Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DETERMINATION AND REASONS

File No. PR-2018-036

Temprano and Young Architects Inc.

v.

National Capital Commission

Determination and reasons issued
Tuesday, February 26, 2019

Canada

TABLE OF CONTENTS

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

AND FURTHER TO a decision to conduct an inquiry into the complaint pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*.

BETWEEN

TEMPRANO AND YOUNG ARCHITECTS INC. **Complainant**

AND

THE NATIONAL CAPITAL COMMISSION **Government Institution**

DETERMINATION

Pursuant to subsection 30.14(2) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal determines that this complaint is not valid.

The Canadian International Trade Tribunal determines that it will not award costs in this matter.

Cheryl Beckett

Cheryl Beckett
Presiding Member

Tribunal Panel:	Cheryl Beckett, Presiding Member
Support Staff:	Laura Colella, Counsel
Complainant:	Temprano and Young Architects Inc.
Government Institution:	National Capital Commission
Counsel for the Government Institution:	Gerald H. Stobo Marc McLaren-Caux

Please address all communications to:

The Registrar
Secretariat to the Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: citt-tcce@tribunal.gc.ca

STATEMENT OF REASONS

[1] On October 19, 2018, Temprano and Young Architects Inc. (Temprano & Young) filed this complaint with the Canadian International Trade Tribunal (the Tribunal) regarding a Request for Standing Offers (RFSO) issued by the National Capital Commission (NCC) (File No. LW082). The intent of the RFSO was to issue approximately 12 Standing Offers to architectural consulting firms to provide services to the NCC on an "as and when requested" basis.

[2] On September 21, 2018, the NCC notified Temprano & Young in writing that it was not successful in its bid, specifying:

> Unfortunately, your technical proposal for the General category did not pass the minimum requirement of 80%. The technical score obtained was [redacted] on 100.[1]

[3] Temprano & Young alleges that the procuring entity has failed to evaluate its bid in accordance with the evaluation process and essential criteria set out in the tender documents, and did not exercise due diligence to ensure a fair and unbiased evaluation. Temprano & Young further alleges that the debriefing revealed that the structure of the essential requirements of the tender was flawed and could not result in a fair and impartial evaluation.

BACKGROUND

[4] On April 25, 2018, the NCC published the RFSO. Temprano & Young submitted its Technical Bid and its Financial Offer to the NCC for this RFSO.

[5] The RFSO process closed on June 12, 2018.

[6] On September 21, 2018, the NCC informed Temprano & Young by email that it was not the successful bidder. On October 16, 2018, a debrief session was held between Temprano & Young and the NCC. It is during this debrief session that Temprano & Young alleges it became aware of its grounds of complaint.

RELEVANT TERMS OF THE RFSO

[7] Section 6.1.6 of the Terms of Reference for the Standing Offer Agreement reads:

> 6.1.6 The material in each Part will be evaluated individually to confirm whether the proponent satisfies all requirements of the Terms of Reference for that Part. Evaluations will be conducted as follows:
>
> • The proponent's proposal must achieve at least 24 points (80%) for Part 1 material in order for its Part 2 material to be reviewed. If a proposal does not achieve 80% for its Part 1 material, the proposal will receive no further consideration;

---

1. The NCC notes in its Government Institution Report, at page 10, that the "regret letter sent to the Complainant stated in error that its proposal had received [redacted] points in the technical evaluation and should have stated that the Complainant's proposal received no further consideration because it failed to achieve the minimum number of points for Part 1."

> • The proponent's proposal must achieve at least 28 points (80%) for its Part 2 material in order for its Part 3 material to be reviewed. If a proposal does not achieve 80% for its Part 2 material, the proposal will receive no further consideration;
>
> • The proponent's proposal must subsequently achieve at least 28 points (80%) for its Part 3 material in order to be considered technically qualified and have its fee proposal considered. If a proposal does not achieve 80% for its Part 3 material, the fee envelope will not be opened and the proposal will receive no further consideration.

POSITIONS OF THE PARTIES

Temprano & Young's position

[8] Temprano & Young's position that the NCC acted unreasonably can be summarized as follows:

- The structure of the submission requirements was flawed and could not result in a fair and impartial evaluation: Temprano & Young alleges that the evaluation ought to have been structured in a manner that would have required evaluators to evaluate each of the three parts independently and without having access to the totality of the bid.

- The contracting authority did not abide by the essential requirements of the tender and did not act in accordance with the criteria and essential requirement specified: Temprano & Young alleges that the evaluation of its bid was not conducted in accordance with the RFSO and that evaluators were influenced by the totality of the bid when evaluating Part 1. Temprano & Young submits that during the debrief, it learned that the evaluators had reviewed Parts 2 and 3 of its bid. Temprano & Young alleges that the evaluators took into consideration elements of Parts 2 and 3 to evaluate Part 1 of its bid, and deemed its bid non-compliant based upon information disclosed in Parts 2 and 3.

- The contracting authority did not exercise due diligence with respect to ensuring that the information provided by the potential supplier insured a fair and unbiased review: Temprano & Young alleges that the NCC failed to contact a reference it submitted to provide information on work it could not submit in its bid due to security requirements. Furthermore, Temprano & Young alleges that evaluators improperly considered an auto-reference. Finally, Temprano & Young alleges that a fairness advisor ought to have been used in the process.

The NCC's position

[9] The NCC submits that Temprano & Young's first argument was filed outside the timelines prescribed in the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[2] (the *Regulations*) and that, even if it had not been, denies that the process was flawed or unfair, either in structure or in the manner in which the evaluation was conducted.

2. S.O.R./93-602.

[10] The NCC denies that it did not abide by the essential requirements of the RFSO. It submits that while other elements were discussed in the debrief, the evaluation was conducted as per the requirements of the RFSO.

[11] With respect to Temprano & Young's allegation that the NCC failed to exercise due diligence in the evaluation, the NCC submits that the RFSO did not require it to contact a bidder's references, nor was there a requirement to involve a fairness monitor in the procurement process.

[12] Finally, the NCC submits that even if Temprano & Young had met the essential requirements in the technical evaluation, given its financial proposal, it would not have ranked "within the top-four proposals" in its stream and would not have been awarded a Standing Offer in any event. As such, the NCC submits that there was no lost profit for Temprano & Young.

Temprano & Young's reply

[13] Temprano & Young does not respond to the NCC's argument that the first ground of complaint is time-barred. It submits that all three parts of the proposal ought not to have been assessed simultaneously and that it believes that the proposal was not evaluated sequentially.

[14] In addition to the arguments Temprano & Young already made with respect to the second ground of complaint, it also adds that it is concerned by the fact that the evaluators did not provide it with copies of the evaluation scoresheet and "other materials"[3].

[15] With respect to the third ground of complaint, Temprano & Young specifies that it was concerned with the fact that the NCC did not contact one *particular* reference provided in its proposal, given that the work that had been done for that reference could not, according to Temprano & Young, be disclosed in the proposal itself due to security requirements.

[16] Temprano & Young also takes issue with the fact that the NCC received an "internal reference"[4] from someone who had in the past worked with Temprano & Young. Temprano & Young believes that the fact that the NCC verified the auto-reference means that it adds a precondition to having done work for the NCC in order to be successful it its bid. Temprano & Young alleges that this causes a "significant advantage" for those firms who have already done work for the NCC. Regardless, Temprano & Young denies all allegations that any work done previously by its firm was not done well or had to be redone, and rejects information provided by the "auto-reference".

ANALYSIS

[17] Subsection 30.14(1) of the *Canadian International Trade Tribunal Act*[5] (the *CITT Act*) requires that, in conducting an inquiry, the Tribunal limit its considerations to the subject matter of a complaint.[6] At the conclusion of the inquiry, the Tribunal must determine whether a complaint is valid on the basis of whether the procedures and other requirements prescribed in respect of the

3. Exhibit 21c, Vol. 2, Temprano & Young's response to the GIR, page 19 of 35.
4. In the RFSO, referred to as an « auto-reference ».
5. R.S.C., 1985, c. 47 (4th Supp.).
6. In consideration of which, the Tribunal's role is to assess only the allegations that formed part of the complaint filed by Temprano & Young on October 19, 2018.

designated contract have been observed. Section 11 of the *Regulations* provides that the Tribunal is required to determine whether the procurement was conducted in accordance with the applicable trade agreements. For the following reasons, the Tribunal has determined that the first ground of complaint was not filed within the prescribed time limits and the following two grounds of complaint are not valid.

Allegations about the structure of the submission requirements are late.

[18] Subsections 6(1) and 6(2) of the *Regulations* provide that a potential supplier who makes a complaint before the Tribunal shall make it within 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier. Alternatively, a potential supplier may make an objection regarding a procurement to the relevant government institution, and if it is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

[19] Temprano & Young suggests that because the entire Technical Bid was available to the evaluators, they would have been influenced by the material in each part while evaluating the other parts. It submits that the RFSO ought to have required each part to be submitted in sealed envelopes so that it is only if Part 1 was deemed compliant that Part 2 would be assessed, and so on.

[20] However, the structure of the process was clearly laid out in the RFSO and thus bidders should reasonably have become aware of it upon reading the RFSO, which would have occurred, at the latest, at the bid closing date. As such, if Temprano & Young considered that the structure or criteria of the RFSO raised fairness concerns or were otherwise inconsistent with the requirements of the trade agreements, it had 10 working days from becoming aware of the structure or criteria of the RFSO to file an objection or a complaint in that respect.

[21] If a potential supplier believes that there is a flaw in the invitation to tender, it must file a complaint in a timely manner. The procurement review process does not provide for grievances to be accumulated and then presented only when a proposal is rejected. In this regard, in *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*,[7] the Federal Court of Appeal stated the following:

> [18] In procurement matters, time is of the essence. . . .
>
> [20] . . . Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process. . . .
>
> [21] The Tribunal has made it clear, in the past, that complaints grounded on the interpretation of the terms of a [Request for Proposal] should be made within ten days from the moment the alleged ambiguity or lack of clarity became or normally ought to have become apparent.

7. *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 (CanLII).

[22] The Court added that a bidder must not adopt a "wait-and-see attitude" and make its challenge once the procurement process is over. It stated that this "is precisely the type of attitude that the procurement process and Regulations seek to discourage."

[23] Since Temprano & Young's issue stems from the evaluation procedures set out in the RFSO, it could therefore not wait for the rejection of its proposal before making an objection to the relevant government institution, or filing a complaint with the Tribunal. Rather, it was incumbent on Temprano & Young to do so within 10 working days after the day it became aware or reasonably should have become aware of the process set out in the RFSO.

[24] As such, the Tribunal finds that this allegation was not filed within the limits prescribed by the *Regulations*.

The contracting authority conducted the evaluation in accordance with the criteria and essential requirements specified in the RFSO

[25] The *Canadian Free Trade Agreement* provides that "[t]ender documentation shall include all pertinent details concerning the evaluation criteria that will be used in the evaluation of tenders, including the methods of weighing and evaluation . . . ."[8] It also specifies that a procuring entity shall "base its evaluation on the conditions that the procuring entity has specified in advance in its tender notice or tender documentation"[9] and, "[t]o be considered for an award, a tender shall . . . at the time of opening, comply with the essential requirements set out in the . . . tender documentation . . . ."[10]

[26] The Tribunal is typically deferential to evaluators in their evaluation decisions, and will normally only intervene if the evaluation is *unreasonabl*e, such as where the evaluators have not applied themselves in evaluating a bidder's proposal, have ignored vital information provided in a bid, have wrongly interpreted the scope of a requirement, have based their evaluation on undisclosed criteria, or have otherwise not conducted the evaluation in a procedurally fair way.[11]

[27] Temprano & Young alleges that during the debrief:

> The debriefer spoke only of issues related to staff experience and qualifications, project examples and design quality and awards. None of these issues were to be evaluated in Part 1. The debriefer made specific mention to the 10 Projects which were only referenced in Part 3. It appears that the evaluators reviewed the material in Parts 2 and 3 before evaluating Part 1. This is in violation of the procedures set out in the RFP.

[28] Temprano & Young further alleges that "the debriefer did not explain how our firm scored in any of these categories . . . ."

[29] The NCC confirms that it evaluated each part of the submission separately. It specifies that four individual evaluators scored the proposals separately and then they met to discuss their individual evaluations. One of the evaluators stopped scoring the complainant's bid after Part 1

---

8. *Canadian Free Trade Agreement*, article 509(7) [CFTA].
9. CFTA, article 507(3)(b).
10. CFTA, article 515(4).
11. See e.g. *Gallason Industrial Cleaning Services Inc. v. Department of Public Works and Government Services* (15 August 2018), PR-2018-002 at para. 31.

because Temprano & Young did not meet the minimum score in Part 1 after their individual evaluation. The other three evaluators continued evaluating the entire proposal because they would not know until after the evaluators' meeting if, overall, the bid would meet the minimum score for each part. Once the evaluators all agreed that the minimum score for Part 1 was not met, they did not discuss any of their comments relating to Parts 2 and 3.

[30] The NCC also specifies that in its letter of regret it mistakenly told Temprano & Young that it had received a certain number of points in the technical evaluation (including the unfinalized scores for Parts 2 and 3). The NCC admits that the letter should have simply stated that the proposal received no further consideration because it failed to achieve the minimum requirement of points for Part 1. The NCC also advised that one NCC official on the debrief call was one of the original evaluators who after scoring Part 1 had also reviewed subsequently Parts 2 and 3 of the bid. During the debrief call, the NCC acknowledges that references were made to Temprano & Young's overall bid (including Parts 2 and 3) as the evaluator had reviewed the entire bid during the evaluation process. The NCC advised that it provided this information to Temprano & Young as constructive feedback only.

[31] As quoted above, the Proposal Evaluation establishes that the evaluators would individually evaluate each part. Section 6.1.6. also establishes a scale which provides that Part 2 will not be evaluated if Part 1 doesn't achieve 80% of the required evaluation points and that Part 3 will similarly not be evaluated should the bidder not achieve 80% for its Part 2 materials.

[32] It appears from the information provided by the NCC that evaluators independently evaluated each bid. As such, they all evaluated and tabulated their own results on each of the parts sequentially and it was only after tabulating each of the evaluator's scores that a total score for each part was calculated. Because each evaluator would not know the score attributed to each part by other evaluators, and given that the total score may still be sufficient for each part to be deemed compliant, each of the evaluators, except for one, evaluated the entire proposal, each part having to meet a minimum point rating.

[33] This type of evaluation was not unreasonable in light of the published RFSO. Neither the evaluation procedure set out in the RFSO nor the provisions of the trade agreements specify that the mechanism for evaluation as outlined by Temprano & Young was required. While the NCC could have chosen a different method for the evaluation, the method it chose was reasonable and did not lead to an unreasonable result that would require the intervention of the Tribunal. The evaluation reports demonstrate that each part was evaluated sequentially with regard to its own criteria and bid materials. While Temprano & Young alleges that the evaluators must have been negatively influenced by their subsequent review of Parts 2 and 3 of the bid, the Tribunal is satisfied that the NCC evaluators properly evaluated Part 1 using only the information contained in Part 1 of the bid and were not influenced in hindsight by information in the other parts.

[34] As such, the Tribunal finds that this allegation is not valid.

The contracting authority exercised due diligence and insured a fair and unbiased review

[35] With respect to the issue of the absence of a fairness monitor, as raised by the complainant, there is nothing in the RFSO or any of the trade agreements that require the use of a fairness advisor, and the absence of one does not demonstrate that a procuring entity failed to exercise due diligence or insure fairness. As such, there is no foundation for this allegation.

[36] As for the issue of contacting references, Temprano & Young submits that the NCC ought to have contacted a particular reference it provided to substantiate some of the work it was allegedly unable to include in its bid, given security requirements of that other work.

[37] The RFSO requested that potential bidders submit three recent letters of reference:[12]

> Proponents should provide three recent letters of reference from clients, each for a distinct project that reached construction-completion in the last 5 years. Note: the letters of reference should focus on the firm's abilities and performance. *References may be contacted*.
>
> [Emphasis added]

[38] As per the provisions of the RFSO, the NCC was not obligated to contact references. It was incumbent upon Temprano & Young to ensure that its bid contained sufficient information to allow the evaluators to determine that it met the essential criteria for the process. Temprano & Young did request that the NCC contact its references due to its inability to provide detailed information in the bid for certain projects, citing national security concerns for those projects and clients. While this request is evident in the bid, it is also evident in the RFSO that the NCC is not required to comply with this request.

[39] While government institutions must evaluate bids thoroughly and carefully, the onus is on bidders to make sure that the bid is clear and complies with the mandatory criteria of the solicitation – including by making sure that all their supporting documentation is included with their bid, as required, and clearly demonstrates compliance. Ultimately, it is incumbent upon the bidder to exercise due diligence in the preparation of its proposal to ensure that it is unambiguous and capable of being properly understood by the evaluators. This includes the obligation to fully understand and follow the instructions and requirements of a solicitation. The Tribunal acknowledges the difficulty encountered by Temprano & Young to provide certain information in its bid where it was obliged to limit disclosure allegedly due to the security considerations of some its clients. While Temprano & Young highlighted references for the evaluators, the fact that the NCC did not proactively contact the references provided by Temprano & Young does not create an unfair or biased review by the NCC.

[40] With regard to the auto-reference, Temprano & Young argues at length that the information provided by the auto-reference was incorrect and should not have been considered in the evaluation of the bid. However, the RFSO permitted evaluators to take into account work that bidders had previously conducted in contracts with the NCC, at criterion 1.5:

> In case where the proponent has worked with/for the NCC, the NCC reserves the right to auto-reference past contract files in the evaluation of this rated requirement.

[41] As such, while the Tribunal has carefully considered the objection formulated by Temprano & Young with respect to the substance of the auto-reference, it remains that it was not unreasonable for the evaluators to take auto-references into account, as this was specifically provided for in the RFSO.

---

12. RFSO, section 5.1.2.1, criterion 1.5.

COSTS

[42] The NCC requested its costs in responding to the complaint.

[43] Although the Tribunal finds that the NCC did not breach the applicable trade agreements, it finds that the errors contained in the letter of regret dated September 21, 2018, with respect to the number of points Temprano & Young received in the evaluation as well as the information that was provided to Temprano & Young during the debrief session (although provided with the best of intentions) caused Temprano & Young to conclude that its bid was not evaluated fairly.

[44] For these reasons, the Tribunal determines that each party should bear its own costs.

DETERMINATION

[45] Pursuant to subsection 30.14(2) of the *CITT Act*, the Tribunal determines that the complaint is not valid.

[46] The Tribunal determines that it will not award costs in this matter.

Cheryl Beckett

Cheryl Beckett
Presiding Member