

B. BID PROTEST MECHANISM

Article 35: Application

1. This Part IV(B) applies to the avoidance and resolution of disputes between suppliers and government entities relating to a specific procurement covered by Article 14(1).
2. Where a supplier believes that a specific procurement is inconsistent with this Agreement and any other trade agreement, that supplier must choose which agreement's dispute resolution process to use and, once chosen, will have no recourse to the other process regarding that same specific procurement.

Article 36: Consultations

1. The supplier may deliver a written request for consultations to the government entity with a copy to the administrator within ten days after the day on which the supplier first knew, or reasonably should have known, of the alleged inconsistency with the applicable obligations. The request shall provide a summary of the supplier's complaint. If the supplier fails to request consultations within the specified time period, the supplier shall be unable to proceed with further consideration of the matter under this Part IV(B).
2. In the written request under paragraph 1, the supplier may request that the government entity postpone, or the government entity may decide to postpone, the award of a contract in order to facilitate resolution of the matter. Taking into consideration the merits of the complaint, the government entity may refuse any such request.
3. The government entity and the supplier shall make every effort to arrive at a mutually satisfactory resolution of the matter through consultations and, to that end, shall exchange information sufficient to enable a full examination of the matter.
4. The government entity and the supplier shall conclude consultations within 20 days following delivery of the request for consultations under paragraph 1.
5. The supplier and the government entity may engage in any other informal efforts to attempt to resolve the matter and may, by mutual consent, extend the deadline for concluding consultations.
6. Consultations shall be without prejudice to the rights of the disputants in any further proceedings.

Article 37: Selection of Arbiter and Initiation of Proceedings

1. The Parties shall establish a roster of arbiters and each Party shall nominate at least five persons to that roster that meet the criteria set out in Schedule 3. The Parties shall list on the Agreement's website the names of the arbiters, their biographical information and the Party which appointed the arbiter to the roster.
2. All arbiters selected must be independent and impartial in the matter under dispute and otherwise comply with the code of conduct. Any alleged violations of the code of conduct shall be dealt with in accordance with the procedures provided in the code of conduct.
3. If the dispute is not resolved through consultations under Article 36, the supplier may, within 14 days following the conclusion of consultations, deliver a written request to the administrator, with a copy to the government entity, for the appointment of an arbiter to rule on whether the procurement at issue has been or is being conducted in conformity with the Agreement.
4. The request under paragraph 3 shall contain the following:
 - (a) a list of five candidates to serve as the arbiter selected from the roster established under paragraph 1, no more than two of whom may be selected from one Party's list of nominees;
 - (b) the identity of the supplier, and the address and contact person or counsel of record to which all further communications respecting the bid protest can be sent;
 - (c) if applicable, the title and tender reference number of the procurement;
 - (d) the name of the government entity;
 - (e) clear and detailed information concerning the factual grounds of the supplier's protest;
 - (f) detailed information concerning the alleged violation of the applicable obligations of the Agreement;
 - (g) copies of all correspondence between the supplier and the government entity relating to the specific procurement at issue;
 - (h) the remedies being requested, including supporting documentation on the actual cost of preparing and submitting the bid for the specific procurement at issue and its costs for legal representation relating to the bid protest; and

- (i) a signed consent and a financial deposit, in accordance with Schedule 7.
5. An arbiter may order the supplier to provide further financial deposits to the administrator at the times and in the amounts considered appropriate, at the arbiter's discretion. In considering whether to order such further financial deposits the arbiter will take in account:
- (a) the supplier's financial situation;
 - (b) the supplier's location or principal place of business;
 - (c) the complexity of the proceeding and the likely costs to be incurred as a result;
 - (d) the services to be provided by the administrator; and
 - (e) any other factor that is likely to affect the overall costs of the proceeding or the ability of the government entity to collect on a cost award issued against the supplier.

Any failure by a supplier to provide the financial deposits required under paragraph 4 or by subsequent order of the arbiter under this paragraph shall result in automatic termination of the proceeding.

6. Within seven days of the delivery under paragraph 3, the administrator shall determine the availability of the supplier's nominees and advise the government entity as to which nominees are available.
7. The government entity shall, within seven days of delivery of the list of available nominees under paragraph 6, select one of the nominees to act as the arbiter. If the government entity fails to select an arbiter within seven days, the administrator will choose the arbiter by lot from the list of available nominees.
8. If none of the nominees identified under paragraph 4(a) are available to serve, the administrator will choose the arbiter by lot from the roster.
9. If the supplier fails to:
- (a) submit the request for the appointment of an arbiter in accordance with paragraph 3; or
 - (b) meet the requirements of paragraph 4;

the matter shall be deemed to be resolved, and the supplier shall be unable to proceed with further consideration of the matter under this Part IV(B).

10. Any dispute under this Part IV(B) shall be deemed to take place in the territory of the Party of the government entity at issue.

Article 38: Bid Protest Proceedings

1. Within 14 days of delivery of the request under Article 37(3), the government entity shall deliver a written reply to the administrator, with a copy to the supplier. The reply shall address each of the supplier's allegations as set out in its request under Article 37(3). The reply shall also provide information and documentation concerning the government entity's costs for legal representation relating to the bid protest.
2. If the government entity fails to meet the information or time requirements under paragraph 1, it forfeits the right to present any further material in the proceeding unless specifically requested or authorised by the arbiter.
3. Within seven days of delivery of the government entity's reply under Article 38(1), the supplier may deliver a written counter-reply to the administrator, with a copy to the government entity.
4. The arbiter may request additional written submissions from the disputants.
5. The arbiter shall consider the matter in light of the applicable obligations of the Agreement and shall issue a final report to the disputants no later than ten days after delivery of the last submission under paragraph 3, or when exercised, paragraph 4. The arbiter may extend this period, with reasons for doing so, by no more than ten days. In reaching a decision, the arbiter shall consider only the written material that has been submitted to the administrator in accordance with this Part IV(B).
6. The arbiter's final report shall contain:
 - (a) findings of fact;
 - (b) a determination as to whether the specific procurement at issue is consistent with the Agreement;
 - (c) if applicable, recommendations as to how the government entity may bring itself into compliance with the Agreement; and
 - (d) the amount of any cost award and, if the government entity has acted inconsistently with the Agreement, any recoupment award, determined in accordance with Article 39.
7. If, at any time prior to the issuance of the arbiter's final report, one or more additional requests under Article 37 are delivered to the administrator relating to the same specific procurement, the bid protests shall thereafter

be consolidated into one proceeding and the following modified procedures shall apply to that proceeding:

- (a) within three days of receiving the additional request, the administrator shall notify the existing arbiter and each of the disputants that a consolidation of the suppliers' bid protests is required; and
 - (b) if the arbiter considers that additional submissions are then required, the arbiter shall immediately thereafter inform the disputants and fix the time periods for delivery.
8. In the event of a consolidation of two or more requests under paragraph 7, the arbiter may extend the time period for delivery of the final report by no more than 40 days from the date the arbiter and the disputants are notified of the consolidation by the administrator.
9. If the disputants agree to terminate a bid protest prior to the issuance of the arbiter's final report, the arbiter may issue a cost award, allocating costs at the arbiter's discretion, unless a specific allocation is otherwise agreed to between the disputants.
10. Subject to Article 41, the arbiter's final report is binding on the disputants and, subject to Article 7(4) and any ruling relating to confidentiality made by the arbiter under Article 42 and the arbiter's final report shall thereafter be made public.

Article 39: Cost and Recoupment Awards

1. A cost award shall in principle be issued against the unsuccessful disputant. However, the arbiter may apportion a cost award between the disputants if the arbiter determines that apportionment is reasonable, taking into account the circumstances of the bid protest.
2. In determining the amount of any recoupment award to be issued against the government entity, the arbiter shall take into account:
 - (a) the complexity of the specific procurement at issue;
 - (b) the dollar value of the specific procurement at issue;
 - (c) the complexity of the bid prepared and submitted by the supplier;
 - (d) the complexity of the bid protest proceeding;

- (e) the efforts made by the government entity and the supplier to arrive at a mutually satisfactory resolution to the dispute under Article 36; and
 - (f) any other factor considered relevant by the arbiter.
3. In no event shall the amount of any cost award and, if applicable, any recoupment award issued against a disputant in any one proceeding under this Part IV(B) exceed \$50,000 each.
 4. For greater certainty, an arbiter cannot issue a recoupment award against a supplier.

Article 40: Enforcement of Awards

1. In the event that the arbiter orders any cost award or recoupment award under Article 38(6)(d) and Article 39, the arbiter shall specify in the final report:
 - (a) with respect to any cost award, a breakdown between the fees and expenses of the arbiter and the costs for legal representation that comprise the cost award; and
 - (b) subject to paragraph 2, a reasonable period of time within which the award(s) shall be paid by the disputant against which the order has been made.
2. The financial deposit provided by the supplier under Article 37(4)(i) shall be dealt with as follows:
 - (a) if no cost award has been issued against the supplier, the administrator shall return the entire amount of the financial deposits to the supplier;
 - (b) if a cost award of less than the amount of the financial deposits has been issued against the supplier, the administrator shall pay the amount of the cost award over to the arbiter and government entity out of the financial deposit, pursuant to the allocation in the final report, and shall return any funds remaining to the supplier; and
 - (c) if a cost award in excess of the financial deposits is issued against the supplier, the administrator shall first pay the amount of the arbiter's fees and expenses, as indicated in the final report, to the arbiter. The administrator shall then pay the remaining funds, if any, to the government entity. The supplier shall then pay the amount of any difference between the financial deposits and the total cost

award to the government entity within the time period specified in the final report.

3. Each Party shall provide under its laws that any cost awards and recoupment awards issued by an arbiter under Article 38(6)(d) and Article 39 shall be enforceable in the same manner as an order issued by that Party's superior court.

Article 41: Judicial Review

1. A disputant may request judicial review of an arbiter's final report within 15 days of it being issued under Article 38(5) under:
 - (a) section 30 of the *Arbitration Act* (RSBC 1996 c.55) if the government entity is from British Columbia;
 - (b) subsection 45(1)(c) and (f) through (i), and subsection 45(8) of the *Arbitration Act* (RSA 2000, c. A-43) if the government entity is from Alberta; and
 - (c) clauses 46(1)(c) and (f) through (i) and subsection 46(8) of *The Arbitration Act, 1992* (S.S. 1992, c. A-24.1) if the government entity is from Saskatchewan

and solely for purposes of this Article, the Parties agree that this Part IV(B) constitutes an "arbitration agreement" and any arbiter's final report issued under Article 38(5) constitutes an "award" as those terms are defined in the applicable statute.

2. The time for payment of any cost award or recoupment award as determined by the arbiter under Article 40(1) shall be suspended during the period of any judicial review under this Article.

Article 42: Protection of Confidential Information

1. Further to Article 7(4), the arbiter shall determine any issues relating to the protection of confidential information and the logistical arrangements therefor.

Article 43: Other Provisions

1. The Parties shall publish the contact details for the administrator on the electronic tendering websites provided by the Parties and on the Agreement's website.

2. Each Party shall take such measures as are necessary to implement this Part IV(B), and, in doing so, may assume responsibility for some or all of its government entities for some or all aspects of the bid protest mechanism. If a Party does assume such responsibility, it shall notify the administrator.
3. The administrator shall copy the Party responsible for the government entity on all communications received from or delivered to the government entity. Each Party shall designate a contact point for receiving such communications and shall notify the administrator thereof.
4. In the event that an arbiter is dismissed, resigns or becomes otherwise unavailable, a replacement arbiter will be selected in accordance with the procedures in paragraphs 5 through 8 of Article 37.
5. Paragraphs 3 through 5 of Schedule 5 shall apply to the remuneration of arbiters, with such changes as may be required in the circumstances.
6. Where, in any proceeding, a question of procedure arises to which this Part IV(B) does not provide an answer, or the answer provided is incomplete, the question shall be disposed of by the arbiter in such a matter as the arbiter decides is reasonable in the circumstances and consistent with the principles of fairness.
7. The provisions of this Part IV(B) shall enter into force on July 1, 2015.