to all the RVDs at issue.[70]

132. According to the DISO/NMSO, in the call-ups below $100,000, the departments could access a specific piece of equipment of an individual offeror listed in the standing offer, which is essentially a "brand name" call-up. For instance, Enterasys' equipment listed in this standing offer is presented in confidential exhibit 11 of the GIR, which includes a description of each piece of equipment that was qualified under the standing offer, offered at a pre-determined price and discounts. The RVD contemplated in the DISO/NMSO is a call-up for products which requests offerors qualified in a relevant category to present their "Best and Final Offer" on prices for a requested piece of equipment that falls within the category's technical definition.[71]

133. Article 14 states the following regarding equivalent products:

> **Equivalents:** ***These equivalents conditions only apply when a Client has [specified] a product by Brand Name. All other RVDs shall be based on the generic specifications found in Annex A***
>
> An RVD may include requirements to propose equipment that has been specified by brand name, model and/or part number. . . .

134. During testimony, PWGSC's witnesses explained how the internal process works in the context of this standing offer. The process starts with a purchase request placed by client departments with PWGSC through the ISIS. The ISIS gives access to the list of equipment by brand name being offered in accordance with the DISO. The fact that departments, through the ISIS, call for specific pieces of equipment by brand name is not a concern in my view, because this is essentially a "client-driven" purchase request system referring them to potentially available products, by brand name, such as those of Enterasys in confidential

---

68. *Re Complaint Filed by Northern Lights Aerobic Team, Inc.* (7 September 2005), PR-2005-004 (CITT) at paras. 51-52; *Re Complaint Filed by Joint Venture of BMT Fleet Technology Limited and Notra Inc.* (5 November 2008), PR-2008-023 (CITT) at para. 25.
69. Tribunal Exhibit PR-2009-080-27, Administrative Record, Vol. 1A at 323.
70. Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 175.
71. *Ibid.*

exhibit 11 of the GIR, obtained trough a competitive process leading to a standing offer. Essentially, a standing offer, according to PWGSC's Standard Acquisition Clauses and Conditions Manual,[72] is one method of supply used by PWGSC, which authorizes departments and agencies to make call-ups for equipment against the standing offer that details goods required in accordance with pre-determined conditions.[73] The DISO defines a call-up as a requisition by an identified user, either a department or PWGSC, in accordance with the terms of the DISO.

135. PWGSC is the authority responsible for all matters concerning the DISO[74] and must ensure compliance of each RVD with the terms of the DISO and the applicable trade agreements. PWGSC is responsible for the technical analysis and decides ultimately how to proceed.[75]

136. The Tribunal has, in past decisions, specified that the terms and conditions of a DISO do not shield PWGSC from the responsibility of meeting the requirement of the trade agreements for each RVD.[76] The Tribunal has stated the following:

> 43. In any event, the Tribunal finds that, irrespective of whether the NESS DISO conforms to the requirements of the trade agreements, each RVD, individually considered, is a distinct process which can lead to the awarding of a "designated contract" as defined in section 30.1 of the *CITT Act* and must therefore comply with the requirements of the trade agreements. The Tribunal notes that potential suppliers may file complaints with the Tribunal concerning any aspect of the procedures that are used by the Government and that lead to the awarding of contracts. As a result, the Tribunal is of the view that the terms of the NESS DISO do not shield PWGSC from having to conform to the trade agreements with respect to any RVD, including the ones in question. Specifically, in the circumstances of these RVDs, the Tribunal must determine whether PWGSC was justified in specifying products by brand name and whether it conducted the procurements in accordance with the above-noted *NAFTA* and *AGP* provisions.

137. PWGSC's decision to proceed with a generic description RVD or a "brand name or equivalent" RVD is the result of the analysis of the technical information submitted by departments; whether the piece of equipment required will be used in an existing network or a new network is key to this analysis. Mr. Perrier indicated the following: "I'm looking for information that will guide us to justify the use of either that brand name, because it is an existing network, or if it's not, if it's not a project that is being rolled out as a new building or a new network. That's what I am looking for."[77] This testimony corroborates one of the main bases for decision alleged by PWGSC to proceed with an RVD with or without a generic description, which is consistent with its decision process examined by the Tribunal in previous cases.

---

72. See "Terms and Conditions of the Standing Offer" at article 4 of the DISO, Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 171-72; Standard Acquisition Clauses and Conditions, Version 10-1, Section 1 at 29.
73. More generally, BusinessDictionary.com defines a standing offer as follows: "Agreement under which a vendor allows a buyer to purchase specified goods or services at a predetermined price for a certain period on an 'as and when' requirement basis."
74. Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 172-73.
75. *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 340.
76. *Re Complaints Filed by NETGEAR, Inc*. (15 May 2008), PR-2007-075 to PR-2007-077 (CITT) at para. 43.
77. *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 328-29.

138. The Tribunal's previous decision[78] on the same matter (i.e. relating to the use of a "brand name or equivalent" RVD versus an RVD with a generic description of the technical specifications), regarding different RVDs but under the same circumstances as the current 43 brand name RVDs, established that PWGSC complied with Article 1007(3) of *NAFTA* and Article VI(3) of the *AGP* and found that this particular ground of complaint was not valid.[79]

139. The relevant part can be found in paragraphs 46 to 54 of the Tribunal's decision. The following extracts summarize the Tribunal's conclusion:

> 53. Therefore, the Tribunal accepts PWGSC's justifications as being reasonable in the circumstances of the RVDs in question. The Tribunal believes that the use of brand names was justified, given that there appeared to be no sufficiently precise way of otherwise describing the procurement requirements. The Tribunal notes that, although it made reference to brand-name products in the RVDs, PWGSC allowed for equivalent products to be proposed, as required by Article 14 of the NESS DISO and Article 1007(3) of *NAFTA* and Article VI(3) of the *AGP*.
>
> 54. Accordingly, the Tribunal is of the view that PWGSC has, in these circumstances, acted in conformity with Article 1007(3) of *NAFTA* and Article VI(3) of the *AGP* and finds that this ground of complaint is not valid.

140. I see no substantive reason to depart from Tribunal jurisprudence on this same issue, except for RVD 650 and RVD 651 where documentary evidence suggests that there were no substantive reasons, other than time constraints, to proceed with a "brand name or equivalent" RVD. In my view, PWGSC presented the necessary justifications to specify products by "brand name or equivalent" for the RVDs at issue, with the exception of RVD 650 and RVD 651, in terms required by Article 1007(3) of *NAFTA*.

141. The Tribunal has received documentary evidence that demonstrates that PWGSC applied itself in the examination of clients' purchase requests before proceeding with an RVD under the DISO. A technical analysis was done by the technical authority, which led to an exchange of information between departments and PWGSC on the technical aspects of the requests, which in turn resulted in a decision to proceed or not to an RVD and to decide if the RVD should be based on the generic specifications as outlined in Annex A of the DISO or on a "brand name or equivalent". The documentation requested from client departments included a question as to whether the equipment was going to be used in an existing or a new infrastructure, which in turn forms the basis to proceed with a generic RVD or a "brand name or equivalent" RVD. In each RVD at issue, PWGSC's technical authority provided an opinion to the PWGSC contracting authority as to whether the request should be presented as a "brand name or equivalent" RVD or as a "generic" RVD. The contracting authority then made the final decision, in consultation with legal counsel if need be, about the type of RVD to be issued. Consequently, each purchase request was examined by PWGSC before it decided on which basis the RVD would proceed.

---

78. *Re Complaints Filed by NETGEAR, Inc*. (15 May 2008), PR-2007-075 to PR-2007-077 (CITT).
79. This decision was reiterated, or the same ground of complaint was not accepted for inquiry, in the following cases: *Re Complaints Filed by NETGEAR, Inc.* (29 April 2008), PR-2007-080 to PR-2007-083 (CITT); *Re Complaint Filed by NETGEAR, Inc*. (26 May 2008), PR-2007-088 (CITT); *Re Complaints Filed by NETGEAR, Inc*. (17 June 2008), PR-2007-091 to PR-2007-094 (CITT); *Re Complaints Filed by NETGEAR, Inc*. (10 July 2008), PR-2008-003 to PR-2008-006 (CITT); *Re Complaints Filed by NETGEAR, Inc*. (21 May 2008), PR-2008-014 and PR-2008-015 (CITT); *Re Complaints Filed by NETGEAR, Inc.* (12 December 2008), PR-2008-038 to PR-2008-043 (CITT); *Re Complaints Filed by NETGEAR, Inc*. (16 April 2009), PR-2009-001 to PR-2009-004 (CITT).

142. The evidence indicates that, in three of the RVDs at issue, the technical authority indicated that the RVDs should proceed on the basis of a generic description because the required equipment was going to be used in a new infrastructure instead of an existing infrastructure. Therefore, this technical opinion implies that it was possible to use generic specifications instead of a "brand name or equivalent" RVD.

143. Of these three RVDs, RVD 636 proceeded with a generic description of the technical specifications in conformity with Article 1007(3) of *NAFTA*, instead of using a brand name.

144. However, RVD 650 and RVD 651 proceeded with the designation of a "brand name or equivalent", despite the technical view that an RVD with a generic description of the technical requirements was warranted. I find that PWGSC, in the case of these particular RVDs, did not give sufficient reasons for not proceeding with a generic description, other than management constraints. The technical authority's analysis implied that a generic description was possible. Therefore, I found that these RVDs were not conducted in accordance with Article 1007(3) of *NAFTA*, which stipulates the following: ". . . unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as 'or equivalent' are included in the tender documentation."

145. The evidence indicates that, except for RVD 650 and RVD 651, PWGSC decided that, for switches that were considered to fall in either category 1.1 and category 1.2, when they needed to interoperate with an existing network infrastructure, and that the system was critical to clients, a brand name was required for the same reasons already provided by PWGSC and accepted by the Tribunal in the previous complaints[80] and for the reasons reiterated in the GIR and through testimony. I do not find this approach to be less valid in the current sets of complaints.

146. I am satisfied by the explanations provided by PWGSC that a generic description is not sufficiently[81] precise to ensure the procurement of the right product when installed and used in existing infrastructure, i.e. a product that will properly integrate into those networks. In my view, in the circumstances of the present case, Article 1007(3) of *NAFTA* authorizes PWGSC to identify products by brand name when using an RVD, to the extent that it can provide to the Tribunal a reasonable explanation to the effect that generic specifications are not sufficiently precise to allow it to ensure that the requested product will properly integrate into the existing network. In such a case, my opinion is that PWGSC presented a reasonable explanation that there is no other sufficiently precise or intelligible way to identify the products, since the use of generic specifications would risk compromising the Government's networks and prevent it from purchasing the products effectively required.

147. PWGSC submitted in the GIR and confirmed during the hearing that,[82] when switches are to be installed and integrated into existing networks, whose integrity and reliability are essential to the host department or agency, failure of the switches to properly integrate into those networks could compromise those networks. PWGSC submitted the following:

---

80. *Re Complaints Filed by NETGEAR, Inc.* (15 May 2008), PR-2007-075 to PR-2007-077 (CITT) at para. 51.
81. See Merriam-Webster Online at www.merriam-webster.com, *s.v.* "sufficient": ". . . enough to meet the needs of a situation or a proposed end . . . ." As well, this dictionary provides the following comment on the two terms "sufficient" and "enough": "SUFFICIENT suggests a close meeting of a need . . ." and "ENOUGH is less exact in suggestion than sufficient . . . ." In other words, in this instance, the generic specifications need to have the necessary precision to ensure that the product procured will work within an existing network. Otherwise, the product could be specified by brand name, provided the words "or equivalent" were added.
82. *Transcript of Public Argument*, 14 May 2010, at 92.

> Where interoperability with an existing network is required, a precise description of the exact technical requirements presents a very high level of complexity because of the vast number of features and performance criteria involved. There are literally hundreds of such factors that would need to be addressed not only in respect of product specifications but, also, and more critically, in regard to specific interoperability requirements. If PWGSC were limited to using generic specifications, it is possible that essential criteria might be inadvertently omitted, resulting in the purchase of a product that does not completely interoperate with existing devices.[83]

148. In the complaints mentioned above,[84] it was argued that there was absolutely no justification for specifying products by brand name. In the current complaints, Enterasys argued that PWGSC could have easily provided a description of the operational requirements in the subject RVDs without the use of a specific brand name, model or part number. In my view, the evidence does not support an argument that providing a description of the operational requirements through a generic description would be easy.

149. During the hearing, it was possible for the Tribunal to better understand the difficulty for PWGSC to develop, and to the industry to respond, to an RVD based on the generic specifications found in Appendix A to Annex A of the NMSO, in reviewing the example of RVD 636, which related to a new network. In summary, RVD 636 took four months to prepare and execute, while it takes on average of one month to procure a switch with an RVD that specifies "brand name or equivalent" essentially because of the complexity of describing, and of understanding from an offeror's perspective, each and every specification of a switch that will interoperate in a new system/infrastructure. As explained by Ms. St-Jean Valois,[85] the specifications in RVD 636 contained 62 technical criteria above the minimum requirements of the generic description, these criteria were subject to 13 amendments during the process, the offerors asked 98 clarification questions in relation to the generic specifications, three extensions of time were allowed to submit a proposal, and the equivalency test alone took one month to develop. Even with that level of care, attention and time to outline the specifications and the appropriate equivalency test, PWGSC mentioned that there was still a risk of not procuring the right product. Mr. Perrier gave an example of the serious consequences when the appropriate product is not procured in terms of stability of the network.[86] Ms. St-Jean Valois testified that the industry better understands the Government's requirements when it uses a brand name and that the industry is better positioned to comply with article 14. She stated as follows: "They understand us. Some succeed in demonstrating article 14 in the brand name. They do that very well"[87] [translation]. By contrast, in an existing network, when a switch is already used and needs to be replaced, its replacement with the same product or its equivalent would ensure that the product will interoperate with the system, as explained by Mr. Perrier.[88]

150. In assessing the reasonableness of PWGSC's explanation to use a "brand name or equivalent" instead of a generic description included in the DISO, in addition to the testimonies of Ms. St-Jean Valois and Mr. Perrier on the risk when a switch is procured in relation to an existing system, I took into consideration the testimony of one of PWGSC's witnesses, Mr. Oxner, who explained the following:

---

83. Tribunal Exhibit PR-2009-080-27, Administrative Record, Vol. 1A at 134-35.
84. *Re Complaints Filed by NETGEAR, Inc.* (15 May 2008), PR-2007-075 to PR-2007-077 (CITT).
85. *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 372-73.
86. *Ibid.* at 362-64.
87. *Ibid.* at 373.
88. *Ibid.* at 385. Mr. Perrier was asked the following question: "So you are then sure that the Hewlett-Packard in question, the switch, the number, if we use this Hewlett-Packard, it's because the specific characteristics of that product ensures interoperability and security, the security relation with the mainframe or with other equipment to which it connects, correct?" [translation]. M. Perrier's response: "Yes" [translation].

> I haven't really been involved in the technical justifications or the discussions that have gone back and forth [between the departments and PWGSC], but when you're looking at this type of thing and you're looking at brand name products versus generic specifications, the reason many of the clients go with brand name products is because they have them in their network . . . already. . . . And the larger reason is because of operational capabilities. All of these tools come with firmware, software capabilities that interconnect with all of these products. So if you start introducing other types of products into your network, it creates operational complexity. With operational complexity, there can be problems that Michel [Perrier] was talking about here. . . . This is one of the fundamental principles. But, yes, I mean you could put the [generic] specifications out there certainly but they would have and probably end up with those operational capabilities truly not equivalent in the way that the equipment is controlled. . . . So if you put generic specifications . . . for all of these various RVDs . . . there is that operational aspect that is always critical to existing networks. . . . If it's a brand new network, that's what we call greenfield . . . many times in the industry, where you're starting off and they don't have any equipment in place or they're going to replace everything in their network, then it's totally logical to go with generic specifications at that point. . . . And that is kind of what happened with 636 . . . as an example."[89]

151. It is my view that, in the circumstances of this case, as reviewed above, the risk and the consequences of not procuring the right product when a switch is to be used in an existing system/infrastructure constitute a sufficient and reasonable justification for PWGSC to require a "brand name or equivalent".

152. Therefore, in my view, PWGSC presented the necessary justifications to specify products by "brand name or equivalent" for each of the 43 RVDs at issue, with the exception of RVD 651 and RVD 650, in terms required by Article 1007(3) of *NAFTA*. I see no substantive reason to depart from Tribunal jurisprudence on this same issue, except for RVD 651 and RVD 650 where documentary evidence suggests that there were no substantive reasons, other than time constraints, to proceed with an RVD that specified a "brand name or equivalent".

**Sufficient Information and Time to Allow Suppliers to Demonstrate Equivalency—Grounds 5 and 7**

Enterasys' Position

153. Enterasys submitted that article 9.2 of Appendix A to Annex A of the NMSO states the following:

> **9.2. Interoperability and Performance Testing**
>
> . . .
>
> At Canada's discretion the required testing can be waived provided the Offeror submits a relevant interoperability and performance test report from a recognized independent 3rd party testing firm acceptable to Canada. The report must be based on testing done on the identical equipment, hardware and firmware versions being proposed and include the appropriate interoperability testing.

154. Enterasys stated that article 14 requires that, where an equivalent to a brand name product is proposed, the equivalent be considered where the bidder has met the following conditions:

> i. clearly designates in its RVD response the brand name, model and/or part number of the equivalent product being proposed;

89. *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 389-92.

ii. demonstrates that the proposed equivalent is fully compatible with, interoperates with and is interchangeable with the items specified in the RVD;

iii. provides complete specifications and descriptive technical documentation for each equivalent item proposed;

iv. substantiates the compliance of its proposed equivalent by demonstrating that it meets all mandatory performance criteria that are specified in the RVD; and

v. clearly identifies those areas in the specifications and descriptive technical documentation that demonstrate the equivalence of the proposed equivalent item.

155. Enterasys submitted that, on the basis of debriefing information that it received[90] regarding previous RVDs (not at issue), PWGSC made it clear that it would not consider a bid for equivalent products unless the bidder submitted a comprehensive interoperability and performance test report, on the basis of testing done between the identical OEM equipment, hardware and firmware versions provided in the RVD solicitation and the equipment proposed by a competitive bidder. According to Enterasys, since the issuance of the DISO/NMSO, all bidders that have attempted to submit equivalent bids, including bidders that have submitted interoperability and compatibility reports, had their bids declared non-compliant because the reports were not sufficient.

156. Enterasys submitted that PWGSC has consistently refused to provide bidders with sufficient information and time to prepare bids in a manner compliant with article 14. It alleged that, in accordance with Article 1012 of *NAFTA*, PWGSC is required to provide bidders with ". . . adequate time to allow suppliers . . . to prepare and submit tenders before the closing of the tendering procedures . . . ."

157. While acknowledging that article 14 provides bidders with a standard four-day period to submit an RVD response, Enterasys submitted that PWGSC can extend the deadline for more complex requirements. It further submitted that, for RVDs that specify brand name products, the bidding period should be extended upon request by bidders that wish to prepare bids for "equivalent products". Enterasys submitted that, according to a "professional opinion letter" provided by the founder of the Tolly Group,[91] all the solicitation periods for brand name RVDs should be extended to at least 20 working days so that all the necessary testing information can be requested from PWGSC and received, and the appropriate testing can be completed to substantiate compliance with the operational requirements.

PWGSC's Position

158. PWGSC submitted that, in previous decisions, the Tribunal has stated the following: ". . . the identification of a product by brand name, as well as by model and serial number, informed potential suppliers of the mandatory performance requirements that had to be met by any proposed equivalent products . . . ."[92] It also stated the following: ". . . when they are provided with a brand name, as well as a model and serial number, companies involved in supplying network equipment would be able to make determinations as to which of their products, if any, would be fully compatible with, interchangeable with and seamlessly interoperate with the items specified in the RVD."[93]

90. According to the complaint, Enterasys stated the following: "Based on debriefing information that we have recently received on previous [RVDs] . . .", Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 15. However, this debriefing information was in fact provided to counsel for Enterasys in response to proposals that had been submitted on behalf of another bidder and not with respect to an Enterasys' bid.
91. Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 243 [Tolly letter].
92. *Re Complaints Filed by NETGEAR, Inc.* (15 May 2008), PR-2007-075 to PR-2007-077 (CITT) at para. 59.
93. *Re Complaints Filed by NETGEAR, Inc.* (10 July 2008), PR-2008-003 to PR-2008-006 (CITT) at para. 62.

159. PWGSC submitted that, when an RVD identifies a brand name, bidders are entitled to propose equivalents to that brand name equipment, as per article 14, which defines an equivalent product as being ". . . equivalent in form, fit, function and quality that are fully compatible with, interchangeable with and seamlessly interoperate with the items specified in the RVD . . . ." PWGSC submitted that an assessment of equivalence is based on the specific brand name equipment as presented in an RVD, unless otherwise provided for in an RVD and that, for the 43 brand name RVDs at issue, there were no mandatory performance requirements other than those of the identified brand name products. PWGSC submitted that bidders were not therefore required to address larger network issues and the operational requirements, device connections, configurations and other particulars of the host network to demonstrate equivalence. It submitted that an equivalent product, for example, must be interchangeable with and interoperate with the brand name product and not with devices from the host network.

160. PWGSC submitted that, contrary to Enterasys' allegations, when a client department defines its requirements using brand names, bidders do not require the technical justification provided to PWGSC by that user. PWGSC submitted that the identification of a particular brand name product provides notice that the mandatory performance requirements for the RVD are the performance specifications of that particular product. PWGSC submitted that such specifications are well understood in the industry and that the designation of a particular product provides a convenient point of reference for the industry. PWGSC submitted that, therefore, in being provided with a reference to a brand name, bidders are provided with all the information necessary to submit responsive bids for an equivalent product.

161. PWGSC submitted that neither Enterasys nor any of its authorized agents, including West Atlantic Systems, submitted proposals in response to any of the RVDs that specified brand names. PWGSC argued that failing to submit proposals is equally consistent with a lack of products equivalent to those identified by brand name in the RVDs. PWGSC submitted that Enterasys failed to file any evidence to support its allegation that it was unable to properly bid without additional information or that the tendering procedures otherwise prevented it from submitting a compliant proposal. PWGSC further submitted that Enterasys bears the burden of proof and that mere assertions are not proof upon which findings of fact can be made.

162. PWGSC submitted that article B.14 of the NESS RFSO and article 14 provide for four working days as the standard response time to an RVD, but that, on average, the bidding periods are longer. PWGSC referenced a previous determination[94] in which, it argues, the Tribunal rejected the allegation that the RVD processes provided insufficient bidding periods to meet the evidentiary obligation imposed on bidders proposing equivalent products. The Tribunal stated as follows:

> . . . it is open to DISO holders to demonstrate equivalency by providing evidence, such as a thorough comparison and analysis of the technical specifications of their products vis-à-vis those of the items specified in the RVDs, or by providing detailed examples of instances where their products have been installed and interoperate with products similar to those specified in the RVDs. Although an engineering report or results from benchmark comparison testing, if available, could be submitted in order to demonstrate equivalency, the Tribunal believes that these are not specifically required by the RVDs.

163. Enterasys alleged that PWGSC will not consider a bid for equivalent products unless that bidder submits a comprehensive interoperability and performance test report based on testing done between the identical equipment, hardware and firmware versions provided in the RVD solicitation and the proposed

94. *Ibid.* at para. 67.

equivalent equipment.[95] PWGSC noted that article 14 defines the evidentiary obligations on a bidder that proposes an equivalent product and that it does not *require* an interoperability and performance test report from a recognized independent third-party testing firm acceptable to Canada. It submitted that the NMSO provides that testing of new networking equipment may be waived where a bidder submits such a report. It submitted that the DISO does not require that the report be included with a proposal in response to an RVD.

164. PWGSC argued that article 9.2 of Appendix A to Annex A of the NESS DISO provides PWGSC with discretion to have new networking equipment tested and that testing may be waived where the bidder submits a relevant interoperability and performance test.

165. In addition, PWGSC rejected the inference that Enterasys takes from the Tolly letter that extensive testing, using a test plan developed having regard to the host network, is necessary to meet the obligation on bidders that propose equivalent products. PWGSC submitted that the report proposed by The Tolly Group is more in the nature of the interoperability and performance test report upon which Canada may waive testing of new equipment. PWGSC also notes that The Tolly Group was asked for its opinion on what it would require in order to prepare an interoperability and compatibility report. PWGSC submitted that an interoperability report of the kind proposed by The Tolly Group is not required by bidders that propose equivalent products and that, therefore, additional bidding time to prepare such a report is not necessary.[96]

166. PWGSC submitted that all the RVDs at issue had a bidding period consistent with the NMSO. It argued that, given that reference to a brand name provides sufficient information for a bidder to propose an equivalent product, the NMSO bidding period is sufficient for a bidder to propose equivalent products. PWGSC submitted that, regarding RVD 650, the requirement was for Hewlett-Packard products and that the contract was awarded to a bidder that offered to provide equivalent products from another manufacturer, thus demonstrating that the bidding periods for the RVDs were sufficient.

CCSI's Position

167. CCSI submitted that Enterasys made references to debriefing information that it received regarding "previous RVDs" without providing any documentary evidence of that debriefing. It noted that Enterasys, when submitting questions regarding each of the RVDs at issue during their respective solicitation periods, referred to information provided by a "network expert" without identifying the individual and establishing that the individual was an actual network expert. In addition, it noted that Enterasys did not indicate that the person actually made the reputed comments or that the comments had been accurately reported.

95. PWGSC denied that this was the case.
96. Regarding the generic specification in RVD 636, one of PWGSC's witnesses stated that, because of the use of generic specifications, there was a need for a more robust test plan that required bidders to demonstrate the capabilities of their products. *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 263-64.

168. CCSI submitted that Enterasys advanced the same arguments regarding the conduct of the RVD process under the NMSO in previous cases. It argued that, given that the Tribunal has already determined that article 14 does not breach the trade agreements and that the wording that PWGSC includes within each RVD,[97] where brand names are being requested, complies with the trade agreements,[98] CCSI submitted that the Tribunal should apply *res judicata* and determine that the complaints are not valid. CCSI submitted that, by referring to a particular brand name product, PWGSC provided potential suppliers with sufficient information to allow them to bid and that the Tribunal held that describing requirements in terms of brand name products provided sufficient detail to allow equivalent products to be bid.[99] CCSI provided the Tribunal with examples of what, it claimed, was publicly available information[100] on the configuration of competing products and that this information was all that was required for Enterasys to submit an equivalent product bid. It submitted that Enterasys, like all other NMSO holders and resellers, should have been aware of the potential requirements that could be procured and should have taken steps to respond to an RVD as quickly as possible. It submitted that PWGSC should not be held responsible for Enterasys' failure to take reasonable steps to prepare for RVDs.

169. CCSI submitted that the procurements at issue are not complex and did not require an extension to the four-day bidding period allowed by article 14. CCSI submitted that Enterasys incorrectly interpreted the category 1.1 and 1.2 requirements as absolutes that had to be met without deviation.

170. CCSI also submitted that Enterasys had not taken the steps required by the *Rules* to qualify Mr. Kevin Tolly as an expert, thus negating CCSI's and PWGSC's ability to respond to his evidence and that, therefore, his testimony should not be submitted to the Tribunal.

**Analysis**

171. As noted above, Article 1007 of *NAFTA* requires the following:

> 3. Each Party shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark or name, patent, design or type, specific origin or producer or supplier unless there is no sufficiently precise or intelligible way of otherwise describing the procurement requirements and provided that, in such cases, words such as "or equivalent" are included in the tender documentation.

97. "**For the supply and delivery of the following [brand name] products or equivalent. Note: Any equivalent products must be fully substantiated as indicated in the NESS NMSO document. List equivalent products by OEM and part number with a cross reference to the list below**", Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 96.
98. *Re Complaints Filed by NETGEAR, Inc.* (15 May 2008), PR-2007-075 to PR-2007-077 (CITT); *Re Complaints Filed by NETGEAR, Inc.* (29 April 2008), PR-2007-080 to PR-2007-083 (CITT); *Re Complaint Filed by NETGEAR, Inc.* (26 May 2008), PR-2007-088 (CITT); *Re Complaints Filed by NETGEAR, Inc.* (17 June 2008), PR-2007-091 to PR-2007-094 (CITT); *Re Complaints Filed by NETGEAR, Inc.* (10 July 2008), PR-2008-003 to PR-2008-006 (CITT).
99. *Re Complaints Filed by NETGEAR, Inc.* (17 June 2008), PR-2007-091 to PR-2007-094 (CITT) at para. 55.
100. Tribunal Exhibit PR-2009-080-37, Administrative Record, Vol. 1B at 86-322.

172. With respect to this element of the complaints, the Tribunal also considers that Article 1013 of *NAFTA* also specifically applies. It reads as follows:[101]

> 1. Where an entity provides tender documentation to suppliers, the documentation shall contain all information necessary to permit suppliers to submit responsive tenders, including information required to be published in the notice referred to in Article 1010(2), except for the information required under Article 1010(2) (h). The documentation shall also include:
>
> . . .
>
> f. a statement of any economic or technical requirements and of any financial guarantees, information and documents required from suppliers;
>
> g. a complete description of the goods or services to be procured and any other requirements, including technical specifications, conformity certification and necessary plans, drawings and instructional materials.

173. The Tribunal considers that Article 1013 of *NAFTA* requires good faith and, when read in light of Article 1007(3), represents the effective implementation of a mechanism that allows for the submission of proposals regarding "equivalent" products. In tandem with Article 1007(3), Article 1013, in particular paragraphs (f) and (g), specifically requires the provision of ". . . all information necessary to permit suppliers to submit responsive tenders . . . ."

174. With respect to the allegation that PWGSC did not allow suppliers that sought to propose an equivalent product with sufficient time to prepare responsive tenders, Article 1012(1) of *NAFTA* provides that an entity shall ". . . in prescribing a time limit, provide adequate time to allow suppliers . . . to prepare and submit tenders . . ." and that, in determining a time limit, consistent with its reasonable needs, an entity shall ". . . take into account such factors as the complexity of the procurement, the extent of subcontracting anticipated . . . ."

175. The Tribunal notes that article 14 creates a mechanism whereby pre-qualified suppliers can establish equivalency. It prescribes the following:

> Products that are equivalent in form, fit, function and quality that are fully compatible with, interchangeable with and seamlessly interoperate with the items specified in the RVD will be considered where the Offeror:
>
> i. clearly designates in its RVD response the brand name, model and/or part number of the equivalent product being proposed;
>
> ii. demonstrates that the proposed equivalent is fully compatible with, interoperates with and is interchangeable with the items specified in the RVD;
>
> iii. provides complete specifications and descriptive technical documentation for each equivalent item proposed;
>
> iv. substantiates the compliance of its proposed equivalent by demonstrating that it meets all mandatory performance criteria that are specified in the RVD; and
>
> v. clearly identifies those areas in the specifications and descriptive technical documentation that demonstrate the equivalence of the proposed equivalent item.

101. Similar language is found in Article Kbis-06(1) of the *CCFTA*, Article 1704(6) of the *CPFTA* and Article XII(2) of the *AGP*.

176. The Tribunal also notes that the terms of article 14 are not *per se* contested, but that the application of that regime in the case of the RVDs at issue is contested in terms of the information provided, and time granted, by PWGSC for the demonstration of equivalency in each instance. In essence, the question is whether PWGSC, in the circumstances of the 40 brand name RVDs that remain at issue, provided the information that was "necessary" for the supplier to assess and demonstrate equivalency and accorded sufficient time to the suppliers to demonstrate equivalency.

177. PWGSC submitted that the brand name or model number and information publicly available was sufficient in all cases. Enterasys' witness, on the other hand, stated that this information provides him with 50 to 60 percent of what he requires,[102] and that, according to him, that is not enough, on the basis of his previous experiences, to establish equivalency. Enterasys' witness testified that PWGSC had previously refused to provide answers to questions raised in respect of technical requirements and that he believes that those answers would be necessary for a bidder to demonstrate equivalency and for PWGSC to assess the equivalency of bids that do not offer to supply the specified brand name equipment.

178. The Tribunal considers that, as the complainant, Enterasys bears the burden of demonstrating that it was not provided with the necessary information.

179. In all cases where brand name products were requested, PWGSC provided bidders with the requested brand names/model numbers. According to PWGSC's witnesses, this provides potential suppliers with sufficient information because only the publicly available (through the Internet) technical specifications of the products specified in the RVDs are used to evaluate bids for equivalent products.[103] According to the testimony of Enterasys' witness, he asked questions to PWGSC during the solicitation period that, he claimed, were designed to allow Enterasys to determine what was being requested,[104] where it was being used and how it was going to be used. The witness stated that his questions were often not answered or that PWGSC advised that the NMSO did not require that certain information be provided. The Tribunal notes that, typically, the same set of questions was asked for each RVD and that many of those questions did not relate to the equipment being requested, but related instead to whether PWGSC would consider other products that Enterasys would like to submit instead or to changing the solicitation process itself.[105]

180. The Tribunal notes that there was no expert evidence to support whether, in fact, the allegedly required information is indeed necessary or whether the information provided in the RVDs allowed for an assessment or demonstration of the required elements of article 14. In this regard, the Tribunal also notes that the signatory of a letter, which Enterasys filed in evidence and purportedly aimed at demonstrating that bidders needed more information and time to prepare responsive tenders for an equivalent product, was not qualified as an expert and that the opinion expressed in his letter is premised on selected facts that were disclosed to him by Enterasys based on Enterasys' interpretation of the NMSO requirements. Therefore, the Tribunal cannot give much weight to this evidence.

---

102. *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 221.
103. *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 283, 300.
104. In the case of RVD 640, as an example, the witness for Enterasys claimed that the items being purchased were not even switches, but were components of a switch. *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 49.
105. In this regard, see, for example, *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 52-53; Tribunal Exhibit PR-2009-092-01, Administrative Record, Vol. 1 at 56-59.

181. PWGSC indicated that there is no prescribed manner for the demonstration of equivalency and that the equivalency requirements can be met with a simple table that compares the functionalities of the requested brand name product and those of the proposed equivalent product and a document that explains how the technical specifications of the proposed equivalent product match those of the requested products.[106] However, during his testimony, Enterasys' witness claimed that, on the basis of its past experience, Enterasys needs to demonstrate equivalency with an extensive interoperability and compatibility report. However, for confidentiality reasons on the part of Enterasys' witness, the Tribunal was unable to ask questions to PWGSC's witnesses regarding the circumstances surrounding these prior bids and alleged debriefings and was therefore unable to assess the relevance and probative value of this evidence. Accordingly, the Tribunal is unable to give significant weight to the witness's claims.

182. The Tribunal finds the testimony of PWGSC's witnesses regarding the sufficiency of a comparative table and narrative explanation of how the products are equivalent to be credible. That being said, the Tribunal believes that, even with such a simple procedure, it remains necessary for the potential supplier to be able to assess and demonstrate the equivalency requirements of article 14, i.e. that the proposed equivalent product is fully compatible with, interoperates with and is interchangeable with the items specified in the RVD. Whether or not the information provided by PWGSC (i.e. the brand names/model numbers) is sufficient or whether, in fact, more information is required is a technical issue that the Tribunal cannot determine on the basis of the evidence submitted by Enterasys. The Tribunal is confronted with two "non-expert" opposing views and, even if there was no actual evidence provided by PWGSC of an evaluation of an equivalent bid on the basis of article 14 criteria, the fact remains that, in one instance, RVD 651, a bid for an equivalent product was deemed compliant, apparently without PWGSC having provided bidders with any information beyond the requested brand names/model numbers. This suggests that it was possible for the bidder, in that case, to submit a responsive tender using the information that PWGSC provides with the RVDs, i.e. the brand names/model numbers, with no requirement for network diagrams or any other information contained in the TJ.

183. The Tribunal is convinced that the obligations under Articles 1007(3) and 1013 of *NAFTA* are clear, in that PWGSC, if allowed to use a brand name, must ensure that it provides the necessary information for the supplier to assess and eventually demonstrate equivalency under the conditions set in article 14. As a result, it would seem reasonable that, concerning the demonstration that the proposed product is equivalent to the incumbent product in terms of "interoperability", PWGSC provide the technical information that would allow for an assessment or demonstration of interoperability. As noted above, it seems contrary to the allegations provided by Enterasys on the lack of information in order for it to proceed with a bid that, in one of the RVDs at issue, the information was sufficient to allow an equivalent product by a competitor to be selected. On balance, the Tribunal sees no reason to depart from its previous findings on this issue.[107]

184. In these circumstances, the Tribunal considers that Enterasys has not established that PWGSC failed to provide suppliers with all the information necessary to submit responsive tenders and is not convinced that PWGSC was required to provide additional information on the client departments' existing equipment and network environment in order to allow suppliers to submit compliant equivalent bids. The Tribunal is of the view that additional information would only have been required had the evaluation of any proposed equivalent products in the solicitations at issue been based on requirements or technical specifications other than those of the identified brand name products. However, as discussed above, this does not appear to be the case.

---

106. *Transcript of Public Hearing*, Vol. 2, 14 May 2010, at 108, 257-61, 379-83.

107. *Re Complaints Filed by NETGEAR, Inc.* (10 July 2008), PR-2008-003 to PR-2008-006 (CITT). The Tribunal notes that the evidence filed in these cases regarding RVD 651 suggests that, indeed, no additional information is warranted for bidders to be able to submit responsive tenders.

185. Article 14 of the NESS NMSO clearly states that "[p]roducts that are equivalent in form, fit, function and quality that are fully compatible with, interchangeable with and seamlessly interoperate *with the items specified in the RVD* will be considered . . . ." [emphasis added]. This statement, which is incorporated by reference into the RVDs in question, does not require bidders to address larger network issues which, in the Tribunal's opinion, may have required additional information, such as a network diagram or an interface product listing. Based on the case presented in the complaints and the lack of evidence, the Tribunal is unable to conclude, on balance, that the need for additional information, including network diagrams or a listing of other devices required to interface with the requested switches, was warranted.

186. With respect to the allegation that bidders of equivalent products were not provided with enough time to prepare the necessary equivalency reports, Enterasys has argued that bidders of equivalent products would require a four-week extension to the standard four-day bidding period provided in the NMSO. PWGSC and CCSI, on the other hand, have argued that the four-day time period was adequate in each case. At the hearing,[108] PWGSC indicated that it neither requires nor requests the type of equivalency report noted in Enterasys' complaints regarding brand name RVDs, such as in RVD 651.

187. This issue is intrinsically linked to the issue of availability of information necessary to submit bids. As noted above, the Tribunal accepted the statements of PWGSC's witnesses as to the nature of the demonstration required, i.e. a comparative table and narrative explanations in a separate document. It seems reasonable to think that that method would be less demanding than the type of tests suggested by Enterasys, which suggests that time may not be as much of an issue as appears to be indicated by the complaints. On this issue, it is clear from the evidence that demonstrating equivalence under article 14 does not require a bidder to provide the extensive interoperability and performance test report contemplated by article 9.2 of Appendix A to Annex A of the NMSO. In the Tribunal's opinion, this provision pertains to post-bid discretionary testing for new equipment that PWGSC may waive in certain circumstances at its discretion. In other words, the Tribunal considers that Enterasys may have wrongly interpreted the nature of the demonstration that is required under article 14 and, as a result, overestimated the time that is reasonably necessary to make the demonstration that is actually required. In this regard, the Tribunal is of the view that a four-day period to perform the basic analysis of equivalency and provide the documents that PWGSC apparently requires, along with a bid, does not appear unreasonable.

188. As to the issues of information and time in the case of the RVDs that specify products with brand names, the Tribunal concludes that Enterasys has failed to demonstrate that the information and time provided were insufficient. Consequently, the Tribunal cannot accept the argument that PWGSC has not complied with the requirements of Article 1012(1) of *NAFTA* by not extending the time allocated to bidders to submit proposals beyond the standard four-day period provided in the NMSO, as was requested by Enterasys during the bidding period.

189. In conclusion, the Tribunal finds that Enterasys has not met its burden of demonstrating that, in the context the RVDs in question, the information provided is not sufficient in order to permit suppliers to submit responsive tenders or that the RVD bidding periods were not sufficient.

190. Enterasys also submitted that incumbent suppliers were provided with additional information to which other bidders were not privy, including some of the information that it requested during each of the RVD solicitation periods. This allegation was not supported by any evidence other than assertions made by

108. *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 258-59.

Enterasys' witness. There is no actual indication that such information was, in fact, made available to any bidders. For this reason, the Tribunal is unable to conclude that PWGSC has failed to provide all suppliers with equal access to information with respect to the procurements, as required by Article 1008(2) of *NAFTA*. The Tribunal therefore concludes that these grounds of complaint are not valid.

**Categorization of Goods Under Category 1.1/1.2—Grounds 1, 2 and 3 of All Sets of Complaints and Ground 8 of File Nos. PR-2009-092 to PR-2009-102 and PR-2009-104 to PR-2009-128**

Enterasys's Position

191. Enterasys submitted that article 14 states the following:

> **Recipients of [RVDs]**: The RVD will be sent by PWGSC to all Offerors who hold a Standing Offer in the relevant Category and are listed in the selected Category at the date and time of RVD issuance. No RVD shall include products from multiple Categories. Where equipment is required from multiple Categories, a separate RVD will be sent to each Offeror in each applicable Category.

192. Enterasys submitted that, in many instances, the products listed in the deliverables lists of the subject RVDs were not compliant with one or more of the mandatory technical specifications set out in Appendix A to Annex A of the NMSO for the applicable categories. In Enterasys' view, all items specified on a RVD must possess all the technical specifications identified in Appendix A to Annex A of the NMSO for the relevant category of products. Enterasys also submitted that certain RVDs for category 1.2 included products from category 1.1, as well as products that have capabilities from other classes and categories. Enterasys claimed that this represented a breach of the terms and conditions of the NESS DISO and the trade agreements.

193. Enterasys submitted that, throughout all the complaints to date regarding the NESS DISO/NMSO, this is the first time that PWGSC has attempted to make a distinction between the "technical specifications" and "technical definition" of the categories. It submitted that the listings for category 1.1 and category 1.2 in Appendix A to Annex A of the NMSO clearly explain the included specifications that must be met, as a minimum, in order for a bidder to be issued a standing offer and that the other term used for these minimum specifications is "generic specifications".

194. Enterasys further submitted that, although the NMSO is only for LAN switch hardware, many of the items requested in these RVDs are outside the scope of the categories, including cabling and some storage area network and server software items. Enterasys submitted, as examples, items 2 and 3[109] of RVD 710[110] and items 2, 3 and 4[111] of RVD 678[112] as being items outside the proper scope of the RVDs. Enterasys claimed that it had honoured the terms and conditions of the NMSO and had not included items outside the scope of the categories, such as cables and software, on its PPL, but that PWGSC had allowed other companies to do so. It argued that PWGSC's behaviour is discriminatory and breaches the terms and conditions of the NMSO and the trade agreements.

109. "Nexus 5000 Fabric Manager Server License" and "Nexus 5010 Storage Protocols Services License", Tribunal Exhibit PR-2009-104-01, Administrative Record, Vol. 1 at 477.
110. File No. PR-2009-122.
111. "10GBASE-CU SFP+ Cable 1 Meter", "10GBASE-CU SFP+ Cable 3 Meter", "10GBASE-CU SFP+ Cable 5 Meter", Tribunal Exhibit PR-2009-104-01, Administrative Record, Vol. 1 at 75.
112. File No. PR-2009-106.

195. In Exhibit 1 to its comments on the GIR,[113] Enterasys filed a document prepared by Mr. Weedon, which contained his views on the documents filed by PWGSC in response to the Tribunal's April 7, 2010, order and included additional submissions, broken down by RVD, as to why particular items requested on the deliverables lists of most RVDs were not compliant with the alleged mandatory technical specifications set out in Appendix A to Annex A of the NMSO for the relevant category. The Tribunal has considered this document, which provides details regarding Enterasys' position on product categorization issues, in its analysis of these grounds of complaint.

PWGSC's Position

196. PWGSC submitted that Enterasys' allegations of inappropriately categorizing equipment are based on its misunderstanding of how products are placed on a PPL within a given category. It submitted that the flawed basis of Enterasys' grounds of complaint is its claim that a product on a PPL within a given category must possess all the technical specifications identified in Appendix A to Annex A of the NMSO for that category.

197. PWGSC submitted that, to be qualified in an equipment category, bidders were required to propose a product model and/or family of models (depending on the category) that met (i) the technical definition and (ii) the technical specifications of that category as specified in Appendix A to Annex A of the NMSO. It submitted that, if the evaluated equipment in a given category met the technical definition and technical requirements of that category, and the bidder satisfied other listed mandatory requirements, that bidder received a standing offer for that category. PWGSC submitted that, in accordance with article 14, "[o]nce an Offeror has qualified in a Category, all equipment offered by that Offeror as listed in the OEM's Canadian Published Price List ***that falls within that Category's technical definition*** will be available for call-up" [emphasis in original]. It further submitted that, as all equipment listed in a particular category on a bidder's PPL is available for call-up, an RVD may identify equipment for requisition using that listed equipment for that category.

198. PWGSC submitted that the technical *definition* of a category is different from the technical *specifications* of that category. PWGSC submitted that the feature that distinguishes LAN switches in category 1.1 from those in category 1.2 is the inclusion of Layer 3 IP routing in the latter. Thus, according to PWGSC, a LAN switch with Layer 3 IP routing functionality is included in category 1.2 regardless of the other technical specifications of the switch (for example, port densities, access speeds, etc.). PWGSC submitted that, as an example, a NMSO holder qualified in category 1.1 may offer for sale all the Layer 2 LAN switches on its PPL that do not include Layer 3 functionality. It also submitted that a LAN switch that falls within the technical definition of one category may possess a technical specification listed for another category.

199. Regarding Enterasys' allegations that PWGSC is procuring items other than those allowed by the RVD category (e.g. network management software [RVD 636 and RVD 710] and cables [RVD 678]), PWGSC submitted that the NMSO contemplates the acquisition of certain additional items, including cables and certain types of software. Specifically, PWGSC noted that article 29 of the NMSO provides the following:

> ii) The proposed product(s) shall contain all ancillary equipment, such as a power supply, cabinetry, cables and connectors required to enable the product to satisfy the requirements called up herein and be operable in a standard office environment.

113. Tribunal Exhibit PR-2009-080-53, Administrative Record, Vol. 1C at 29-43.

iii) Any applicable software shall be the current release, unless otherwise specified, in general use and require no further research and development. The software shall be supported by, and fully compatible with the hardware up to the limit of hardware expansion capability. All software must be completely integrated and fully interfaced with the hardware.

200. PWGSC submitted that the mandatory technical specifications for both category 1.1 and category 1.2 used in the initial evaluation of bidders' proposals contemplate the purchase of software. It submitted that, under the heading "9) Management Features" in category 1.2, the technical specifications include, as an example, "h. DNS Support (may be implemented in management software item k.)" and "m. Required management software and SNMP MIB II support must be proposed".[114] It further submitted that there are two types of software that can be procured under the NESS DISO: firmware, which provides programming (i e. provides operational functionality) that is integrated with the hardware architecture of a device, and bundled software, which also provides programming, but does not integrate with the hardware architecture of a device. It submitted that the bundled software and hardware complement each other to meet the mandatory technical requirements of a NESS category.

201. Specifically regarding the software requested in RVD 636, PWGSC submitted that it was a generic network switch management solution for managing category 1.2 products. It noted that no specific brand name of software was requested; rather, the requirement was for firmware or bundled software that could be used with a graphical user interface via the Internet. PWGSC noted that this was also a technical requirement in the initial evaluation of bidders' proposals to be issued a NMSO.[115]

202. Specifically regarding cables and other ancillary items, PWGSC submitted that such equipment may be bundled with a proposed product or, for administrative convenience, presented as a separate product item in an RVD. It noted that cables cannot be procured independently of NESS hardware. It also noted that Enterasys' categories 1.1 and 1.2 PPLs include separate line items for software licenses and cables.

CCSI's Position

203. CCSI submitted that Enterasys incorrectly interpreted the category 1.1 and category 1.2 requirements as absolutes that must be met without deviation. CCSI supported PWGSC's statement that the specifications were used only for the purpose of conducting the original evaluation process, that is, for a supplier to become a holder of a standing offer.

204. CCSI submitted that, in Enterasys' questions to PWGSC during the solicitation periods concerning the categorization of goods in the various RVDs, it referred to a "networking expert" in support of its claims that the particular OEM product at issue did not meet the requirements of the specific category. CCSI submitted that Enterasys did not identify this expert or the source of the expert's alleged knowledge. CCSI submitted that Enterasys has an obligation to provide evidence in support of its complaint and that unsupported references to an unidentified network expert are not sufficient to meet this requirement. CCSI submitted that the Tribunal should dismiss the grounds of complaint regarding the categorization of products in all these complaints.

114. The Tribunal notes that similar language is found in article 6) of category 1.1, Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 214-15.
115. Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 217.

## Analysis

205. In the Tribunal's opinion, the trade agreements, including *NAFTA*, require that a government institution be governed by the terms set out in the tender documentation for any particular solicitation. Accordingly, a government institution will conduct a procurement process in a manner inconsistent with *NAFTA* if it does not act in accordance with the terms of the solicitation documents.[116]

206. In these complaints, the solicitation documents include the RVDs that are at issue and the NMSO. The relevance of the NMSO is made clear by the terms of all RVDs which, as noted above, provide that the terms and conditions of the NMSO shall apply to the evaluation of each RVD and that proposals (in response to an RVD) must comply with all mandatory conditions and technical requirements of the NMSO.

207. Therefore, the Tribunal must determine whether PWGSC acted in accordance with the relevant terms of the RVD and the NMSO in categorizing equipment for the purposes of the RVDs at issue. In order to make this determination, the Tribunal is of the view that it must examine the applicable terms and conditions set out in the NMSO and those of the specific RVDs at issue in their entirety.

208. In this regard, the Tribunal notes the wording of provisions of the NMSO, which indicates that RVDs are to specify only products from one category (i.e. PWGSC shall not "cross" categories) and that bidders are required to propose products meeting all the specifications listed on a specific RVD. Article 14 reads as follows:

> **14) Call-up Process/Limitations**
>
> Individual Call-Ups made by the ITSB Administrative Authority (**Article 6c**) on behalf of identified users pursuant to this Standing Offer must not exceed the following limits. These limits are on a per-Category basis. *Individual call-ups shall not cross categories.*
>
> . . .
>
> Once an Offeror has qualified in a Category, all equipment offered by that Offeror as listed in the OEM's Canadian Published Price List **that falls within that Category's technical definition** will be available for call-up.
>
> . . .
>
> **Recipients of [RVDs]**: The RVD will be sent by PWGSC to all Offerors who hold a Standing Offer in the relevant Category and are listed in the selected Category at the date and time of RVD issuance. *No RVD shall include products from multiple Categories.* Where *equipment is required from multiple Categories, a separate RVD will be sent to each Offeror in each applicable Category.*
>
> . . .
>
> **RVD Response Requirements**: Only responses to RVDs that meet all the following requirements will be considered by PWGSC for a Call-up:
>
> (A) The products proposed for delivery in the RVD response must be identical to the specifications listed in the RVD.
>
> [Emphasis added]

116. *Re Complaints Filed by NETGEAR, Inc.* (15 May 2008), PR-2007-075 to PR-2007-077 (CITT) at 21.

209. In view of the above provisions, it is clear that each RVD issued under the NMSO must require the delivery of products from only one category, that is, the category identified in the RVD, and that such products must fall within that category's technical definition. Enterasys alleged that most, if not all, of the RVDs at issue contained requirements for items that did not fall within the ambit of the relevant category of the RVD. The implication being that, even if only one item was not from the particular category indicated on any given RVD, a bidder would be unable to bid on that RVD, as its PPL for that category could not contain the item(s) that were not within the scope of that category. Its argument is based on the proposition that, in order to meet the technical definition of the relevant category, products must comply with all the technical specifications set out in Appendix A to Annex A of the NMSO. In response, PWGSC submitted that Enterasys has misinterpreted the relevant provisions and that the technical definition of a category is different from the technical specifications of that category. In PWGSC's view, equipment offered within a category offered by a holder of an NMSO need not support all the technical specifications stipulated in Appendix A to Annex A of the NMSO in order to be consistent with the technical definition of the category.

210. Thus, in order to dispose of these grounds of complaint, the Tribunal must first address the question of whether the technical specifications listed in Appendix A to Annex A of the NMSO are relevant or applicable in order to determine whether the items required by each RVD fall within the technical definition of the relevant category. Indeed, should the Tribunal accept PWGSC's interpretation on this threshold issue, it would not have to further examine most of Enterasys' specific allegations, since those allegations require the Tribunal to accept that the technical specifications listed in Appendix A to Annex A of the NMSO are mandatory and define each category. The cases before the Tribunal are limited to either category 1.1 or category 1.2.

211. On this issue, the Tribunal notes that, while article 14 provides that ". . . all equipment . . . **that falls within that Category's *technical definition* will be available for call-up**" [emphasis added], there is no specific provision entitled "technical definition" in the NMSO. Article 14 refers however to the "generic specifications" found at Annex A in defining requirements:

> …
>
> **Equivalents**: ***These equivalents conditions only apply when a Client has [specified] a product by Brand Name. All other RVDs shall be based on the generic specifications found at Annex A***

212. The NMSO also defines the concept of "Non-Compliance" in the following manner:

> ***Non-Compliance***: Any product that fails to meet the Call-up/RVD *technical specifications*. Examples of non-compliance include: less than mandatory number of ports; less than mandatory communication speed; less than mandatory expansion slots; cannot support mandatory protocol(s).[117]
>
> [Emphasis added]

213. Annex A of the NMSO is the NESS Statement of Work (SOW), which includes an appendix (Appendix A) entitled "NESS – Equipment DISO, Classes and Categories of Equipment, Technical Specifications". Clause 1.3 of the SOW, found on pages 1 and 2, entitled "Approach", states the following:

> (M) This Statement of Work (SOW) identifies the *Mandatory requirements that Offerors shall fulfill to qualify as NESS Equipment DISO Offerors*; and shall comply with to maintain their status throughout the period of the DISO.

117. Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 194.

> (M) Clients will have access to the Network Equipment available through the NESS Equipment DISOs by sending their requirements to ITSB for processing. All call-ups resulting from these DISOs will be approved and issued by PWGSC/ITSB or PWGSC/ITSPD exclusively. Offerors shall not accept call-ups from any other entity under these DISOs.
>
> (I) Through consolidation, the Crown will ensure that it receives best value through economies of scale. The management of technology and pricing will be simplified because all call-ups will be managed by ITSB and because the overall procurement, including all Requests for Volume Discounts (RVDs), will be managed by PWGSC.
>
> (I) This NESS DISO will allow the addition of new Classes and Categories of Network Equipment when new technology becomes available. It also allows more flexibility for the purchase of any Network Equipment available from an Original Equipment Manufacturer (OEM) *within a specific Category*. Effectively, *the OEM's Canadian published price list (PPL) forms an integral part of the DISO within each Category of Network Equipment for which that OEM has qualified.*[118]
>
> [Emphasis added]

214. Appendix A to Annex A of the NMSO provides direction regarding the nature of mandatory requirements. It reads as follows:

> 2. To be eligible for a DISO award in a given Network Equipment Category, a technical offer must be compliant with all Mandatory requirements in that category.

215. Appendix A to Annex A of the NMSO then defines categories 1.1 and 1.2 by providing both a general description of equipment (i.e. different types of switch) and by listing, immediately afterward, the precise requirements with which the switches must comply as follows:

> **1.1 Category - L2 LAN switches**
>
> Layer 2 Ethernet Switch. It does not include L3 functionality except in the management features. Propose one L2 switch model compliant with requirements below:
>
> 1) Architecture:
>  a. Can be, standalone or stackable.
> 2) Port Density (top port densities in a) -d) are not simultaneous requirements)
>  a. Minimum 2 Small Form-Factor Pluggable (SFP) or GBICs, expandable to min. 16
>  b. Minimum 24 RJ-45 ports, expandable to min. 192 RJ-45 and/or SC ports.
>  c. Support for minimum 192 10/l00Base-TX ports
>  d. Support for minimum 48 standard 1000Base-T (for full configuration)
> 3) Access Speeds & Interfaces
>  a. 10Base-TX / 100 Base-TX Speed and Duplex auto-sensing on each RJ-45 ports
>  b. 1000Base-T - RJ-45, SFP or GBIC
>  c. 1000Base-SX SFP or GBIC
>  d. 1000Base-LX SFP or GBIC
> 4) Performance (for full configuration 192 ports)
>  a. Switching Fabric: no less than 30 Gbps
>  b. Forwarding (64 byte packets): no less than 14 Mpps
>  c. Number of MAC addresses supported: min 4096
>  d. Number of VLAN Configured: min 192
>  e. Number of VLAN ID Supported: min 192
> 5) Features and Standards Support Provided
>  a. Link Aggregation as per IEEE 802.3 - 2002

118. Tribunal Exhibit PR-2009-092-01, Administrative Record, Vol. 1 at 216.

b. 10Base-T as per IEEE 802.3 - 2002
c. 100Base-TX as per IEEE 802.3 - 2002
d. Gigabit Ethernet 1000Base-T/SX/LX as per IEEE 802.3 - 2002
e. Auto-negotiation of speed and duplex mode for all data rates - IEEE 802.3 - 2002
f. Manual setting for speed and duplex mode for 10/1000data rates - IEEE 802.3 - 2002
g. Full duplex mode, flow control as per IEEE 802.3 - 2002
h. Ethernet prioritization and CoS as per IEEE 802.1Q - 2003, IEEE 802.1p
i. VLAN Tagging as per IEEE 802.1Q - 2003
j. STP, RSTP as per IEEE 802.1Q, IEEE 802 .1w
k. Optional: MSTP as per IEEE 802.1Q - 2003
1. Security: IEEE 802.1x
m. IP multicast flooding prevention feature - IGMP snooping or equivalent

6) Management Features
   a. CLI support (command line interface)
   b. SNMPv1 as per RFCs 1157, 1155, 1212, 1215 and SNMPv2c as per RFCs 1901, 2578-2580, 3416-3418
   c. Optional: SNMPv3 as per RFCs 3410 - 3415, 3584
   d. RMON I as per RFC 2819;
   e. Optional: RMON II as per RFC 2021
   f. Telnet (RFC 854)
   g. TFTP (RFC 783)
   h. Optional: DNS Support (may be implemented in management software item k)
   i. SNTP as per RFC 2030 or NTP as per RFC 1305
   j. Port Mirroring
   k. A port must be provided for management and diagnostics
   1. Switch configuration must be stored in NVRAM, or an equivalent method of storing the configuration information during power down.
   m. Required management software and SNMP MIB II support must be proposed.
   n. Visual indication of the status of the device and components is required
7) Security Features
   a. Support user authentication as per IEEE 802.1X
   b. Support user authentication via Radius or TACACS+
   c. MAC address filtering, MAC Learning and Locking
   d. Password Encryption, Secured Shell
8) Informational: POE support on all access ports - as per IEEE 802.af, Class 3

**1.2. Category - L2-3 LAN switches**

Devices with main purpose to perform L2-3 Ethernet switching/ IP routing. The device may include hardware and software modules, blades etc. with functionality in higher layers, up to L7.

Propose one Layer 2-3 chassis based LAN Switch product. Switch requirements consist of:

1) Physical specifications:
   a. 19" Rack mountable unit
2) Redundancy:
   a. Optional: Add on modules for hot swappable redundant CPU and Power supply.
3) Port Density. Propose chassis model numbers, modules, etc. supporting min. configuration below (port density requirements not simultaneous):
   a. Min 160 10/100Base-T ports
   b. Min 100 Gigabit ports
   c. Min 2 10Gigabit ports
4) Access Speeds & Interfaces
   a. 10Base-T / 100Base-TX - Speed and duplex auto-sensing

b. 10Base-T / 100Base-TX / 1000Base-T - Speed and duplex auto-sensing
c. 1000Base-T
d. 1000Base-LX/SX
e. 10GBase-SR//LR
f. Optional : 10 Gbase-LX4

5) Performance:
   a. Switching fabric: Min. 80 Gbps.
   b. Forwarding: Min. 60Mpps
   c. Number of MAC addresses supported: min 16000
   d. Number of VLAN Configured: min 1024
   e. Number of VLAN ID Supported: min 4094
   f. Support for Jumbo Frames better than: 4000 bytes
6) Standards Support Provided:
   a. Link Aggregation as per IEEE 802.3 - 2002
   b. 10Base-T as per IEEE 802.3 - 2002
   c. 100Base-TX as per IEEE 802.3 - 2002
   d. Gigabit Ethernet 1000Base-T/SX/LX as per IEEE 802.3 - 2002
   e. Ten Gigabit Ethernet 10GBase-SR/LR as per IEEE 802.3ae
   f. Optional: 10GBase-LX4 as per IEEE802.ae
   g. Auto-negotiation of speed and duplex mode for all data rates - IEEE 802.3 - 2002 (Except 10GE data rate)
   h. Manual setting for speed and duplex mode for 10/100data rates - IEEE 802.3 - 2002
   i. Full duplex mode, flow control as per IEEE 802.3 - 2002
   j. Ethernet prioritization and CoS as per IEEE 802.1Q - 2003, IEEE 802.lp
   k. VLAN Tagging as per IEEE 802.1Q - 2003
   1. STP, RSTP, as per IEEE 802.1D, IEEE 802.1w
   m. Optional: MSTP as per IEEE 802.1Q - 2003
   n. Security: IEEE 802.1x
7) IP routing
   a. Inter VLAN IP routing
   b. Static Routes, RIPv1, RIPv2, as per RFC1058, RFC 2453
   c. OSPFv2 as per RFC 2328
   d. Optional BGPv4 as per RFC 1771
   e. IGMP RFC 11 12, RFC 2236
   f. DHCP Relay -RFC 1541, RFC 1542
   g. Protocol Independent Multicasting (PIM) -RFC 2362
8) QoS Features
   a. 802.1Q-2003 CoS classification/ reclassification based on
      i. incoming physical port
      ii. source/ destination IP address
      iii. Optional: source/ destination MAC address
      iv. TCP/UDP port number
   b. DSCP marking (if L3 switching enabled)
      i. incoming physical port
      ii. source/ destination IP address
      iii. TCP/UDP port number
   c. ACL based per input port rate limiting
9) Management Features:
   a. CLI support (command line interface)
   b. SNMPvl as per RFCs 1157, 1155, 1212, 1215 and SNMPv2c as per RFCS 1901, 2578-2580, 3416-3418
   c. Optional: SNMPv3 as per WCs 3410 - 3415, 3584

d. RMON I as per RC 2819;
e. Optional: RMON II as per RJC 2021
f. Telnet (RFC 854)
g. TFTP (RFC 783)
h. DNS Support (may be implemented in management software item k.)
i. SNTP as per RFC 2030 or NTP as per RFC 1305
j. Port Mirroring
k. A port must be provided for management and diagnostics
1. Switch configuration must be stored in NVRAM
m. Required management software and SNMP MIB II support must be proposed.
n. Visual indication of the status of the device and components is required

10) Security Features
    a. Support user authentication as per IEEE 802.1X
    b. Support user authentication via Radius or TACACS+
    c. MAC address filtering, MAC Learning and Locking
    d. Password Encryption, Secured Shell
11) Optional: POE support on all access ports - as per IEEE 802.af, Class 3
12) Informational: Propose available network interface cards and hw/sw modules with specialized functionality.

216. In view of these provisions, the Tribunal is unable to accept PWGSC's interpretation of the NMSO, which limits the technical definition of each category to the general description. First, it is clear from the language that the general description of each category cannot be dissociated from the listed mandatory requirements. Those requirements are an integral part of the definition of the products that can be included in the PPL and for which an offer can be made in response to an RVD. The language is quite specific. For category 1.1, the general description concludes with the following words before listing the mandatory requirements: "Propose one L2 switch model compliant with requirements below . . ." and, similarly, the general description for category 1.2 concludes by stating the following: "Switch requirements consist of . . . ." In the Tribunal's opinion, these provisions cannot be reasonably interpreted to mean, as PWGSC submitted, that any switch on a PPL in a given category need not meet all of the technical specifications listed in Appendix A to Annex A of the NMSO in order to fall within that category's technical definition.

217. The Tribunal considers that an RVD can only comply with the terms of the NMSO if it is in respect of an item that is within the ambit of the category listed in Appendix A of the RVD and, by necessary implication, an item that meets the mandatory requirements of that category. It follows logically that the only way by which an assessment of compliance may be performed is by referring to the entirety of the definition, including the list of mandatory requirements.

218. This conclusion is reinforced by examples that are used in the definition of the concept of "non-compliance" quoted previously, i.e. "less than mandatory number of ports; less than mandatory communication speed; less than mandatory expansion slots; cannot support mandatory protocol(s)."

219. Non-compliance is determined by referring to the applicable technical specification of an RVD (i.e. whether a brand name product is requested or if the RVD uses the generic specifications). In either case, ultimately, the technical specifications are those that are found in category 1.1 or category 1.2 of Appendix A to Annex A of the NMSO. The brand name product is one that must be included in an offeror's PPL and, therefore, one that must meet the technical specifications of that category. A generic RVD specifically refers to the technical specification of the applicable category. In both cases, non-compliance is determined on the basis of those technical specifications.

220. Therefore, the Tribunal agrees with Enterasys and will consider the entire definition, including the list of mandatory technical specifications, in order to assess whether PWGSC complied with the terms of the solicitation documents in categorizing network equipment for the purposes of the RVDs at issue.

**Individual RVD Analysis**

221. Before it examines Enterasys' specific allegations of product miscategorization, the Tribunal notes that most of these allegations rest solely on Mr. Weedon's assertions and testimony at the hearing that the products listed in the deliverables lists of the subject RVDs are not compliant with one or more of mandatory technical specifications set out in Appendix A to Annex A of the NMSO. At the hearing, Mr. Weedon acknowledged that the information provided as an attachment to Enterasys' comments on the GIR in this regard represented his opinions.[119]

222. The Tribunal notes that Mr. Weedon has not been qualified as an expert in the area of networking equipment in these proceedings. Consequently, the Tribunal cannot simply accept his opinions on the matter of product categorization as establishing facts. There is an onus on the complainant to prove its case and substantiate its allegations. In other words, mere assertions are not proof upon which findings of fact can be made. Thus, in examining Enterasys' specific allegations, the Tribunal considered whether there was evidence on the record to corroborate Mr. Weedon's assertions.

223. Moreover, in Enterasys' comments on the GIR, which were submitted after it examined the documents that the Tribunal ordered PWGSC to produce, contained allegations of miscategorization regarding both the RVDs and their associated TJs. The Tribunal will limit its review of the miscategorization to those allegations relating to the RVDs and not the TJs. On the basis of the above-noted testimony of PWGSC's witnesses, it is clear to the Tribunal that the technical requirements listed in the TJs were neither made known to bidders prior to bid submission nor used in the evaluation of any bids. The TJs are consequently irrelevant to this ground of complaint. In any event, bidders were required to respond to the requirements of the RVD and, therefore, it is the RVD that is the base document that must be examined from a miscategorization perspective.

224. With these considerations in mind, the Tribunal examined each RVD with regard to the following three types of allegedly miscategorized equipment:

- ancillary equipment, such as power cords, power supplies and cables;
- software; and
- items that should not have been included, as they do not fall within the scope of the category of the RVD.

File No. PR-2009-080—RVD 631—Category 1.2

225. The Tribunal notes that the RVD contains three items that it considers to fall within the "ancillary" aspect of a category—a power cord, a chassis fan tray and a power supply.[120] In addition, Enterasys alleged that, as the items requested in the RVD were pieces of a switch, as opposed to an assembled switch, each item, by itself, did not meet the specifications of category 1.2.

119. *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 168-69.
120. Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 35.

226. The Tribunal considers that article 29 of the NMSO allows for the procurement of ". . . all ancillary equipment, such as a power supply, cabinetry, cables and connectors required to enable the product to satisfy the requirements called up herein . . . ." It also notes that even Enterasys' PPL contains such ancillary items. The Tribunal considers that all allegations regarding the procurement of such ancillary items to be unfounded, unless Enterasys submitted evidence that, for example, an RVD was being used to purchase additional ancillary equipment beyond what could reasonably be considered to be in support of the equipment being procured. It has not submitted such evidence in the case of this RVD.

227. With respect to the allegation that the items being procured are not within the scope of the category as a whole, the Tribunal has been provided with conflicting non-expert points of view. However, it is the complainant that must demonstrate to the Tribunal that PWGSC has not acted in a manner required by the trade agreements. The Tribunal does not consider that Enterasys has met this burden. Although Enterasys had the opportunity to provide such necessary expert evidence, as noted above, it did not do so within the rules established by the Tribunal's legislation. Accordingly, with regard to all of Enterasys' allegations regarding the procurement of items that are not within the scope of the category on this RVD, the Tribunal considers Enterasys' submissions to be mere allegations and cannot find, on the basis of those statements, evidence that the items were not appropriately categorized.

PR-2009-081—RVD 640—Category 1.2

228. Enterasys alleged that the only item in the RVD was a piece of a switch, as opposed to an assembled switch, and that, therefore, it did not meet the specifications of the category. As noted above, the Tribunal considers this to be a mere allegation and cannot determine that the item was miscategorized on the basis of the evidence on the record.

PR-2009-082—RVD 641—Category 1.2

229. Enterasys submitted that item 1 in the RVD was part of category 7.1 and that item 2 was for modules outside the scope of category 1.2. The Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2009-083—RVD 643—Category 1.2

230. The Tribunal notes that one item was a power supply, which it considers to be part of the normal ancillary equipment purchased on an RVD. The Tribunal also notes that item 6 reads "ProCurve Switch 5400 zl Premium Edge *Lic*" [emphasis added], which the Tribunal takes to mean a software licence.

231. The Tribunal considers that, in addition to PWGSC's argument that the specifications of both category 1.1 and category 1.2 contemplate the acquisition of certain types of software, the definition of category 1.2 found in Appendix A to Annex A of the NMSO states the following: "Devices with main purpose to perform L2-3 Ethernet switching/ IP routing. *The device may include hardware and software modules*, blades etc. with functionality in higher layers, up to L7"[121] [emphasis added]. The Tribunal, therefore, considers that category 1.2 RVDs, such as RVD 643, allow for more software to be procured than RVDs based on the more restrictive category 1.1 definition. The Tribunal cannot determine that the listed software is excluded from category 1.2.

121. *Ibid.* at 215.

232. Enterasys submitted that the switch identified in the RVD was outside the scope of category 1.2. The Tribunal considers this to be a mere allegation and cannot determine that the item was miscategorized.

PR-2009-084—RVD 644—Category 1.2

233. The Tribunal notes that the RVD contains four items that, according to it, fall within the acceptable "ancillary" aspect of the category—two power supply items and two fan items. The Tribunal could not discern any Enterasys allegation regarding any particular item of the RVD as not being within the scope of category 1.2.

PR-2009-085—RVD 645—Category 1.2

234. The Tribunal notes that the RVD contains two power supply items and one software item. The Tribunal could not discern any Enterasys allegations regarding any particular item of the RVD as not being within the scope of category 1.2. The Tribunal does not consider that Enterasys has provided any evidence that the request for ancillary equipment is outside the scope of category 1.2, given the context of the RVD. The Tribunal also notes that it can find no evidence in support of Mr. Weedon's assertion and, therefore, cannot conclude that the software is miscategorized.

PR-2009-086—RVD 647—Category 1.2

235. The Tribunal notes that the RVD contains four power supply items and that, although Enterasys did allege that they were "redundant power supplies for existing switches",[122] it provided no evidence other than Mr. Weedon's opinions to support this claim. The Tribunal, therefore, cannot determine that they have been miscategorized.

236. Enterasys also claimed that the Cisco Catalyst 4948 switch identified in the RVD was outside the scope of category 1.2. The Tribunal considers this to be a mere allegation and cannot determine that the item was miscategorized.

PR-2009-087—RVD 648—Category 1.1

237. Enterasys claimed that the documentation provided by PWGSC pursuant to the Tribunal's order demonstrated that the switch identified in this RVD had been originally miscategorized as being in Cisco's category 1.2 PPL, but that PWGSC, subsequent to approving the switch for category 1.2, removed the switch from category 1.2 and placed it in category 1.1. Noting that this is a category 1.1 RVD, the Tribunal, therefore, considers that, in this case, Enterasys does not dispute that the switch is properly categorized in category 1.1.

PR-2009-092—RVD 650—Category 1.1

238. Enterasys alleged that the requested item does not meet any of the minimum requirements for category 1.1. The Tribunal considers this to be a mere allegation and cannot determine that the item was miscategorized.

122. Tribunal Exhibit PR-2009-080-53, Administrative Record, Vol. 1C at 33.

PR-2009-093—RVD 651—Category 1.2

239. Enterasys claimed that two of the Cisco products identified in the RVD did "not support full Layer 3 switching"[123] and are outside the scope of category 1.2. Enterasys provided Cisco 3750-E datasheets to support this claim; however, without the benefit of expert evidence, the Tribunal is unable to determine how this evidence leads to the conclusion that the products are outside the scope of category 1.2. The Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2009-094—RVD 653—Category 1.2

240. The Tribunal could not discern any Enterasys allegation regarding either of the two items in the RVD as being outside the scope of category 1.2.

PR-2009-095—RVD 662—Category 1.2

241. The Tribunal notes that the RVD contains two "stacking cable" items. Enterasys alleged that "stacking" is a category 1.1 specification and is outside the scope of category 1.2.

242. The Tribunal notes that item 12 in RVD 636,[124] a category 1.2 RVD for which Enterasys submitted a technically compliant proposal, similarly contained a requirement for "Switch Stacking Cables".[125] Given that Enterasys' own category 1.2 PPL obviously contains stacking cables (otherwise, its proposal would have been found non-compliant for failing to propose equipment for all the line items listed in RVD 636), the Tribunal considers that such cables are properly categorized in category 1.2.

PR-2009-096—RVD 663—Category 1.2

243. The Tribunal notes that the RVD contains two items—a fan tray item and a power supply item—that it considers allowable ancillary equipment. Enterasys claimed that item 2 of the RVD did not include any of the Layer 3 specifications and was outside the scope of category 1.2. The Tribunal considers this to be a mere allegation and cannot determine that the item was miscategorized.

PR-2009-097—RVD 666—Category 1.2

244. The Tribunal notes that the RVD contains one power supply item, which it considers allowable ancillary equipment. The Tribunal could not discern any Enterasys allegations regarding any particular item of the RVD as being outside the scope of category 1.2.

PR-2009-098—RVD 672—Category 1.2

245. The Tribunal notes that the RVD contains two items—one fan tray item and one power supply item—both of which it considers allowable ancillary equipment. Enterasys alleged that the items in the RVD were components for a chassis-based system, but the Tribunal could not discern any Enterasys allegation regarding any particular item of the RVD as being outside the scope of category 1.2.

123. *Ibid.*
124. File No. PR-2009-100.
125. Tribunal Exhibit PR-2009-092-01, Administrative Record, Vol. 1 at 158.

PR-2009-099—RVD 680—Category 1.2

246. The Tribunal notes that there is one software item. The Tribunal also notes that this is a category 1.2 RVD, which allows for a greater selection of software to be procured than in category 1.1. The Tribunal cannot determine that the software was miscategorized.

247. Enterasys alleged that the items in the RVD were pieces of a switch, as opposed to an assembled switch, and that, therefore, they did not meet the category 1.2 specifications. The Tribunal considers this to be a mere allegation and cannot determine that the items were miscategorized.

PR-2009-100—RVD 636—Category 1.2

248. The Tribunal will address RVD 636 below.

PR-2009-101—RVD 684—Category 1.2

249. The Tribunal notes that the RVD contains one power supply item, which it considers allowable ancillary equipment. Enterasys alleged that the items in the RVD did not meet the category 1.2 requirements of a Layer 2-3 LAN switch. The Tribunal considers this to be a mere allegation and cannot determine that the items were miscategorized.

PR-2009-102—RVD 670—Category 1.1

250. Enterasys submitted that the switches listed in the RVD did not meet the minimum performance requirements for category 1.1. The Tribunal considers this to be a mere allegation and cannot determine that the items were miscategorized.

PR-2009-104—RVD 669—Category 1.2

251. Enterasys alleged that all the items in the RVD were pieces of a switch, as opposed to an assembled switch, and that, therefore, they did not meet the category 1.2 specifications. Enterasys also alleged that, even if the switch was assembled and configured, it would be outside the scope of category 1.2. The Tribunal considers this to be a mere allegation and cannot determine that the items were miscategorized.

PR-2009-105—RVD 671—Category 1.2

252. The Tribunal notes that the RVD contains one power supply item, which it considers allowable ancillary equipment. Enterasys did not allege that the items in the RVD were miscategorized.

PR-2009-106—RVD 678—Category 1.2

253. The Tribunal notes that the RVD contains three items—all cables—which it considers allowable ancillary equipment. Enterasys alleged that these cables are network infrastructure cables outside the scope of category 1.2. The Tribunal considers this to be a mere allegation and cannot determine that the items were miscategorized.

PR-2009-107—RVD 688—Category 1.1

254. Enterasys alleged that one of the line items included a particular Layer 3 routing protocol that is outside the scope of category 1.1. The Tribunal considers this to be a mere allegation and cannot determine that the items were miscategorized.

PR-2009-108—RVD 695

255. This RVD was re-tendered and, as noted above in the "Preliminary Matters" section, the complaint was dismissed.

PR-2009-109—RVD 691—Category 1.2

256. The Tribunal notes that the RVD contains three items—two power supply items and one rack mount item—which it considers allowable ancillary equipment. Enterasys alleged that none of the items in the RVD meet the required Layer 3 routing protocols. The Tribunal considers this to be a mere allegation and cannot determine that the items were miscategorized.

PR-2009-110—RVD 685—Category 1.2

257. The Tribunal notes that the RVD contains two items—both power supply items—which it considers allowable ancillary equipment. Enterasys alleged that none of the items in the RVD meet the required Layer 3 routing protocols. Enterasys also alleged that one item was a category 4 firewall item for existing devices. The Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2009-111—RVD 692—Category 1.2

258. Enterasys alleged that some of the items were going to be installed in existing switches, but the Tribunal could not discern any Enterasys allegation regarding any particular item of the RVD as being outside the scope of category 1.2.

PR-2009-112—RVD 693—Category 1.2

259. The Tribunal notes that the RVD contains four items—two power supply items, one fan tray item and one fan item—which it considers allowable ancillary equipment. Enterasys alleged that another four items did not meet the necessary Layer 3 routing protocols and that another item was a firewall item which, in addition to being outside of category 1.2, would not even function as a firewall, as the RVD did not include the necessary software licence.

260. Regarding the firewall item, the Tribunal notes that the item description reads as follows: "Firewall blade for . . . ." As noted above, according to the technical definition of the category 1.2 RVDs in Appendix A to Annex A of the NMSO, products such as ". . . hardware and software modules, *blades* etc. with functionality in higher layers, up to L7" [emphasis added] may be procured. The Tribunal, therefore, does not find that the firewall item is miscategorized. Regarding Enterasys' submission regarding the other four items that were outside the scope of category 1.2, the Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2009-113—RVD 697—Category 1.1

261. The Tribunal notes that the RVD contains one console cable item, which it considers allowable ancillary equipment. Enterasys alleged that one of the RVD items supported Layer 3 routing and was therefore outside of category 1.1. The Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2009-114—RVD 702—Category 1.2

262. Enterasys alleged that none of the three requested switches support generic routing encapsulation and that they are therefore outside the scope of category 1.2. The Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2009-115—RVD 704—Category 1.1

263. The Tribunal notes that the RVD contains one stacking cable item, which it considers allowable ancillary equipment. Enterasys submitted that one of the items, a "10GBASE-SR X2 Module", would not fit in the category 1.1 switches being requested by this RVD. Enterasys alleged that these modules would only fit in category 1.2 switches and were therefore outside the scope of category 1.1. The Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2009-116—RVD 706—Category 1.2

264. The Tribunal notes that the RVD contains three items—one power supply item, one fan item and one power cord item—which it considers allowable ancillary equipment. Enterasys alleged that all the items in the RVD did not meet the category 1.2 requirements of a Layer 2-3 chassis-based LAN switch product. It submitted that most of the items were components to be installed in existing chassis. The Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2009-117—RVD 707—Category 1.1

265. The Tribunal notes that the RVD contains five items—three cable items, one power cord item and one accessory kit item—which it considers allowable ancillary equipment. The Tribunal also notes that there are three software items in the RVD and finds only one of which is allowed under category 1.1.

266. The Tribunal notes that section 6) m. of the specifications in Appendix A to Annex A of the NMSO regarding category 1.1 states the following: "Required management software and SNMP MIB II support must be proposed." The RVD requested that bidders provide the following:

- Nexus 5000 Fabric Manager Server Licenses;
- Nexus 5010 Storage Protocols Services Licenses; and
- Nexus 5000 Base OS Software Rel 4.1(3)N1(1).

267. On its face, The Tribunal does not find that the description of the last two software packages fall under the umbrella of the allowable "required management software" within the scope of category 1.1 and, therefore, does not consider them to be properly categorized.

268. Enterasys alleged that four of the items in the RVD did not meet the category 1.1 requirements of a Layer 2 Ethernet LAN switch product and that the above-noted three cable items were not shown in the access speed/interface element of the category 1.1 specification. It also submitted that most of the cable items were components for existing devices. The Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2009-118—RVD 711

269. This RVD was re-tendered and, as noted above in the "Preliminary Matters" section, the complaint was dismissed.

PR-2009-119—RVD 712—Category 1.2

270. The Tribunal notes that the RVD contains two items—one patch cable item and one power supply item—which it considers allowable ancillary equipment. Enterasys alleged that the cable was a Layer 1 infrastructure cable and outside the scope of category 1.2, but the Tribunal considers this to be a mere allegation and cannot determine that the item was miscategorized.

PR-2009-120—RVD 714—Category 1.2

271. The Tribunal notes that the RVD contains two items—one fan tray item and one power supply item—which it considers allowable ancillary equipment. Enterasys did not allege that any of the items in the RVD were miscategorized.

PR-2009-121—RVD 685

272. This RVD was re-tendered and, as noted above in the "Preliminary Matters" section, the complaint was dismissed.

PR-2009-122—RVD 710—Category 1.1

273. The Tribunal notes that the RVD contains a power cord item, which it considers allowable ancillary equipment. The Tribunal also notes that there are two software items in the RVD and finds only one of which is allowed under category 1.1.

274. As noted above regarding RVD 707, the Tribunal considers that, under category 1.1, "[r]equired management software and SNMP MIB II support . . ." may be procured. RVD 710 requested the following:

- Nexus 5000 Fabric Manager Server Licenses; and
- Nexus 5010 Storage Protocols Services Licenses.

275. As with RVD 707, the Tribunal does not consider that Nexus 5010 Storage Protocols Services Licenses fall under the umbrella of "required management software" and, therefore, finds them to be outside the scope of category 1.1.

276. Enterasys alleged that three of the items in the RVD, including the Nexus 5010 Storage Protocols Services Licenses, did not meet the category 1.1 requirements of a Layer 2 Ethernet LAN switch product. Other than supporting its above-noted decision regarding the Nexus 5010 Storage Protocols Services Licenses, the Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2009-123—RVD 708—Category 1.2

277. Enterasys alleged that none of the RVD items were Layer 2-3 LAN switches and that none of the items could be configured to meet the category 1.2 requirements of a Layer 2-3 chassis-based LAN switch product. The Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2009-124—RVD 717—Category 1.2

278. The Tribunal notes that the RVD contains four items—three cable items and one power cord item—which it considers allowable ancillary equipment. Enterasys alleged that none of the items met the category 1.2 requirements of a Layer 2-3 chassis-based LAN switch product. The Tribunal considers these to be mere allegations and cannot determine that the items were miscategorized.

PR-2009-125—RVD 719—Category 1.1

279. The Tribunal notes that the RVD contains one cable item, which it considers allowable ancillary equipment. Enterasys alleged that the only other item in the RVD supported Layer 3 IP Static/Default Routing and is therefore outside the scope of category 1.1. The Tribunal considers this to be a mere allegation and cannot determine that the item was miscategorized.

PR-2009-126—RVD 720—Category 1.2

280. The Tribunal could not discern any Enterasys allegation regarding any particular item of the RVD as being outside the scope of category 1.2.

PR-2009-127—RVD 726—Category 1.1

281. The Tribunal notes that the RVD contains one cable item, which it considers allowable ancillary equipment. Enterasys alleged that the cable was a Layer 1 infrastructure cable and outside the scope of category 1.1, but the Tribunal considers this to be a mere allegation and cannot determine that the item was miscategorized.

PR-2009-128—RVD 699—Category 1.1

282. The Tribunal could not discern any Enterasys allegation regarding any particular item of the RVD as being outside the scope of category 1.1.

283. In summary, the Tribunal is unable to accept Enterasys' claims of product miscategorization, with the exception of its claims in relation to RVD 707 and RVD 710. Therefore, the Tribunal finds that the following complaints, on the issue of the categorization of goods, are valid in part: File Nos. PR-2009-117 and PR-2009-122.

RVD 636

284. RVD 636 was treated in a different manner from the other RVDs at issue because it used generic specifications instead of specifying particular brand name products According to PWGSC, Enterasys submitted a financially and technically compliant bid in response to this RVD, but the contract was awarded to another bidder on the basis of price.[126]

126. *Transcript of Public Hearing*, Vol. 1, 13 May 2010, at 265.

285. The Tribunal considers that, in this case, the use of generic specifications, the length of the solicitation period and the amount of information provided to bidders were adequate and complied with the requirements of the trade agreements. The Tribunal notes that Enterasys claimed that PWGSC's response to one of the questions that it asked during the solicitation period was unacceptable because it precluded Enterasys from bidding a product that it ". . . really wanted to bid . . ."[127] and presumably felt would have best met the requirements. The Tribunal does not consider that the trade agreements require the government to amend technical or operational requirements to suit a particular bidder's proposed solution. In addition, the Tribunal notes that Enterasys, and at least one other bidder, was able to submit a technically compliant proposal.

## REMEDY AND COSTS

### Remedy

Enterasys' Position

286. Enterasys requested that the Tribunal recommend that all contracts awarded in relation to the RVDs at issue be cancelled and the requirements re-tendered in compliance with the trade agreements or, in the alternative, that West Atlantic Systems, as the representative agent of Enterasys, be compensated for its lost profits regarding all 44 RVDs.[128] While acknowledging that it had not submitted any proposals regarding the 43 brand name RVDs, Enterasys submitted that, if PWGSC had provided it with the information that it requested, it had products that it could have proposed. It argued that it is reasonable to infer that, if it had just come down to price regarding the brand name RVDs, on price alone, those RVDs would not all have been awarded to the incumbent. In Enterasys' opinion, not compensating it for its lost profits would essentially be rewarding PWGSC for withholding the information that it ought to have produced and depriving companies like Enterasys from the opportunity to bid.

287. Enterasys submitted that, if the RVDs were re-tendered, the Tribunal should ensure that they are within the scope of the technical specifications of the categories and that PWGSC include all the information regarding the client departments' operational requirements. Enterasys further requested that the operational requirements be properly explained and justified and that any information requested by bidders be provided as part of the "Enquiries" process, encompassing any information sufficient to ascertain interoperability, including providing a copy of the "running configuration" and "firmware version" of the product being requested. Enterasys submitted that PWGSC should also be required to extend the due date of RVDs, upon request, in order to give time to bidders to perform testing so that they can include an interoperability report with their bids.

288. Given Enterasys' belief that PWGSC has demonstrated that it will continue to misuse article 14 if allowed to do so, Enterasys requested that the Tribunal rule that the article 14 "Equivalents" clause be removed from the NESS standing offer.

---

127. *Ibid.* at 31.

128. Regarding the first two sets of complaints (File Nos. PR-2009-080 to PR-2009-087 and PR-2009-092 to PR-2009-102), Enterasys had only requested that it be compensated for the lost profits for the 19 RVDs at issue. When it filed its third set of complaints (File Nos. PR-2009-104 to PR-2009-128), it modified this request to include the cancellation and re-tendering of all 44 RVDs.

289. Enterasys submitted that the integrity of the Government's procurement system has been compromised by the way that PWGSC has been running the NESS standing offer and that, therefore, additional damages should be awarded to West Atlantic Systems, as the representative agent of Enterasys.

290. Enterasys also requested its complaint costs.

PWGSC's Position

291. PWGSC requested that, in the event that the complaints are dismissed, it be awarded its costs and that the Tribunal take into consideration the conduct of Enterasys' representative, West Atlantic Systems, and the individuals associated with the representative. PWGSC argued that, notwithstanding the prior guidance provided by the numerous decisions involving RVDs issued further the NESS DISO, West Atlantic Systems disregarded that guidance and filed 44 redundant complaints. Having regard to the Tribunal's *Guideline for Fixing Costs in Procurement Complaint Proceedings* (the *Guideline*), PWGSC submitted that the Tribunal should give consideration to whether West Atlantic Systems has engaged in frivolous and vexations litigation and should fix costs accordingly.

292. PWGSC submitted that, recognizing that Enterasys' various grounds of complaint have been addressed by the Tribunal in earlier determinations, in the event that a ground of complaint is upheld, compensation for lost profits or lost opportunity should not be recommended. Instead, PWGSC submitted that the Tribunal's recommendation should be limited to proposing a change to the way that PWGSC administers the NESS DISO and resulting RVDs.

293. Having found the complaints to be valid in part, the Tribunal must now recommend the appropriate remedy.

294. In this regard, subsection 30.15(3) of the *CITT Act* provides as follows:

> (3) The Tribunal shall, in recommending an appropriate remedy under subsection (2), consider all the circumstances relevant to the procurement of the goods or services to which the designated contract relates, including
>
> (*a*) the seriousness of any deficiency in the procurement process found by the Tribunal;
>
> (*b*) the degree to which the complainant and all other interested parties were prejudiced;
>
> (*c*) the degree to which the integrity and efficiency of the competitive procurement system was prejudiced;
>
> (*d*) whether the parties acted in good faith; and
>
> (*e*) the extent to which the contract was performed.

295. The Tribunal considers that PWGSC's conduct regarding brand name RVDs amounts to a serious deficiency in the procurement process and prejudices the integrity and efficiency of the competitive procurement system. That being the case, the Tribunal does not consider that PWGSC was acting in bad faith or that Enterasys itself was targeted or prejudiced by PWGSC's actions. The Tribunal notes that, in all three sets of complaints, Enterasys stated that it was unable to bid (even though the Tribunal notes that Enterasys did submit a bid in response to RVD 636) because ". . . PWGSC would not update [its] published

price list in their system in time to respond to these [RVDs] . . . ."[129] As noted above in the "Preliminary Matters" section, the manner in which PWGSC and the suppliers manage their respective PPLs is a matter of contract administration and beyond the Tribunal's jurisdiction.

296. The Tribunal notes that, despite its conclusion that PWGSC failed to comply with Article 1007(3) of *NAFTA* in certain instances, it found that Enterasys did not establish that additional information from PWGSC was required in order to permit bidders to submit responsive tenders. In the Tribunal's opinion, this means that PWGSC's actions did not have the effect of ensuring that no compliant equivalent bid could be submitted. In other words, the Tribunal considers that PWGSC's action did not preclude Enterasys from submitting a bid and, possibly, being awarded a contract. Therefore, there is no basis to recommend compensation for any lost opportunity to bid or lost profits. Indeed, on the basis of the evidence before it, particularly in view of Enterasys' decision not to submit a bid in all cases (other than in response to RVD 636 in respect of which it found Enterasys' complaints to be not valid), the Tribunal is not in a position to conclude that Enterasys could have been awarded a contract in any circumstances in the cases of these RVDs that were the subject of the complaints that were found valid in part. As such, the Tribunal cannot assess the likelihood that Enterasys could even have been successful, had it bid. Therefore, the degree to which Enterasys was prejudiced could have been minimal or even non-existent.

297. With respect to other remedies claimed by Enterasys, including its claim for additional damages and the cancellation of contracts that have already been awarded, the Tribunal is of the view that such remedy recommendations are not warranted in light of its conclusion that the complaints are valid only in part and its finding on the limited degree of prejudice, if any, suffered by Enterasys. In addition, given its view that PWGSC acted in good faith at all times during the procurement processes at issue, the deficiencies in these procurement processes and the prejudice to the integrity and efficiency of the competitive procurement system found by the Tribunal do not warrant upsetting the procurements or recommending any monetary compensation.

**Costs**

298. In accordance with the Tribunal's *Guideline*, the Tribunal awards Enterasys its reasonable costs incurred in preparing and proceeding with the complaints.

**Majority Analysis Regarding Complaint Costs**

299. The *Guideline* contemplates classification of the level of complexity of complaint cases based on three criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the complaint proceedings. The complexity of the procurements was, on their face, low, in that they involved the procurement of standard items or simply defined items. The complexity of the complaints was high, in that, although the complaints involved ambiguous or overly restrictive specifications (normally indicative of a medium level complexity), each of the 44 complaints contained multiple grounds of complaint. Finally, the complexity of the complaint proceedings was high because there was an intervener, there were two motions, parties submitted additional information beyond the normal scope of the proceedings, a public hearing was held, and the proceedings required the use of the 135-day time frame. Accordingly, the Tribunal considers the complexity of these cases to be high, as referred to in Appendix A of the *Guideline* (Level 3). The Tribunal reserves jurisdiction to establish the final amount of the award.

129. Tribunal Exhibit PR-2009-080-01, Administrative Record, Vol. 1 at 24; Tribunal Exhibit PR-2009-092-01, Administrative Record, Vol. 1 at 26; Tribunal Exhibit PR-2009-104-01, Administrative Record, Vol. 1 at 29-30.

**Separate Analysis of Member Vincent Regarding Complaint Costs**

300. While the Tribunal has only found that certain of the 44 complaints are valid in part and, regarding which, I only agree that 4 are valid in part, I am of the view that each party should assume its own costs in this matter.

**DETERMINATION OF THE TRIBUNAL**

301. Pursuant to paragraph 10(*a*) of the *Regulations*, the following complaints are dismissed for lack of a valid basis:

- PR-2009-108—Solicitation No. W0106-09613B/A (RVD 695)
- PR-2009-118—Solicitation No. W010S-10D282/A (RVD 711)
- PR-2009-121—Solicitation No. W6369-10P5GG/A (RVD 685)

302. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the following complaint is not valid:

- PR-2009-100—Solicitation No. B8217-090660/A (RVD 636)

303. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the following complaints are valid in part:

- PR-2009-092—Solicitation No. 45045-090105/A (RVD 650)
- PR-2009-093—Solicitation No. 45045-090104/A (RVD 651)
- PR-2009-117—Solicitation No. A0416-094516/B (RVD 707)
- PR-2009-122—Solicitation No. B8219-090643/A (RVD 710)

304. Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal (Member Vincent dissenting) determines that the following complaints are valid in part:

- PR-2009-080—Solicitation No. M9010-104482/A (RVD 631)
- PR-2009-081—Solicitation No. W8474-10BF32/A (RVD 640)
- PR-2009-082—Solicitation No. 31184-092762/B (RVD 641)
- PR-2009-083—Solicitation No. 45045-090096/A (RVD 643)
- PR-2009-084—Solicitation No. WA050-106225 (RVD 644)
- PR-2009-085—Solicitation No. 21120-108465/A (RVD 645)
- PR-2009-086—Solicitation No. 9K001-101037/A (RVD 647)
- PR-2009-087—Solicitation No. 9K001-101037/B (RVD 648)
- PR-2009-094—Solicitation No. C1111-090828/A (RVD 653)
- PR-2009-095—Solicitation No. 45045-090101/A (RVD 662)
- PR-2009-096—Solicitation No. W6369-10DE70/A (RVD 663)
- PR-2009-097—Solicitation No. 45045-090122/A (RVD 666)
- PR-2009-098—Solicitation No. T8086-090909/A (RVD 672)
- PR-2009-099—Solicitation No. U6158-097064/A (RVD 680)
- PR-2009-101—Solicitation No. EN869-103932/A (RVD 684)
- PR-2009-102—Solicitation No. M9010-105184/A (RVD 670)
- PR-2009-104—Solicitation No. M9010-105182/A (RVD 669)
- PR-2009-105—Solicitation No. 21120-104931/A (RVD 671)
- PR-2009-106—Solicitation No. A0416-094512/A (RVD 678)

- PR-2009-107—Solicitation No. W6369-10P5FF/A (RVD 688)
- PR-2009-109—Solicitation No. 59017-100012/A (RVD 691)
- PR-2009-110—Solicitation No. W6369-10P5GG/B (RVD 685)
- PR-2009-111—Solicitation No. W8484-108305/A (RVD 692)
- PR-2009-112—Solicitation No. W6369-10P5GM (RVD 693)
- PR-2009-113—Solicitation No. 23240-103042/A (RVD 697)
- PR-2009-114—Solicitation No. EN869-103849/A (RVD 702)
- PR-2009-115—Solicitation No. 23240-103817/A (RVD 704)
- PR-2009-116—Solicitation No. A0416-094516/A (RVD 706)
- PR-2009-119—Solicitation No. FP945-090053/A (RVD 712)
- PR-2009-120—Solicitation No. C1111-090957/A (RVD 714)
- PR-2009-123—Solicitation No. 84084-090232/A (RVD 708)
- PR-2009-124—Solicitation No. M9010-105183/A (RVD 717)
- PR-2009-125—Solicitation No. 24062-090345/A (RVD 719)
- PR-2009-126—Solicitation No. K7C20-090674/A (RVD 720)
- PR-2009-127—Solicitation No. C1111-090959/A (RVD 726)
- PR-2009-128—Solicitation No. 84084-090254/B (RVD 699)

305. Pursuant to section 30.16 of the *CITT Act*, the Tribunal (Member Vincent dissenting) awards Enterasys its reasonable costs incurred in preparing and proceeding with the complaints, which costs are to be paid by PWGSC. In accordance with the *Guideline*, the Tribunal's preliminary indication of the level of complexity for these complaint cases is Level 3, and its preliminary indication of the amount of the cost award is $4,100. If any party disagrees with the preliminary indication of the level of complexity or the preliminary indication of the amount of the cost award, it may make submissions to the Tribunal, as contemplated by the *Guideline*. The Tribunal reserves jurisdiction to establish the final amount of the award.

Serge Fréchette
Serge Fréchette
Presiding Member

Diane Vincent
Diane Vincent
Member
(Dissenting in part)

Stephen A. Leach
Stephen A. Leach
Member