



# How EU Businesses Can Take Advantage of Public Procurement Opportunities in Canada under the CETA

*A Practical Business Guide*



This project is funded by  
the European Union

Market Access Support  
for EU Business in Canada under  
CETA // January 2020 //

Chapter 19 of the EU-Canada *Comprehensive Economic and Trade Agreement* (CETA) requires the Canadian central government (referred to as the “federal government” in Canada) and sub-central governments (including Canada’s provincial, territorial and municipal governments) to treat EU suppliers of goods and services in an open, transparent, and non-discriminatory manner when they participate in many types of public procurement.

To be covered by the CETA, a publicly procured contract must satisfy the following three requirements: (i) it must be offered by a government entity listed in the CETA; (ii) it must meet or exceed specific value thresholds; and (iii) it must not be subject to any of the express exclusions set out in the CETA. The term “covered procurement” is used to describe a procurement that satisfies all three of these requirements. Although there are some exceptions, most government entities in Canada are listed in the CETA as covered procurement entities. These entities include not only government departments and agencies, but also “Crown corporations” and other commercial enterprises that are owned by Canadian governments.

The CETA is the first international trade agreement in which Canada has made market access and non-discrimination commitments that cover a wide range of sub-central government procurements – particularly public procurements conducted by municipalities. The result is that EU firms have a competitive advantage over prospective suppliers from other countries, including the United States, in a wide range of public procurement opportunities offered by the procuring entities of these sub-central governments. To put this into context, Canada has 10 provincial governments, three territorial governments, and over 3,700 municipal governments.



With the objective of providing a starting point for EU businesses interested in identifying potential opportunities in Canada, including small and medium-sized enterprises (SMEs), this document provides an overview of the procurement obligations that Canadian government entities owe to EU suppliers under the CETA.

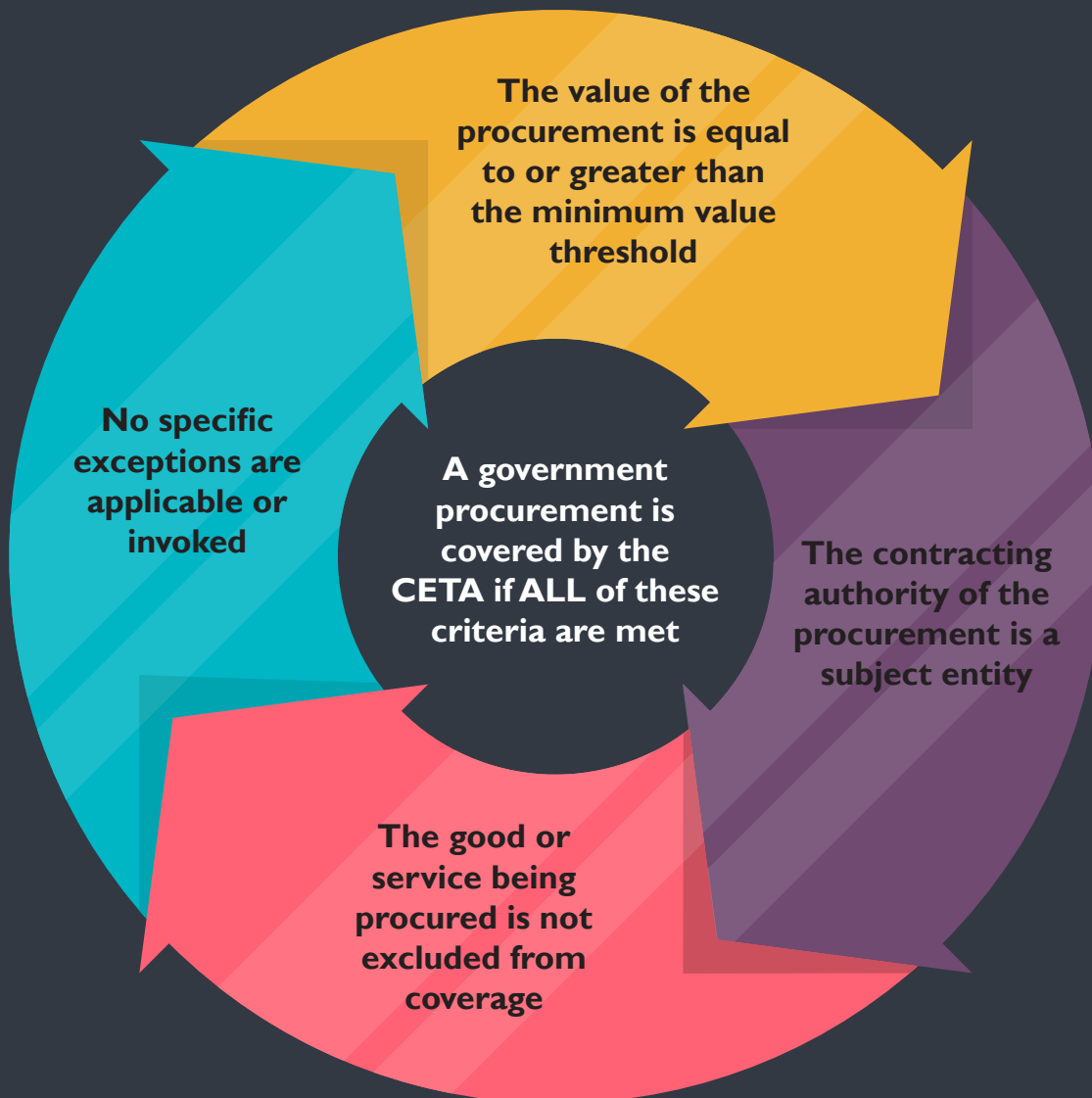
It is important to note that the CETA does not limit the kinds of procurements in which an EU supplier may participate. Even if a procurement in Canada is not covered by the CETA, EU suppliers may nevertheless be permitted to submit a proposal. Whether a non-covered procurement is open to EU suppliers must be determined on a case-by-case basis. Although the CETA market access and non-discrimination commitments do not apply to non-covered procurements, EU suppliers with competitive bids may have a reasonable chance of success.

It is common for solicitations in Canada to expressly identify whether a particular procurement is subject to a trade agreement. Sometimes, however, solicitations either remain silent on this issue or improperly claim that the procurement is not subject to a trade agreement. When this happens, EU suppliers will need to conduct their own assessment of whether the solicitation is a covered procurement.

To determine whether a solicitation is a covered procurement, potential suppliers must ask three questions:

1. Is the procuring government entity subject to the CETA?
2. Are the goods and/or services being procured subject to the CETA?
3. Does the procurement value meet or exceed the minimum value thresholds that apply under the CETA?

The following diagram highlights how to determine whether a procurement is covered under the Agreement, if it satisfies all the conditions below:



The vast majority of Canadian government entities are subject to the CETA. This includes departments, ministries, secretariats, agencies, municipalities, boards, councils, committees, Crown corporations, government-owned commercial enterprises, school boards, universities, community colleges, and publicly funded academic, health and social service entities.

Even though the majority of procuring entities are subject to the CETA, EU suppliers still need to review the exclusions. Examples of such exclusions include:

- The Alberta Office of the Auditor General;
- The British Columbia Legislative Assembly;
- Manitoba Public Insurance Corporation;
- Nova Scotia Lands Inc.;
- Research & Development Corporation of Newfoundland and Labrador;
- Ontario Power Generation; and
- Yukon Development Corporation.

The publicly procured contracts of these and other excluded entities are not covered by the CETA.

In order to determine whether the CETA covers or excludes a procuring entity in Canada, EU firms should either obtain advice from Canadian experts, or independently review the following Annexes of Canada's market access schedule to Chapter 19, which can also be found online:

- [Annex 19-1, Canadian central government entities covered by the CETA;](#)
- [Annex 19-2, sub-central government entities covered by the CETA;](#)
- [Annex 19-3, all other Canadian government entities covered by the CETA, including Crown corporations and other entities of a corporate or commercial nature.](#)

As a general principle, all goods, services and construction services are subject to the CETA unless they are expressly excluded from the CETA. For this reason, EU suppliers need to familiarize themselves with the applicable exclusions.

This can be accomplished by either obtaining advice from Canadian experts, or by independently reviewing the following Annexes (available online) of Canada's market access schedule to Chapter 19:

- [Annex 19-4, goods covered by the CETA;](#)
- [Annex 19-5, services, other than construction services, covered by the CETA;](#)
- [Annex 19-6, construction services covered by the CETA;](#)
- [Annex 19-7, general notes on additional exceptions.](#)

It is important to note that there are general exclusions that apply to all government entities and more specific exclusions that only apply to certain federal government entities or to certain provincial or territorial government entities.

Examples of the general exclusions include:

- the acquisition or rental of land, existing buildings or other immovable property, or the rights thereon;
- non-contractual agreements or any form of assistance that a Canadian government provides, including cooperative agreements, grants, loans, equity infusions, guarantees and fiscal incentives;
- the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions or services related to the sale, redemption and distribution of public debt, including loans and government bonds, notes and other securities;
- public employment contracts; and
- procurement conducted:
  - for the specific purpose of providing international assistance, including development aid;
  - under the particular procedure or condition of an international agreement relating to the stationing of troops or relating to the joint implementation by the signatory countries of a project; or
  - under the particular procedure or condition of an international organisation, or funded by international grants, loans or other assistance if the applicable procedure or condition would be inconsistent with this Chapter.

Examples of specific exclusions include:

- Shipbuilding and repair, including related architectural and engineering services, for certain central entities, and for certain sub-central entities in British Columbia, Manitoba, Newfoundland and Labrador, New Brunswick, Nova Scotia, Prince Edward Island, and Quebec;
- Mass transit vehicles in Ontario and Quebec;
- International crossings between Canada and another country, including the design, construction, operation or maintenance of the crossing as well as any related infrastructure;
- Goods purchased for representational or promotional purposes, or construction services purchased for representational or promotional purposes outside the Province, in respect of the Provinces of Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan;
- The acquisition, development, production or co-production of programme material by broadcasters and contracts for broadcasting time;
- Some activities in the fields of drinking water, energy, transport and the postal sector;
- For the Province of Quebec, a range of goods for procurement by Hydro-Quebec;
- For the Province of Manitoba, a range of goods for procurement by the Manitoba Hydro Electric Board;
- For the Province of Prince Edward Island, the procurement of construction materials used for highway construction or maintenance;
- Services procured in support of Canadian military forces located overseas;
- For the Province of Quebec, procurement from a non-profit organisation with respect to urban planning;
- Procurement subject to the Northwest Territories Business Incentive Policy; and
- Procurement subject to the Nunavummi Nangminiqaqtunik Ikajuuti Policy in Nunavut.

These examples show the wide range of exceptions to the market access and non-discrimination obligations for government procurements in Canada.

**If such an exclusion applies, then the procurement is not covered by the CETA. For this reason, it is recommended that potential EU suppliers determine at an early stage whether and to what extent the goods and/or services that they offer fall within the scope of an express exclusion.**

# The Procurement Must Meet or Exceed the Value Thresholds of the CETA



To be covered under the CETA, a procurement must have a total value that meets or exceeds a minimum value threshold. The CETA establishes different thresholds for procurements relating to:

- Central government entities, as compared to sub-central (i.e., provincial and municipal) government entities;
- Government departments and agencies, as compared to Crown corporations or government-owned commercial enterprises; and
- Goods as compared to services as compared to construction services.

When estimating the value of a procurement, Canadian governments are prohibited from dividing the procurement into separate smaller procurements or using a valuation method with the intention of avoiding the CETA obligations. The estimated value must be the maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration.

If a procurement results in the award of more than one contract, or “recurring contracts”, the calculation of the estimated maximum total value must be based upon the value of recurring contracts during either the most recent 12 months period or the procuring entity’s most recent fiscal year. This value must be adjusted to take into account any anticipated changes in the quantity or value of the goods or services that will be procured over the following 12 months.<sup>1</sup>

<sup>1</sup> Alternatively, the estimated value of recurring contracts can be calculated by estimating the value of the contracts to supply the same types of goods or services during the 12 months following the initial contract award or the procuring entity’s fiscal year.



The minimum value thresholds applicable to Canadian federal government procurements in Canadian dollars, as published by the Government of Canada<sup>2</sup> and covering the two-year period from 1 January 2020 through 31 December 2021 are as follows:

Central Government Entities listed in Annex 19-1			Central Government Entities listed in Annex 19-3		
Goods	Services	Construction	Goods	Services	Construction
\$238,000	\$238,000	\$9,100,000	<b>Section A</b> \$650,000	<b>Section A</b> \$650,000	\$9,100,000
			<b>Section B</b> \$732,400	<b>Section B</b> \$732,400	

To determine which of the thresholds apply to a particular procurement opportunity, EU suppliers will need to determine whether the procuring entity is covered under Annex 19-1 or Annex 19-3 of the CETA. If the procuring entity is covered under Annex 19-3, it will be necessary to determine whether that procuring entity is listed in Section A or Section B. This can be accomplished:

- by obtaining advice from Canadian experts, or
- by independently reviewing [Annex 19-1](#) and [Annex 19-3](#), which are available online.

<sup>2</sup> For the most recent publication of the thresholds for Canadian federal government entities under the CETA and other trade agreements, see Government of Canada, Treasury Board Secretariat, “Contracting Policy Notice 2019-4 Trade Agreements: Thresholds Update” (13 December 2019), available online at <https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/contracting-policy-notice-2019-4-trade-agreements-thresholds-update.html> For the original publication of the CETA thresholds, see Government of Canada, Treasury Board Secretariat, “Contracting Policy Notice 2017-6 Trade Agreements: Thresholds Update” (21 December 2017), available online at <https://www.canada.ca/en/treasury-board-secretariat/services/policy-notice/2017-6.html>



The minimum value thresholds applicable to Canadian provincial, territorial and municipal government procurements in Canadian dollars, as published by the Government of Ontario and covering the two-year period from 1 January 2020 through 31 December 2021, are as follows:

Sub-Central Government Entities listed in Annex 19-2			Sub-Central Government Entities listed in Annex 19-3		
Goods	Services	Construction	Goods	Services	Construction
\$366,200	\$366,200	\$9,100,000	<u>Section A</u> \$650,000	<u>Section A</u> \$650,000	\$9,100,000
			<u>Section B</u> \$732,400	<u>Section B</u> \$732,400	

To determine which of the thresholds apply to a particular procurement opportunity, EU suppliers will need to determine whether the procuring entity is subject to Annex 19-2 or Annex 19-3 of the CETA. Again, if the procuring entity is covered under Annex 19-3, it will be necessary to further determine whether that procuring entity is listed in Section A or Section B. This can be accomplished:

- by obtaining advice from Canadian experts, or
- by independently reviewing [Annex 19-1](#) and [Annex 19-3](#), available online.

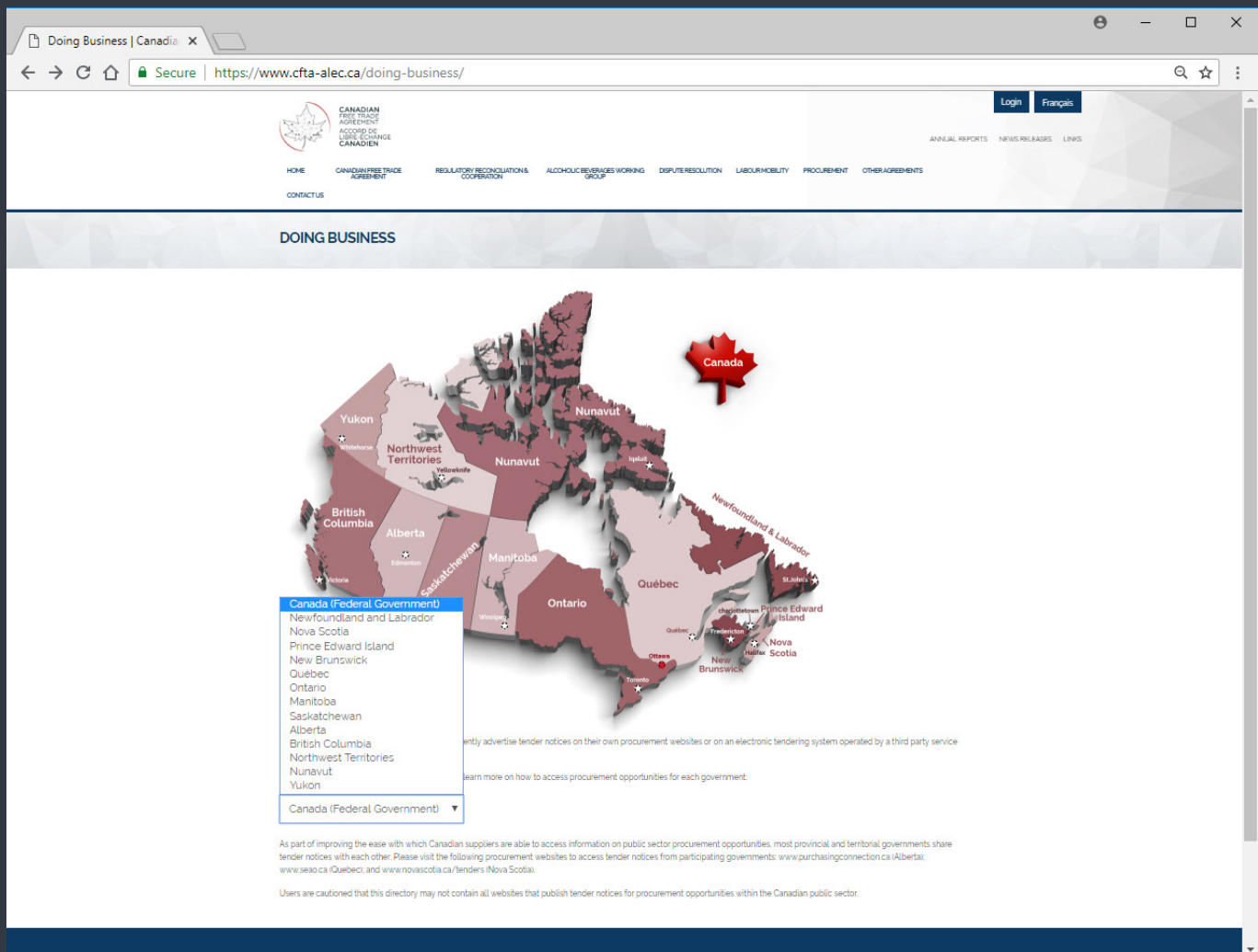
In terms of taking advantage of the CETA market access to Canadian government procurements, the single greatest challenge currently facing EU enterprises is the identification of opportunities offered by sub-central government entities in a timely manner.

Currently, a Canada-wide electronic single point of access (“SPA”) that publishes a consolidated and searchable list of all intended government procurement notices does not exist. Under the CETA, Canada has a 5-year transitional period to develop and implement an SPA that covers all central and sub-central government procurement throughout Canada. The deadline for the implementation of the SPA is 21 September 2022.

In the meantime, EU suppliers can access a list of procurement opportunities with the Canadian federal government online at <https://buyandsell.gc.ca/>. This website not only provides access to federal Government of Canada tenders, free of charge, but it also provides a range of resources that includes the government’s procurement policy and guidelines, information on previously awarded contracts, and government funded initiatives and programmes. For EU suppliers who are only interested in central government procurements, this is a comprehensive and accessible electronic resource.

A similar resource does not currently exist for Canadian sub-central government procurements. However, the website for the CFTA provides accessible links to all of the provincial and territorial portals that publish government procurement opportunities, as well as to the larger municipal government portals. The CFTA portal does not provide accessible links to all municipalities across the country.

While the CFTA's website does not replace the need for an electronic SPA, it is currently the single best resource available to assist EU companies in identifying sub-central government procurement opportunities in Canada. This resource can be accessed online at <https://www.cfta-alec.ca/doing-business/>. Clicking on any of the Provinces or territories in the map of Canada (or, alternatively, using the pull-down menu bar to select the Province or territory of interest) leads to a page that consolidates links to online portals and government procurement resources, including for many municipal governments.



In addition to these resources, there also exist websites that publish procurement opportunities from across Canada. These resources, which charge a fee for their services, will include some but not all of the sub-central government procurements subject to the CETA. Such service providers include:

- [https://www.merx.com/;](https://www.merx.com/)
- [https://www.biddingo.com/;](https://www.biddingo.com/)
- [https://www.bidsandtenders.ca/.](https://www.bidsandtenders.ca/)

The CETA requires that Canada provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may challenge a procurement on the basis that the procuring government entity has breached its CETA obligations. This mandatory bid dispute process is currently different for Canadian central government procurements as compared to sub-central government procurements.

For Canadian central government procurements, the federal government has delegated bid dispute adjudication to the Canadian International Trade Tribunal (“CITT” or “Tribunal”). The CITT is an independent, quasi-judicial tribunal. For two decades, its mandate has included the adjudication of complaints alleging that the Canadian federal government has breached its procurement obligations under a number of trade agreements, including the NAFTA, the GPA, the AIT, and more recently the CFTA and the CETA.

The fact that trade agreements such as the NAFTA, the AIT, and the GPA have been implemented and enforced by the CITT to discipline the central government’s procurement activities for over two decades is an important factor to consider for EU suppliers looking to sell their products or services to the federal government. The enforcement of Canada’s obligations under its pre-CETA trade agreements has established a regime that is generally consistent with Canada’s obligations under the CETA. Through the CITT’s rulings, vital procurement principles such as transparency and non-discrimination are already firmly embedded in the federal government’s procurement practices. This should reassure EU suppliers that Canadian central government procurement is operated in a sophisticated manner.

The laws regulating public contracting in the Province of Quebec have been amended to implement government procurement obligations under the CFTA and the CETA and to establish a procedure for the administrative review of suppliers’ complaints regarding the decisions of procuring entities. In late January 2019, the Province of Quebec established the Quebec Public Procurement Authority (“QPPA”). The QPPA, whose purpose is to oversee all public procurement in the Province, has the authority to audit or investigate whether a tendering process has been compliant with Quebec’s public procurement framework. Since May 2019, all of QPPA’s functions and powers are in effect, including its capacity to adjudicate suppliers’ complaints.

Nevertheless, it is mandatory for EU companies who wish to attain public contracts in Quebec to obtain authorisation from the QPPA to enter contracts as a foreign enterprise. The necessary documentation and administrative procedures can be found on the QPPA’s [website](#).

In all other Provinces and territories, there are currently no administrative tribunals equivalent to the CITT to adjudicate bid disputes arising from sub-central government procurements.

The CETA and the CFTA are the first trade agreements to require strong bid dispute mechanisms for sub-central government procurement. It is expected that, over time, the bid dispute regime demanded by the CETA and the CFTA for sub-central procurement will equal the enforcement standards imposed by the CITT on central government procurement. It is also expected that prior rulings by the CITT will be relied upon in future sub-central disputes.

While there remains uncertainty on how provincial or territorial courts will judicially review sub-central government procurements, it is expected that the application of the CETA will be consistent with the jurisprudence already developed by the CITT's adjudication of procurement disputes under other trade agreements that contain substantially similar provisions.

It is important to note that the development of procurement principles in Canada is generally derived from custom and judicial precedents rather than from statutes. This means that the interpretation of applicable trade agreements by the CITT is often based upon the principles established in previous decisions. The CITT has had the jurisdiction to adjudicate procurement disputes since 1994, so these common issues represent over 25 years of jurisprudence. In this context, examples of procurement issues that often arise include:

- 1 Whether the winning bidder submitted a technically compliant proposal;
- 2 Whether the procuring entity has included prohibited restrictive specifications in the solicitation (e.g., requiring Canadian regional content in a manner that discriminates against an EU supplier);
- 3 Whether the solicitation included ambiguous evaluation criteria;
- 4 Whether the evaluators properly evaluated all of the proposals in accordance with the terms and conditions of the solicitation;
- 5 Whether the evaluators introduced undisclosed evaluation criteria into the evaluation process;
- 6 Whether the government entity permitted an improper "bid repair", i.e., by allowing a bidder to supplement or 'fix' their non-compliant proposal through revised or additional submissions after the bid closing date;
- 7 Whether the winning proposal was submitted after the bid closing period. In Canada, proposals that are submitted after the time and date at which a bid period closes must, as a general proposition, be rejected;
- 8 Whether evaluators ignored vital information contained in the proposal; and
- 9 Whether the government purchasing authority undertook improper "bid shopping" by negotiating with two or more bidders after the submission of their respective proposals.

The CITT is designated as the bid challenge authority for the Canadian central government. It adjudicates complaints filed by suppliers relating to contracts covered by various trade agreements, including the CETA. Other multilateral trade agreements include the CFTA, the NAFTA and the AGP, as well as bilateral trade agreements such as the Canada-Korea Free Trade Agreement, the Canada-Chile Free Trade Agreement and the Canada-Colombia Free Trade Agreement. While each of these agreements has differently worded provisions, they generally guarantee national treatment and non-discrimination in Canadian federal procurements. They also impose procedural disciplines aimed at promoting transparency, predictability and competition in public sector procurements. It is not uncommon for more than one trade agreement to apply to a particular procurement opportunity.

The CITT imposes very short time limits for the filing of procurement complaints. A supplier must file a complaint within ten working days after the day on which the basis of the complaint became known or reasonably should have become known. There is one exception to this time limit: if the supplier makes a formal written objection to the relevant government entity, then the 10 working day limitation period is suspended until that government entity denies the objection. A large portion of procurement complaints filed with the CITT are dismissed because they are filed outside of the 10 working day limitation period.

While most suppliers retain legal counsel to assist with a procurement complaint, suppliers may also represent themselves. The CITT has published instructions on how to file a procurement complaint, and these are available online at <https://www.citt-tcce.gc.ca/en/collections/procurement-inquiries/how-to-file-a-procurement-complaint.html>

The length of procurement inquiry is normally 90 days from the date on which the complaint is filed. The CITT is authorized by law to extend the period of inquiry up to 135 days if the complaint is complex. In addition, parties can request that the Tribunal conduct the inquiry under an “express option”, which would result in the inquiry being accelerated to just 45 days. Requests to conduct the inquiry under the express option are not common.



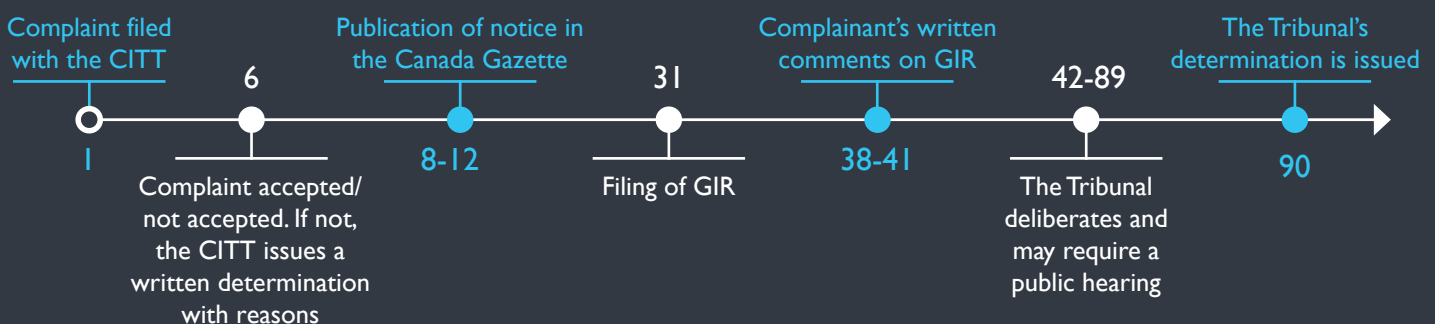
The table below provides an example of a typical 90-day schedule for a complaint process:

Day	Process
1	The complaint is properly filed with the CITT.
6	The CITT either does or does not accept the complaint for inquiry. If the complaint is not accepted for inquiry, the CITT will issue a written determination with reasons to follow.
8-12	Notice of the inquiry is published in the <i>Canada Gazette</i> .
31	The relevant government entity will file a Government Institution Report ("GIR"). The GIR is the government's written statement that must fully respond to all of the issues forming the basis of the complaint.
38-41	The complainant is permitted to file written comments on the GIR.
42-89	The Tribunal deliberates and may require a public hearing.
90	The Tribunal's determination is issued with reasons to follow at a later date.

When the CITT determines that a complaint is valid, it will recommend a remedy to be implemented by the government entity. By legislation, recommendations are to be implemented to the greatest extent possible by the relevant government entity. Remedies may include:

- that a new solicitation for the designated contract be issued;
- that the bids be re-evaluated;
- that the designated contract be terminated;
- that the designated contract be awarded to the complainant; or
- that the complainant be compensated for lost profits or lost opportunity.

Finally, the CITT determinations are subject to judicial review by the Federal Court of Appeal. Applications for judicial review must be filed within 30 days from the CITT determination.



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