Time waits for no one: Procurement complaints before the CITT

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For the past decade, the Government of Canada has continued to accelerate policy development and procurement processes in the national defence space. In 2014, Canada adopted the "Defence Procurement Strategy" as a means of improving defence procurement and with a view to developing streamlined, timely and more efficient procurement processes.[1] In the ensuing years, the Defence Investment Plan,[2] the Public Services and Procurement Canada pilot program for defence procurements[3] and defence policy, *Our North, Strong and Free*,[4] all serve as indicators of a growing policy emphasis on Canada's national defence capability.

The 2024 Budget tabled on April 16, 2024, forecasted an increase in defence spending from $26.9 billion in 2022-2023 to $44.2 billion in 2025-2026.[5] The 2024 Budget also includes a $1.2 billion investment to support procurement through the Department of National Defence's (DND) Capital Investment Fund over the next 20 years.[6]

As defence procurement policy and investment continues to evolve in Canada, the potential for procurement disputes to arise between government and suppliers and potential suppliers in the defence space increases. When these disputes do arise, suppliers and potential suppliers involved in these procurement processes must navigate a complex and often conflicting legal regime.

When an irregularity or dispute arises within a procurement process, suppliers and potential suppliers must quickly assess an array of potential legal remedies that may be available, then act swiftly to preserve their legal rights. Different remedies may be available depending on the value of the procurement, the applicable trade agreement, and any possible jurisdictional exclusions.

A typical first step will be assessing whether or not the dispute falls within the jurisdiction of the Canadian International Trade Tribunal (CITT). If so, the supplier or potential supplier may proceed with raising an objection to the procuring government institution and/or bringing a complaint before the CITT.

Other potential remedies that merit consideration include raising a complaint with the Office of the Procurement Ombudsman, initiating an application for judicial review in the Federal Courts, or pursuing other forms of legal action before the courts. Each route of

redress has its own unique jurisdictional requirements and deadlines. Some forms of redress may also require that other legal remedies were pursued first or may be incompatible when pursued together.

Each of these options for resolution are subject to time limits and notice requirements, which must be observed to avoid the loss of a potential remedy. In particular, the extremely short time limit for raising an objection or filing a complaint with the CITT provided for in the *Procurement Inquiry Regulations (*the *Regulations*),[7] require both attentiveness and proactive thinking on the part of a potential complainant whenever an issue in the procurement process arises. As the Federal Court of Appeal has confirmed in *Terra Reproductions Inc. v The Attorney General of Canada*,[8] there is little room for relief from the strict 10 working-day time limit for raising an objection or filing a complaint with the CITT, which runs from the date when the basis for the complaint becomes reasonably known to the complainant.

Background

Terra Reproductions Inc. (Terra) was involved in a procurement issued by the Department of Natural Resources (the Department) for the electronic reproduction of photographic material for the National Air Photo Library. Terra's bid was rejected by the Department on Jan. 11, 2023, on the basis that it failed to comply with a mandatory requirement. On Jan. 30, 2023, Terra informed the Department that it objected to the test method applied by the Department in rejecting Terra's bid. The Department replied to Terra on Feb. 7, 2023, defending its test method. Discussions between Terra and the Department continued until Terra filed a complaint with the CITT in relation to its objection on Feb. 15, 2023.

The CITT decided not to conduct an inquiry into Terra's complaint because Terra's objection was raised 13 working-days after the Department had advised Terra that its bid was non-compliant, which exceeded the 10 working-day deadline mandated by subsection 6(2) of the *Regulations.*[9] The fact that Terra and the Department had continued to engage in discussions after Terra had issued its objection late, had no bearing on the CITT's decision to dismiss the complaint.

Terra applied to the Federal Court of Appeal for judicial review of the CITT's decision.

Decision

The Federal Court of Appeal dismissed Terra's application, upholding the CITT's treatment of the 10 working-day deadline as reasonable.[10]

Terra had attempted to raise new evidence before the Court, which was held to be inadmissible. Terra had also attempted to raise a new argument, that it should have been granted an extension of time pursuant to subsection 6(3)(b) of the *Regulations.*

The Court held that the CITT ought to have been first given the opportunity to consider all of Terra's evidence and argument and, therefore, it was not appropriate for Terra to raise new evidence or new argument in the judicial review proceeding. The Court determined that to allow otherwise would undermine the legislative framework that

granted the CITT jurisdiction to determine procurement complaints and lead to *de facto* first-instance review by the Court instead.[11]

The Court rejected the argument that the CITT should have granted Terra an extension of time pursuant to paragraph 6(3)(b) on its own initiative, as "it is not the obligation of the Tribunal to look after the substantive interests of any party before it or develop or run a party's case for it."[12] Accordingly, the timelines in the *Regulations* were strictly upheld.

Recourse to judicial review and other administrative remedies

Under normal circumstances, a complainant seeking redress in relation to a defence procurement contract, will be required to exhaust its options with the CITT prior to pursuing legal action with the courts.[13] However, not all procurement processes or potential remedies are within the CITT's jurisdiction. For instance, some defence procurements will be subject to the national security exemptions (NSE), which exclude some or all of the obligations of applicable trade agreements. An NSE will oust the jurisdiction of the CITT.

Therefore, in circumstances where the CITT does not provide an adequate remedy or where it does not have the jurisdiction to consider a complaint, the courts have determined that judicial review is possible.[14] Furthermore, recent trends in administrative law have emphasized the quasi-constitutional function of judicial review, indicating that where no adequate alternative remedies or other bars exist, parties may seek judicial review of decisions affecting them.[15] The recent decisions in *Yatar v TD Insurance Meloche Monnex* and *Canada (Attorney General) v Best Buy Canada Ltd.*,[16] are indicative of a trend of permissiveness towards the availability of judicial review.

Depending on the nature of the procurement process and the remedy being sought in relation to the complaint, it therefore may be possible for a complainant to seek judicial review of the government's conduct or decision in relation to defence procurement contracts in the Federal Courts. However, an affected supplier must submit its application within 30 days from the date that the impugned decision was communicated to it.[17]

For lower value contracts involving Canadian suppliers, a complainant may raise its objection with the Office of the Procurement Ombudsman. Such complaints must be submitted within 30 working-days from the date of contract award or the date on which the supplier reasonably ought to have become aware of the grounds of its complaint.[18]

The availability of the above-noted remedies is often governed by the nature of the procurement itself. Depending on the project, domestic and international trade treaties may alter or wholly supplant remedies available to parties seeking to submit a complaint or objection in relation to a defence procurement contract.

Takeaways

Not all procurement processes will be subject to the CITT's jurisdiction.[19] Defence procurements will frequently be excluded due to NSEs. This possible lack of jurisdiction, coupled with the significantly abbreviated timelines in the *Regulations* and elsewhere, require suppliers to take proactive steps to prepare a dispute plan that adequately takes into account the timelines for objection (which have been strictly interpreted by the courts), procedural requirements, and potential jurisdictional issues associated with commencing a dispute.

With respect to complaints to the CITT in particular, the criteria for obtaining an extension of time pursuant to subsection 6(3) of the *Regulations* are narrow and will not apply in every case. Unless it is obvious that the failure to file a complaint on time was due to something outside of the supplier's control or was related to a systemic problem[20] a party should assume that it must comply with the 10 working-day deadline.

If there is any doubt as to whether the nature of the procurement or the supplier's desired remedy is within the jurisdiction of the CITT, it will also be vital to consider whether other legal remedies ought to be pursued concurrently, including by seeking judicial review in the Federal Courts, raising a complaint to the Office of the Procurement Ombudsman, or commencing legal action with the courts on other grounds. Failure to properly assess all options, and act appropriately, can result in losing the opportunity to advance the complaint at issue altogether.

Due to the variety of remedies available to suppliers in the procurement context, their respective deadlines, and the jurisdictional complexities involved in forum selection, having a comprehensive understanding of all potential remedies and their appropriate sequencing is vital to preserving rights ahead of and during a procurement dispute in the defence space. BLG has experience providing specialized advice in this area in addition to advising on procurement processes that are exempt from the CITT complaints procedure entirely. For more information, please contact the individuals below.

Footnotes

[1] Public Services and Procurement Canada, *Defence Procurement Strategy* (2014).

[2] Department of National Defence, *Defence Investment Plan 2018;* Department of National Defence, *Defence Investment Plan 2018: Annual Update 2019;* Department of National Defence, *Defence Capabilities Blueprint* (2023 Update).

[3] Public Services and Procurement Canada, "Backgrounder: Piloting a Streamlined Approval Process for Defence Procurements" (2018).

[4] Department of National Defence, *Our North, Strong and Free: A Renewed Vision for Canada's Defence* (2024).

[5] Department of Finance Canada, *Budget 2024*, Chapter 7: Protecting Canadians and Democracy (April 16, 2024), Chart 7.1.

[6] Department of Finance Canada, *Budget 2024*, Chapter 7: Protecting Canadians and Democracy (April 16, 2024).

[7] *Procurement Inquiry Regulations*, SOR/93-602 [*PIR*].

[8] *Terra Reproductions Inc. v The Attorney General of Canada*, 2023 FCA 214 [*Terra Reproductions*].

[9] *PIR.*

[10] *Terra Reproductions Inc.* PR-2022-069, 2023 CanLII 14030 (CITT), at paras. 20-22, 25.

[11] *Terra Reproductions*, at paras. 5-6.

[12] *Terra Reproductions*, at para. 7.

[13] *TPG Technology Consulting Ltd. v R,* 2014 FC 933, at paras. 95, 107-108; *Strickland v Canada (AG),* 2015 SCC 37, at paras. 40, 42-45.

[14] *Telus Integrated Communications v Canada (AG),* [2000] FCJ No. 1263, at paras. 44-47; *Agustawestland International Ltd. v Canada (Minister of Public Works & Government Services),* 2004 FC 1545 at paras. 46-47, 51, 53 (this application was later converted into an action for breach of contract, reported at 2005 FC 1640).

[15] *Yatar v TD Insurance Meloche Monnex,* 2024 SCC 8, at paras. 61-66.

[16] 2021 FCA 161.

[17] *Federal Courts Act,* RSC 1985, c F-7, subsection 18.1(2).

[18] *Procurement Ombudsman Regulations,* SOR/2008-143, subsections 7(1), 16(1).

[19] *Canadian International Trade Tribunal Act,* RSC 1985, c 47 (4th Supp), subsection 30.11(1); *PIR,* section 3.

[20] *PIR,* subsection 6(3).

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