

Understanding Sole-Sourcing in Canadian Public Procurement
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by

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1. Introduction

In the public sector, much as in the private sector, competition is generally understood as the optimal means to obtain the best value for money. Competition allows for comparison and thus for the identification of superior ability, products and performance. Competition also forces rival firms to fine-tune their operations, develop new products and techniques and continually approach new problems with an eye to innovation, modernization and improvement. Sole-source contracting involves purchasing goods or services directly from one particular supplier. Therefore, sole-sourcing is marked by the absence of competition. There are some advantages to this approach. For example, sole-sourcing generally takes less time than does administering a competitive call for tenders, as no extended evaluation period need take place. However, it is generally understood that this slight benefit is not sufficient to outweigh the disadvantages including the need for the optimal use of the public purse. For this reason, the public sector is generally limited to utilizing sole-source procurement only in limited circumstances.

This paper focuses on the different ways that sole-sourced public procurement is regulated in Canada, with special attention paid to those regulations pertaining to the construction industry. Part 2 examines the regulation of sole-sourcing at the federal level. This includes an examination of various multilateral and bilateral international trade agreements concluded by Canada, as well as the Agreement on Internal Trade, an agreement concluded between the federal government and the provinces and territories. This part considers the general rule against sole-sourcing imposed by these agreements as well as the various exceptions to this rule. This part also considers the recourses afforded by these agreements to disappointed suppliers in respect of sole-sourced procurements (including applications to the Canadian International Trade Tribunal). This part then explains how competing suppliers may identify sole-source procurements, the standing requirements that must be satisfied in order to bring a complaint in respect of such procurement, and the remedies available upon a successful challenge.

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Part 3 examines the regulation of sole-sourcing at the provincial and municipal levels. This involves an examination of four different trade and procurement agreements. These are the Canada-United States Agreement on Government Procurement, the Agreement on Internal Trade, the Agreement on the Opening of Public Procurement for Ontario and Quebec, and the New West Partnership Trade Agreement. These agreements are compared and contrasted, with special attention being paid to the advantages and disadvantages of their enforcement mechanisms in respect of one another and in respect of the agreements considered in Part 2.

2. Regulation of Sole-Sourcing at the Federal Level

(a) International Trade Agreements (ITAs)

The regulation of sole-sourcing is more developed at the federal level than at provincial and municipal levels. This is because it is only at the federal level that the various international trade agreements entered into by Canada, which touch on procurement have effect. These agreements include:

- The North American Free Trade Agreement (“NAFTA”);
- The World Trade Agreement on Government Procurement (“WTO-AGP”);
- The Free Trade Agreement between Canada and the Republic of Peru (“FTACP”); and
- The Canada-Chile Free Trade Agreement (“CCFTA”).

Canada is a party to several other free trade agreements, including agreements with Israel and Columbia. However, as the provisions of these agreements have not yet been integrated into the same public procurement enforcement mechanism as those agreements listed above, they will not be dealt with further.

There is one other agreement which is fundamental to any discussion of challenging sole-sourced contracts at the federal level in Canada. This is the Agreement on Internal Trade commonly referred to as the AIT. The AIT is a novel agreement concluded by all Canadian provinces as well as the Canadian federal government and concerns various matters relating to trade and investment within Canada. Much of the AIT is concerned with regulating the behaviour of provinces and sub-provincial entities such as municipalities and school boards (see below). However, much like the international trade agreements, the AIT also regulates public procurement and sole-sourcing at the

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federal level in Canada. From this point forward we will therefore refer to these five agreements, including the NAFTA, the WTO-AGP, the FTACP, the CCFTA and the AIT, collectively as the International Trade Agreements or “ITAs.” We will also focus primarily on the provisions of the AIT, the NAFTA and the WTO-AGP in particular.

(b) The General Rule Against Sole-Sourcing and Exceptions to the Rule

As a general rule, each of the ITAs prohibits government procurement through sole-sourcing. This prohibition stems primarily from those issues discussed above, namely that sole-sourcing prevents competition and thus fails to consistently ensure the best value for money. However, each of the ITAs also acknowledges that sole-sourcing may be a suitable practice in certain circumstances. As such, each ITA provides for numerous exceptions to the general prohibition against sole-sourcing by government institutions. The exact construction of these exceptions varies from ITA to ITA. Nonetheless, it remains accurate to say that the ITAs permit sole-sourcing in a number of common circumstances. These include, but are not limited to:

- where sole-sourcing is necessary to protect exclusive rights such as: patents, copyrights or proprietary information, or for technical reasons, the goods or services can only be supplied by a single supplier;¹
- where no other valid bids are received;²
- where the procurement entails additional deliveries from the original supplier as replacement parts or continuing services or to ensue interchangeability with existing equipment or services;³
- where the procurement is awarded to the winner of a design contest (note that the NAFTA provides this exception solely in relation to architectural designs);⁴
- where the procurement is being conducted in circumstances of emergency or unforeseeable urgency;⁵ and
- where the procurement is being made under especially advantageous conditions such as bankruptcy or insolvency proceedings.⁶



¹ AIT 506(12)(a); NAFTA 1016(2)(d); WTO-AGP XV(1)(d).

² AIT 506(11)(f); NAFTA 1016(2)(a); WTO-AGP XV(1)(a).

³ AIT 506(12)(a)&(b); NAFTA 1016(2)(b); WTO-AGP XV(1)(b).

⁴ AIT 506(12)(g); NAFTA 1016(2)(h); WTO-AGP XV(1)(j).

⁵ AIT 506(11)(a); NAFTA 1016(2)(c); WTO-AGP XV(1)(c).

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Each ITA should be consulted individually to ensure that the specific wording of each exception is applied accurately to the circumstances at hand. It must also be noted that certain exceptions appear in some of the ITAs which do not appear in others. Furthermore, some of these are of particular relevance to the construction industry. These include the following:

- The AIT permits tendering for construction materials where technical considerations or transportation costs impose geographic limits on available suppliers in certain circumstances.⁷
- The WTO-AGP permits limited tendering “when additional construction services which were not included in the initial contract but which were within the objectives of the original tender documentation have, through unforeseeable circumstances, become necessary to complete the construction services described therein.”⁸
- The WTO-AGP permits limited tendering of “new construction services consisting of the repetition of similar construction services which conform to a basic project for which an initial contract was awarded.”⁹

In respect of the construction industry, it is also imperative to consult the industry specific exceptions provided in the ITAs. For example, NAFTA Annex 1001.1b-2, exempts certain architectural and engineering services from the treaty’s scope, as well as some systems engineering services. These industry-specific exceptions are detailed and often complicated and must be consulted individually in respect of different procurements. In total, an exhaustive examination of each of these exceptions is beyond the scope of this article. Nonetheless, the following case studies are illustrative of some of the different ways the federal government has attempted to justify its decisions to sole-source procurement.

(i) *Proprietary and Exclusive Rights*

In *Re Enterasys Networks v PWGSC*, Enterasys objected to the use of brand names in a procurement contract for the supply of networking equipment awarded by the Department of Public Works and Government Services (the “PWGSC”).¹⁰ It made its objection pursuant to Article 1007(3) of the NAFTA which specifies that “[e]ach party

⁶ AIT 506(12)(i); NAFTA 1016(2)(g); WTO-AGP XV(1)(i).

⁷ AIT 506(11)(d).

⁸ WTO-AGP XV(f).

⁹ WTO-AGP XV(g).

¹⁰ See *Enterasys Networks v Department of Public Works and Government Services*. The case is currently being appealed by the Attorney General of Canada to the Federal Court of Appeal.

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shall ensure that the technical specifications prescribed by its entities do not require or refer to a particular trademark, name, patent, design or type.” The PWGSC argued that the use of brand names rather than generic specifications would ensure the smooth integration of the new equipment into the existing network. It also argued that revising the technical aspects of the bid request to provide for technical equivalency would be onerous and beyond the capability of certain internal departments. These arguments were rejected as it was held that these practical and operational considerations fell outside the scope of NAFTA Article 1007(3).

(ii) *Emergency and Unforeseeable Urgency*

In *Re Luik*, the PWGSC attempted to argue unforeseeable urgency after it awarded a procurement contract for a consumer research study regarding proposed health warnings on tobacco products on a sole-source basis. Dr. Luik challenged the decision arguing, *inter alia*, that the circumstances surrounding the procurement did not satisfy the AIT’s unforeseeable urgency standard. This provides that sole-sourcing will be permitted where “an unforeseeable situation of urgency exists and the goods, services or construction cannot be obtained in time by means of open procurement procedures.”¹¹ His argument was successful. It was held that the PWGSC could not argue unforeseeable urgency, as Health Canada had known about the need for the study for more than two years and had been in preliminary negotiations with the eventual supplier over the course of this period.¹² A similar decision was reached in *Novell Canada, Ltd.* There it was held that, in addition to the situation having not been reasonably foreseeable, the urgency of the situation must also not be a result of a lack of diligence on the part of the procuring entity.¹³

(iii) *Absence of Competition or Alternate Bidders*

In *Re Patlon Aircraft & Industries Ltd.*, the Department of National Defence (the “DND”), through the PWGSC, sole-sourced a procurement contract for nuclear, biological and chemical protective suits on the premise that describing the suits in terms of performance requirements would not have been effective or efficient and that there was no safe alternative or substitute to the type of suit the DND wished to secure. Patlon Aircraft & Industries argued that there were various other protective suits on the market capable of meeting the DND’s specifications. The CITT (see below) referred to the text of AIT Article 506(12) which provides that, “[w]here only one supplier is able to meet the requirements of a procurement,” sole-sourcing may be used “[w]here there is an absence of competition for technical reasons and the goods and services can be supplied only by a particular supplier and no alternative or substitute exists.”¹⁴ The

¹¹ AIT 506(11)(a).

¹² *Re Luik*, PR-99-035.

¹³ *Re Novell Canada, Ltd.*, PR-98-047.

¹⁴ AIT 506(12)(b).

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Tribunal then held that this test can be broken down into two separate limbs. First, that there is “only one supplier that can meet the requirements of the procurement,” and, secondly, that “no alternative or substitute exists.”¹⁵ It then held that the requirements of these tests had not been met by the PWGSC. It stated:

[i]t would have been quite reasonable and possible, in this case, for DND’s requirement to be written in terms of performance criteria and opened to competition. Based on the evidence before it, the Tribunal is of the view that there may indeed have been other equivalent suits available on the market that could have satisfied the requirement. The Tribunal is of the view that it is only through an open competition that this question can be resolved.¹⁶

(c) Enforcing the ITAs: the Canadian International Trade Tribunal

Although the ITAs are international agreements executed by states, rights and obligations in respect of sole-sourcing created by these treaties are not enforced at the international level but at the national level. In other words, unlike under Chapter 11 of the NAFTA, where a party is entitled to bring a dispute to a tribunal organised under international law, under the NAFTA Chapter 10 and the other procurement-related agreements at issue here, a complainant has recourse to a national body organized under national law. In Canada this occurs before the Canadian International Trade Tribunal, a quasi judicial administrative tribunal whose mandate and jurisdiction are set out in the *Canadian International Trade Tribunal Act* (the “CITT Act”).¹⁷

The CITT is based in Ottawa and is composed of nine full time members appointed for terms of up to five years. Although it has jurisdiction over numerous matters other than government procurement, including trade and tariff issues, it remains a specialized and relatively efficient forum for procurement dispute resolution. A complaint made to the CITT may concern “any aspect of the procurement process.”¹⁸ However, the CITT is not authorized to consider matters of contract administration or performance.¹⁹ The CITT is only concerned with determining whether the relevant federal entity has carried out the procurement in compliance with the applicable trade agreement. CITT inquiries are generally heard and decided within a 90 day time frame, though in certain instances this may be extended to 135 days. CITT decisions are subject to judicial review by the Federal Court of Appeal, pursuant to the *Federal Court Act*.²⁰ Pursuant to *Dunsmuir v*

¹⁵ *Re Patlon Aircraft & Industries Ltd.*, PR-2003-015.

¹⁶ *Ibid.*

¹⁷ *Canadian International Trade Tribunal Act*, R.S.C. 1985, c. 47 (4th Supp.).

¹⁸ CITT Act, section 30.11.

¹⁹ See *Re Flag Connection Inc.*, PR-2009-018.

²⁰ *Federal Court Act*, R.S.C. 1985, c. F-7, section 18.1 and paragraph 28(1)(e).

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New Brunswick, due to the specialization of the Tribunal, the Federal Court will approach the CITT's decisions with a high degree of deference.²¹

(d) Identifying Sole-Source Procurements

(i) *Designated contracts*

In order to challenge a procurement decision before the CITT, a disappointed supplier must meet several jurisdictional thresholds. Key among these, is that the procurement decision in question qualifies as a "designated contract." For this to be the case, three separate tests must be met.

First, the government procurement must meet the monetary threshold prescribed by the relevant ITA. The monetary threshold (for federal department and agencies) under the AIT is CAD\$100,000.00 for services and construction and CAD\$25,000.00 for goods. The threshold for the WTO-AGP is CAD\$8,500,000.00 for construction and CAD\$221,300.00 for goods and services. The threshold for the NAFTA (Canada/US) is CAD\$9,900,000.00 for construction contracts, CAD\$76,600.00 for services and CAD\$27,300.00 for goods.

Secondly, the procurement must be made by a "government institution" that is subject to the relevant ITA. This will include prescribed federal government department, agencies and Crown corporations. For example, Annex 502.1A of the AIT groups applicable government entities by political subdivision and for the federal government includes, *inter alia*, the Department of Agriculture, the Correctional Service of Canada, the Department of Fisheries and Oceans, the Department of National Health and Welfare, the Department of National Defence, the Department of Public Works and the Department of Transport. Annex 1001.1a-2 of the NAFTA, on the other hand, defines "government enterprises" to include Defence Construction (1951) Ltd., Canada Post Corporation, and Via Rail Canada Inc.

Lastly, the procurement must be for "designated goods and/or services", as described in the relevant ITA. In respect of the NAFTA, this is provided at Article 1001 and in respect of the WTO-AGP, this is provided at Article 1. Both of these provisions in turn refer to detailed annexes referring to different signatories (particularly in respect of the WTO-AGP) and different industry sectors. For example, the NAFTA Article 1001(1) (b) limits government procurement in respect of "construction services", to those transactions provided for in Annex 1001.1b-3. However, this Annex defines construction work broadly to include "[p]reconstruction work; new construction and repair, alteration, restoration and maintenance work on residential buildings, non-residential buildings or civil engineering works." It also provides that the work "can be carried out either by general contractors who do the complete construction work for the owner of the project,

²¹ See *David Dunsmuir v New Brunswick*, 2008 SCC 9.

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or on their own account; or by subcontracting parts of the construction work to contractors specializing, e.g., in installation work, where the value of work done by subcontractors becomes part of the main contractor's work.”

(ii) *ACANs – function and content*

In order to challenge contracts awarded on a sole-source basis, suppliers must be aware of when such contracts have been awarded. One means by which this is achieved is through reference to ACANs or “Advanced Contract Award Notices.” These are notices communicated by government entities indicating their intent to sole-source a procurement contract on the basis that only one supplier is capable of satisfying the procurement’s requirements. ACANs are advertised on the MERX Government Electronic Tendering System for a minimum of fifteen day periods and are required to contain certain information. This includes the capabilities required to perform the proposed procurement, as well as the exception in the relevant ITA the government purports to rely on in justification of its decision to award the contract on a sole-sourced basis. The ACAN must also provide an estimate of the cost of the proposed contract where it is possible to do so without prejudicing negotiations with the proposed contractor.²²

The CITT has ruled on the required content of ACANs on a number of occasions. It has held that an ACAN must “contain a clear statement of any criteria that could prevent the qualification of a potential supplier.”²³ It has also held that, where the procurement decision contemplates “mandatory requirements,” the government entity “has an obligation to ensure that these requirements are clearly and transparently stated, that they are capable of being assessed and applied in a non-discriminatory manner, [and] that they are essential to the fulfillment of the contract.”²⁴ The government entity has a duty to review all responses received to an ACAN in a fair and reasonable manner. The government body may continue with a sole-sourced procurement where no responses to the ACAN are received. However, it must abandon a sole-sourced contract in favour of a competitive bid, where it determines that an additional supplier is able to satisfy the requirements established in the ACAN. In total, the CITT has held that “the use of an ACAN should not replace the process of open competition in the selection of suppliers, nor should it be treated as a flexible, more expeditious means of running or attempting to run a competitive procurement action.”²⁵

(iii) *Scope of procurements – identifying when a previous sole-source procurement has ended*

²² See the Treasury Board Contracting Policy Manual at Article 10.7.13

²³ *Re Liuk*, PR-99-035.

²⁴ *Ibid.*

²⁵ *Re Patlon Aircraft & Industries Ltd.*, PR-2003-015.

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It is also important that suppliers monitor the duration of awarded procurements. Although a government body has contracted with a supplier for the provision of goods or services, this relationship will not be allowed to endure indefinitely. Neither will it be allowed to substantially change in character or scope during performance. It is therefore important for competitive suppliers to ensure that successful bidders do not materially renegotiate or amend the terms of a procurement contract with the government entity during the course of performance.

In *Re Bell Mobility*, for example, the PWGSC procured a telecommunications service contract.²⁶ During performance, an additional service plan was added to the procurement to accommodate a subsequently identified group of users. This had the effect of substantially altering the service specifications mandated in the request for proposals. The additional service plan was thus held to constitute a new procurement awarded without competition in violation of Article 506 of the AIT. In *Re Colley Motorships Ltd.*, on the other hand, a procurement contract for household relocation services led to the provision of related vehicle relocation services.²⁷ However, the vehicle relocation services had not formed part of the original solicitation. The vehicle relocation services were thus also held to constitute an entirely new procurement that had not been submitted to competitive tendering in violation of the AIT.

(e) Challenging Sole-Source Procurements

(i) *Complainant Standing and other Formal Issues*

A disaffected supplier will only be able to challenge a sole-sourced government procurement which qualifies as a “designated contract.” However, there are several other jurisdictional hurdles which must also be cleared before a supplier can have a complaint against a sole-sourced procurement heard by the CITT.

First, the supplier must qualify as either a “bidder” or a “prospective bidder” in respect of the contract.²⁸ For this to be the case, the supplier must be capable of meeting the requirements for the procurement as held in *Re Allen Systems Group*.²⁹

Secondly, the complaint must be made within the time limits prescribed by the CITT. In particular, the complaint must be filed within ten working days of when the basis of the complaint became known, or reasonably should have become known to the potential supplier.³⁰ However, if the complainant objects within that time frame to the relevant

²⁶ *Re Bell Mobility*, PR-2008-008 and PR-2008-009.

²⁷ *Re Colley Motorships Ltd.*, PR-2008-002.

²⁸ CITT Act, section 30.1 and section 30.11.

²⁹ *Re Allen Systems Group*, PR-2005-005; *Novell Canada Ltd.*, PR-99-001.

³⁰ See *Re Bell Canada*, PR-2005-055; *Re NETGEAR Inc.*, PR-2008-055.

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public entity, it then has ten days from that time, when relief by the government body is denied, to file its claim with the CITT.³¹

Thirdly, the complaint must be properly documented and must set out all of the information required by the CITT, including the basis of the complaint.³² The Tribunal in *Re Allen Systems Group* held that this must “disclose a reasonable indication that the procurement has not been carried out in accordance with [the applicable ITA].”³³ It is also important that the complainant err on the side of an expansive approach, as section 30.14 of the *CITT Act* requires that, in conducting an inquiry, the Tribunal limits its consideration to the subject matter of the complaint.

Lastly, the supplier must meet the jurisdictional requirements of the trade agreement that is being relied on for the complaint. Therefore, a Canadian supplier must challenge a sole-sourced procurement decision by the federal government under the AIT; an American company must challenge the procurement under the NAFTA; and a European company must challenge the decision under the WTO-AGP. Whether or not a company is of the appropriate nationality may not always be clear. For example, in the Northrop Grumman saga, a foreign supplier brought a claim before the CITT under the AIT, on the grounds that it would perform the procurement contract from within Canada. However, the Supreme Court of Canada held that as a foreign company with no office in Canada, the company was not a Canadian supplier for the purposes of the CITA.³⁴ However, this decision does not absolutely rule out the possibility that a foreign supplier with a greater base of operations in Canada, such as a permanent office, could not access the CITT in this way.

(ii) Challenging the methodology of the procurement process

A supplier who fails to demonstrate the capability to meet a sole-sourced contract may nonetheless challenge the contract before the CITT where it can demonstrate that the broader methodology used during the procurement was inadequate. Stated differently, even if the supplier cannot establish that it could satisfy the requirements as written, it may nonetheless challenge the procurement decision where it proves that it may have been in a position to satisfy the proposal, were its requirements formulated differently.

³¹ *Ibid.*

³² See *Re Flag Connection Inc.*, PR-2009-018.

³³ *Re Allen Systems Group*, PR-2005-005.

³⁴ See *AG Canada v Northrop Grumman Overseas Services Corporation*, 2009 SCC 50; *AG Canada v Northrop Grumman Overseas Services Corporation*, 2008 FCA 187.

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The decision of the CITT in *Re Novell Canada Ltd.* is illustrative of this distinction.³⁵ In that case, the PWGSC awarded to Microsoft Corporation on a sole-source basis, an order of 22,000 Microsoft Windows NT client access licences and 600 Microsoft Windows NT server licences. The CITT recognized that, even though Novell was not in a position to directly supply the Microsoft licenses, it could still “challenge the aspect of the procurement process which deals with the sourcing methodology used for the ACAN.” It held that “Novell need not demonstrate... its ability to participate as a bidder or prospective bidder in the specific solicitation, since the restrictive nature of the sourcing methodology used in the ACAN prevents Novell from being a potential supplier on the designated contract.” Rather, it held that “Novell need only demonstrate that it would have been a bidder or prospective bidder” had it been able to provide a comparable alternative.

This is an important avenue of protest. It effectively allows suppliers to challenge sole-sourced procurement decisions on the basis that a reasonable alternative to the government’s requirements may exist. It also means that the CITT will not defer to the “subjective judgment” of the procuring body that no reasonable alternative exists, but will instead interrogate the terms of the procurement.³⁶ In this regard, the CITT has repeatedly indicated that proposals should be “goal orientated” rather than “product specific,”³⁷ and that they should be based on “performance criteria” rather than any pre-conceived final product that the government may have in mind.³⁸ Stated differently, it has held that “[r]equirements should be expressed in terms of results required, not solutions,”³⁹ and that the failure to express a proposed procurement in terms of goals rather than solutions, is “tantamount to running a secret competition without proper notification.”⁴⁰

(iii) *Restrictive approach and the burden of proof*

It is important to note that the CITT generally takes a restrictive approach to sole-sourcing and requires that the government decisively demonstrate that its sole-sourced procurement falls under an applicable exemption. In this regard, the onus is on the government “to establish and justify the need to utilize limited tendering procedures.”⁴¹ This removes much of the burden from the complaining supplier. It means that “[i]t is not for the complainant to demonstrate any case for a competitive solicitation.”⁴² Competitive solicitations are viewed by the CITT as the norm and “the standard

³⁵ *Re Novell Canada Ltd.* PR-99-001.

³⁶ *Re Liuk*, PR-99-035.

³⁷ *Re Cognos Inc.*, PR-2002-017.

³⁸ *Re Cognos Inc.*, PR-2002-017.

³⁹ *Re Information Builders (Canada) Inc.*, PR-2007-009.

⁴⁰ *Re Liuk*, PR-99-035.

⁴¹ *Re Information Builders (Canada) Inc.*, PR-2007-009.

⁴² *Re Sybase Canada Ltd.*, PR-96-037.

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requirement of the rule.”⁴³ As a result, the “true requirement is for the government to demonstrate the case for a sole-sourcing.”⁴⁴ This effectively relieves the complainant of any burden to prove that it would have won a contract that was sole-sourced had it been allowed to bid for it. As held by the CITT in *Re Sybase Canada Ltd.*, “[i]t is the Tribunal’s view that exception to the open competitive process should be read narrowly. Where evidence is presented to suggest that a limited tendering procedure is not justified, the onus will fall upon government departments to show that the use of these exceptions is, in fact and in law, appropriate.”

(f) *Remedies and Recommendations*

The CITT does not have the authority to directly amend or terminate a procurement contract or create a new contract in its place with the complainant party. The CITT only has the power to provide the complainant with remedies in the shape of recommendations. These may take a number of different forms. The CITT may recommend that a new solicitation take place in respect of the procurement. It may recommend that the government entity re-evaluate the bids tendered in respect of the procurement. It may recommend that the procurement contract be terminated. It may recommend that the designated contract be awarded to the complainant. It may recommend that the complainant be compensated by an amount specified by the Tribunal. It may recommend that the complainant be awarded the costs expended in the preparation of any bid made in relation to the procurement decision complained of. Finally, it may recommend that the complainant be awarded the costs expended in contesting the procurement decision before the Tribunal. Costs of filing and proceeding with the complaint are awarded to the successful party based on a flat rate system according to three levels of complexity.⁴⁵ These are \$1000.00 for level one, \$2,400.00 for level two, and \$4,100.00 for level three. Bid preparation costs are most often awarded in cases where the CITT recommends the annulment of a blemished proposal and a re-consideration of the procurement.⁴⁶

The question arises as to what recourse a supplier would have if the government entity did not respect and implement the CITT’s recommendation. In the authors’ experience, this has rarely, if ever, been the case. There is a statutory obligation under section 30.18 of the CITTA requiring the government institution to implement the Tribunal’s recommendations to the greatest extent possible.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ See CITT Act, section 30.16.

⁴⁶ See *Re The Impact Group*, PR-2005-050; *Re Envoy Relocation Services*, PR-2004-054R.

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3. Regulation of Sole-Sourcing at the Provincial and Municipal Level

(a) Introduction to the Regulation of Procurement at the Sub-Federal Level

The regulation of public procurement is less cohesive and developed at the provincial and municipal level, than it is at the federal level. This is particularly the case in terms of enforcement. Nonetheless, there are numerous similarities between these two related, yet distinct systems. In both systems there are multiple regulatory instruments which must be distinguished and which will be applicable in different circumstances. In both systems there is a general prohibition against sole-sourced procurement which gives way to multiple exceptions. In both systems there are also enforcement mechanisms in place intended to give disaffected suppliers rights of recourse where they feel they have been illegitimately denied the ability to compete for a sole-sourced government procurement contract.

(b) Canada US Agreement on Government Procurement

The most recent agreement of relevance to challenging sole-source procurement contracts at the provincial level is actually an agreement international in character. This is the recently concluded 2010 Canada – U.S. Agreement on Government Procurement (the “CUSAGP”), designed largely in response to the *American Investment and Recovery Act of 2009* and its controversial “Buy American” provisions. The CUSAGP temporarily waives “Buy American” provisions in respect of Canadian suppliers in exchange for increased U.S. supplier access to construction service procurement contracts of numerous Canadian agencies, Crown Corporations and municipalities (the “Temporary Agreement”). The CUSAGP also permanently modifies the commitments of both Canada and the United States under the WTO-AGP, resulting in broad and guaranteed mutual access for suppliers to sub-federal procuring entities (the “Permanent Agreement”).

Like the ITAs, the Temporary Agreement and the Permanent Agreement both contain a broad prohibition against sole-source government procurement. However, like the ITAs the Temporary Agreement and the Permanent Agreement also both contain numerous exceptions to this general rule.⁴⁷ These include many of the exceptions canvassed above, including, but not limited to:

- Where no tenders were submitted or no suppliers requested participation;⁴⁸

⁴⁷ In respect of the Temporary Agreement these are provided at Article 9 of Appendix C of the CUSAGP. In respect of the Permanent Agreement these are provided at Article XIII the Revised Text of the Agreement on Government Procurement (Articles I-XXI) as at 13 November 2007 (WTO Document negs 268 (19 November 2007) (hereafter the “2007 Revised GPA”).

⁴⁸ CUSAGP, Appendix C, Article 9(h); 2007 Revised GPA, Article XIII.1(a)(i).

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- Where the goods or services can be supplied only by a particular supplier and no reasonable alternative or substitute goods or services exist (in certain circumstances);⁴⁹
- For additional deliveries by the original supplier of goods or services that were not included in the initial procurement (in certain circumstances)(note that this only applies to the Permanent Agreement);⁵⁰
- For work to be performed on property by a contractor according to provisions of a warranty or guarantee held in respect of the property or the original work (note that this only applies in respect of the Temporary Agreement);⁵¹
- Insofar as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the procuring entity, the goods or services could not be obtained in time using open tendering or selective tendering;⁵² and
- For purchases made under exceptionally advantageous conditions that only arise in the case of unusual disposals such as those arising from liquidation, receivership or bankruptcy.⁵³

The most significant implication of the CUSAGP is that, whereas U.S. suppliers previously only had standing to challenge procurement decisions made by the federal government of Canada, these same suppliers will now have similar recourse against Canadian public procurement decisions made at the provincial level. This will likely lead to increased participation by U.S. suppliers in the competition for provincial procurement contracts. Due to the bid protection and domestic review mechanisms in this Agreement, U.S. suppliers, this will also have the effect of forcing provinces to revisit and re-evaluate their previous procurement policies in respect of U.S. companies. That said, the specific provincial entities to which U.S. suppliers now have guaranteed access through the CUSAGP are not uniform and vary significantly from province to province. Other inconsistencies include the fact that Crown corporations in all provinces and territories are explicitly excluded from the coverage of the Permanent Agreement but not from the Temporary Agreement.

While the rights of protest bestowed upon U.S. suppliers by the CUSAGP are somewhat revolutionary, the exact mechanism by which these are to be enforced has yet to be finally determined. There is a provincial bid review mechanism set out in paragraphs 6

⁴⁹ CUSAGP, Appendix C, Article 9(b); 2007 Revised GPA, Article XIII.1(b).

⁵⁰ 2007 Revised GPA, Article XIII.1(c).

⁵¹ CUSAGP, Appendix C, Article 9(j).

⁵² CUSAGP, Appendix C, Article 9(f); 2007 Revised GPA, Article XIII.1(d).

⁵³ CUSAGP, Appendix C, Article 9(e); 2007 Revised GPA, Article XIII.1(g).

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to 22 of Appendix C, in which Canada and the U.S. are obligated to “provide a timely, effective, transparent and non-discriminatory administrative or judicial review procedure through which a supplier may challenge... a breach of the [CUSAGP].” Pursuant to Article XVIII(4) of Appendix C, Canada and the U.S. are also obligated to “establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement.”

In respect of goods,, services and construction services covered under the Permanent Agreement, the U.S. has agreed that the provinces have until February 11, 2010 to establish provincial interim bid review mechanisms that conform with Article XVIII:7(b) of the 2007 Revised GPA.⁵⁴

The monetary threshold under the Permanent Agreement for a claim regarding the procurement of construction services is CAD\$8,500,000.00, and for the procurement of good and services is CAD\$604,500.00. The monetary threshold for a claim regarding the procurement of construction services under the Temporary Agreement is CAD\$8,500.000.00.

(c) The Agreement on Internal Trade (the “AIT”)

In addition to applying to federal government procurement, the AIT also addresses procurement decisions taken at the provincial and sub-provincial level.

Provincial procurement is regulated by AIT Article 5, while sub-provincial procurement is regulated through Annex 502.4. Sub-provincial procurement caught by this Annex includes procurement by so called “MASH sector” entities. These include municipalities, municipal organizations, school boards and publically-funded academic institutions, health and social service entities, as well as any corporation or entity owned or controlled by one or more of the preceding entities or bodies. Similar to procurement at the federal level, the AIT mandates competitive procurement practices at the provincial and sub-provincial level except in certain limited exceptions where single or sole-sourcing is permitted. The list of exceptions for provincial procurement is provided at AIT Articles 506(11) and 506(12). The list of exceptions concerning MASH sector entities is provided at Appendices C and D of AIT Article 502.4. These are substantially similar to those discussed in relation to the ITAs and the CUSAGP (and will not be reiterated here). Monetary thresholds for procurement claims under the AIT in respect of provincial and sub-provincial entities are set at \$100,000.00 for construction and services, and \$25,000.00 for goods, but some public institutions may be subject to

⁵⁴ Note that the CUAGP also gives Canadian suppliers the right to challenge procurement decisions made by individual U.S. states. It is not necessary for the CUAGP to apply to procurement decisions made by the United States Federal government as this right is already enjoyed by them under NAFTA Chapter 10 discussed above.

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higher thresholds or exempt from regulation altogether under the annexes to Chapter 5 of the AIT.

Unlike claims related to federal procurement, AIT claims related to provincial and MASH procurement under the AIT are not submitted to the CITT. Rather, for claims directed at provincial procurement, including claims related to sole-sourced contracts, disaffected suppliers must first petition their own provincial government.⁵⁵ Their provincial government must then agree to advance their claim on their behalf against the other province or provincial entity allegedly in violation of its procurement obligations under the AIT.⁵⁶ Where a resolution between the parties can't be reached, the circumstances of the complaint may be considered by an expert panel.⁵⁷ If the panel decides in favour of the complaining supplier, it will make recommendations on the matter.⁵⁸ If the offending province does not heed these recommendations, the complaining province is then entitled to take retaliatory action.⁵⁹ Disputing parties may appeal expert panel reports on the grounds that the panel erred in law, failed to observe a principle of natural justice or acted beyond or refused to exercise its jurisdiction.⁶⁰ Finally, it is critical to emphasize that, pursuant to AIT Article 1701(2), the dispute resolutions procedures of the AIT are not available in respect of procurement by MASH sector entities.

In total, this enforcement mechanism is significantly weaker than the direct right of recourse afforded to suppliers by the ITAs and the *CITT Act* in respect of Canadian federal procurement. First, it is only available in respect of procurement at the provincial level. This effectively reduces the obligations of MASH sector entities to avoid sole-sourcing to mere promises rather than enforceable guarantees. Secondly, it prohibits suppliers from independently advancing their own causes and instead makes them dependent on their home provinces for such advocacy. This may be difficult to secure and may involve political forces and considerations entirely outside the control of the supplier. Thirdly, it imposes several layers of consultation, negotiation and determination between the offending conduct and any eventual remedy. This may result in a redundant recommendation that is delivered long after the relevant procurement has been performed. As a result of these disadvantages, this province-to-province, non-judicial dispute resolution mechanism has been little used. At the time of writing only nine panel reports are listed on the AIT's website. Furthermore, none of these decisions directly involve complaints involving sole-sourced contracts.

⁵⁵ See AIT Article 1710(1).

⁵⁶ Note that, pursuant to Article 1710(3) the supplier's home province may require the supplier to exhaust all administrative remedies available to the supplier prior to initiating proceedings on the suppliers behalf.

⁵⁷ See AIT Articles 1703 to 1705.

⁵⁸ See AIT Article 1706.

⁵⁹ See AIT Article 1709.

⁶⁰ See AIT Article 1709.

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Neither will a disaffected supplier find immediate assistance under the common law. Canadian jurisprudence does not materially affect the ability of public institutions to sole-source procurement projects. In particular, the common law does not regard public institutions as any different from private entities in respect of procurement practices. Therefore, like private commercial entities, government institutions are under no obligation to employ competitive tenders when procuring goods and services in the marketplace. Rather, they are free under the common law and under the principle of freedom of contract, to enter into contractual negotiations and contractual agreements – including sole-sourcing agreements – at their complete discretion. The only exceptions to this general rule are related obligations imposed by the common law, including, *inter alia*, the duty to perform contractual obligations in good faith. Specifically, as held by the Newfoundland Court of Appeal, “[a] private party seeing a service has no duty to use a public or any other tender system. Except in the case of deceit or negligent misrepresentation, tort law seems generally to have no role in contractual relationships.”⁶¹

(d) Quebec-Ontario Procurement Agreement

The Agreement on the Opening of Public Procurement for Ontario and Quebec (the “AOPPOQ”) regulates inter-provincial trade and investment between these two provinces and was signed in 1994. The preamble to the AOPPOQ provides that the agreement is the result of the recognition by the provinces that “interprovincial trade barriers must be reduced or eliminated so as to improve productivity and competitiveness of Ontario and Quebec firms” and that they agree that “one of the most important ways to reduce trade barriers between provinces is through the opening of public procurement based on reciprocity.”

The AOPPOQ defines “construction contract” widely to include “a contract regarding the construction, reconstruction, demolition, repair or renovation of a building, structure or other civil engineering or architectural work.”⁶² It further defines “construction contract” to include “site preparation, excavation, drilling, seismic investigation, the supply of products and materials, equipment and machinery if these are included in and incidental to a construction contract, as well as the installation and repair of fixtures of a building, structure or other civil engineering or architectural work.”⁶³ However, the AOPPOQ defines “construction contract” to exclude “professional consulting services related to the construction contract.”⁶⁴ Furthermore, Article 1.2 of Appendix B of the AOPPOQ provides that the Agreement does not apply to procurement of services (as distinct from

⁶¹ *Exploits Valley Air Services Ltd. v College of the North Atlantic*, (2005), 33 CCLT (3d) 138 at para 36 (Nfld. CA).

⁶² See AOPPOQ, Article 1.1.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

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construction contracts) which, by provincial legislation or regulation, can be provided only by, *inter alia*, licensed engineers, land surveyors or architects.⁶⁵

Article 4.1 of the AOPPOQ establishes the general rule that all “[p]rocurements covered by [the] Agreement must be subject to [one] of the transparent tendering systems” established by its provisions.⁶⁶ Article 5.1 then establishes seven exceptions to this rule in respect of sole-sourcing. These are:

- procurements to ensure compatibility with existing products, to protect exclusive rights such as copyrights, patents, or exclusive licences, or for the maintenance or repair of specialized equipment that must be carried out by the manufacturer or its representative;⁶⁷
- research and development or where the procurement involves the production of a prototype or original concept;⁶⁸
- where the carrying out of work by a contractor other than the contractor who did the original work will nullify the guarantees held;⁶⁹
- work that involves the construction or renovation of rental buildings or parts of rental buildings and is being carried out by the lessor of the building;⁷⁰
- purchases of goods already the subject of a lease-purchase agreement where payments are partially or totally credited to the purchase;⁷¹
- in the absence of tenders in response to a call for tenders;⁷² and
- goods purchased under exceptionally advantageous circumstances such as bankruptcy or receivership.⁷³

The AOPPOQ also establishes other exceptions to mandatory competitive tendering that do not fall under the banner of sole-sourcing.⁷⁴ These include “procurements

⁶⁵ AOPPOQ, Appendix B Articles 1.2(i).

⁶⁶ See AOPPOQ, Article 4.1.

⁶⁷ AOPPOQ, Article 5.1(a)(i).

⁶⁸ AOPPOQ, Article 5.1(a)(ii).

⁶⁹ AOPPOQ, Article 5.1(a)(iii).

⁷⁰ AOPPOQ, Article 5.1(a)(iv).

⁷¹ AOPPOQ, Article 5.1(a)(v).

⁷² AOPPOQ, Article 5.1(a)(vi).

⁷³ AOPPOQ, Article 5.1(a)(vii).

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between public organizations” and “construction work done outside Ontario and Quebec.”⁷⁵

Complaints regarding procurement decisions may be made by “qualified suppliers.” This is defined by the AOPPOQ at Article 1.1 to be “any supplier that is capable of fulfilling the conditions of the procurement or procurements under consideration based on an assessment of its financial, technical, and commercial capacity.”⁷⁶ Suppliers excluded from a sole-sourced contract may inquire into the procurement pursuant to Article 7 of the AOPPOQ. Article 7.1 gives suppliers the right to certain information in respect of awarded procurements, including the names and addresses of the successful bidders as well as the successful total bid price.⁷⁷ Article 7.2 gives the parties to the Agreement (i.e. Ontario and Quebec) the right to request copies of the tender documents and evaluation criteria used in a procurement decision.⁷⁸

Where, based on this or other information, a supplier wishes to file a complaint in respect of a sole-sourced procurement contract, it may do so pursuant to Article 9 of the AOPPOQ. This section provides for a three phase dispute resolution process. First, a supplier who “claims to have been unfairly prejudiced by a decision of a party may make a complaint to the procuring government” pursuant to Article 9.2. If this does not lead to a “satisfactory solution,” the supplier may then contact the procurement coordinator appointed by his or her provincial government to lodge an official complaint pursuant to Article 9.3. This coordinator must then attempt to negotiate a solution with his or her counterpart in the other province. Where these two coordinators fail to agree on a solution, the coordinator for the jurisdiction of the complainant may then request that the matter be considered by an expert panel pursuant to Article 9.4. This panel will then render a final report to be provided to the responsible Ministers of the two provinces who are obligated to consult one another “in order to reach a mutually acceptable settlement based on the panel’s report.”⁷⁹ Where the province home to the complaining supplier considers that an offending province fails to adhere to the expert report, it may “temporarily suspend the application of equivalent benefits under [the] Agreement to the non-complying party and its resident suppliers until such time as a satisfactory solution is reached.”⁸⁰

Similar in nature to the province-to-province dispute resolution process established by the AIT in respect of provincial procurement, this dispute resolution system is weak and relatively ineffective. It too prohibits suppliers from independently advancing their own

⁷⁴ See AOPPOQ, Article 5.1(b) to 5.1(i).

⁷⁵ AOPPOQ, Article 5.1(b) and 5.1(g).

⁷⁶ See AOPPOQ, Article 1.1.

⁷⁷ AOPPOQ, Article 7.1.

⁷⁸ AOPPOQ, Article 7.2.

⁷⁹ AOPPOQ, Article 9.12.

⁸⁰ AOPPOQ, Article 9.15.

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causes and instead makes them dependent on their home provinces for such advocacy. Like the AIT, it also imposes several layers of consultation, negotiation and determination between the offending conduct and any eventual remedy. The monetary thresholds established by the AOPPOQ are \$100,000.00 for construction contracts, \$200,000.00 for service contracts and \$25,000.00 for supply contracts.⁸¹ However, Article 2.2 states that “[i]f an agreement on procurement among all governments in Canada providing for different thresholds is reached, the thresholds provided for in [the agreement] will be modified accordingly.”⁸² This suggests that the monetary thresholds governing the AOPPOQ are now those imposed by the AIT.

(e) The New West Partnership Trade Agreement (formerly TILMA)

The British Columbia-Alberta Trade, Investment, and Labour Mobility Agreement (the “TILMA”) was signed by B.C. and Alberta in 2006 and came into force in 2007. The TILMA lowered the thresholds established by the AIT relating to the regulation of public procurement in respect of B.C. and Alberta. However, while the threshold for goods was lowered from \$25,000.00 to \$10,000.00, and the threshold for services was lowered from \$100,000.00 to \$75,000.00, the threshold for construction contracts was kept at \$100,000.00.

Effective July 1, 2010, TILMA was replaced by the New West Partnership Trade Agreement (the “NWPTA”) between British Columbia, Alberta and Saskatchewan. Besides the inclusion of Saskatchewan, the NWPTA maintains many of the provisions established by the TILMA, including all of its monetary thresholds applicable to procurement made by provincial governments and entities.⁸³ Monetary thresholds applicable to sub-provincial procurement under the NWPTA are \$200,000.00 for construction, \$75,000.00 for services and \$75,000.00 for goods.⁸⁴ Similar to the AIT, sub-provincial entities caught by the NWPTA include municipalities, health regions, school boards and publically-funded post-secondary institutions.⁸⁵ The NWPTA sets a different set of monetary thresholds for procurement by provincial Crown corporations.⁸⁶ These are \$100,000.00 for construction, \$100,000.00 for services and \$25,000.00 for goods. The NWPTA mandates that procurement in respect of all three of these categories be conducted in an open and non-discriminatory fashion.⁸⁷ The NWPTA further mandates that, where an inconsistency between the NWPTA and the AIT in

⁸¹ AOPPOQ, Appendix A Articles 1.1, Appendix B 1.1 and Appendix C 1.1.

⁸² AOPPOQ, Article 2.2.

⁸³ See NWPTA, Article 14(1)(a)

⁸⁴ See NWPTA, Article 14(1)(c).

⁸⁵ See NWPTA, Article 14(1)(c).

⁸⁶ See NWPTA, Article 14(1)(b).

⁸⁷ See NWPTA, Article 14.1.

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respect of public procurement occurs, the provision which is determined to be “more conducive to liberalized trade, investment and labour mobility” prevails.⁸⁸

Article 14.3 indirectly prohibits sole-source procurement. It provides that that the parties “shall ensure that procuring government entities post tender notices for all covered procurement through an electronic tendering system or systems provided by the Party.” The exceptions to this rule are provided at Part V-A. These are procurements:

- from philanthropic institutions, prison labour or persons with disabilities;⁸⁹
- from a public body or a non-profit organization;⁹⁰
- of goods purchased for representational or promotional purposes; and services or construction purchased for representational or promotional purposes outside the territory of a Party;⁹¹
- of health services and social services;⁹²
- on behalf of an entity not covered by Article 14;⁹³
- by entities which operate sporting or convention facilities, in order to respect a commercial agreement containing provisions incompatible with Article 3, 4 or 14;⁹⁴
- where it can be demonstrated that only one supplier is able to meet the requirements of a procurement;⁹⁵
- where an unforeseeable situation of urgency exists and the goods, services or construction could not be obtained in time by means of open procurement procedures;⁹⁶

⁸⁸ NWPTA, Article 1.2

⁸⁹ NWPTA, Part V-C(2)(a).

⁹⁰ NWPTA, Part V-C(2)(b).

⁹¹ NWPTA, Part V-C(2)(c).

⁹² NWPTA, Part V-C(2)(d).

⁹³ NWPTA, Part V-C(2)(e).

⁹⁴ NWPTA, Part V-C(2)(f).

⁹⁵ NWPTA, Part V-C(2)(g).

⁹⁶ NWPTA, Part V-C(2)(h).

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- when the acquisition is of a confidential or privileged nature and disclosure through an open bidding process could reasonably be expected to compromise government confidentiality, cause economic disruption or be contrary to the public interest;⁹⁷
- of services provided by lawyers and notaries;⁹⁸
- of goods intended for resale to the public;⁹⁹ or
- in the absence of a receipt of any bids in response to a call for tenders.¹⁰⁰

The dispute resolution process established by the NWPTA is reminiscent of that established by the AIT and the AOPPOQ. First, a disaffected supplier must take all reasonable steps to resolve its complaint before any other regulatory body with jurisdiction to hear the matter, such as an administrative tribunal.¹⁰¹ Where this does not settle the matter, the supplier may then petition its government to initiate consultations with the province it believes to be in violation of the NWPTA.¹⁰² The supplier's home province may then choose to advance the supplier's cause on its behalf pursuant to Article 25.3. If, however, the supplier's home province declines to advocate the complaint on the supplier's behalf, the supplier may nonetheless advance its cause on its own pursuant to Article 25.5. Where negotiations under Article 25 do not lead to the resolution of the matter, an expert panel may be established under Article 26.2. The final report of the expert panel is binding on the disputants pursuant to Article 27.12. If the provincial party fails to implement the report of the panel, a subsequent panel may order a monetary award against the infringing province and in favour of complaining suppliers pursuant to Article 29.7. Monetary awards are capped by Article 30.2 at \$5,000,000.00.

This dispute resolution mechanism is even more convoluted than those established by the AIT and the AOPPOQ. That said, this added complication includes both positive and negative aspects. On the downside, the NWPTA injects two added layers to the procurement dispute resolution process. First, it requires that the supplier exhaust all other potential avenues of dispute resolution before resorting to the provisions of the NWPTA. Secondly, it imposes a second level of expert review before a monetary award may be rendered. On the upside, the NWPTA allows a disaffected supplier to advance its own case where its home province refuses to participate on its behalf. This means

⁹⁷ NWPTA, Part V-C(2)(i).

⁹⁸ NWPTA, Part V-C(2)(j).

⁹⁹ NWPTA, Part V-C(2)(k).

¹⁰⁰ NWPTA, Part V-C(2)(l).

¹⁰¹ NWPTA, Article 24.2 and Article 25.2.

¹⁰² NWPTA, Article 25.2.

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that the supplier's case is not ultimately tied to its home province's appetite to represent its interests. Unlike the AIT and the AOPPOQ, the NWPTA also expressly contemplates the rendering of substantial monetary awards in favour of complaining suppliers.¹⁰³ This is a significant signal in and of itself that may do much to encourage greater adherence to the prescriptions of the NWPTA from the initial stages of all related procurement decisions.

It is also important to note that, unlike many of the other procurement related agreements considered thus far, the NWPTA contains several provisions designed to limit the amount of procurement disputes brought under its auspices. First, the expert panel is afforded the discretion to render costs awards pursuant to Article 32.1 to deter frivolous complaints by suppliers. Secondly, only one complaint on any particular matter can be considered at a time, thereby allowing a situation to be corrected and reducing the need for further complaints.¹⁰⁴ Lastly, the NWPTA provides that, if a supplier believes that a government action violates both the NWPTA and the AIT, the supplier may pursue remedies under only one of the two agreements and cannot pursue remedies under both.¹⁰⁵

4. Conclusion

The regulation of sole-sourced public procurement in Canada is multi-faceted and complex. Attention must always be paid to the nature of the government entity engaging in sole-sourced procurement as well as character and nationality of the disaffected supplier interested in challenging the procurement. Different procurement agreements may be applicable to the procurement and each of these may have its own unique dispute resolution mechanism with its own individual advantages and disadvantages. Generally speaking, more forceful recourse is available to suppliers in respect of federal procurement than is available in respect of provincial and sub-provincial procurement. This is primarily because of the availability of the CITT in respect of the ITAs and the AIT at the federal level and its streamlined and efficient dispute resolution procedures. This is also because suppliers challenging procurement at the federal level need not rely in any fashion on the cooperation of their home jurisdiction. Nonetheless, the trend is for greater regulation of provincial and sub-provincial procurement practices going forward, as is exhibited by the CUSAGP and the supplier-friendly aspects of the NWPTA's dispute resolution mechanism.

¹⁰³ Note that the AIT also provides for the rendering of monetary penalties. However, as the AIT provides for an exclusively province-to-province dispute resolution system, these penalties are awarded to the complaining province and not to the relevant supplier. See AIT Articles 1707 and 1707.1.

¹⁰⁴ NWPTA, Article 25.2.

¹⁰⁵ NWPTA, Article 34.2.

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