

“TIME MACHINE OR CASH MACHINE?”: FEDERAL PROCUREMENT BASICS #3 (COMPENSATION AND OTHER REMEDIES)

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If a complainant is successful in a challenge of a federal procurement decision, the Canadian International Trade Tribunal (Tribunal, or, CITT) will recommend a remedy. The Tribunal's decision on remedies is indeed a recommendation and not a binding decision in the strict sense, but is usually fully carried out by the federal government entity. The Federal Court of Appeal has stated the government entity cannot decide to ignore or delay implementation of the Tribunal's recommendations merely if it disagrees with them, even if it files an application for judicial review (see *Canada (Attorney General) v. Northrop Grumman Overseas Services Corporation* (26 October 2007), 2007 FCA 336).

Some specific remedies are enumerated in subsection 30.15(2) of the *Canadian International Trade Tribunal Act (CITT Act)* including that:

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

As can be seen from this list, there are two types of final remedies: non-monetary and monetary. These two types of remedies seek to address errors in the procurement process, by redoing the process, coming to the right decision on certain issues, or compensating the complainant for losses suffered as a result of the error(s). (There is also an injunction-type remedy under subsection 30.13(3) of the *CITT Act* - a postponement of contract award order can be issued pending the Tribunal's inquiry; this remedy is only available where a contract has not yet been awarded at the time of the complaint.)

Non-monetary remedies – the “time machine”

Non-monetary remedies seek to place complainants in the situation where they were before the government's

breach of the trade agreements. Non-monetary remedies can be varied and some are novel and unexpected but the most common (alone or in combination) are:

1. re-evaluation of the bid – the Tribunal identifies errors in the previous evaluation and directs it to be redone in accordance with its decision (e.g. *Marine Recycling Corporation and Canadian Maritime Engineering Ltd.* (22 January 2021), PR-2020-038, PR \square 2020 \square 044 and PR-2020-056);
2. cancelling an existing contract, and/or awarding a contract to a different supplier – as a result of an error, it may be obvious that the contract should have been awarded to a particular supplier (e.g. *Turbo Expert Québec Inc.* (6 February 2019), PR-2018-029).

Monetary compensation – the “cash machine”

Monetary remedies are recommendations that the complainant be awarded a sum of money as compensation for the government’s breach of the trade agreements. The Tribunal has published guidelines on establishing the amounts of its monetary remedies, which is a separate process (sometimes called the ‘compensation phase’) following its decision on the merits i.e., the decision that there has been a breach of the trade agreements. These guidelines are available [here](#).

Monetary awards by the Tribunal vary in amounts but have been as high as \$25 million ‘plus’ (see *Oshkosh Defense Canada Inc.* (29 December 2017), PR-2015-051 and PR \square 2015-067). Monetary compensation falls into three categories:

1. *Lost profit*: this is for situations where it is clear that the complainant would have won the contract, but for the government’s breach;
2. *Lost opportunity (partial lost profit)*: this is for situations where it is uncertain whether the complainant or other bidders would have won the contract, but for the government’s breach. In calculating compensation for lost opportunity, the Tribunal will take the profits that a complainant would have earned on a contract and divide it by the number of potential bidders;
3. *Bid preparation costs*: awarded, for example, in cases where the complaint is successful but the complainant would not have been the winning bidder;
4. *Litigation costs/legal fees*: usually awarded to successful complainants. More commonly, the Tribunal is willing to depart from its modest standard costs (three levels ranging from \$1,150 to \$4,700) and has ordered higher costs, dependent on the specific facts of the inquiry.

The above is the last article in the “Procurement Basics” series. Future updates will discuss new cases, procedural developments and other news related to procurement.

For more information, or assistance with a federal procurement challenge at the CITT, please contact the

author, Peter Jarosz^[1], at: 613.691.6145, peter.jarosz@mcmillan.ca.

[1][ps2id id='1' target=''] The author was counsel in the CITT Secretariat's Legal Services Branch from April 2015 to April 2021. The views expressed in this article are his own.

by [Peter Jarosz](#)

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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