

## Frequently Asked Questions

This document is intended to assist suppliers in understanding and navigating the procedural requirements of the new Bid Protest Mechanism (“BPM”).<sup>1</sup> This document is **not** intended to be an interpretive guide, **does not constitute legal advice**, and **does not replace** the specific obligations of the trade agreements or the BPM.

### 1. What is the Bid Protest Mechanism (BPM)?

The BPM is an administrative review process which provides suppliers with an independent arbitral process to resolve complaints that a specific procurement by a government entity from British Columbia, Alberta, Saskatchewan or Manitoba was not conducted in compliance with the rules of one or more of the following trade agreements:

1. [New West Partnership Trade Agreement \(NWPTA\)](#);
2. [Canadian Free Trade Agreement \(CFTA\)](#);
3. [Canada-European Union \(EU\) Comprehensive Economic and Trade Agreement \(CETA\)](#);
4. [Comprehensive and Progressive Agreement for Trans-Pacific Partnership \(CPTPP\)](#); and
5. [World Trade Organization Agreement on Government Procurement \(WTO-GPA\)](#).

The BPM process involves three phases:

1. [Consultations](#);
2. [Initiation of proceedings, including the selection of an arbiter](#); and
3. [Arbiter’s report](#).

### 2. Is the BPM process the only review procedure available to me?

No. Some government entities may have other administrative review procedures in place for resolving disputes arising out of procurements. Using these or other review procedures has no bearing on the time limitations in the BPM.

### 3. Who can use the BPM?

To access the BPM, a supplier must be from a jurisdiction that is a party to one of the trade agreements to which the BPM applies.

### 4. What is a covered procurement?

The BPM applies to disputes related to specific procurements covered by one of the trade agreements listed in Article 1 of the BPM.

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<sup>1</sup> As established by the Agreement Among the Parties to the New West Partnership Establishing the Bid Protest Mechanism.

To determine if a procurement is covered by one of the trade agreements, you will need to establish:

**(a) Whether the government entity is covered by at least one of the trade agreements.**

Generally speaking, the following government entities of the Provinces of British Columbia, Alberta, Saskatchewan and Manitoba are subject to the BPM:

- departments, ministries, agencies, boards, councils, committees and commissions;
- Crown corporations, government-owned commercial enterprises, and other entities that are owned or controlled by a Party to the BPM; and
- municipalities, school divisions, publicly-funded academic, health and social service entities, and any corporation or entity owned or controlled by one of the preceding (the “MASH” sector).

However, some government entities are not covered by a particular trade agreement for some or all of their procurements. Suppliers should note that:

- The NWPTA and the CFTA cover all government entities except for those that are specifically excluded.
- The CETA, CPTPP and the WTO-GPA cover only those government entities that are listed in the Annexes and Appendices to those trade agreements.

Each trade agreement reflects what was negotiated between a specific set of governments: for this reason, the government entities covered by each agreement are different from one agreement to the next.

**(b) Whether the procurement is valued over the relevant thresholds.**

DEPARTMENTS AND MINISTRIES	NWPTA Part II, Article 14.1(a)	CFTA* Article 504.3(a)	WTO-GPAT† Appendix I, Annex 2	CPTPP† Annex 15-A	CETA† Annex 19-2
Goods	\$10,000	\$30,300	\$651,000	\$651,000	\$366,800
Services	\$75,000	\$121,200	\$651,000	\$651,000	\$366,800
Construction	\$100,000	\$121,200	\$9,100,000	\$9,100,000	\$9,100,000

CROWN CORPORATIONS	NWPTA Part II, Article 14.1(b)	CFTA* Article 504.3(c)	WTO-GPAT	CPTPP†	CETA† Annex 19-3	
					Section A	Section B‡
Goods	\$25,000	\$605,600	No coverage		\$651,000	\$733,600
Services	\$100,000	\$605,600			\$651,000	\$733,600
Construction	\$100,000	\$6,056,100			\$9,100,000	

MASH	NWPTA Part II, Article 14.1(C)	CFTA* Article 504.3(B)	WTO-GPAT† Appendix I, Annex 2	CPTPP† Annex 15-A	CETA† Annex 19-2
Goods	\$75,000	\$121,200	No coverage		\$366,800
Services	\$75,000	\$121,200			\$366,800
Construction	\$200,000	\$302,900			\$9,100,000

\* The procurement thresholds for the CFTA are adjusted with inflation by the Internal Trade Secretariat in accordance with Annex 504.4 of that Agreement. The values above are for 2022-2023.

† The procurement thresholds for the WTO-GPA, CPTPP and the CETA are fixed in Special Drawing

Rights. Periodically, these thresholds are adjusted to account for changes in currency strength. The values above are for 2022-2023.

‡ Section B entities are those involved in energy transmission, water treatment and distribution, electricity and gas distribution, and transit networks (see CETA, Annex 19-3, Section B).

### **(c) Whether the procurement is exempt from coverage.**

Each trade agreement has a number of party-specific and general exceptions as well as limitations on scope and coverage. Please review each trade agreement for more information.

Examples where certain obligations may not apply include:

- measures with respect to Aboriginal peoples;
- procurements from not-for-profit organizations or from persons with disabilities;
- procurements in urgent, unforeseen situations;
- where it can be demonstrated that only one supplier can meet the requirements of the procurement;
- procurement of goods and services intended for commercial resale; and
- procurement of health services and social services.

## **5. Who is involved in the BPM?**

The BPM involves:

1. a supplier or suppliers with a complaint regarding a covered procurement;
2. the procuring government entity;
3. an administrator – an independent contractor who provides administrative management of the BPM ([nwpta.administrator@shaw.ca](mailto:nwpta.administrator@shaw.ca)); and
4. an independent and objective arbiter selected from a roster of potential arbiters to review and adjudicate the dispute.

## **PHASES**

### **6. What are the phases of resolving a complaint on a specific procurement?**

There are three phases to a dispute under the BPM:

1. [Consultations](#);
2. [Initiation of proceedings, including the selection of an arbiter](#); and
3. [Arbiter's report](#).

## **PHASE 1: CONSULTATIONS**

### **7. What do I need to do during the consultation phase and what are my responsibilities?**

The consultation phase is designed to informally resolve disputes arising between a supplier and a government entity, before a supplier considers a request for arbitration. As one of the purposes of the

BPM is to resolve disputes in a timely manner, the BPM sets out a time limit during which a supplier may request consultations.

### **Time Limit**

A supplier must request consultations **within 10 days** after the day on which the supplier first knew, or reasonably should have known, of the government entity's alleged inconsistency with a trade agreement. If the supplier fails to request consultations within this specified time period, it loses its right to use the BPM to resolve the dispute.

The consultation process, including the requirements for suppliers, is set out in Article 2 of the BPM. Suppliers need to carefully adhere to what is set out in Article 2 when requesting consultations. A request for consultations must be in writing, and must be sent to both the government entity and the administrator.

As part of the request for consultations, the supplier may request that the procurement process be suspended or postponed while consultations are ongoing. The government entity may refuse to suspend or postpone the procurement. Article 2.3 has more details on the request to postpone or suspend the procurement process.

## **PHASE 2: INITIATION OF PROCEEDINGS, INCLUDING SELECTION OF ARBITER**

### **8. The matter was not resolved through consultations. What is my next step?**

If the matter is not resolved through consultations in Phase 1, the supplier may choose to proceed to arbitration. To initiate arbitration, the supplier must submit the following material to the administrator, with a copy to the government entity:

1. a written complaint that includes details of the alleged inconsistency;
2. a list of five potential arbiters;
3. a financial deposit of \$2,500; and
4. the signed consent form.

Please see the [Supplier Submission Checklist](#) for more details on the written submission.

### **Time Limit**

A supplier may initiate arbitration **within 14 days** following the conclusion of consultations. If the supplier fails to do so within this time period, it loses its right to use the BPM to resolve the dispute.

The selection of the arbiter and initiation of the arbitration process is set out in Article 3 of the BPM. A supplier needs to carefully follow what is set out in paragraphs 1 to 3 of Article 3 if it chooses to request an arbiter and initiate the arbitration process.

## 9. When and how is an arbiter chosen?

As part of the supplier's written request to initiate arbitration, the supplier must select five potential arbiters chosen from the arbiter roster established by the four Provinces (each Province appoints a roster of independent arbiters for this purpose). A supplier may choose a maximum of two potential arbiters from any one Province's roster.

The administrator is able to provide information to the supplier regarding the current arbiter roster, upon request.

Once the administrator receives the list of potential arbiters from the supplier, the administrator will determine the availability of those persons and will inform the relevant government entity accordingly. The government entity must choose one of the available candidates to arbitrate the dispute. Both of these steps may take up to seven days each.

## 10. Which trade agreement do I name in my request for the initiation of arbitration?

The BPM applies to disputes relating to specific procurements covered by the trade agreements listed in Article 1 of the BPM. To bring a complaint in the context of a specific procurement, that procurement must be covered by one of the trade agreements, and the supplier must have standing to bring a challenge under that trade agreement.

### **Alberta, Saskatchewan or Manitoba**

If the government entity responsible for the procurement is from Alberta, Saskatchewan or Manitoba, the supplier may initiate arbitration under the specific trade agreement it wishes to have an arbiter make a ruling under. In the event the supplier has standing under more than one trade agreement, the supplier must select which **one** of those trade agreements it wishes the arbiter to apply to the dispute.

### **British Columbia**

If the government entity responsible for the procurement is from British Columbia, and the supplier has standing under more than one trade agreement, the supplier may select multiple trade agreements it wishes the arbiter to apply to the dispute.

In both cases, the supplier must identify the detailed information concerning the alleged inconsistency with the agreement or agreements.

The public tender documents issued by the government entity may indicate which, if any, trade agreements the government entity considers the procurement to be subject to.

Most suppliers do not have standing to bring disputes under all of the trade agreements. Suppliers from British Columbia, Alberta, Saskatchewan and Manitoba will usually have two agreements to choose from, since these Provinces are signatory to both the NWPTA and the CFTA. Canadian suppliers from

other provinces or territories have standing under the CFTA. EU suppliers have standing under the CETA. Suppliers from CPTPP member countries have standing under that agreement. Suppliers from WTO-GPA member countries have standing under that agreement.

Suppliers will likely know from Phase 1 Consultations whether the government entity believes the procurement is exempt from one or more trade agreements.

## 11. What kind of remedies can I request?

Awards permitted by the BPM **do not** include claims for lost profits or other forms of contractual or non-contractual damages. The supplier is able to request only the following remedies:

1. **Tariff cost awards**, which are costs incurred relating to the dispute resolution process itself. This includes the costs paid by the supplier for a lawyer, counsel or agent, charges for postage, courier service and other disbursements, to a maximum of \$5,000 per disputant; and
2. **Bid preparation cost awards**, which are certain demonstrable costs incurred relating to the bid preparation. This includes the material, labour and other costs identified in Schedule 4 of the BPM, to a maximum of \$50,000 across all suppliers participating in disputes relating to a specific procurement.

The supplier should also identify in its submission how it recommends **operational costs** be allocated between the disputants. Operational costs refer to the cost of the arbiter and administrator relating to the specific dispute. Operational costs are calculated in accordance with Schedule 3 of the BPM.

## 12. How much is the financial deposit?

When making its initial request for the appointment of an arbiter, the supplier must provide a financial deposit of \$2,500. The request will not be considered complete until the financial deposit is received.

### Time Limit

To ensure the supplier submits a complete request within the 14 days, suppliers should address the financial deposit requirement without delay.

Acceptable forms of payment include a direct wire transfer, bank draft, or certified cheque made payable to the administrator.

The arbiter may request that the supplier provide an additional financial deposit in order to more fully cover the estimated operational costs of the proceedings. If the supplier does not provide such additional financial deposits, the proceedings will automatically be terminated and the dispute is deemed to be resolved. The supplier will thereby lose its right to use the BPM to resolve the dispute.

## 13. Do I need to include confidential information in my request for arbitration?

Suppliers may choose what supporting documentation to include in their requests to initiate arbitration. The supplier must provide detailed information concerning the factual grounds of the dispute and the

alleged inconsistency with the specified trade agreement(s). Should the supplier believe that parts of its submission are confidential and should not be released to the public, the supplier should indicate clearly in writing what elements of its submission are confidential. The arbiter will make a determination respecting the confidentiality of that information. If information is designated as confidential, the government entity, the arbiter and the administrator must respect that designation, unless the arbiter orders otherwise.

The government entity, in its response, is similarly entitled to designate information as confidential. The supplier and arbiter must respect that designation, unless the arbiter orders otherwise.

Government entities subject to the BPM may also be subject to provincial freedom of information and privacy legislation. Information provided to the government entity through the BPM could be subject to freedom of information requests.

#### **14. What is next after submitting my request for arbitration?**

Once a supplier has requested the initiation of proceedings, the government entity has 14 days to respond to each of the supplier's allegations and the supplier's submission regarding cost awards. The government entity's reply should include submissions on the allocation of operational costs and, if requesting a tariff cost award, supporting documentation. A failure to respond precludes the government entity from submitting any further material to the arbiter unless the arbiter requests or authorizes further submissions.

#### **Time Limit**

A supplier may submit a counter-reply to the government entity's submissions **within 7 days** of the delivery of the government entity's reply. The counter-reply must be sent to the government entity and the administrator.

### **PHASE 3: ARBITER'S REPORT**

#### **15. What happens after the arbiter has received the submissions?**

The arbiter has 10 days after the delivery of the last submission (the reply or counter-reply) to reach a decision and issue a report, though the arbiter may extend that timeline by another 10 days if they are unable to meet the first deadline. In their report, the arbiter will consider only the submitted written material and the obligations of the named trade agreement(s), in light of the procedures of the BPM. Specifications regarding the content of the arbiter's report are detailed in Article 5.7 of the BPM.

#### **16. What if another supplier has a similar request?**

If, before an arbiter renders their report, one or more additional requests to initiate arbitration (*i.e.* by another supplier) are delivered to the administrator relating to the same specific procurement, the arbiter will consolidate the disputes. However, the arbiter may refuse to consolidate the disputes if consolidation would be contrary to the interests of a fair and efficient resolution of the disputes.

In the event that multiple requests are consolidated, the arbiter will establish a new timeline and will deliver the arbiter's report within 10 days of the delivery of the final submission by the disputants. The arbiter may request additional submissions from the disputants; however, nothing requires any of the suppliers to alter their requests for the initiation of arbitration.

If the arbiter determines that the consolidation would be contrary to the interests of a fair and efficient resolution of the disputes, a separate arbitration process will be initiated for the subsequent request.

## 17. Is the arbiter's report public?

Yes. The arbiter's report will be posted to the New West Partnership web site, <http://www.newwestpartnership.ca/>.

Publication of the arbiter's report is subject to the rules respecting the designation of confidential information.

## 18. What are the potential outcomes of the arbiter's decision?

The arbiter's report will contain findings of fact, determinations as to whether the specific procurement was consistent with the applicable trade agreement(s) and, if applicable, recommendations as to how a government entity can bring itself into compliance with the named trade agreement(s).

The arbiter may also make three different kinds of monetary awards, as follows:

1. **Tariff cost award, which covers costs relating to the dispute resolution process itself:** This includes a counsel or agent's fees and related postal, courier or other disbursements, to a maximum of \$5,000 per disputant. Tariff cost awards are discretionary and can be issued against a supplier or government entity.
2. **Operational cost award, which covers costs incurred by the arbiter and administrator:** This includes per diem fees and disbursements incurred by the arbiter as well as fees and disbursements of the administrator directly relating to the particular dispute. More information on operational costs can be found in Schedule 3 of the BPM, Operational Cost Awards. Operational cost awards are mandatory, but the arbiter determines which of the disputants bears the costs of the dispute.
3. **Bid preparation cost award, which covers certain costs relating to the bid preparation:** The maximum amount of bid preparation costs that can be awarded against a government entity is \$50,000 per specific procurement. This means that if multiple disputes relating to a single specific procurement proceed to arbitration, the total amount of bid preparation cost awards across all related proceedings is subject to that maximum. If this cap is reached, the arbiter or arbiters will determine how this amount is split between the suppliers. More information on what is allowed in determining a supplier's bid preparation costs can be found in Schedule 4 of the BPM, Bid Preparation Cost Awards. Bid preparation cost awards are discretionary, and can only be issued against a government entity, and not a supplier.



## 19. What if I believe my complaint was not properly dealt with?

### **Time Limit**

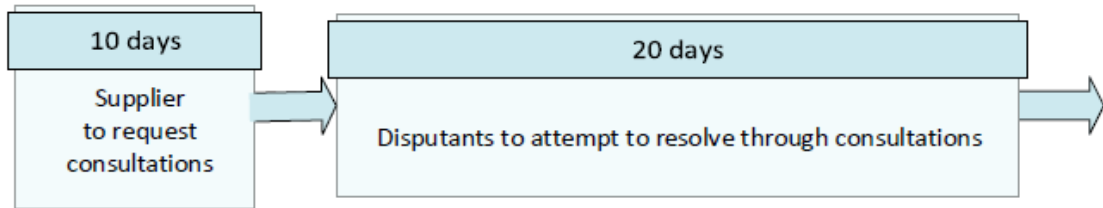
**Within 15 days** of the release of the arbiter's report, a disputant may request a judicial review of the arbiter's report in the superior court of the Province responsible for the government entity.

The court on judicial review may examine the arbiter's report and the proceedings for issues related to procedural fairness, the arbiter's jurisdiction, or evidence that the award was obtained by fraud.

The payment of any cost awards is suspended while judicial review is ongoing.

## Bid Protest Mechanism – Timeline

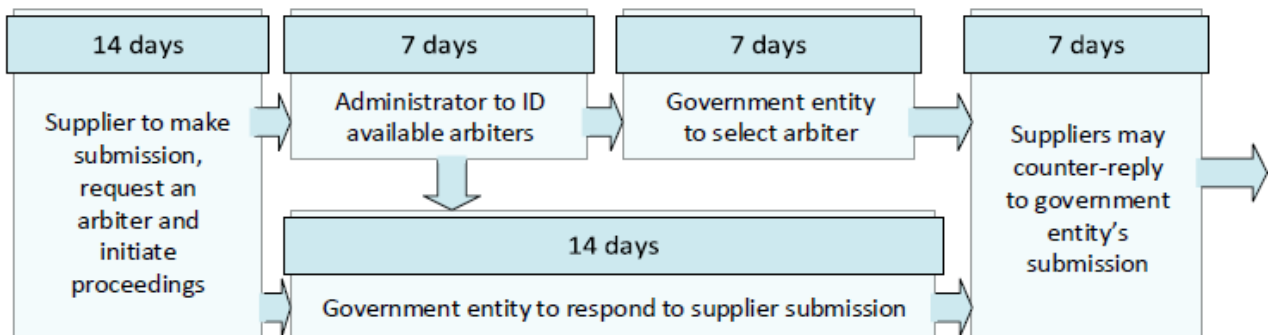
### Phase One: Consultations



Running timeline



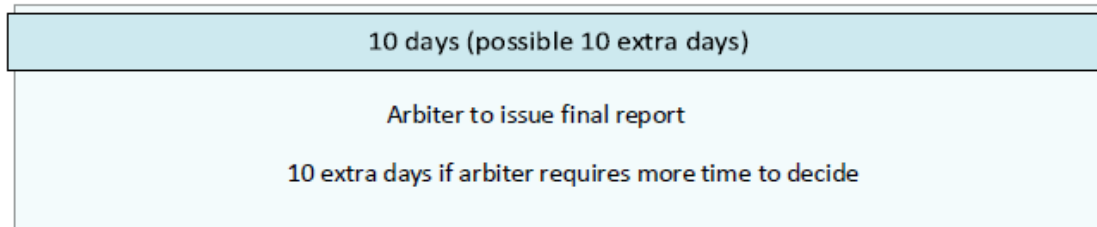
### Phase Two: Initiation of Proceedings, including the Selection of Arbitrator



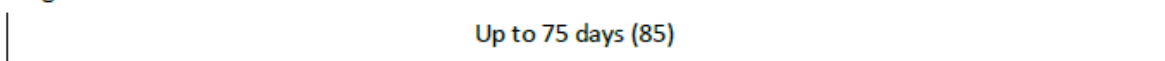
Running timeline



### Phase Three: Arbitrator's Report



Running timeline



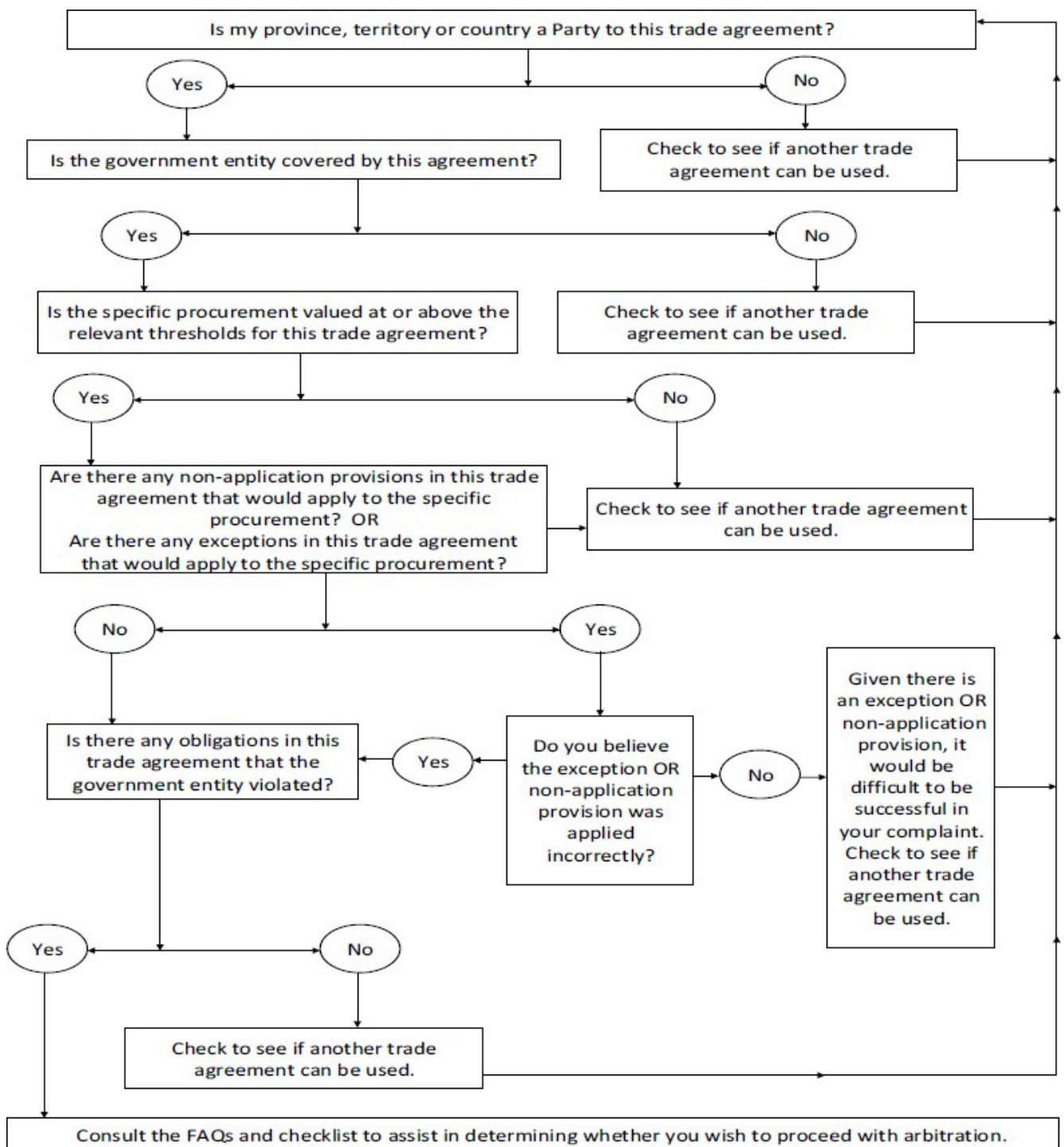
## How Do I Know Which Trade Agreement to Select?

This flowchart is intended to help suppliers determine which trade agreement(s) to name in their request for arbitration. Currently, the BPM applies to the following trade agreements:

1. [New West Partnership Trade Agreement \(NWPTA\)](#);
2. [Canadian Free Trade Agreement \(CFTA\)](#);
3. [Canada-European Union \(EU\) Comprehensive Economic and Trade Agreement \(CETA\)](#);
4. [Comprehensive and Progressive Agreement for Trans-Pacific Partnership \(CPTPP\)](#); and
5. [World Trade Organization Agreement on Government Procurement \(WTO-GPA\)](#).

Note:

- If the government entity is from British Columbia, the supplier may name more than one trade agreement in the supplier's submission.
- If the government entity is from Alberta, Saskatchewan or Manitoba, the supplier may name only one trade agreement in the supplier's submission.



Note: In the event that your concern is not covered by any trade agreement, the BPM may not be an appropriate review procedure for this complaint.

## BPM Request for Arbitration, Article 3.3 Supplier Submission Checklist

NOTE: A request for arbitration is not considered to be complete until all items on this checklist have been sent to the administrator.

<b>CHECKLIST</b>	
<input type="checkbox"/>	The identity of the supplier, and the address and contact person or counsel of record for further communications.
<input type="checkbox"/>	The name of the procuring government entity.
<input type="checkbox"/>	The title and reference number of the procurement (if applicable).
<input type="checkbox"/>	Detailed information regarding the factual grounds for the supplier's dispute
<input type="checkbox"/>	The name of the trade agreement that forms the basis for the dispute. If the government entity is from: <ul style="list-style-type: none"> <li>• British Columbia, the supplier can name more than one trade agreement; and</li> <li>• Alberta, Saskatchewan or Manitoba, the supplier can name only one trade agreement.</li> </ul>
<input type="checkbox"/>	Detailed information concerning the alleged inconsistency with the named trade agreement(s).
<input type="checkbox"/>	Copies of all relevant documentation and correspondence relating to the procurement (e.g. request for tenders, addenda, the supplier's bid).
<input type="checkbox"/>	Documentation relevant to awards being requested, including: <ul style="list-style-type: none"> <li>• supporting documentation on the actual cost of bid preparation and submission; and</li> <li>• supporting documentation of the costs for legal representation relating to the dispute.</li> </ul>
<input type="checkbox"/>	Submissions on the allocation of operational costs.
<input type="checkbox"/>	List of five potential arbiters: <ul style="list-style-type: none"> <li>• potential arbiters must be selected from the roster established by the Parties; and</li> <li>• no more than two candidates for arbiter can be selected from any one Party's nominees.</li> </ul>
<input type="checkbox"/>	A signed consent in accordance with Schedule 2 of the BPM.
<input type="checkbox"/>	Financial deposit of \$2500 payable to the administrator in accordance with Schedule 2 of the BPM.