

**WINNING STRATEGIES BEFORE THE CANADIAN
INTERNATIONAL TRADE TRIBUNAL: PROCEDURE AND
PRACTICE**

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I. Introduction

Federal government procurement provides an important income stream for various businesses. Each year the government of Canada buys approximately \$14 billion worth of goods and services. Over 85 departments, agencies and Crown corporations sign approximately 60,000 contracts totalling \$10 billion annually.² If federal government procurement provides big opportunities, the Canadian International Trade Tribunal (“CITT”) helps to maintain the integrity of the process.

The CITT’s mandate is to help ensure that federal procurements covered by trade agreements are conducted in an open, fair and transparent manner, and in a way that maximizes competition.³ It does so by providing a forum for dealing with federal government procurement complaints. One advantage of the CITT federal procurement complaints process is the speedy procedure. However, there are procedural traps for the unwary. The purpose of this outline is to discuss CITT’s jurisdiction and procedure and to provide an outline of winning strategies.

II. Procurements Covered By Trade Agreements

Several trade agreements require the government of Canada to establish an independent bid challenge authority to deal with federal government procurement complaints.⁴ Canada has provided the CITT with such authority.⁵ The CITT has authority to determine whether or not federal departments, agencies or Crown corporations have complied with procurement requirements respecting specified goods and services covered by trade agreements (the “Agreements”) within monetary

¹ Daniel L. Kiselbach, Partner, Miller Thomson, LLP gratefully acknowledges the assistance of articling students Leanna Krause and Nicholas Peterson. Comments are welcomed and may be sent to him at dkiselbach@millerthomson.com. The paper should not be used or construed as legal advice. Persons with specific legal issues should contact legal counsel for legal advice which is applicable to their circumstances.

² CanadaBusinessOntario, *Government Procurement Guide* 2010-03-01 online at: <http://www.cbo-eco.ca/en/?linkServID=473F0C22-925F-777F-5FE8BF2A67DBDB8E>. See also Robert C. Taylor and Lisa M. Bolton, “Overview of Canadian Government Procurement Law”, (42(1)) 2006 *American Bar Association The Procurement Lawyer*.

³ *Procurement Review Process: A Descriptive Guide*, p. 1 online at: <<http://citt.gc.ca>>.

⁴ See discussion of trade agreements at Canadian International Trade Tribunal, *Procurement Review Process: A Descriptive Guide*, *supra*, p. 1 and outlines of CITT process at *Appendix 1 Checklist For Filing A Complaint* and *Appendix 2 Schedule Of Events In A 90 – Day Inquiry*: online at: <<http://citt.gc.ca>>.

⁵ See *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.) (“CITT Act”) and, in particular, provisions under the heading “Complaints by Potential Suppliers” (section 30.1 onwards) and the *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R. / 93 – 602.

thresholds.⁶ Federal government procurement requirements are set out in the provisions of the *Canadian International Trade Tribunal Procurement Inquiry Regulations* (the “Regulations”) and the articles of Agreements such as those noted below:⁷

1. The *Agreement on Internal Trade* (“AIT”).⁸ Canada has agreed to provide all Canadian suppliers with equal access to federal government procurements for specified goods and services bought by listed departments, agencies and Crown corporations. The AIT applies to specified government procurements and prohibits Canada from discriminating against goods and services or the suppliers from a province or region.
2. World Trade Organization *Agreement on Government Procurement* (“AGP”).⁹ Canada has agreed to provide suppliers of signatory countries with equal opportunity to compete with Canadian suppliers for contracts for specified government procurements.
3. The *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* (“NAFTA”).¹⁰
4. The *Canada-Chile Free Trade Agreement* (“CCFTA”).¹¹
5. The *Canada-Peru Free Trade Agreement* (“CPFTA”).¹²
6. *Canada-Colombia Free Trade Agreement* (“CCOFTA”).¹³

⁶ Treasury Board of Canada Secretariat, Contracting Policy Notice 2011-05 - Trade Agreements: Update of Thresholds online at: < http://www.tbs-ct.gc.ca/pubs_pol/dcgpubs/ContPolNotices/2011/12-19-eng.asp>

⁷ See *Procurement Review Process: A Descriptive Guide*, *supra*.

⁸ The *Agreement on Internal Trade*, 18 July 1994, C. Gaz 1995.I.1323 online at Internal Trade Secretariat: <http://www.ait-aci.ca/index_en/ait.htm>.

⁹ The *Agreement on Government Procurement*, 15 April 1994, Annex 4 of the World Trade Organization Agreement online at World Trade Organization: <http://www.wto.org/English/docs_e/legal_e/final_e.htm>.

¹⁰ *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) and *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, Part Four: Government Procurement.

¹¹ *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), Part Three *BIS*: Government Procurement and *Canada-Chile Free Trade Agreement Implementation Act*, S.C. 1997, c. 14.

¹² *Canada-Peru Free Trade Agreement*, Chapter Fourteen, Government Procurement, online at: <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/peru-toc-perou-tdm.aspx?lang=eng&view=d>> and *Canada – Peru Free Trade Agreement Implementation Act*, S.C. 2009, c. 16.

III. The CITT's Jurisdiction

It is important to ensure the a potential complaint falls within the CITT's jurisdiction before filing a complaint. If the CITT does not have jurisdiction over a matter arising in connection with a matter, relief may be obtained in other venues, such as the Federal Court. The CITT does not have jurisdiction to dispose of actions for breach of contract, tort or other causes of action not rooted in the terms of the Agreements.¹⁴

The CITT may entertain complaints arising out of a designated contract made under the Agreements.¹⁵ The CITT may receive a complaint, conduct an inquiry and make a determination as to whether or not the procurement process has complied with the Regulations and Agreements.¹⁶ Case law provided guidance respecting the CITT's jurisdiction. For example, in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, the Supreme Court of Canada held that under the AIT, the potential supplier must be a "Canadian supplier".¹⁷

Another illustrative case is *Canada (Attorney General) v. Enterasys Networks of Canada Ltd.* There, the Federal Court of Appeal held that if a procurement process has not prevented a person tendering a bid, and it did not enter a bid, then the person lacks standing to bring a complaint because it is not a "potential supplier":¹⁸ A summary of Enterasys is provided below.

In Enterasys the Federal Court of Appeal granted applications for judicial review brought by the Attorney General of Canada respecting CITT determinations. The CITT determinations upheld number of Enterasys' complaints which were made under ss. 30.11(1) of the CITT Act. The Court agreed with the Crown's position that the CITT lacked jurisdiction. This was because Enterasys did not submit a bid, and because the CITT found that no act of Public Works and Government Services Canada ("PWGSC") precluded Enterasys from entering a bid.

The court reasoned as follows. The contracts that were the subject of the complaints were "designated contracts" (defined in s. 30.1 of the CITT Act) subject to NAFTA. A complaint could be made by a "potential supplier" pursuant to ss. 30.11(1) of the CITT Act. The term "potential supplier" (defined in ss. 30.1 of the CITT Act) meant "... a

¹³ *Canada-Columbia Free Trade Agreement*, Chapter Fourteen, Government Procurement online at: <<http://www.international.gc.ca>> and *Canada-Colombia Free Trade Agreement Implementation Act*, S.C. 2010, c. 4.

¹⁴ Courts still have jurisdiction over actions against the federal Crown for breach of contract and tort claims arising out of the tendering process. See *Envoy Relocation Services Inc. v. Canada (Attorney General)*, [2008] O.J. No. 1789 (S.C.J.).

¹⁵ CITT Act, *supra*, s. 30.1 defines "designated contract" as "...a contract for the supply of goods or services that has been or is proposed to be awarded by a government institution and that is designated or of a class of contracts designated by the regulations." See also *Canadian International Trade Tribunal Procurement Inquiry Regulations*, S.O.R./93-602, s. 3(1) ("CITT Procurement Regulations").

¹⁶ CITT Act, R.S.C. 1985 (4th Supp.), c. 47, ss. 16, 30.11(1).

¹⁷ *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50.

¹⁸ *Canada (Attorney General) v. Enterasys Networks of Canada Ltd.*, 2011 FCA 207.¹⁸

bidder or prospective bidder on a designated contract.” The CITT considered “bidder or prospective bidder on a designated contract to include a person eligible to bid, but precluded from doing so.

The court found that the CITT may commence an inquiry on the basis of the complainant’s allegation that it was precluded from bidding by an objectionable aspect of the procurement process. However, where (as in this case) the CITT finds that this allegation is without merit, it must dismiss the complaint for want of jurisdiction. The CITT had jurisdiction to determine a complaint under ss. 30.11(1) of the CITT Act only if the complainant was a “bidder or prospective bidder on a designated contract” (as defined in s. 30.1 of the CITT Act).

IV. Short Time Limits Apply For Making a Complaint

Complainants must act quickly. Very short time limits apply to the CITT procurement dispute process. A potential supplier must file a complaint within 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.¹⁹ The CITT frequently dismisses complaints not brought within the 10 day time limit for filing a complaint.²⁰

The 10 day time limit may be extended to a maximum of 30 days in situations where the failure to file the complaint within the time limits was beyond the control of the complainant or when the complaint raises issues of a systemic nature.²¹ The reasons for seeking this extended time period should be set out in materials submitted to the CITT.²²

V. The Complaint Must Be Complete

It is essential to note that filing a complaint is not like filing a Notice of Claim or Statement of Claim.²³ The complaint must include all of the relevant evidence. The presentation of all relevant evidence may be difficult where critical documentation is solely in the possession of the procuring agency. The CITT procurement complaints process does not include steps for documentary or oral discovery.

The complaint provides the basis for subsequent pre-inquiry/pre-hearing steps, such as the filing of a Government Institution Report (“GIR”) in response to the complaint. There is no prescribed format for filing a complaint with the CITT.²⁴ However, the CITT Act

¹⁹ CITT Procurement Regulations, *supra* note 2 at s. 6(1).

²⁰ See Robert C. Taylor & Lisa M. Bolton, “Overview of Canadian Government Procurement Law” (2006) 42 *The Procurement Lawyer* [Overview].

²¹ *Ibid.* at s. 6(3)-(4).

²² The granting of this extension is separate from any extension the CITT may grant on the time limits set out in the *Canadian International Trade Tribunal Rules* pursuant to its overarching discretion to ensure fairness.

²³ Ronald D. Lunau and Catherine Beaudoin, “Canadian Procurement Litigation Update 2008”, *Lexpert* November 2008 p. 112.

²⁴ A Procurement Complaint Form is published by the CITT online at:
<http://www.citt.gc.ca/procure/complaint/index_e.asp>

provides that the complaint must be in writing and must include the following information:²⁵

1. The complainant's identity, the designated contract concerned and the government institution that awarded or is to award the contract.
2. A clear and detailed statement of the substantive and factual grounds of the complaint.
3. The form of relief requested.
4. The address of the complainant to which notices and other communications respecting the complaint may be sent.
5. All information and documents relevant to the complaint that are in the complainant's possession.

The complainant must provide the written complaint and any additional information and documents required by the rules, together with the application fee.²⁶

VI. Conditions for an Inquiry/Interim Order

The CITT must decide within 5 working days whether or not it will conduct an inquiry into the complaint based on the existence of the following jurisdictional facts:²⁷

1. The complainant must be a potential supplier.
2. The complaint must concern a designated contract.
3. The information provided by the complainant must disclose a reasonable indication that the procurement has not been conducted in accordance with the applicable Agreement.

One key consideration at this stage is whether or not to seek an interim order. A complainant may seek an interim order in the nature of an injunction if a procurement contract has not been awarded. The CITT has the jurisdiction to order that a government institution delay the awarding of a contract that has not yet been awarded pending the outcome of the inquiry.²⁸

VII. Time Frame for a Report and Reply

The government institution which is the subject of the complaint has 25 days from the date it receives notice that the CITT has accepted the complaint for inquiry to respond by

²⁵ CITT Act, *supra* note 1 at s. 30.11.

²⁶ *Ibid.*

²⁷ CITT Procurement Regulations, *supra* note 2 at s. 7.

²⁸ CITT Act, *supra* note 1 at s. 30.13(3).

filing a GIR.²⁹ The GIR must set out the following information:³⁰

1. The complaint.
2. The solicitation.
3. All other documents relevant to the complaint.
4. A statement that sets out all findings, actions and recommendations of the government institution and responds fully to all allegations of the complaint.
5. Any additional evidence or information that may be necessary in order to resolve the complaint.

The complainant has 7 days from the day they receive the GIR to provide the CITT with a reply to GIR, or make a request that the case be decided on the basis of the record.³¹ The CITT may entertain requests for further steps (such as a sur-reply from the government entity) necessary to reply and refine the issues for determination.

VIII. Protection of Confidential Information

In order to provide a complete complaint some businesses must tender confidential business information. In such cases it is important to take advantage of processes that can help to shield confidential business information from the eyes of competitors who may seek leave to intervene in a CITT inquiry.³² The CITT has established very specific and detailed rules respecting confidentiality to ensure that information is only disclosed to the CITT, the government institution and legal counsel. The process may include the filing of a confidential and non-confidential record of evidence.³³

IX. The Inquiry/Hearing

The CITT has all the powers of a superior court of record with respect to attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders and other matters necessary or proper for the due exercise of its jurisdiction.³⁴ Most cases are dealt with on the basis of written submissions.³⁵ However, the CITT may entertain an oral hearing (where witnesses are called under oath and a transcript of proceedings is created) if the complainant can establish that there is:

²⁹ *Canadian International Trade Tribunal Rules*, S.O.R./91-499, s. 103 (“CITT Rules”).

³⁰ *Ibid.*

³¹ *Ibid.* at s.104.

³² See *Overview*, *supra* note 6.

³³ See CITT Act, *supra* note 1 at ss. 44-49; CITT *Guideline: Designation, Protection, Use and Transmission of Confidential Information* available at: http://www.citt.gc.ca/publicat/ConfInfo_e.asp.

³⁴ CITT Act, *supra* note 1 at s. 17(2).

³⁵ See *Overview*, *supra* note 6.

1. An issue of credibility in the evidence that can not be resolved on the basis of written testimony in affidavits.
2. A complicated issue of fact that can not be resolved by the CITT without the assistance of expert evidence.

A party may request a hearing or the CITT may decide to hold a hearing on its own initiative.³⁶ In such cases, however, the CITT typically requires that the oral hearing be limited to the tendering of witnesses. It will almost always insist upon the filing of written legal arguments.

X. The Decision³⁷

Generally, a complaint will be decided within the time limit of 90 days.³⁸ If an extension of a time limit has been granted, the CITT must still finish the inquiry process and issue its findings and recommendations within 135 days.³⁹

However, any party may request in writing, within 3 days of filing the complaint, to elect an express option which will result in a decision within 45 days.⁴⁰ The CITT will decide whether or not a complaint is suitable for the express option based on the reasons provided by the applicant, the complexity of the complaint and the CITT's workload. Electing the express option places a great burden on all the parties and the CITT to complete the pre-inquiry steps within extremely short time limits. For this reason the express option is rarely used.

XI. Complaint is Valid

If the CITT determines that a complaint is valid, the CITT may recommend a remedy.⁴¹ These remedies include the following recommendations:⁴²

1. The issuance of a new solicitation.
2. The re-evaluation of the bids.
3. The termination of the designated contract.
4. The award of the designated contract to the complainant.

³⁶ CITT Rules, *supra* note 11 at s. 105.

³⁷ A flow-chart of the CITT Procurement Process is available at http://www.citt.gc.ca/publicat/procu_e.asp#P24_5847

³⁸ CITT Procurement Regulations, *supra* note 2 at s. 12.

³⁹ CITT Procurement Regulations, *ibid*.

⁴⁰ See CITT Rules, *supra* note 11 at s. 107; *CITT Procurement Regulations, ibid*.

⁴¹ CITT Act, *supra* note 1 at s. 30.15(2).

⁴² *Ibid*.

5. The award of compensation to the complainant in an amount specified by the CITT.⁴³

In determining which remedy to recommend, the CITT must consider all the relevant circumstances to the procurement, including: the seriousness of any deficiency in the procurement process found by the CITT, the degree to which the complainant and all other interested parties were prejudiced, the degree to which the integrity and efficiency of the competitive procurement system was prejudiced, whether the parties acted in good faith and the extent to which the contract was performed.⁴⁴

The CITT may only make a recommendation; however, recommendations are to be implemented by the government institution to the greatest extent possible.⁴⁵ The government institution must advise the CITT of the extent to which it will implement the recommendations or, if the government decides not to implement the recommendations, it must provide the CITT with reasons as to why it will not implement them.⁴⁶

XII. Complaint Dismissed

The CITT may decide to dismiss a complaint under the following circumstances.⁴⁷

1. The complaint has no valid basis.
2. The complaint does not concern a procurement by a government institution.
3. The complaint breaches the applicable time limits.
4. The complainant fails to file with the CITT the necessary information in support of its complaint.

The recent *Enterasys* case is illustrative of when a case might be dismissed. In that case the Federal Court of Appeal considered (in *obiter dicta*) whether it was permissible for a procurement to specify the item to be procured by brand name. The contracts which were the subject of the complaints were “designated contracts” subject to NAFTA. The court considered NAFTA Article 1007(3) which stated that:

1007.(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.*

⁴³ The CITT has released the *Canadian International Trade Tribunal Procurement Compensation Guidelines* to help assist the parties in cases where the CITT has recommended that compensation be paid and to inform them as to the principles that may guide the CITT at arriving at the appropriate amount of compensation. See: <http://www.citt.gc.ca/publicat/prcomp_e.asp>.

⁴⁴ CITT Act, *supra* note 1 at s. 30.15(3).

⁴⁵ *Ibid.* at s. 30.18(1).

⁴⁶ *Ibid.* at s. 30.18(2) at tab A-1; *CITT Procurement Regulations*, *supra* note 2 at s. 13.

⁴⁷ CITT Procurement Regulations, *ibid.* at s. 10.

The Federal Court indicated that the evidence justified the PWGSC's decision to use brand name specifications in all but two designated contracts. The risk and consequences of not procuring the right product constituted a reasonable justification for the PWGSC to require "brand name or equivalent".

XIII. Costs and Judicial Review

The winner of the CITT inquiry may be awarded its nominal costs.⁴⁸ Parties may appeal the CITT's determination to the Federal Court of Appeal.

XIV. Summary

This paper has provided an outline of the CITT's jurisdiction, procedures and winning strategies for dealing with federal government procurement disputes. If there are disadvantages to the CITT federal procurement complaint process (such as the absence of discovery and the limited authority to make recommendations), one advantage is the speed of the decision-making process. CITT decisions respecting federal government procurement complaints are generally made within 90 days of commencement. This is a much shorter time frame than one might ordinarily expect in a court proceeding. Parties using the CITT federal procurement complaint process may wish to keep in mind the following winning strategies:

1. Ensure that the complainant has standing and that the CITT has jurisdiction before filing a complaint. There are technical requirements relating to standing and jurisdiction. For example, under the AIT a potential supplier must be a "Canadian supplier". Further a person who has not bid in the specified time frame does not have standing because it is not a "potential supplier". The CITT may entertain complaints arising out of a designated contract made under the Agreements (but not contract or tort claims).
2. Act quickly. Very short time limits apply to the CITT federal government procurement dispute process. A potential supplier must file a complaint within 10 working days after the day on which the basis of the complaint became known, or reasonably should have become known to the potential supplier.
3. Include all relevant evidence in the complaint. The complaint provides the basis for subsequent pre-inquiry/pre-hearing steps.
4. If a procurement contract has not been awarded, ask the CITT to issue an order to the government institution requiring it to delay the granting of a contract pending the outcome of the inquiry.
5. File a reply when appropriate. A complainant has 7 days from the day that it receives the GIR to provide the CITT with a reply to GIR, or make a request that the case be decided on the basis of the record. The CITT may entertain requests (such as a sur-reply) where necessary.

⁴⁸ CITT Act, *supra* note 1 at ss. 30.15(4), 30.16.

6. Protect against the disclosure of confidential business information from competitors. A complainant may use the CITT's rules to protect against the disclosure of confidential business information (such as the filing of a confidential and non-confidential record).
7. Request an oral hearing where appropriate. A complainant may apply to have an oral hearing where there is an issue of credibility in the evidence that can not be resolved on the basis of written testimony in affidavits, or there is a complicated issue of fact that can not be resolved by the CITT without the assistance of expert evidence.
8. Don't use the express option unless it is clear that all parties can complete the inquiry process within the accelerated time frame related to that option.