

**PROCUREMENT  
REVIEW PROCESS:  
A DESCRIPTIVE GUIDE**

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## BASIC FEATURES OF THE PROCUREMENT REVIEW PROCESS

### INTRODUCTION

The *North American Free Trade Agreement*,<sup>1</sup> the *Agreement on Internal Trade*,<sup>2</sup> the *Agreement on Government Procurement*<sup>3</sup> and the *Canada-Korea Agreement on the Procurement of Telecommunications Equipment*<sup>4</sup> require the signatories to maintain an independent bid challenge authority. The *North American Free Trade Agreement Implementation Act*<sup>5</sup> establishes the Canadian International Trade Tribunal (the Tribunal) as the bid challenge (complaint) authority for Canada. Parliament has enacted legislation designed to ensure that the procurements covered by *NAFTA*, the *AIT*, the *AGP* or the *CKTEA* are conducted in an open, fair and transparent manner and, wherever possible, in a way that maximizes competition. On occasion, a potential supplier may have reason to believe that a contract has been or is about to be awarded improperly or illegally, or that, in some way, it has been wrongfully denied a contract or an opportunity to compete for one. The Tribunal provides an opportunity for redress for potential suppliers concerned about the propriety of the procurement process relating to contracts covered by *NAFTA*, the *AIT*, the *AGP* or the *CKTEA*.

### BACKGROUND

#### *AIT*

As a party to the *AIT*, the Government of Canada has agreed to provide all Canadian suppliers equal access to federal government procurement for contracts involving specified classes of goods and services (including construction services) bought by the government departments and agencies and Crown corporations listed in the *AIT*. Insofar as the federal government is concerned, the *AIT* applies to procurements with a value equal to or greater than \$25,000, in cases where the largest portion of the procurement is for goods, and a value equal to or greater than \$100,000, in cases where the largest portion of the procurement is for services, including construction services contracts.

The *AIT* prohibits the federal government from discriminating against goods or services of a particular province or region and the suppliers of such goods or services and those of any other province or region. The *AIT* imposes procedural disciplines aimed at promoting equal access to procurement for all Canadian suppliers.

The text of the *AIT* is available online at [www.intrasec.mb.ca/eng/it.htm](http://www.intrasec.mb.ca/eng/it.htm).

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1. 32 I.L.M. 289 (entered into force 1 January 1994) [*NAFTA*].
  2. 18 July 1994, C. Gaz. 1995.I.1323, online: Internal Trade Secretariat <<http://www.intrasec.mb.ca/eng/it.htm>> [*AIT*].
  3. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [*AGP*].
  4. (5 July 1999), Can. T.S. 2001 No. 24 (entered into force 1 September 2001) [*CKTEA*].
  5. S.C. 1993, c. 44.

## **NAFTA**

As a party to *NAFTA*, Canada has agreed to provide suppliers of the United States and Mexico equal opportunity to compete with Canadian suppliers for contracts involving specified classes of goods and services (including construction services) bought by the government departments and agencies and government enterprises listed in *NAFTA*.

*NAFTA* applies to government procurements with a value equal to or greater than certain monetary thresholds. The monetary thresholds applicable to procurements by government departments and agencies are \$89,000 for goods, services or any combination thereof and \$11.5 million for construction services contracts. The monetary thresholds applicable to procurements by government enterprises are \$445,000 for goods, services or any combination thereof and \$14.2 million for construction services contracts. As between Canada and the United States, the monetary threshold for the procurement of goods by departments and agencies is \$38,000. These thresholds are revised periodically in accordance with the indexation and conversion provisions in *NAFTA*.

*NAFTA* guarantees national treatment and non-discrimination to goods originating in Canada, the United States and Mexico, as well as to the suppliers of such goods and service suppliers in Canada, the United States and Mexico. *NAFTA* imposes procedural disciplines aimed at promoting transparency, predictability and competition in public sector procurements.

The text of Chapter Ten of *NAFTA* is available online at [www.dfait-maeci.gc.ca/nafta-alena/agree-fr.asp](http://www.dfait-maeci.gc.ca/nafta-alena/agree-fr.asp).

## **AGP**

As a party to the *AGP*, Canada has agreed to provide suppliers of the signatory countries equal opportunity to compete with Canadian suppliers for contracts involving specified classes of goods and services (including construction services) bought by the government departments, agencies and enterprises listed in the *AGP*.

The *AGP* applies to government procurements with a value equal to or greater than certain monetary thresholds. The monetary thresholds applicable to procurements by government departments, agencies and enterprises are \$261,300 for goods, services or any combination thereof and \$10.0 million for construction services contracts. These thresholds are revised periodically in accordance with the provisions of the *AGP*.

The *AGP* guarantees national treatment and non-discrimination to goods originating in the signatory countries, as well as to the suppliers of such goods and services. The *AGP* imposes procedural disciplines aimed at promoting transparency, predictability and competition in public sector procurements.

The text of the *AGP* is available online at [www.wto.org/onfide/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/onfide/docs_e/legal_e/final_e.htm).

## **CKTEA**

As a party to the *CKTEA*, Canada has agreed to provide suppliers of the Republic of Korea equal opportunity to compete with Canadian suppliers for contracts involving telecommunications equipment bought by the government entities listed in the *CKTEA*.

The *CKTEA* provides for the application of non-discriminatory rules with respect to the procurement of telecommunications equipment by listed government entities. Under the terms of the *CKTEA*, the federal government is required to adopt and maintain bid protest procedures for procurements that it covers. The Tribunal has been designated as the bid challenge authority under the *CKTEA*. The *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>6</sup> were amended accordingly, and the amendments came into force on November 1, 2000.

The text of the *CKTEA* is available online at [www.pwgsc.gc.ca/sos/corporate/sm/text/ch04nx-02-e.html](http://www.pwgsc.gc.ca/sos/corporate/sm/text/ch04nx-02-e.html).

## Regulations and Rules

The Tribunal has detailed regulations and rules concerning the filing of a complaint, the procedure to follow when appearing before the Tribunal and the provision of time limits for the various steps in the review process. These regulations and rules have been published in the *Canada Gazette*, which is the official newspaper of the Government of Canada, and on the Government Electronic Tendering Service (GETS).<sup>7</sup> These forums are used for serving notices under *NAFTA*, the *AIT*, the *AGP* and the *CKTEA*. These regulations and rules may be updated from time to time, and any resulting amendments are published in the *Canada Gazette*.

## Definitions

“Counsel”: person who acts in a proceeding on behalf of a party

“Counsel of record”: counsel of record for a party as determined in accordance with the *Canadian International Trade Tribunal Rules*<sup>8</sup>

“Designated contract”: contract for the supply of goods or services that is designated by the *Regulations* or that is of a class of contracts designated by the *Regulations*

“Government institution”: department or ministry of state of the Government of Canada, or any other body or office, that is designated by the *Regulations*

“Intervener”: interested party that has been granted leave of the Tribunal to intervene in any proceedings in relation to a complaint

“Potential supplier”: bidder or prospective bidder on a designated contract

“Send”: transmit by hand, registered mail, fax or other electronic means capable of producing for the recipient, at the destination, a printed copy of the document, information or notification

“Working day”: day that is not a Saturday, a Sunday or a holiday

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

7. Currently operated under contract under the name MERX.

8. S.O.R./91-499 [*Rules*].

## TRIBUNAL'S MANDATE

The Tribunal's mandate authorizes it to receive complaints pertaining to any aspect of the procurement process, conduct inquiries and make determinations. Its jurisdiction covers complaints under *NAFTA*, the *AIT*, the *AGP* and the *CKTEA*.

In dealing with a complaint, the Tribunal must determine whether the government institution responsible for the procurement under review has complied with the requirements of *NAFTA*, the *AIT*, the *AGP* or the *CKTEA* and such other procedural requirements, as prescribed in the *Regulations*.

## PROCUREMENT COMPLAINTS

### Objections Directed to a Government Institution

A potential supplier that objects to a procurement is encouraged to first contact the appropriate government institution. The fact that an objection is directed to a government institution, and is thereafter dismissed or otherwise denied, does not prevent a potential supplier from directing the same objection to the Tribunal, provided the requirements for filing and the time frames within which to file are observed.

### Complainant

Any potential supplier may file a complaint with the Tribunal with regard to a designated contract. A complainant may decide to retain counsel.

### Sending a Complaint

A complaint should be addressed to the Secretary of the Tribunal. It may be sent by mail, electronic means or courier, or it may be delivered in person. The Tribunal requires that the original and seven copies of the complaint and relevant documentation be filed.

### Complaint Format

There is no prescribed format for filing a complaint. Formal briefs and other technical forms are not required; however, complaints must be made in writing. A complaint form is available as an aid for filing but is not intended to replace the requirements outlined in the *Canadian International Trade Tribunal Act*<sup>9</sup> or the *Regulations*. It is available on the Tribunal's Web site at [www.citt-tcce.gc.ca/procure/complaint/eform\\_e.asp](http://www.citt-tcce.gc.ca/procure/complaint/eform_e.asp).

Potential suppliers who elect not to use the procurement complaint form should ensure that their complaint is concise and logical. A complaint *must* contain the following information:

- The identity of the complainant, the designated contract concerned and the government institution that awarded or is to award the contract. The Tribunal needs this information in order to establish that the complainant is a potential supplier and that the complaint is in respect of a designated contract. This condition must be met before the complaint can be accepted for inquiry.

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



- A clear and detailed statement of the substantive (legal) and factual grounds of the complaint. The complaint must be organized in such a manner that a reader can understand, without further explanation, why the complaint is being made. Events, which include times and dates, that led to the complaint should be provided. The provisions in *NAFTA*, the *AIT*, the *AGP* or the *CKTEA* that have allegedly been breached should also be identified. All relevant facts which support any allegations should also be included.
- A statement on the form of relief requested if the complaint is determined to be valid. Complainants may request a number of remedies, such as the issuance of a new solicitation, the re-evaluation of a bid, the termination of the designated contract, the award of the designated contract to the complainant or compensation. Complainants may also request that they be reimbursed for the reasonable costs that they incurred in preparing a response to the solicitation for the designated contract as well as for preparing and proceeding with the complaint.
- The address, telephone number and fax number of the complainant and the contact to whom notices and other communications respecting the complaint may be sent.
- All information and documents relevant to the complaint that are in the complainant's possession. This may include the solicitation documents and statement of work, any related correspondence and any other applicable documents.

### **Basis of a Complaint**

The Tribunal considers complaints against solicitations and awards or proposed awards on a designated contract. Under the *Regulations*, the designated contracts are those described in Chapter Ten of *NAFTA*, in Chapter Five of the *AIT*, in Article I of the *AGP* and in Article I of the *CKTEA*. A complaint may relate to any aspect of the procurement process and concern one or more of the procedural requirements contained in Chapter Ten of *NAFTA*, in Chapter Five of the *AIT*, in the *AGP* or in the *CKTEA*. For example, alleged restrictive specifications, the omission of a required provision, ambiguous or indefinite evaluation factors, and the inconsistent or mistaken application of evaluation criteria are some of the matters that may form the basis of a complaint.

### **FILING A COMPLAINT**

#### **Meaning of "Filed"**

Provided it complies with the requirements of the *CITT Act*, a complaint is considered filed on the day on which the Tribunal receives it. If a complaint is deficient, it is considered filed on the day that the Tribunal receives the information that corrects the deficiencies.

#### **Time Limits for Filing a Complaint**

An inquiry by the Tribunal into a procurement complaint may delay the procurement or delivery of goods and services needed by the government. Therefore, in order to minimize the possible adverse impact of these delays, time limits for the filing and the resolution of complaints have been established. These time limits provide complainants with a reasonable opportunity to submit complaints.

Generally, a potential supplier that files a complaint with the Tribunal must do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

If a potential supplier has made an objection to the relevant government institution, it may file a complaint with the Tribunal within 10 working days after the day on which it has actual or constructive knowledge of the denial of relief by that government institution, provided the objection was made to the government institution within the 10-working-day period mentioned in the preceding paragraph.

Where conditions exist that are beyond the control of the complainant or when, taking into consideration all the circumstances of the procurement, including the good faith of the potential supplier, a complaint raises an issue of a systemic nature, the Tribunal considers any complaint not filed within the time limits set out above, provided such complaints are filed not later than 30 days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier. When a complainant invokes reasons beyond its control, those reasons should be substantiated in the documentation submitted to the Tribunal.

In order to determine the filing deadline, the day on which the designated period of time begins shall not be counted, but the last day of the period shall be counted, unless that day is a Saturday, a Sunday or a holiday observed in the province in which a response or filing of documents is required to be made, in which event, the period shall include the next working day. When the period of time prescribed or allowed is eight days or less, any intervening Saturday, Sunday or holiday shall not be counted.

### **Time Limit Extension**

The Tribunal may, where considerations of fairness require and exceptional circumstances exist, extend any time limit set out in the *Rules*. This, however, does not apply to the filing of a complaint. Under no circumstances will a time limit extension prolong the procurement review process beyond 135 days from the filing of a complaint.

### **Late Filing**

A determination on a complaint shall not be delayed by the failure of a party to file a submission within the prescribed time limit. The failure of any party to comply with the prescribed time limit may result in the resolution of the complaint without the Tribunal's consideration of the late submission.

## **TRIBUNAL INQUIRY PROCESS**

### **Decision to Conduct an Inquiry**

The Tribunal will acknowledge receipt of all complaints and assign a file number to each one for future reference.

Within five working days from the filing of a complaint, the Tribunal must decide whether or not to conduct an inquiry. In all cases, a notice of inquiry is published on GETS and in the *Canada Gazette*.

If the complaint is accepted for inquiry, a copy is sent by the Tribunal to the relevant government institution and the contract awardee, where applicable. If the complaint is not accepted for inquiry, the complainant is notified of that decision.

### **Express Option**

It may be important to have a complaint decided in less than the normal time limit of 90 days. Any party may request the use of the express option, but such a request must be made in writing and submitted to the Tribunal not later than 3 days from the filing of the complaint. The Tribunal decides within 2 days of receiving the request whether the case is suitable for the express option, taking into consideration the reasons for the request, the complexity of the case and the workload of the Tribunal. When the express option is used, the normal time limits for submission of the various reports and comments and the issuance of the Tribunal's determination are compressed.

### **Contract Award and Performance**

When the government institution responsible for the procurement is notified that a complaint has been filed prior to contract award, the government institution may be ordered by the Tribunal to postpone any award until the resolution of the complaint. If, however, the government institution certifies in writing to the Tribunal within the prescribed time limit that the procurement is urgent or that delaying the award would be contrary to the public interest, the Tribunal must rescind such an order. Nevertheless, the inquiry continues. The Tribunal does not have the power to delay the performance of any contract already awarded.

### **Interveners**

An interested party may, with leave of the Tribunal, intervene in any proceedings before the Tribunal. A request for intervener status must be submitted in writing to the Secretary along with reasons why the request should be granted.

### **Government Institution Report**

Within 25 days of receiving notification that a complaint has been accepted for inquiry by the Tribunal, the government institution responds by filing a Government Institution Report (GIR) with the Tribunal, including a statement which fully responds to all the issues forming the basis of the complaint.

Upon receipt of the GIR, the Tribunal sends a copy to the complainant and any interveners.

Within seven days of being sent the GIR, the complainant and any interveners may provide the Tribunal with their comments.

The Tribunal sends to the parties any comments that it receives on the GIR.

All the information gathered during the above stages is submitted to the Tribunal. If the Tribunal considers that sufficient information exists to decide the case, it proceeds to make a determination.

## Type of Hearing

The Tribunal will usually proceed by way of hearing by way of written submission. This determination is made on a case-by-case basis. However, if the information is insufficient or disputed, the Tribunal may, on its own initiative or at the request of a party, schedule a hearing at which the parties and counsel appear before the Tribunal. A hearing involves more formal procedures. Witnesses may be called upon to testify under oath or by affirmation, and a transcript of the proceedings is made. A hearing may be held for various reasons, including the need to resolve a specific factual dispute that is essential to the resolution of the complaint and that cannot be otherwise resolved on the written record. A hearing should be requested as early as possible during the review process.

## Determination

Notwithstanding the above, the Tribunal may, at any stage of the proceedings, decide that the record is complete and proceed to make a determination on the complaint. Under the normal time frame, the Tribunal must issue its findings and recommendations within 90 days of the filing of the complaint. If the express option has been invoked, this is done within 45 days from the date of filing. Under certain circumstances, the deadline for issuing the findings and recommendations extends beyond 90 days, but under no circumstances does it exceed 135 days.

The Tribunal decides whether or not a complaint is valid. When a complaint is valid, the Tribunal may recommend to the government institution appropriate remedies in the form of awards and recommendations. Recommendations are to be implemented to the greatest extent possible by the relevant government institution.

A copy of the determination is sent to the complainant, the government institution and any interveners. The determination is published in the *Canada Gazette* and on GETS, and posted on the Tribunal's Web site.

The Tribunal's determination may be judicially reviewed by the Federal Court of Appeal.

## Withdrawal of a Complaint

Should the parties resolve the complaint before the Tribunal's determination, or should the complainant decide not to pursue a complaint further, the complaint may be withdrawn.

## Dismissal of a Complaint

The Tribunal may dismiss a complaint at any time where:

- the complaint has no valid basis;
- the complaint is not in respect of a procurement by a government institution;
- the complaint is not filed within the time limits set out in the *Regulations* or the *Rules*;  
or
- the complainant has failed to file any information required by the Tribunal.

## PROTECTION OF CONFIDENTIAL INFORMATION

### Designation

For all cases, a public record is constructed by the Tribunal and made available for viewing on the Tribunal's premises. Further, all parties can expect that copies of the public documentation that they submit to the Tribunal will be provided by the Tribunal to the other parties to the proceedings. The Tribunal furnishes a copy of the documentation, except to the extent that the withholding of information is permitted or required by law.

Complainants should pay particular attention to identifying and properly organizing the public and confidential information that they submit to the Tribunal. If a party submits documents which contain information that the party wishes to keep confidential, the party must provide the Tribunal with:

- a statement identifying the information that the party wishes to keep confidential, together with an explanation as to why the information is confidential;
- a non-confidential summary of the confidential information, which should contain sufficient detail to convey a reasonable understanding of the substance of the confidential information (for example, a version of the information which blocks out the confidential information); and
- one set of documents containing the confidential information and marked "confidential" or "*confidentiel*" and one set of documents from which the confidential information has been deleted.

More information regarding the designation and protection of confidential information is found in the *Procedural Guidelines for the Designation and Use of Confidential Information in Canadian International Trade Tribunal Proceedings*. These guidelines are available on the Tribunal's Web site.

### Access to Confidential Information

#### Counsel

Counsel for parties involved in proceedings may submit a Declaration and Undertaking and request access to all confidential information. In essence, the Declaration and Undertaking is a binding commitment by counsel not to disclose any confidential information received, except to a person granted access by the Tribunal to such information. Parties may object to a request by counsel for access to confidential information. It is the Tribunal's responsibility to grant or deny the request, on such terms as it considers appropriate. Under no circumstances may counsel obtain access if they are a director, servant or employee of a party. Counsel are not allowed to make copies of any confidential information without the express permission of the Tribunal.

#### Government Officials

Potential complainants should be aware that, if the complaint is accepted for inquiry, the Tribunal officially requests the authorization from the complainant to release confidential information to government officials involved with the procurement.

## **MATTERS EXTERNAL TO THE TRIBUNAL'S JURISDICTION**

### **Non-designated Contracts**

Any complaint relating to a contract that is not a designated contract does not fall within the Tribunal's jurisdiction.

### **Subcontract Awards**

Complaints against subcontract awards are generally not considered, except in very limited circumstances when the award is made by or for the government entity, such as when a contractor acts as a purchasing agent for the government.

### **Contract Performance**

The Tribunal does not consider complaints involving performance of the contract, such as a contractor's entitlement to additional compensation or a government department's decision not to exercise its options.

### **Matters to Be Determined by Other Bodies**

The Tribunal does not consider complaints involving matters which, under the law, are to be determined by other bodies. For example, disputes over whether a firm meets the requirements of the Federal Contractors' Program for Employment Equity are resolved by the Department of Human Resources Development.

## APPENDIX I

### CHECKLIST FOR FILING A COMPLAINT

#### IDENTITY OF COMPLAINANT

- Company
- Address
- Telephone number
- Facsimile number
- Name and address of the contact person or representative

#### INFORMATION ON DESIGNATED CONTRACT

- Solicitation or file number
- Contract number
- Estimated value
- Product or service being procured
- Federal Supply Classification code, if known

#### IDENTITY OF GOVERNMENT INSTITUTION

##### Elements of the Complaint

###### Statement of complaint

- All events and facts in support of complaint
- Relevant times and dates
- Provisions of the *AGP*, the *AIT*, *NAFTA* or the *CKTEA* that have been breached

###### Statement of form of relief requested

- Costs
- Disposition of solicitation

###### Inclusion of all relevant information and documents

- Request for proposal or statement of work
- Correspondence
- Record of communications
- Identification of public and confidential information

N.B.

—The original and seven copies of the complaint and relevant documentation should be provided when submitting a complaint to the Tribunal.

—The checklist is provided as a guide only and does not replace the requirements set out in the relevant acts, agreements, rules and regulations





**APPENDIX 2**  
**SCHEDULE OF EVENTS IN A 90-DAY INQUIRY**

<b>DAY*</b>	<b>ACTION</b>
1	The Tribunal is satisfied that the complaint is properly filed. Notice of filing sent to the parties.
6	Complaint accepted for inquiry.
8—12	Notice of inquiry published in <i>Canada Gazette</i> and on GETS.
31	GIR received by Tribunal and sent to parties for comments.
38	Parties' comments on the GIR sent to the Tribunal and forwarded to the parties.
39—89	Tribunal's hearing by way of written submission or oral hearing, as required.
90	Determination of the Tribunal in the language of the complainant.

\* Days are approximate.



**APPENDIX 3**  
**SCHEDULE OF EVENTS IN A 45-DAY INQUIRY**  
**(EXPRESS OPTION)**

<b>DAY*</b>	<b>ACTION</b>
1	The Tribunal is satisfied that the complaint is properly filed. Notice of filing sent to the parties.
4	Request for express option by parties.
6	Complaint accepted for inquiry.  Express option granted and parties notified.
8 - 12	Notice of inquiry published in <i>Canada Gazette</i> and on GETS.
16	GIR received by Tribunal and sent to parties for comments.
21	Parties' comments on the GIR sent to the Tribunal and forwarded to the parties.
22—44	Tribunal's hearing by way of written submission on oral hearing, as required.
45	Determination of the Tribunal in the language of the complainant.

\* Days are approximate.



**APPENDIX 4**  
**CANADIAN INTERNATIONAL TRADE TRIBUNAL**  
**ACT**

SHORT TITLE

1. This Act may be cited as the *Canadian International Trade Tribunal Act*.

INTERPRETATION

2. (1) In this Act,

“Chairperson” means the Chairperson of the Tribunal;

“member” means a permanent member, temporary member or substitute member of the Tribunal;

“Minister” means the Minister of Finance;

“prescribed” means prescribed by regulations;

“Tribunal” means the Canadian International Trade Tribunal established by subsection 3(1).

CANADIAN INTERNATIONAL TRADE TRIBUNAL

*Establishment of Tribunal*

3. (1) There is hereby established a tribunal, to be known as the Canadian International Trade Tribunal, consisting, subject to subsection (2), of a Chairperson, two Vice-Chairpersons and not more than six other permanent members to be appointed by the Governor in Council.

(2) In addition to the members who may be appointed under subsection (1), the Governor in Council may, whenever in the opinion of the Governor in Council the workload of the Tribunal so requires, appoint temporary members of the Tribunal on such terms and conditions as the Governor in Council may specify, but the number of temporary members holding office shall not at any time exceed five.

*Head Office, Sittings and Quorum*

13. Subject to subsections 30.11(3), 38(2) and 39(2) and the regulations, three members constitute a quorum of the Tribunal and any three or more members have and may exercise all of the Tribunal’s powers and have and may perform all of the Tribunal’s duties and functions.

*Powers, Duties and Functions*

16. The duties and functions of the Tribunal are to

(b.1) receive complaints, conduct inquiries and make determinations under sections 30.1 to 30.19;

(d) exercise and perform such other duties or functions that, pursuant to any other Act of Parliament or regulations thereunder, shall or may be exercised or performed by the Tribunal.

17. (1) The Tribunal is a court of record and shall have an official seal, which shall be judicially noticed.

(2) The Tribunal has, as regards the 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, all such powers, rights and privileges as are vested in a superior court of record.

### COMPLAINTS BY POTENTIAL SUPPLIERS

30.1 In this section and in sections 30.11 to 30.19,

“complaint” means a complaint filed with the Tribunal under subsection 30.11(1);

“designated contract” means 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;

“government institution” means any department or ministry of state of the Government of Canada, or any other body or office, that is designated by the regulations;

“interested party” means a potential supplier or any person who has a material and direct interest in any matter that is the subject of a complaint;

“potential supplier” means, subject to any regulations made under paragraph 40(f.1), a bidder or prospective bidder on a designated contract.

30.11 (1) Subject to the regulations, a potential supplier may file a complaint with the Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint.

(2) A complaint must

(a) be in writing;

(b) identify the complainant, the designated contract concerned and the government institution that awarded or proposed to award the contract;

(c) contain a clear and detailed statement of the substantive and factual grounds of the complaint;

(d) state the form of relief requested;

(e) set out the address of the complainant to which notices and other communications respecting the complaint may be sent;

(f) include all information and documents relevant to the complaint that are in the complainant’s possession;

(g) be accompanied by any additional information and documents required by the rules; and

(h) be accompanied by the fees required by the regulations.

(3) The Chairperson may assign one member of the Tribunal to deal with a complaint and a member so assigned has and may exercise all of the Tribunal's powers, and has and may perform all of the Tribunal's duties and functions, in relation to the complaint.

**30.12** (1) The Tribunal shall notify the complainant in writing of the receipt of the complaint.

(2) Where the Tribunal determines that a complaint does not comply with subsection 30.11(2), it shall notify the complainant in writing and specify the deficiencies to be corrected, the corrective action required and the period within which the action must be taken.

(3) Where the Tribunal determines that a complaint complies with subsection 30.11(2), it shall notify, in writing, the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party.

**30.13** (1) Subject to the regulations, after the Tribunal determines that a complaint complies with subsection 30.11(2), it shall decide whether to conduct an inquiry into the complaint, which inquiry may include a hearing.

(2) Where the Tribunal decides to conduct an inquiry, it shall notify, in writing, the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party and give them an opportunity to make representations to the Tribunal with respect to the complaint.

(3) Where the Tribunal decides to conduct an inquiry into a complaint that concerns a designated contract proposed to be awarded by a government institution, the Tribunal may order the government institution to postpone the awarding of the contract until the Tribunal determines the validity of the complaint.

(4) The Tribunal shall rescind an order made under subsection (3) if, within the prescribed period after the order is made, the government institution certifies in writing that the procurement of the goods or services to which the designated contract relates is urgent or that a delay in awarding the contract would be contrary to the public interest.

(5) The Tribunal may decide not to conduct an inquiry into a complaint or decide to cease conducting an inquiry if it is of the opinion that the complaint is trivial, frivolous or vexatious or is not made in good faith, and where the Tribunal so decides, it shall notify, in writing, the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party of that decision and the reasons therefor.

**30.14** (1) In conducting an inquiry, the Tribunal shall limit its considerations to the subject-matter of the complaint.

(2) At the conclusion of an inquiry, the Tribunal shall determine whether the complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the designated contract, or the class of contracts to which it belongs, have been or are being observed.

**30.15** (1) Where the Tribunal decides to conduct an inquiry, it shall, within the prescribed period after the complaint is filed, provide the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party with the Tribunal's findings and recommendations, if any.

(2) Subject to the regulations, where the Tribunal determines that a complaint is valid, it may recommend such remedy as it considers appropriate, including any one or more of the following remedies:

- (a) that a new solicitation for the designated contract be issued;
- (b) that the bids be re-evaluated;
- (c) that the designated contract be terminated;
- (d) that the designated contract be awarded to the complainant; or
- (e) that the complainant be compensated by an amount specified by the Tribunal.

(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.

(4) Subject to the regulations, the Tribunal may award to the complainant the reasonable costs incurred by the complainant in preparing a response to the solicitation for the designated contract.

**30.16** (1) Subject to the regulations, 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.

(2) Subject to the regulations, the Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

**30.17** An interested party may, with leave of the Tribunal, intervene in any proceedings before the Tribunal in relation to a complaint.

**30.18** (1) Where the Tribunal makes recommendations to a government institution under section 30.15, the government institution shall, subject to the regulations, implement the recommendations to the greatest extent possible.



(2) Within the prescribed period, the government institution shall advise the Tribunal in writing of the extent to which it intends to implement the recommendations and, if it does not intend to implement them fully, the reasons for not doing so.

(3) Where the government institution has advised the Tribunal that it intends to implement the recommendations in whole or in part, it shall further advise the Tribunal in writing, within the prescribed period, of the extent to which it has then implemented the recommendations.

**30.19** (1) The Tribunal may provide the deputy head of a government institution with its comments and observations on any matter that the Tribunal considers should be brought to the attention of the deputy head in connection with the procurement process.

(2) In subsection (1), “deputy head” means

(a) where the government institution is a department or ministry of state, the person having by law the status of deputy head; and

(b) where the government institution is any other body or an office, the chief executive officer of that body or the person holding that office.

## GENERAL

### *Procedural Matters*

**31.** All parties to a hearing before the Tribunal may appear in person or may be represented at the hearing by counsel or an agent.

**32.** A hearing before the Tribunal may, on the request of any party to the hearing, be held *in camera* if that party establishes to the satisfaction of the Tribunal that the circumstances of the case so require.

**34.** For the purpose of any inquiry under this Act or the *Special Import Measures Act*, the Tribunal may obtain information that in its judgment is authentic, otherwise than under the sanction of an oath or affirmation, and use and act on the information.

**35.** Hearings before the Tribunal shall be conducted as informally and expeditiously as the circumstances and considerations of fairness permit.

**36.** Every person summoned to attend before the Tribunal shall receive the like fees and allowances for so doing as if summoned to attend before the Federal Court.

**37.** The Tribunal shall cause notice of its decision in any proceedings held by it pursuant to any other Act of Parliament to be published forthwith in the *Canada Gazette*.

### *Disclosure of Information*

**43.** In sections 44 to 49, “information” includes evidence.

**44.** Where information is provided to the Tribunal for the purposes of any proceedings before the Tribunal, every party to the proceedings has, unless the information is information to which

subsection 45(1) applies, a right, on request, to examine the information during the normal business hours of the Tribunal and a right, on payment of the prescribed fee, to be provided with copies of any such information that is in documentary form or in any other form in which it may be readily and accurately copied.

**45.** (1) Where a person designates information as confidential pursuant to paragraph 46(1)(a) and that designation is not withdrawn by that person, no member and no person employed in the public service of Canada who comes into possession of that information while holding that office or being so employed shall, either before or after ceasing to hold that office or being so employed, knowingly disclose that information, or knowingly allow it to be disclosed, to any other person in any manner that is calculated or likely to make it available for the use of any business competitor or rival of any person to whose business or affairs the information relates.

(2) Subsection (1) does not apply in respect of any non-confidential edited version or non-confidential summary of information or statement referred to in paragraph 46(1)(b).

(3) Notwithstanding subsection (1), information to which that subsection applies that has been provided to the Tribunal in any proceedings before the Tribunal may be disclosed by the Tribunal to counsel for any party to those proceedings or to other proceedings arising out of those proceedings or to an expert, acting under the control or direction of that counsel, for use, notwithstanding any other Act or law, by that counsel or expert only in those proceedings, subject to any conditions that the Tribunal considers reasonably necessary or desirable to ensure that the information will not, without the written consent of the person who provided the information to the Tribunal, be disclosed by counsel or the expert to any person in any manner that is calculated or likely to make it available to

(a) any party to the proceedings or other proceedings, including a party who is represented by that counsel or on whose behalf the expert is acting; or

(b) any business competitor or rival of any person to whose business or affairs the information relates.

(3.1) Notwithstanding subsection (1), the Tribunal may disclose information to which that subsection applies to an expert retained by the Tribunal for use, notwithstanding any other Act or law, by the expert only in proceedings before the Tribunal under the *Special Import Measures Act* or this Act, subject to any conditions that the Tribunal considers reasonably necessary or desirable to ensure that the information will not, without the written consent of the person who provided the information to the Tribunal, be disclosed by the expert to any person in any manner that is calculated or likely to make it available to

(a) any party to the proceedings; or

(b) any business competitor or rival of any person to whose business or affairs the information relates.

(3.2) For greater certainty, disclosure of information under subsection (3) or (3.1) to a person described in subsection (5) who is an employee of an institution of the Government of Canada that is a party to the proceedings or, in the case of subsection (3), other proceedings is not disclosure to a party to those proceedings for the purposes of subsection (3) or (3.1).

(4) In subsection (3), “counsel”, in relation to a party to proceedings, includes any person, other than a director, servant or employee of the party, who acts in the proceedings on behalf of the party.

(5) In subsections (3) and (3.1), “expert” includes any of the following persons whom the Tribunal recognizes as an expert:

(b) in respect of the determination of damages and costs in procurement review proceedings, persons employed in the government institution involved in the procurement under review; and

(c) any prescribed person.

(6) Every person commits an offence who

(a) uses information disclosed to the person by the Tribunal under subsection (3) or (3.1) for any purpose other than the purpose for which the information was disclosed under that subsection; or

(b) contravenes any condition imposed by the Tribunal under subsection (3) or (3.1).

(7) Every person who commits an offence under subsection (6) is guilty of

(a) an indictable offence and liable to a fine of not more than \$1,000,000; or

(b) an offence punishable on summary conviction and liable to a fine of not more than \$100,000.

(8) No proceedings for an offence under subsection (6) shall be instituted without the consent in writing of the Attorney General of Canada.

(9) In addition to any punishment imposed under subsection (7), counsel or an expert who commits an offence under subsection (6) may be barred by the Tribunal from any further appearance before it in respect of any proceedings before the Tribunal for the period that the Tribunal considers appropriate.

**46.** (1) Where a person who provides information to the Tribunal for the purposes of proceedings before the Tribunal wishes some or all of the information to be kept confidential, the person shall submit to the Tribunal, at the time the information is provided,

(a) a statement designating as confidential the information that the person wishes to be kept confidential, together with an explanation as to why that information is designated as confidential; and

(b) a non-confidential edited version or non-confidential summary of the information designated as confidential pursuant to paragraph (a) in sufficient detail to convey a reasonable understanding of the substance of the information or a statement

(i) that such a non-confidential edited version or non-confidential summary cannot be made, or

(ii) that such a non-confidential edited version or non-confidential summary would disclose facts that the person has a proper reason for wishing to keep confidential,

together with an explanation that justifies the making of the statement.

(2) A person who designates information as confidential pursuant to paragraph (1)(a) fails to comply with paragraph (1)(b) where

(a) the person does not provide the non-confidential edited version, the non-confidential summary or the statement referred to in paragraph (1)(b);

(b) the person provides a non-confidential edited version or a summary of the information designated as confidential pursuant to paragraph (1)(a) but the Tribunal is satisfied that it does not comply with paragraph (1)(b);

(c) the person provides a statement referred to in paragraph (1)(b), but does not provide an explanation that justifies the making of the statement; or

(d) the person provides a statement referred to in paragraph (1)(b), but the Tribunal is satisfied that the explanation given as justification for the making of the statement does not justify the making thereof.

**47.** (1) Where a person has designated information as confidential pursuant to paragraph 46(1)(a) and the Tribunal considers that such a designation is warranted, but the person has failed to comply with paragraph 46(1)(b), the Tribunal shall cause the person to be informed of the failure, of the ground on which the person has so failed and of the application of subsection 48(3) if the person fails to take, within the time limited therefor by or pursuant to that subsection, such action as is necessary for the person to take in order to comply with paragraph 46(1)(b).

(2) Where a person has designated information as confidential pursuant to paragraph 46(1)(a) and the Tribunal considers that, by reason of its nature, extent or availability from other sources or of the failure of the person to provide any explanation as to why it was designated as confidential, the designation of that information as confidential is unwarranted, the Tribunal shall cause the person

(a) to be notified of the fact that the Tribunal considers the designation to be unwarranted and of its reasons for so considering; and

(b) where the person has failed to comply with paragraph 46(1)(b), to be informed as provided in subsection (1).

**48.** (1) Where a person is notified pursuant to paragraph 47(2)(a) with respect to any information that the person has designated as confidential pursuant to paragraph 46(1)(a), the person may, within fifteen days after being so notified,

(a) withdraw the designation, or

(b) submit to the Tribunal an explanation or further explanation as to why the information was designated as confidential

and, where the person does neither of those things within those fifteen days, that information shall not thereafter be taken into account by the Tribunal in the proceedings for the purposes for which it was provided, unless the Tribunal obtains that information from a source other than that person.

(2) Where, pursuant to subsection (1), a person submits to the Tribunal, within the fifteen days referred to in that subsection, an explanation or further explanation as to why the information was

designated as confidential, the Tribunal shall again consider whether, taking into account that explanation or further explanation, the designation of the information as confidential is warranted and, if it decides that it is not warranted, shall cause the person to be notified that the information will not thereafter be taken into account by the Tribunal in the proceedings for the purposes for which it was provided, in which case the information shall not thereafter be taken into account by the Tribunal in those proceedings, unless the Tribunal obtains the information from a source other than that person.

(3) Subject to subsection (4), where a person who has been informed pursuant to section 47 that the person has failed to comply with paragraph 46(1)(b) with respect to any information does not, within fifteen days after being so informed or within such longer time not exceeding thirty days after being so informed as the Tribunal, either before or after the expiration of the fifteen days, in its discretion allows, take such action as is necessary for the person to take in order to comply with paragraph 46(1)(b), the Tribunal shall cause the person to be notified that the information will not thereafter be taken into account by the Tribunal in the proceedings for the purposes for which it was provided, in which case the information shall not thereafter be taken into account by the Tribunal in those proceedings, unless the Tribunal obtains the information from a source other than that person.

(4) Subsection (3) does not apply in respect of any information that the Tribunal is prohibited by subsection (1) or (2) from taking into account in the proceedings for the purposes for which the information was provided.

**49. If**

(a) information or material given or elicited in the course of any proceedings before the Tribunal is, in the opinion of the Tribunal, in its nature confidential,

the information or material shall not knowingly be disclosed by any member or person employed in the public service of Canada who comes into possession of the information in any manner that is calculated or likely to make it available for the use of any business competitor or rival of any person to whose business or affairs the information relates.



## APPENDIX 5

### **REGULATIONS RESPECTING CANADIAN INTERNATIONAL TRADE TRIBUNAL INQUIRIES INTO POTENTIAL SUPPLIERS' COMPLAINTS CONCERNING GOVERNMENT PROCUREMENT**

#### SHORT TITLE

1. These Regulations may be cited as the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

#### INTERPRETATION

2. In these Regulations,

“Act” means the *Canadian International Trade Tribunal Act*;

“Agreement on Government Procurement” means the Agreement on Government Procurement as found in Annex 4 of the World Trade Organization Agreement;

“Agreement on Internal Trade” means the *Agreement on Internal Trade* published in the *Canada Gazette* Part I, on April 29, 1995;

“Canada — Korea Agreement on the Procurement of Telecommunications Equipment” means the Agreement Between the Government of Canada and the Government of the Republic of Korea on the Procurement of Telecommunications Equipment;

“NAFTA” means North American Free Trade Agreement as defined in subsection 2(1) of the *North American Free Trade Agreement Implementation Act*;

“working day” means a day that is not a Saturday or a holiday.

#### DESIGNATIONS

3. (1) For the purposes of the definition “designated contract” in section 30.1 of the Act, any contract or class of contract concerning a procurement of goods or services or any combination of goods or services, as described in Article 1001 of NAFTA, in Article 502 of the Agreement on Internal Trade, in Article I of the Agreement on Government Procurement or in Article 1 of the Canada — Korea Agreement on the Procurement of Telecommunications Equipment, by a government institution, is a designated contract.

(2) For the purposes of the definition “government institution” in section 30.1 of the Act, the following are designated as government institutions:

(a) the federal government entities set out in the Schedule of Canada in Annex 1001.1a-1 of NAFTA, under the heading “CANADA” in Annex 502.1A of the Agreement on Internal Trade or under the heading “CANADA” in Annex 1 of the Agreement on Government Procurement;

- (b) the government enterprises set out in the Schedule of Canada in Annex 1001.1a-2 of NAFTA or under the heading “CANADA” in Annex 3 of the Agreement on Government Procurement;
- (c) any provincial government entities that may be set out in Annex 1001.1a-3 of NAFTA or under the heading “CANADA” in Annex 2 of the Agreement on Government Procurement;
- (d) the entities set out in Annex 1(b) to the Canada — Korea Agreement on the Procurement of Telecommunications Equipment; and
- (e) where a procurement that results in the award of a designated contract by a government entity or enterprise referred to in paragraph (a), (b), (c) or (d) is conducted by the Department of Public Works and Government Services or its successor, the Department of Public Works and Government Services or its successor.

#### APPLICATION

4. These Regulations apply to complaints by potential suppliers concerning designated contracts.

#### DETERMINATION OF THE VALUE OF A CONTRACT

5. Where the Tribunal requires that the value of a designated contract be determined, the Tribunal shall deem that value to be the value of the designated contract that was established by the government institution

- (a) where a notice of proposed procurement was published in accordance with one or more of NAFTA, the Agreement on Internal Trade, the Agreement on Government Procurement and the Canada — Korea Agreement on the Procurement of Telecommunications Equipment, at the time it was published; or
- (b) where a notice of proposed procurement has not been published, at the time the solicitation documentation was made available to potential suppliers.

#### TIME LIMITS FOR FILING A COMPLAINT

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

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

(3) A potential supplier who fails to file a complaint within the time limit set out in subsection (1) or (2) may file a complaint within the time limit set out in subsection (4), if the Tribunal determines, after considering all of the circumstances surrounding the procurement, including the good faith of the potential supplier, that



(a) the failure to file the complaint was attributable to a cause beyond the control of the potential supplier at the time the complaint should have been filed in order to meet the requirements of subsection (1) or (2); or

(b) the complaint concerns any aspect of the procurement process, of a systemic nature, relating to a designated contract, and compliance with one or more of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade, the Agreement on Government Procurement and the Canada — Korea Agreement on the Procurement of Telecommunications Equipment.

(4) A complaint under subsection (3) may not be filed later than 30 days after the day the basis of the complaint became known or reasonably should have become known to the potential supplier.

#### CONDITIONS FOR INQUIRY

7. (1) The Tribunal shall, within five working days after the day on which a complaint is filed, determine whether the following conditions are met in respect of the complaint:

(a) the complainant is a potential supplier;

(b) the complaint is in respect of a designated contract; and

(c) the information provided by the complainant, and any other information examined by the Tribunal in respect of the complaint, discloses a reasonable indication that the procurement has not been carried out in accordance with whichever of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade, the Agreement on Government Procurement or the Canada — Korea Agreement on the Procurement of Telecommunications Equipment applies.

(2) Where the Tribunal determines that the conditions set out in subsection (1) in respect of a complaint have been met and it decides to conduct an inquiry, the Tribunal shall publish a notice of the filing of the complaint in a circular or periodical designated by the Treasury Board.

#### INTERIM REPORTS

8. (1) Where the Tribunal produces or causes to be produced an interim report or similar document in respect of the complaint, it shall, before making any order, finding or recommendation in respect of the complaint, provide a copy of the interim report or similar document to the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party.

(2) The complainant, the relevant government institution or any other party that the Tribunal considers to be an interested party may make representations to the Tribunal on any aspect of the report or similar document referred to in subsection (1) that is not confidential information.

#### POSTPONEMENT OF AWARD OF CONTRACT

9. (1) Where the Tribunal, in accordance with subsection 30.13(3) of the Act, orders the government institution to postpone the awarding of a designated contract, it shall, within five working days after the making of the order, notify the government institution of that order.

(2) The Tribunal shall rescind an order made under subsection 30.13(3) of the Act, if, within seven working days after the day on which the order is made, the government institution provides a certificate referred to in subsection 30.13(4) of the Act in respect of the designated contract.

#### DISMISSAL OF COMPLAINTS

**10.** The Tribunal may, at any time, order the dismissal of a complaint where

(a) after taking into consideration the Act, these Regulations and, as applicable, NAFTA, the Agreement on Internal Trade, the Agreement on Government Procurement or the Canada — Korea Agreement on the Procurement of Telecommunications Equipment, the Tribunal determines that the complaint has no valid basis;

(b) the complaint is not in respect of a procurement by a government institution;

(c) the complaint is not filed within the time limits set out in these Regulations or in any rules made pursuant to subsection 39(1) of the Act; or

(d) the complainant has failed to file any information required by the Tribunal.

#### DETERMINATION

**11.** Where the Tribunal conducts an inquiry into a complaint, it shall determine whether the procurement was conducted in accordance with the requirements set out in whichever of NAFTA, the Agreement on Internal Trade, the Agreement on Government Procurement or the Canada — Korea Agreement on the Procurement of Telecommunications Equipment applies.

#### ISSUANCE OF FINDINGS AND RECOMMENDATIONS

**12.** The Tribunal shall issue its findings and recommendations in respect of a complaint to the complainant, the relevant government institution and any other party that the Tribunal considers to be an interested party

(a) subject to paragraphs (b) and (c), within 90 days after the filing of the complaint;

(b) where, under any rules made pursuant to subsection 39(1) of the Act, the Tribunal grants a request for an express option, within 45 days after it grants that request; or

(c) where, under any rules made pursuant to subsection 39(1) of the Act, the Tribunal authorizes an extension of time, within 135 days after the filing of the complaint.

**13.** Where the Tribunal makes recommendations to a government institution under section 30.15 of the Act, the government institution shall:

(a) advise the Tribunal in writing, within 20 days after receipt of the recommendations, of the extent to which it intends to implement the recommendations and, if it does not intend to implement them fully, the reasons for not doing so; and

(b) where the government institution has advised the Tribunal that it intends to implement the recommendations in whole or in part, advise the Tribunal in writing, within 60 days after receipt of the recommendations, of the extent to which it has then implemented the recommendations.



## APPENDIX 6

### **RULES GOVERNING THE PROCEEDINGS, PRACTICE AND PROCEDURES OF THE CANADIAN INTERNATIONAL TRADE TRIBUNAL**

#### SHORT TITLE

1. These Rules may be cited as the *Canadian International Trade Tribunal Rules*.

#### DEFINITIONS

2. In these Rules,

“Act” means the *Canadian International Trade Tribunal Act*; (*Loi*)

“counsel” includes any person who acts in a proceeding on behalf of a party; (*avocat*)

“counsel of record” means the counsel of record for a party as determined in accordance with rule 11; (*avocat inscrit au dossier*)

“electronic transmission” includes communication by fax or electronic mail or by any other electronic means by which parties can communicate; (*transmission électronique*)

“intervener” means a person who

(c) is an interested party that has been granted leave of the Tribunal to intervene in any proceedings in relation to a complaint under section 30.17 of the Act; (*intervenant*)

“party” means

(d) in the case of a complaint under subsection 30.11(1) of the Act, the complainant, the government institution or an intervener, and

“proceeding” includes an appeal, re-hearing, reference, inquiry, recommencement of inquiry, review, request for a ruling, reconsideration of an order or finding, complaint filed by a domestic producer or any other proceeding before the Tribunal under the Act or under any other Act of Parliament or regulations made thereunder; (*procédure*)

“Secretary” means the Secretary of the Tribunal, and includes any other officer or employee of the Tribunal during any period that the officer or employee is authorized to act as Secretary. (*secrétaire*)

#### INTERPRETATION

3. These Rules shall be liberally construed to secure the fairest, least expensive and most expeditious determination of every proceeding, in accordance with section 35 of the Act.

## PART I

## RULES OF GENERAL APPLICATION

*Application*

4. Except where the context otherwise requires, this Part applies to all proceedings before the Tribunal.

*Directions on Procedure*

5. Where, in any proceeding, a question of procedure arises to which these Rules do not provide an answer, or the answer they do provide is incomplete, the question shall be disposed of, consistently with such, if any, of these Rules as are applicable, in such manner as the Tribunal directs.

*Dispensing with or Varying Procedure*

6. The Tribunal may dispense with, vary or supplement any of these Rules if it is fair and equitable to do so or to provide for a more expeditious or informal process, as the circumstances and considerations of fairness permit.

*Combining of Proceedings*

6.1 The Tribunal may, on its own initiative or on the written request of a party, combine two or more proceedings to provide for a more expeditious or informal process, as the circumstances and considerations of fairness permit.

*Defect in Form and Irregularity*

7. No proceeding is invalid by reason of a defect in form or a technical irregularity.

*Extending or Abridging Time Limits*

8. If it is fair and equitable to do so, the Tribunal may extend or abridge the time limits fixed by these Rules or otherwise fixed by the Tribunal, either before or after their expiry.

*Computation of Time*

9. Unless otherwise provided, the computation of time under these Rules or a direction of the Tribunal is governed by sections 26 to 28 of the *Interpretation Act*.

*Counsel of Record*

11. (1) A counsel who signs a document filed pursuant to these Rules on behalf of any party shall be the counsel of record for the party commencing on the date of filing and continuing until a change, if any, is made in accordance with subrule (2).

(2) A party in a proceeding may change the party's counsel of record by

- (a) filing with the Tribunal a Notice of Change of counsel of record signed by the new counsel;
- (b) serving a copy of the Notice on the former counsel and every other party in the proceeding; and
- (c) filing with the Tribunal proof of service of the Notice.

#### *Official and Other Languages*

**12.1** (1) Subject to subrule (2), all documents filed with the Tribunal must be in English or French.

(2) A person may file an original document in a language other than English or French if, at the same time, the person also files a translation of it in English or French and an affidavit attesting to the accuracy of the translation. If the document is required to be served, the translation and affidavit must be served at the same time.

#### *Submission of Confidential Information*

**15.** (1) If a person provides confidential information to the Tribunal under paragraph 46 (1) (a) of the Act, the person shall file with the Tribunal a document marked “confidential” that contains all of the information and that identifies the portions that have been deleted from the non-confidential edited version or the non-confidential summary under paragraph 46 (1) (b) of the Act, which edited version or summary shall also be filed with the Tribunal.

#### *Disclosure of Information to Counsel or to Expert*

**16.** (1) For the purpose of section 45 of the Act, a counsel for a party, other than a counsel who is not a resident of Canada or who is a director, servant or employee of the party, who wishes access to confidential information provided to the Tribunal shall provide the Tribunal with a declaration and undertaking on the relevant Tribunal form in respect of the use, disclosure, reproduction, protection and storage of the confidential information in the record of a proceeding, as well as that counsel’s disposal of the confidential information at the close of the proceeding or in the event of a change of counsel.

(3) A person who is recognized by the Tribunal as an expert, who is acting under the control and direction of a counsel to whom confidential information has been disclosed and who wishes access to some or all of the confidential information shall provide the Tribunal with a declaration and undertaking on the relevant Tribunal form in respect of the use, disclosure, reproduction, protection and storage of the confidential information in the record of a proceeding, as well as that expert’s disposal of the confidential information at the close of the proceeding or in the event of a change of expert.

4) Any party or interested person may request, by way of notice of motion in accordance with rule 24, that the Tribunal not disclose some or all of the confidential information to a counsel or expert

(5) The Tribunal shall notify counsel, including counsel referred to in subrule (2), and the expert, if any, of its decision whether or not to disclose the confidential information and on what terms and conditions such disclosure would be made, and, in the case of a decision not to disclose the

information, the Tribunal shall serve its decision in writing, with reasons, on the counsel and the expert.

#### *Filing and Communication of Confidential Information*

**17.** Subject to any other provisions of these Rules, confidential information shall be filed with the Tribunal and may be served only by the Tribunal.

#### *Notice of Motion*

**24.** (1) The Tribunal shall proceed by way of notice of motion if

- (a) it decides not to proceed by way of written request under rule 23.1; or
- (b) these Rules so specify.

(2) A notice of motion shall be in writing and set out

- (a) a clear and concise statement of the facts, which must be accompanied by an affidavit if the Tribunal so directs; and
- (b) the decision or order sought and the grounds for seeking it.

(3) A notice of motion given by a party shall be filed with the Secretary and served on the parties not less than three days before the day fixed for the commencement of the hearing.

(4) Any party who wishes to answer a notice of motion shall file a written answer with the Secretary and serve a copy of it on the other parties.

(5) Where a party wishes to submit a document in support of a notice of motion or answer, the document shall accompany the notice or answer in question and the party shall file it with the Secretary and serve a copy of it on the other parties.

(6) Unless the Tribunal directs otherwise, a decision or order on a notice of motion shall be made in writing.

(7) Notwithstanding subrules (2) to (5), a notice of motion in connection with a matter that has not come to the attention of a party prior to the commencement of a hearing may be given orally at the hearing and shall be disposed of in accordance with such procedure as the Tribunal may direct.

#### *Type of Hearing*

**25.** Unless otherwise required by these Rules, the Tribunal may decide to proceed either by

- a) way of a hearing at which the parties or their counsel appear before the Tribunal;
- b) way of electronic hearing;
- c) way of a hearing by way of written submissions; or



d) any combination of the ways referred to in paragraphs (a) to (c).

*Hearing by Way of Written Submissions*

**25.1** When the Tribunal decides to hold a hearing by way of written submissions, the Tribunal shall publish a notice to this effect and may

- (a) dispose of the matter on the basis of the written documentation before it;
- (b) require further information to be furnished by any party; and
- (c) invite submissions from any party or any person who may have an interest in the matter.

PART XI

INQUIRIES INTO PROCUREMENT COMPLAINTS BY POTENTIAL SUPPLIERS

*Interpretation*

**93.** In this Part

“send”, in respect of a document, information or a notification, means to transmit by hand, registered mail or electronic transmission; (*envoyer*)

“working day” means a day that is not a Saturday or a holiday. (*jour ouvrable*)

*Application*

**94.** This Part applies in respect of inquiries into complaints made by potential suppliers under subsection 30.11(1) of the Act.

*Computation of Time*

**95.** In this Part where anything is to be done within eight days or less, any day within that period that is not a working day shall not be counted.

*Day of Filing of Complaints*

**96.** (1) A complaint shall be considered to have been filed

- (a) on the day it was received by the Tribunal; or
- (b) in the case of a complaint that does not comply with subsection 30.11(2) of the Act, on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection.

(2) For the purpose of subrule (1), the day of receipt is the day stamped by the Secretary on the complaint or on the document containing the information that corrects the deficiencies.

*Receipt of a Complaint*

**97.** Where the Tribunal receives a complaint, the Secretary shall forthwith send a notification in writing to the complainant of the receipt of the complaint.

*Notice of Filing of a Complaint*

**98.** Where the Tribunal determines that a complaint complies with subsection 30.11(2) of the Act, the Secretary shall forthwith send a notification in writing of the filing of the complaint to the complainant, the government institution and any other party that the Tribunal considers to be an interested party.

*Deficient Complaint*

**99.** (1) Where the Tribunal determines that a complaint does not comply with subsection 30.11(2) of the Act, the Secretary shall forthwith send a notification in writing to the complainant to that effect and which notice specifies the deficiencies to be corrected, the corrective action required and the period determined by the Tribunal within which the corrective action must be taken.

(2) Where the corrective action referred to in subrule (1) has been taken, and the Tribunal determines that the complaint complies with subsection 30.11(2) of the Act, the Secretary shall forthwith send a notification in writing of the filing of the complaint to the complainant, the government institution and any other party that the Tribunal considers to be an interested party.

*Transmission of Complaint*

**100.** (1) The Secretary shall send a copy of the complaint to the person designated in the solicitation documentation by the government institution to receive complaints in respect of the procurement.

(2) Where no person has been designated in the solicitation documentation to receive complaints, the Secretary shall send the documents referred to in subrule (1)

(a) in the case of a government institution that is a department or ministry of state, to the deputy head; and

(b) in any other case, to the chief executive officer of the appropriate body.

*Notification of Inquiry*

**101.** If the Tribunal decides to conduct an inquiry, the Tribunal shall forthwith send a notification in writing to the complainant, the government institution and any other interested party and the Secretary shall publish a notice of commencement of inquiry.

*Exchange of Information*

**102.** (1) Where a designated contract that is the subject of a complaint has been awarded, the government institution shall forthwith, upon receipt of the complaint, send a notification in writing to the Tribunal that states

- (a) the name and address of the contractor to whom the designated contract was awarded; and
- (b) if known by the government institution, the name of a representative of the contractor.

(2) The Secretary shall forthwith send a copy of the complaint to the contractor referred to in subrule (1).

(3) Subject to Rule 16, the Secretary shall forthwith send a copy of every document that the Tribunal has received from the contractor referred to in subrule (1) to the government institution, the complainant and all interveners.

#### *Government Institution Report*

**103.** (1) Subject to subrule 107(5), a government institution shall file a report with the Tribunal not later than 25 days after it has received the documents referred to in Rule 100.

(2) A report referred to in subrule (1) shall contain a copy of the following:

- (a) the complaint;
- (b) the solicitation, including the specifications or portions thereof relevant to the complaint;
- (c) all other documents relevant to the complaint;
- (d) a statement that sets out all findings, actions and recommendations of the government institution and responds fully to all allegations of the complaint; and
- (e) any additional evidence or information that may be necessary in order to resolve the complaint.

(3) The Secretary shall, forthwith after receiving a report referred to in subrule (1),

(a) send to the complainant a copy of the statement referred to in paragraph (2)(d) and of the documents referred to in paragraph (2)(c), except any documents that the complainant is not otherwise authorized by law to receive; and

(b) make available to all interveners a copy of the material referred to in paragraph (a).

(4) The government institution may, within the time limit set out in subrule (1), make a written request to the Tribunal for an extension of that time limit and shall set out in the application the reasons for the extension.

(5) The Tribunal shall determine, in writing, whether the specific circumstances of the complaint warrant an extension of the time limit for the submission of the report and, where appropriate, may set a new date for the submission of the report.

#### *Filing Comments on the Government Institution Report*

**104.** (1) Subject to subrule 107(5), the complainant shall, within seven days after the day on which the Tribunal sends a copy of the statement to the complainant under subrule 103(3), file with

the Tribunal comments on the statement or make a written request to have the case decided on the basis of the existing record.

(2) The Tribunal shall, forthwith after receiving the comments referred to in subrule (1), send a copy thereof to the government institution and all interveners.

(3) The Tribunal may extend the time limit for the filing of comments under subrule (1) if the complainant makes a written request for the extension within the time limit referred to in that subrule and the specific circumstances of the complaint warrant the extension.

#### *Hearing of Complaints*

**105.** (1) The Tribunal may, in respect of the merits of a complaint, and on the written request of a party or on the Tribunal's own initiative, hold an electronic hearing or a hearing at which the parties or their counsel appear before the Tribunal.

(2) The request for a hearing shall be submitted as soon as possible during the course of the proceedings on the complaint.

(3) A hearing shall be held on a date and at a time and place set by the Tribunal and the Secretary shall send notice thereof to all parties.

(4) The date referred to in subrule (3) shall be not earlier than seven days after the report of the government institution is filed with the Tribunal.

(5) The complainant, the government institution and all interveners may file comments with the Tribunal in respect of the complaint at the hearing.

(6) The Tribunal may direct that a hearing be held if at any time during the proceeding it decides that a hearing is needed to clarify material issues.

#### **106. Rule is repealed.**

#### *Express Option*

**107.** (1) When the complainant, the government institution or an intervener requests an expeditious determination of a complaint, the Tribunal shall consider the feasibility of using the express option procedure set out in subrule (5).

(2) The Tribunal may apply the express option in the case of any complaint that is suitable for resolution within 45 days.

(3) A request for the express option shall be made in writing and submitted to the Secretary not later than three days after a notice of inquiry is given under subsection 30.12(3) of the Act.

(4) The Tribunal shall determine whether or not to apply the express option within two days after receiving a request for it and shall notify the complainant, the government institution and all of the interveners of its determination.

(5) Where the express option is applied, the time limits set out in this Part for filing documents shall not apply and the following procedure shall be followed:

(a) the government institution shall, within 10 days after the day on which it is notified by the Tribunal that the express option is to be applied, file with the Tribunal a report on the complaint containing the material referred to in subrule 103(2);

(b) the Secretary shall, forthwith after receiving a report referred to in paragraph (a), send to the complainant a copy of the documents referred to in paragraph 103(3)(a) and make a copy of that material available to all interveners;

(c) the complainant and an intervener shall, within five days after the day on which the Secretary sends the statement of the government institution referred to in paragraph 103(2)(d) to the complainant pursuant to paragraph (b), file with the Secretary comments on that statement or a request that the case be decided on the existing record;

(d) the Secretary shall, forthwith after receiving the comments referred to in paragraph (c), send a copy thereof to the government institution and all interveners; and

(e) the Tribunal shall issue a determination on the complaint within 45 days after determining that the express option will be applied.

#### *Service of Documents*

**108.** Where, in any proceedings under this Part a document is required by these Rules to be served, the Secretary shall effect that service.