

CANADIAN INTERNATIONAL TRADE TRIBUNAL

GUIDELINE FOR FIXING COSTS IN PROCUREMENT

COMPLAINT PROCEEDINGS

1.0 INTRODUCTION

1.1 The *Canadian International Trade Tribunal Act*¹ provides that the Canadian International Trade Tribunal (the Tribunal) may award costs in procurement complaint proceedings. Specifically, the Tribunal may:

- award costs of, and incidental to, any proceedings before it in relation to a complaint, on a final or interim basis, and the costs may be fixed at a sum certain or may be taxed; and
- direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

1.2 The Tribunal has revised the previous guidelines to simplify and expedite the procedure for awarding costs in relation to procurement complaint proceedings and to bring the level of the awards more in line with the costs granted by most courts of justice in Canada.

1.3 The Tribunal has prepared this guideline to provide guidance to parties seeking to recover the costs of participating in procurement complaint proceedings. The Tribunal and any taxation officer appointed by the Tribunal will follow the procedures described in this guideline where costs are awarded. However, each case will be considered individually, and the guideline is not intended to replace, limit or detract from the discretion of the Tribunal or any taxation officer appointed by the Tribunal in awarding, allowing and taxing costs.

1.4 This guideline applies to the award of costs in procurement complaint proceedings initiated by complaints filed after January 31, 2004.

2.0 GUIDING PRINCIPLES

2.1 This guideline is intended to implement the following principles:

- The costs awarded normally represent a partial indemnity.
- The costs awarded are not intended to be a source of profit for the claimant.
- The assessment and taxation processes should be efficient and fair to all parties.

3.0 INTERPRETATION

3.1 In this guideline,

- “claimant” means the party to whom costs have been awarded by the Tribunal;
- “complaint” means a complaint filed pursuant to subsection 30.11(1) of the *CITT Act*;
- “complaint costs” means the costs associated with a claimant’s participation in complaint proceedings;

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

- “complaint proceedings” means Tribunal proceedings in respect of a complaint; and
- “taxation officer” means any person appointed by the Tribunal pursuant to subsection 30.16(2) of the *CITT Act* to assess claims for complaint costs.

4.0 PROCESS FOR FIXING COSTS

4.1 Description of the Flat Rate System

4.1.1 Each case will be classified into one of three levels of complexity, based on the complexity of the procurement, the complexity of the complaint and the complexity of the proceedings. For more information and examples of how the assessment of complexity will be performed, see Appendix A.

4.1.2 The cost award is a flat rate² that takes into account all expenses, including representation services and disbursements. The amounts associated with each level of complexity are as follows:

Level of Complexity	1	2	3
All-inclusive Flat Rate	\$1,000	\$2,400	\$4,100

4.2 Tribunal’s Procedure for Invoking the Flat Rate System

4.2.1 When the Tribunal issues its determination, it will award costs, if appropriate, and give a preliminary indication of the level of complexity and amount of the award.

4.2.2 Parties that believe that the preliminary indication is not appropriate may make submissions on the complexity of the case, the amount of the flat rate or the reason why the guideline should not be followed.

4.2.3 Parties will have 10 working days from the date of the determination to make such submissions and 5 working days to respond to the submissions of the other parties.

4.2.4 If the parties make no submissions on costs, the Tribunal will confirm its preliminary indication by making a cost order.

4.2.5 If one or more parties make submissions, the Tribunal will consider them, request additional information, if necessary, and then make whatever cost order it believes is warranted.

2. The flat rates were determined after a survey of the existing rates in other courts of justice in Canada and were based on the consideration that indemnification was to be partial only. The initial figure was established at a level generally consistent with the Federal Court of Canada tariff for fees and was then increased by 50 percent to allow for disbursements.

APPENDIX A

ASSESSMENT OF LEVEL OF COMPLEXITY

Based on its experience, the Tribunal has established three levels of complexity to classify complaint cases using the following criteria: the complexity of the procurement, the complexity of the complaint and the complexity of the proceedings.

Level 1

Complexity of the Procurement

- The procurement of goods involved a few standard items or a few simply defined items.
- The procurement of services involved personal services by one party or routine services by more than one party.

Complexity of the Complaint

- The issue was simple and involved solving a minor technical matter prior to the evaluation of the proposals.
- The issue was an evaluation based on a simple pass-or-fail list of easily measurable features.

Complexity of the Proceedings

- There were no motions and few interveners.
- The 90-day time frame was respected.
- No public hearing was held.

Level 2

Complexity of the Procurement

- The procurement of goods involved many off-the-shelf items or a few complex items that may have included an element of service for installation and maintenance.
- The procurement of services involved a defined service project or study, or a moderately undefined project, such as maintenance for breakdown or support, on an as required basis.

Complexity of the Complaint

- The issue was more complex; for example, the matter involved ambiguous or overly restrictive specifications.
- The issue was an evaluation based on a combination of mandatory and rated requirements.
- The issue involved more than one trade agreement, in a slightly different manner.

Complexity of the Proceedings

- There was one motion and a few interveners.
- Some minor submissions beyond the scope of the normal proceedings were entertained.
- No public hearing was held.

Level 3

Complexity of the Procurement

- The procurement of goods involved a complex item, system or facility, which may have included an element of service for installation and maintenance.
- The procurement of services involved an undefined service project or study.

- The procurement involved a construction project with many subcontractors.

Complexity of the Complaint

- The issue was complex and involved many elements of an allegedly ambiguous or overly restrictive specification.
- The issue was an evaluation based on a significant evaluation grid involving a combination of mandatory and rated requirements.
- There were multiple issues touching on different required procedures.
- There were issues relating to differences between the applicable trade agreements.

Complexity of the Proceedings

- There was more than one motion and many interveners.
- The parties were given permission to submit additional information beyond the normal scope of the proceedings.
- The process required the use of the 135-day time frame.
- A public hearing may have been held.