



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File No. PR-2021-048

Pye & Richards – Temprano &
Young Architects Inc.

*Decision made
Tuesday, October 26, 2021*

*Decision and reasons issued
Tuesday, November 9, 2021*

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

BY

PYE & RICHARDS – TEMPRANO & YOUNG ARCHITECTS INC.

AGAINST

THE DEPARTMENT OF FOREIGN AFFAIRS, TRADE AND DEVELOPMENT

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Peter Burn

Peter Burn

Presiding Member

STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*¹ provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*,² a potential supplier may file a complaint with the Canadian International Trade Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the *CITT Act* provides that, subject to the *Regulations*, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the *CITT Act*, it shall decide whether to conduct an inquiry into the complaint.

SUMMARY OF THE COMPLAINT

[2] This complaint by Pye & Richards – Temprano & Young Architects Inc. (PRTY) concerns a procurement by the Department of Foreign Affairs, Trade and Development (DFATD) for the provision of professional and technical architectural and engineering services for the updating of Canadian missions abroad (Solicitation No. 20-173640).

[3] In its complaint to the Tribunal, PRTY alleges that DFATD exhibited bias against proponents lacking experience working on projects for DFATD, and that this effectively made prior DFATD experience a condition of participation. Specifically, PRTY alleges that DFATD favoured an incumbent, the ultimately successful bidder for this solicitation, J.L. Richards & Associates Limited.³

[4] Additionally, PRTY alleges that DFATD evaluators deducted points when scoring its bid because, in their view, it lacked knowledge pertaining to the inner workings of DFATD, and experience working on projects for DFATD, particularly those pertaining to Canadian missions abroad. PRTY's argument, essentially, is as follows: one evaluator's comments discussing PRTY's "perceived lack of experience or knowledge of [DFATD] policy and procedures"⁴ indicates a bias of that evaluator, who in turn influenced the other evaluators, resulting in lower average points being awarded to PRTY.

[5] PRTY believes that DFATD also exhibited bias in the very manner in which the procurement process was structured. PRTY expressed the view that a "systemic bias permeates the evaluation process".⁵ In this regard, PRTY puts forward various alternative high-level suggestions or requests as to how it believes that the procurement ought to be, or ought to have been, structured.

PROCEDURAL HISTORY

[6] The solicitation was published on January 14, 2021, and closed on February 26, 2021.

[7] PRTY submitted a bid on or before the closing date.

[8] On May 6, 2021, DFATD sent a regret letter to PRTY advising it that its bid did not achieve the highest total scores in the Rated Requirements (SR5) section or the Price Proposal (SR6) section.

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

² SOR/93-602 [*Regulations*].

³ Exhibit PR-2021-048-01 at 7; Exhibit PR-2021-048-02 at 86.

⁴ Exhibit PR-2021-048-01 at 10.

⁵ *Ibid.* at 11.

The letter advised that a contract had been awarded to J.L. Richards & Associates Limited, the value of which DFATD later confirmed to be CAD \$1,700,000.00.⁶

[9] On May 6, 2021, PRTY asked for a formal debrief.

[10] On May 19, 2021, DFATD asked the complainant to detail any specific issues on which it wanted to be debriefed. The same day, PRTY requested the following information: the points awarded for each section of the evaluation; the number of submissions; and the ranking of its technical and financial scores relative to other proposals. PRTY indicated that it wanted this information to assess whether not having previously worked for DFATD had been the determining factor in the ranking of proponents.

[11] On May 25, 2021, DFATD provided the complainant with the following information: its score on each of the three rated technical criteria; its total technical and financial scores and overall (combined technical and financial) score; and its ranking as the bidder with the second-highest overall score. The same day, PRTY responded, requesting additional information on the following points: the overall score of the successful proponent; the reason PRTY's proposal had not received a higher score on two of the rated criteria; and whether the latter fact was because the firm "did not have [DFATD] or recent international experience".⁷

[12] On June 8, 2021, counsel for PRTY sent DFATD an "objection letter", requesting additional information regarding the bid evaluations, notably a further explanation of the scoring it had received, as well as information regarding the successful bidder's scoring and price proposal.

[13] On June 11, 2021, DFATD's counsel acknowledged PRTY's correspondence and indicated that a response would be forthcoming, but in very general and vague terms: "We will review the correspondence and will *soon* get back to you"⁸ [emphasis added].

[14] On June 28, 2021, DFATD sent a follow-up email to PRTY, apologizing for the delay and stating that DFATD was "working to get back to you as soon as possible regarding your client's letter of objection".

[15] On September 7, 2021, more than two months after DFATD's first assurance of a prompt answer to its queries, PRTY followed up with DFATD, requesting a response to its letter of June 8, 2021, by September 17, 2021.

[16] On September 9, 2021, DFATD sent PRTY a letter containing additional information regarding the scoring of its bid, including the individual and consensus scoring sheets.

[17] On September 10, 2021, PRTY requested further information from DFATD, namely: 1) the top-level score awarded to the successful proponent; 2) the evaluated price of the procurement; and 3) the successful proposal's consensus score for each rated requirement.

[18] On September 13, 2021, DFATD's counsel answered PRTY saying they would get back to the complainant upon reviewing its request.

⁶ Exhibit PR-2021-048-02 at 84; Exhibit PR-2021-048-01 at 27.

⁷ Exhibit PR-2021-048-02 at 73.

⁸ *Ibid.* at 75.

[19] On September 17, 2021, PRTY filed a first complaint with the Tribunal (File No. PR-2021-044).

[20] On September 23, 2021, the Tribunal decided that PRTY's complaint was premature because PRTY had not yet been denied relief by DFATD, despite the time the department was taking to respond.⁹ The Tribunal noted that its decision did not preclude PRTY from filing a new complaint within 10 working days of receiving a response from DFATD if it still considered itself to have been aggrieved or, alternatively, if DFATD failed to provide a response within a reasonable time frame.¹⁰

[21] On September 28, 2021, PRTY asked DFATD to respond, by October 15, 2021, to its request for additional information of September 10, 2021.¹¹

[22] On October 18, 2021, DFATD provided PRTY with a response, discussing among other things the quality of its overall proposal as well as the relative merits of the successful bidder's proposal.¹²

[23] On October 21 and 22, 2021, PRTY filed this second complaint with the Tribunal. It argues that DFATD's response of October 18, 2021, had not addressed its allegations of bias favouring proponents with previous DFATD experience.¹³

ANALYSIS

[24] Pursuant to sections 6 and 7 of the *Regulations*, after receiving a properly documented complaint (i.e. one that complies with subsection 30.11(2) of the *CITT Act*), the Tribunal may conduct an inquiry into the complaint if all of the following conditions are met:

- i. the complaint has been filed within the time limits prescribed by section 6;
- ii. the complainant is a potential supplier;
- iii. the complaint is in respect of a designated contract; and
- iv. the information provided discloses a reasonable indication that the government institution did not conduct the procurement in accordance with the applicable trade agreements.

[25] For the following reasons, the Tribunal finds that the complaint does not disclose a reasonable indication of a breach of the trade agreements. Further, to the extent that PRTY's comments on the structure of the procurement constitute a distinct ground of complaint, the Tribunal finds that this ground of complaint was not filed within the time limits prescribed by section 6 of the *Regulations*.

No reasonable indication of a breach of the trade agreements

[26] PRTY alleges that the results of the evaluation demonstrate bias on the part of DFATD in favour of an incumbent supplier who was ultimately the successful proponent. PRTY claims, among

⁹ *Pye & Richards – Temprano & Young Architects Inc.* (24 September 2021) PR-2021-044 (CITT) at para. 21.

¹⁰ *Ibid.* at paras. 22-23.

¹¹ Exhibit PR-2021-048-01 at 22-24.

¹² *Ibid.* at 25-30.

¹³ *Ibid.* at 9.

other things, that awarding points on the basis of experience working on “projects of similar size and scope” meant that the bidders would score more points if their experience included work on projects with DFATD, “which would put all other bidders at a disadvantage compared to the incumbent proponent”.¹⁴

[27] As evidence, PRTY points to comments by one of the individual evaluators, under technical requirement SR5.2 (Experience of Personnel), that “[t]he narrative could have provided greater detail of the scope of the work at the embassies”. The same evaluator commented, under SR5.3 (Approach to the Delivery of Services), that PRTY’s suggestions for how to optimize projects under this requirement demonstrate that “the proponent lacks some level of understanding of [DFATD’s] business, process and project requirements”. PRTY argues that these comments demonstrate “a mindset of an evaluator or evaluators who have lost focus of their responsibility to rigorously apply objective requirements in their review of the proponents submitted material as outlined in the RFP”, and that it was “punished” because it lacked “insider knowledge” of “unpublished DFATD policies or procedures”.¹⁵

[28] The Tribunal has consistently found that, while certain situations may arise where bidders have a competitive advantage regarding a particular procurement process, it does not necessarily follow that the solicitation is biased.¹⁶ The Tribunal has also stated that competitive advantages may stem from an array of different sources, including incumbency, but that this is not, in itself, considered to be unfair¹⁷ and that “there is no obligation to offset the effect of incumbency in the formulation of solicitations . . .”.¹⁸ Similarly, in *Almon*, the Federal Court of Appeal reasoned that “the fact that one bidder is better able than another to meet the specifications of an RFP does not in itself necessarily mean that the requirements of the RFP are biased in favour of that bidder”.¹⁹

[29] These findings do not displace the prohibition in the trade agreements against structuring a procurement to prevent participation by non-incumbents. However, in the absence of evidence demonstrating that the requirements of a procurement are “discriminatory, impossible to meet or unreasonable”, the fact that a potential supplier is unable to meet them does not mean that the requirements are inconsistent with the applicable trade agreements.²⁰

[30] In the Tribunal’s view, nothing in the present complaint indicates that awarding points based on experience with “projects of similar size and scope” was other than a legitimate operational requirement. Nor does it appear to have been impossible for PRTY to meet this requirement given

¹⁴ Exhibit PR-2021-048-02 at 86-87.

¹⁵ Exhibit PR-2021-048-01 at 9-10.

¹⁶ *M.D. Charlton Co. Ltd. v. Department of Public Works and Government Services* (24 April 2017), PR-2017-002 (CITT) at paras. 27-28.

¹⁷ *Le Groupe Conseil Bronson Consulting Group v. Department of Public Works and Government Services* (23 June 2017), PR-2016-058 (CITT) at para. 34.

¹⁸ *Ibid.* citing *Corel Corporation v. Department of Public Works and Government Services* (26 October 1998), PR-98-012 and PR-98-014 (CITT).

¹⁹ *Almon Equipment Limited v. Canada (Attorney General)*, 2012 FCA 318 (CanLII) [*Almon*] at para. 11.

²⁰ *Almon Equipment Limited* (3 January 2012), PR-2011-023 (CITT) at para. 72; see also *R.P.M. Tech Inc. v. Department of Public Works and Government Services* (25 March 2015), PR-2014-040 (CITT) at paras. 26-29; *Lions Gate Risk Management Group v. Department of Public Works and Government Services* (18 December 2020), PR-2020-024 (CITT) at paras. 44-47, 54-57.

the high points its proposal received under SR5.1 and SR5.2 (the two requirements including this criterion).

[31] PRTY received high points under each requirement, and the second-highest overall score. In the Tribunal's view, the fact that another bidder received slightly higher points and that the experience included in its proposal, which received a top score, may have been gained through incumbency does not indicate bias. Indeed, given that PRTY received the second-highest overall score, nothing appears to suggest that it would have been denied the contract had another proposal not received an even higher score. DFATD's letter of October 18, 2021, provides a cogent explanation as to why another proposal was awarded more points. It provides PRTY with the relative merits of the winning bid in respect of the technical requirements, including the demonstration of project experience.

[32] Based on the evidence from the evaluation records and the debriefing information provided by DFATD, the Tribunal fails to see how experience working on projects for DFATD can be characterised as having been a condition of participation, as opposed to merely a source of experience that was highly relevant under the terms of the evaluation. The fact that the successful bidder had prior experience working on projects at embassies, and with DFATD, can therefore be more accurately described as a competitive advantage, which, as outlined above, the Tribunal has found to not, in and of itself, indicate a discriminatory solicitation.

[33] The Tribunal was provided with no evidence whatsoever to support PRTY's contention that one evaluator contaminated others through a purported bias. The Tribunal notes that the evaluator whose comments PRTY alleges demonstrate bias awarded higher individual scores to PRTY's proposal under SR5.2 and SR5.3 than did the other two evaluators. It is therefore difficult to see on what basis it can be inferred that this evaluator acted as a "thought leader" in influencing the other evaluators to arrive at a lower consensus score than otherwise would have been the case.

[34] In fact, the very allegation of bias made by PRTY in respect of that evaluator is also entirely unsupported by any evidence whatsoever. The Tribunal has consistently found that it is not sufficient for a complainant to simply state that it believes there is bias, but that the complainant must offer sufficient evidence to support its claim.²¹ The Tribunal also generally presumes the good faith and honesty both of the bidders and of the public servants,²² such that "the complainant must provide sufficient evidence to overcome this assumption".²³

[35] The Tribunal reminds complainants that allegations of impropriety (such as bias) by public servants ought to be brought only after careful consideration of whether they are appropriate. The Tribunal recognizes that the overwhelming majority of public servants act in the honourable discharge or their duties to the Crown and Canadians and uphold the *Values and Ethics Code for the Public Sector*.²⁴ Mistakes happen. On balance they are rare, and when they do the Tribunal's

²¹ *Sunny Jaura d.b.a. Jaura Enterprises* (31 January 2019), PR-2018-058 (CITT) at paras. 13, 15; *SoftSimTechnologies Inc.* (26 March 2020), PR-2019-068 (CITT) at paras. 38-39.

²² *SoftSim Technologies Inc. v. Department of Foreign Affairs, Trade and Development* (11 June 2020), PR-2019-053 (CITT) at para. 77; *MasterBedroom Inc. v. Department of Public Works and Government Services* (28 June 2017), PR-2017-017 (CITT) at para. 12; *GESFORM International* (27 May 2014), PR-2014-012 (CITT) at para. 16.

²³ *2484726 Ontario Inc. d.b.a. Brion Raffoul v. Department of Public Works and Government Services* (4 March 2021), PR-2020-064 (CITT) at para. 69.

²⁴ Online: <<https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049>>.

experience is that they are typically inadvertent. Fraud, bias, or anything similarly willfully and premeditatively untoward are extremely rare occurrences.

[36] The Tribunal notes that the technical evaluations contained scoring rubrics noting the number (or range) of points to be awarded for varying levels of quality of the responses under the various requirements. The Tribunal finds them to be straightforward.

[37] Further, the Tribunal has consistently found that, in the context of a consensus-based evaluation, individual scores are not determinative but rather serve as a starting point for evaluators' discussion when deciding how many points to award for specific criteria. Consensus scores will therefore not always reflect the average or median of individual scores, and discrepancies between the two are not a sufficient basis from which to infer unfairness or unreasonableness.²⁵ In short, evaluations of this sort are achieved as a result of the iterative process of the individuals of an evaluation team acting as a collective that ultimately adheres to a consensus score.

[38] In the present complaint, the Tribunal sees nothing to suggest that having experience working on "projects of similar size and scope" was other than a legitimate operational requirement, or that having experience working on projects for DFATD was necessary to be awarded points under the requirements that included this criterion.

[39] Nor do the evaluation records contain anything to suggest to the Tribunal that there was bias on the part of the evaluators, or DFATD more broadly.

[40] For the foregoing reasons, this Tribunal rejects this ground of complaint on the basis that it does not disclose a reasonable indication of a breach of the applicable trade agreements.

Grounds of complaint relating to the structure of the procurement are late

[41] PRTY's complaint also includes several suggestions for how DFATD could differently structure procurements such as this one. These appear to be largely forward-looking in nature, and PRTY acknowledges that "it may not be in CITT's mandate to advise [DFATD] how to structure their procurement calls".²⁶ However, to the extent that these suggestions constitute a separate ground of complaint regarding the structure of the procurement at issue, the Tribunal finds that they are late.

[42] Pursuant to subsections 6(1) and (2) of the *Regulations*, a potential supplier must either raise an objection with the procuring government institution or file a complaint with the Tribunal no later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the supplier.

²⁵ *ACT for Performance Inc. v. Department of Foreign Affairs, Trade and Development* (15 June 2021), PR-2020-085 (CITT) at paras. 162, 168; *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (9 October 2014), PR-2014-015 and PR-2014-020 (CITT) at para. 144, application for judicial review dismissed 2015 FCA 272; *Deloitte Inc.* (25 July 2017), PR-2016-069 (CITT); *Solutions Moerae Inc. o/a MSI v. Industry Canada* (12 September 2016), PR-2016-004 (CITT) at para. 60.

²⁶ Exhibit PR-2021-048-01 at 11.

[43] In this regard, the Tribunal considers that PRTY should reasonably have become aware of this ground of complaint, at the earliest, at the time the RFP was published (i.e. January 14, 2021) or, at the latest, when PRTY submitted its bid to DFATD (i.e. February 19, 2021).²⁷

[44] Accordingly, the deadline for PRTY to make an objection to DFATD would have been 10 working days from February 19, 2021.

[45] PRTY only brought its objection to DFATD's attention on October 21, 2021, after the RFP had already been awarded to the winning bidder and several months after it should reasonably have become aware of any grounds of complaint regarding the structure of the RFP.

[46] As the Federal Court of Appeal stated in *IBM Canada*, "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".²⁸ It is up to the bidder to make sure to consider any issues in a solicitation and to file any complaint in a timely manner.

[47] Consequently, the Tribunal finds that that this ground of complaint was filed beyond the time limits set out in the *Regulations* and, therefore, cannot be considered by the Tribunal. Moreover, as it appears to be premised on the same allegations of bias in favour of incumbents which have already been addressed in these reasons, even if this ground of complaint had been submitted in a timely fashion, the Tribunal would find that it does not disclose a reasonable indication of a breach of the trade agreements for the same reasons as outlined above.

[48] For the foregoing reasons, the Tribunal finds that this complaint does not disclose a reasonable indication of a breach of the applicable trade agreements and further, that any grounds of complaint pertaining to the overall structure of the procurement process are late.

DECISION

[49] Pursuant to subsection 30.13(1) of the *CITT Act*, the Tribunal has decided not to conduct an inquiry into the complaint.

Peter Burn
Peter Burn
Presiding Member

²⁷ Exhibit PR-2021-048-02 at 11.

²⁸ *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.*, 2002 FCA 284 [*IBM Canada*] at para. 20.