



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## ORDER AND REASONS

File No. PR-2020-070

1091847 Ontario Ltd.

v.

Shared Services Canada

*Order and reasons issued  
Friday, October 22, 2021*

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IN THE MATTER OF a complaint filed by 1091847 Ontario Ltd. pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C., 1985, c. 47 (4th Supp.);

AND FURTHER TO the Canadian International Trade Tribunal's preliminary indication of the level of complexity for the complaint case and its preliminary indication of the amount of the cost award.

**BETWEEN**

**1091847 ONTARIO LTD.**

**Complainant**

**AND**

**SHARED SERVICES CANADA**

**Government  
Institution**

**ORDER**

In its determination of May 6, 2021, the Canadian International Trade Tribunal, pursuant to section 30.16 of the *Canadian International Trade Tribunal Act*, awarded Shared Services Canada its reasonable costs incurred in responding to the complaint. The Tribunal's preliminary indication of the level of complexity for the complaint case was between Levels 2 and 3, and its preliminary indication of the amount of the cost award was \$3,000.

Having considered the submissions on costs of both 1091847 Ontario Ltd. and Shared Services Canada, the Tribunal hereby reduces the level of complexity for the complaint case to Level 2 and the amount of the cost award to \$2,750. The Tribunal directs 1091847 Ontario Ltd. to take appropriate action to ensure prompt payment.

Randolph W. Heggart

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Randolph W. Heggart

Presiding Member

## STATEMENT OF REASONS

### INTRODUCTION

[1] On May 6, 2021, the Canadian International Trade Tribunal, pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*,<sup>1</sup> determined that the complaint filed by 1091847 Ontario Ltd. was not valid. The Tribunal, pursuant to section 30.16, also awarded Shared Services Canada (SSC) its reasonable costs incurred in responding to the complaint, which costs were to be paid by 1091847 Ontario Ltd.<sup>2</sup>

[2] In accordance with the *Procurement Costs Guideline (Guideline)*,<sup>3</sup> the Tribunal's preliminary indication of the level of complexity for this complaint case was between Levels 2 and 3, and its preliminary indication of the amount of the cost award was \$3,000. The Tribunal indicated that, if any party disagreed with these preliminary indications, it could make submissions as contemplated in Article 4.2 of the *Guideline*.<sup>4</sup>

[3] On June 4, 2021, the Tribunal issued the reasons for its determination of May 6, 2021.

[4] On June 18, 2021, 1091847 Ontario Ltd. filed submissions arguing that each party should bear its own costs or, should the Tribunal not agree, that it find that the level of complexity for this complaint case was Level 1 and reduce the amount of the cost award to \$1,150 or less.

[5] On June 25, 2021, SSC filed reply submissions arguing that the Tribunal's preliminary indication of the level of complexity for this complaint case and its preliminary indication of the amount of the cost award were reasonable and should not be revised.

[6] On August 24, 2021, 1091847 Ontario Ltd. filed additional (unsolicited) submissions requesting that the Tribunal "cancel" its determination of May 6, 2021, or, should the Tribunal decide not to do so, that it not award any costs to SSC or that it consider awarding 1091847 Ontario Ltd. its costs incurred in proceeding with this complaint. 1091847 Ontario Ltd. filed these submissions following receipt of information which it claimed indicated that SSC had cancelled the procurement at issue prior to the filing of the Government Institution Report (GIR) and had failed to inform the Tribunal of the cancellation.

[7] On September 2, 2021, SSC filed submissions in response to the additional submissions filed by 1091847 Ontario Ltd.

[8] Having considered the submissions on costs of both 1091847 Ontario Ltd. and SSC, the Tribunal has decided to reduce the level of complexity for the complaint case to Level 2 and the

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<sup>1</sup> R.S.C., 1985, c. 47 (4th Supp.) [*CITT Act*].

<sup>2</sup> See *1091847 Ontario Ltd. v. Shared Services Canada* (6 May 2021), PR-2020-070 (CITT) [*1091847 Ontario Ltd.*].

<sup>3</sup> The *Guideline* can be found on the Tribunal's Web site at <<https://citt-tcce.gc.ca/en/resource-types/procurement-costs-guideline.html>>.

<sup>4</sup> Paragraph 4.2.3 of the *Guideline* provides that parties will have 10 working days from the date of the determination to make submissions and 5 working days to respond to the submissions of the other parties. On May 19, 2021, following the receipt of a request from 1091847 Ontario Ltd., the Tribunal extended the time for the filing of submissions to 10 working days from the issuance of the reasons for its determination. See Exhibit PR-2020-070-45.

amount of the cost award to \$2,750, which costs are to be paid by 1091847 Ontario Ltd. The reasons for the Tribunal's decision are provided below.

## ANALYSIS

[9] Pursuant to section 30.16 of the *CITT Act*, the Tribunal has discretionary power to award costs of, and incidental to, any procurement complaint proceedings. An award of costs is not intended to be a source of profit for the successful party, nor is it imposed as punishment on the party who pays them.<sup>5</sup>

### Level of complexity of the case

[10] For the purposes of fixing costs, the Tribunal considers its *Guideline*, which contemplates the classification of cases into one of three levels of complexity based on the complexity of the procurement, the complexity of the complaint and the complexity of the proceedings, with each of the three levels being associated with an all-inclusive flat rate.<sup>6</sup>

[11] As stated above, the Tribunal's preliminary indication of the level of complexity for this complaint case was between Levels 2 and 3, and its preliminary indication of the amount of the cost award was \$3,000. The Tribunal provided the following reasons for its preliminary indication of the level of complexity of the case:

The procurement was a relatively simple parts stocking exercise involving commercial goods and services. The complaint was somewhat complex as it raised multiple grounds of complaint and was ambiguous in some respects. Finally, although there were no interveners and a hearing was not necessary, the complaint proceedings were made unnecessarily complicated by the fact that 1091847 Ontario Ltd. sought accommodations for "timing matters", made multiple requests for extensions, repeatedly requested the issuance of production orders by the Tribunal, raised multiple new grounds of complaint in its comments on the GIR and subsequent filings, filed documents and submissions that failed to comply with the Tribunal's *Confidentiality Guidelines*, and changed its views on previous confidentiality designations requiring the resubmissions of documents. The process also required the use of the 135-day timeframe.<sup>7</sup>

[12] 1091847 Ontario Ltd. submitted that its complaint was not complex and that it was rather SSC's multiple submissions related to claims of vexatious abuse of process by counsel for 1091847 Ontario Ltd. that unnecessarily added to the complexity and the length of time required for this complaint case. It noted that the Tribunal did not ultimately address this matter because it found that "it did not have a direct bearing on its analysis in respect of 1091847 Ontario Ltd.'s grounds of complaint."<sup>8</sup> In its view, if SSC had not raised this matter, 1091847 Ontario Ltd. would not have needed to file significant evidence to prove that the accusations were untrue and the level of complexity of the complaint case would have been Level 1 or less.

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<sup>5</sup> *Canada (Attorney General) v. Georgian College of Applied Arts And Technology*, 2003 FCA 199 (CanLII) at para. 25.

<sup>6</sup> *Guideline* at para. 4.1 and Appendix A. The *Guideline* is not binding on the Tribunal.

<sup>7</sup> *1091847 Ontario Ltd.* at para. 138.

<sup>8</sup> *Ibid.* at para. 134.

[13] 1091847 Ontario Ltd. also noted that the COVID-19 pandemic and other reasons related to counsel for 1091847 Ontario Ltd.'s personal situation added to the length of time needed to deal with the complaint. 1091847 Ontario Ltd. submitted that it should not be penalized for having taken longer to respond as a result of these limitations.

[14] SSC submitted that 1091847 Ontario Ltd.'s request for decreased costs should be dismissed as the case reached a higher level of complexity due to 1091847 Ontario Ltd.'s conduct during the proceedings, including its refusal to follow direction from the Tribunal, its attempts to enlarge the scope of the complaint and its repeated requests for the production of documents. SSC also noted that 1091847 Ontario Ltd. raised unnecessary conflict of interest issues relating to activities that did not involve counsel for SSC, requested additional time to secure legal counsel (but did not do so), and attempted to split its case by submitting in its comments on the GIR new arguments and evidence that could have been submitted as part of the original complaint.

[15] SSC further noted that, while it is 1091847 Ontario Ltd.'s position that the claims of vexatious abuse of process made by SSC were untrue, the Tribunal did not make any finding in that regard.

[16] When the Tribunal issued its preliminary indication of the level of complexity for this complaint case, it had already discounted the complexity that was added as a result of SSC's claims of vexatious abuse of process by counsel for 1091847 Ontario Ltd. The Tribunal's preliminary indication that the level of complexity of the case was between Levels 2 and 3 was based entirely on other factors, including the complexity of the complaint itself, but more importantly on 1091847 Ontario Ltd.'s conduct during the proceedings.

[17] As explained in the reasons for its determination, 1091847 Ontario Ltd. repeatedly requested the issuance of production orders by the Tribunal, raised multiple new grounds of complaint in its comments on the GIR, filed documents and submissions that failed to comply with the Tribunal's *Confidentiality Guidelines*, and changed its views on previous confidentiality designations, requiring the resubmissions of documents. Moreover, as noted by SSC, the proceedings were also made unnecessarily complicated by the fact that 1091847 Ontario Ltd. raised conflict of interest issues relating to activities that did not involve counsel for SSC and attempted to split its case by submitting in its comments on the GIR new arguments and evidence that could have been submitted earlier.

[18] That being said, the Tribunal does acknowledge that some of 1091847 Ontario Ltd.'s requests for extensions and accommodations were granted for reasons related to counsel for 1091847 Ontario Ltd.'s personal situation and that this should not be regarded as having complicated the proceedings. For this reason, the Tribunal finds it appropriate to reduce the level of complexity for the complaint case to Level 2 and the amount of the cost award to \$2,750.

### **Cancellation of the procurement at issue**

[19] 1091847 Ontario Ltd. indicated that it received documents from SSC on August 12, 2021, which show that SSC cancelled and de-committed the funds for the procurement at issue in early February 2021, prior to the filing of the GIR.<sup>9</sup> It requested that the Tribunal cancel its determination because, in its view, the Tribunal lacks jurisdiction to make a determination once a procurement is cancelled.

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<sup>9</sup> Exhibit PR-2020-070-48 at 5, 7.

[20] 1091847 Ontario Ltd. also submitted that, based on its past experience, the Tribunal orders the dismissal of a complaint when it is informed that the procurement has been cancelled. It therefore submitted that, if SSC had acted in good faith and properly informed the Tribunal of the cancellation, it would have saved 1091847 Ontario Ltd. a great deal of time and effort. On this basis, it requested that, if the Tribunal decided not to cancel its determination, it not award any costs to SSC or consider awarding 1091847 Ontario Ltd. its costs incurred in proceeding with the complaint.

[21] SSC explained that, because of the timing of the complaint, it would not likely be able to award a contract and receive delivery of the goods before the fiscal year-end (i.e. March 31, 2021) and that, given the considerable amount of funds allotted for this requirement, the only prudent action was to de-commit the funds from the 2020-2021 fiscal year, which allowed them to be used for another purpose before they lapsed.

[22] SSC stated that the procurement was at no time cancelled during the complaint proceedings and that it was only after it received the Tribunal's determination, in May 2021, that it determined that it did not have the required funds in the new fiscal year and thus cancelled the procurement.

[23] The Tribunal is satisfied with the explanation provided by SSC to the effect that it only de-committed the funds for the procurement at issue from the 2020-2021 fiscal year in February 2021 and that the procurement was therefore not cancelled at any time prior the issuance of the Tribunal's determination. The Tribunal notes that, even if the procurement had been cancelled in February 2021, this would not have deprived the Tribunal of its jurisdiction to continue the inquiry and issue a determination.<sup>10</sup> Moreover, although the Tribunal has the discretion to cease an inquiry pursuant to subsection 30.13(5) of the *CITT Act* if it deems it appropriate, it is under no obligation to do so.<sup>11</sup>

[24] In light of the foregoing, the Tribunal maintains its cost award to SSC in the amount of \$2,750.

## CONCLUSION

[25] The Tribunal reduces the level of complexity for the complaint case to Level 2 and the amount of the cost award to \$2,750. The Tribunal directs 1091847 Ontario Ltd. to take appropriate action to ensure prompt payment.

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Randolph W. Heggart

Randolph W. Heggart  
Presiding Member

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<sup>10</sup> See *Adéland Soucy (1975) Inc. v. Department of Public Works and Government Services* (24 June 2009), PR-2008-062 (CITT) [*Adéland Soucy*] at paras. 11-32. See also *R.P.M. Tech Inc. v. Department of Public Works and Government Services* (24 February 2014), PR-2013-028 (CITT) at paras. 8-9; *Lanthier Bakery Ltd. v. Department of Public Works and Government Services* (6 May 2015), PR-2014-047 (CITT) at paras. 22-23.

<sup>11</sup> See *Adéland Soucy* at para. 28.