



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Procurement

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## DECISION AND REASONS

File PR-2021-068

Baja Construction Canada

*Decision made  
Wednesday, February 2, 2022*

*Decision and reasons issued  
Wednesday, February 16, 2022*

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.

**BY**

**BAJA CONSTRUCTION CANADA**

**AGAINST**

**THE PARKS CANADA AGENCY**

**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.

Georges Bujold  
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Georges Bujold  
Presiding Member

## STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> (CITT Act) provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*<sup>2</sup> (Regulations), 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] The complaint by Baja Construction Canada (Baja) relates to a Request for Proposal (RFP), solicitation 5P468-21-0180/A, issued by the Parks Canada Agency (PCA) for the design and construction of office space at the Lake Louise Visitor Centre in Banff National Park.

[3] In its complaint, Baja alleges that the evaluators of the bids were not qualified and, as such, the procurement process was conducted unfairly. Specifically, Baja claims that the evaluators lacked proper qualifications and practical experience in the relevant design and construction services. In Baja's view, this situation resulted in an unreasonable assessment of the bids submitted in response to the RFP, including the unfair scoring of its own bid.

[4] For the reasons set out below, the Tribunal has decided not to conduct an inquiry into the complaint.

### BACKGROUND

[5] On November 30, 2021, PCA published the RFP on Buyandsell.gc.ca. The deadline for bid submissions was December 21, 2021.

[6] On January 10, 2022, PCA informed Baja that it would not be issued a contract and that the contract had been awarded to another bidder. PCA also advised Baja that the evaluation team had determined that its bid did not comply with all of the mandatory requirements of the RFP, including achieving the minimum pass mark of 60 out of a possible 100 points under the point-rated technical evaluation.<sup>3</sup> On the same day, Baja requested a "formal review" as well as a list of the evaluators and their respective qualifications in design-build projects.<sup>4</sup>

[7] On January 12, 2022, Baja repeated its request to PCA for information concerning the evaluators' qualifications.<sup>5</sup> On January 13, 2022, PCA assured Baja that its concerns would be addressed at the debrief.<sup>6</sup> The debrief took place on January 17, 2022.

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<sup>1</sup> R.S.C., 1985, c. 47 (4th Supp.).

<sup>2</sup> SOR/93-602.

<sup>3</sup> Exhibit PR-2021-068-01 at 10.

<sup>4</sup> Exhibit PR-2021-068-01.A at 38.

<sup>5</sup> *Ibid.* at 49.

<sup>6</sup> *Ibid.* at 53.

[8] Baja sent its notice of objection to PCA on January 19, 2022, stating that the three members of the evaluation board did not have the required experience to be “reviewing or administering an RFP of this nature and have created an unfair advantage through not properly grading the RFP”.<sup>7</sup>

[9] On January 25, 2022, PCA responded to Baja’s objection, stating that the bid evaluation results had been reviewed and it had been determined to be fair and in accordance with the evaluation requirements stipulated in the RFP. PCA also stated that it had no concerns with respect to the experience or ability of the evaluators.<sup>8</sup>

[10] On January 19, 2022, Baja filed its complaint with the Tribunal.

[11] On January 21, 2022, pursuant to subsection 30.12(2) of the CITT Act, the Tribunal notified Baja that its complaint did not comply with subsection 30.11(2) and that additional information was required before it could be considered filed. The Tribunal requested that Baja provide various documents relating to the solicitation as well as clarification regarding the grounds of complaint.<sup>9</sup>

[12] On January 28, 2022, Baja filed additional documents with the Tribunal as well as further submissions with respect to its grounds of complaint. That same day, the Tribunal considered the complaint to have been filed.<sup>10</sup>

## ANALYSIS

[13] On February 2, 2022, pursuant to subsection 30.13(1) of the CITT Act, the Tribunal decided not to conduct an inquiry into the complaint.

[14] Pursuant to sections 6 and 7 of the Regulations, after receiving a complaint that complies with subsection 30.11(2) of the CITT Act, the Tribunal must determine that the following four conditions are met for it to conduct an inquiry:

- (i) the complaint has been filed within the time limits prescribed by section 6 of the Regulations;
- (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 procurement has not been conducted in accordance with the relevant trade agreements.

[15] For the following reasons, the Tribunal finds that the complaint does not meet the fourth condition noted above. That is, the Tribunal does not find that the ground of complaint discloses a reasonable indication of a breach of the relevant trade agreements.

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<sup>7</sup> *Ibid.* at 41, 42.

<sup>8</sup> *Ibid.* at 39.

<sup>9</sup> Exhibit PR-2021-068-02.

<sup>10</sup> Paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules* provides that, in the case of a complaint that does not comply with subsection 30.11(2) of the CITT Act, the complaint is considered to have been filed “. . . on the day that the Tribunal receives the information that corrects the deficiencies in order that the complaint comply with that subsection.”

[16] In this case, Baja alleges that PCA failed to properly constitute the RFP “review panel”, resulting in an improper and unfair solicitation process. According to Baja, during the debrief, it became apparent to it that the members of the RFP’s review panel did not have the “proper qualifications and practical experience in the design and construction of similar type projects.”<sup>11</sup> Baja submits that its bid was unfairly assessed due to the alleged inexperience of the evaluators.

[17] In its complaint, Baja made submissions with respect to the work experience of the individual evaluators. For instance, Baja alleges that one evaluator was a “labourer” of PCA, with no prior experience in design or construction of similar facilities. Another evaluator was described as “Project Manager” with less than seven years of practical experience and no prior experience with any project of similar scope to the RFP. Similarly, in respect of another evaluator, Baja alleges that the individual was “Project Manager” with less than four years of experience in construction but no prior design-build experience or any background in architecture. An evaluator was also described as a project manager that was listed on LinkedIn as a “labourer” of PCA with less than four years of experience.<sup>12</sup> Baja also submitted screenshots of a page from three individuals’ online employment profiles.<sup>13</sup>

[18] To demonstrate that the evaluators were not qualified, Baja pointed to certain alleged deficiencies with respect to the evaluation results. Baja submitted that the reasons provided for the scores did not align with the RFP documents and failed to account for its experience in successfully completing projects of a similar scope and magnitude. Moreover, Baja lost points for including information in its bid that was requested in the RFP. Baja submitted that it was penalized for listing “[K]ootenay [F]ield unit” in its bid and that PCA requested the inclusion of “layout planning and design documents”, which is contrary to architectural professional standards for providing “free services” in Alberta.<sup>14</sup> Baja submits that its bid was unfairly graded and that, had the review panel been properly constituted with individuals that had the appropriate knowledge and experience relevant to the project, the unfair evaluation results would not have occurred. According to Baja, the evaluators did not review its bid “in full” and did not understand the requirements of the project, which resulted in the project being awarded to an underqualified construction firm with minimal experience. Baja noted that, during the debrief, one of the evaluators could not directly answer questions posed by Baja regarding the evaluation.

[19] With respect to the evaluation of bids submitted in response to the RFP, the RFP states that “[t]he Technical Portion of competitive bids are evaluated, without knowledge of the price, by the Technical *Evaluation Board*”<sup>15</sup> [emphasis added]. According to the RFP’s glossary of terms, “Evaluation Board” was defined as follows:

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<sup>11</sup> Exhibit PR-2021-068-01.A at 1.

<sup>12</sup> Exhibit PR-2021-068-01 at 7.

<sup>13</sup> Exhibit PR-2021-068-01.A at 65–67. From this information, it appears that these individuals were the three evaluators on the evaluation board. While Baja’s complaint was not clear in this regard and does not include conclusive evidence indicating that these individuals were the actual evaluators assigned to the procurement at issue by PCA, the Tribunal assumed that this was the case to assess the merits of Baja’s allegations.

<sup>14</sup> Exhibit PR-2021-068-01 at 7.

<sup>15</sup> See the RFP at 9, online:

<[https://buyandsell.gc.ca/cds/public/2021/11/30/e45afd488cc81d717993b7c5711b5691/e\\_-\\_5p468-21-0180\\_db\\_rfp.pdf](https://buyandsell.gc.ca/cds/public/2021/11/30/e45afd488cc81d717993b7c5711b5691/e_-_5p468-21-0180_db_rfp.pdf)>.

The board established to evaluate and rate proposals. Board members represent a *broad cross-section of professional qualifications and experience*.

[Emphasis added]

[20] The RFP therefore did not require that the members of the evaluation board possess any specific type of qualification or experience or, more precisely, as submitted by Baja, “practical experience in the design and construction of *similar type projects*” [emphasis added]. There was no provision in the RFP that obligated PCA to select evaluators that had the type of practical experience described by Baja, i.e. work experience on projects similar to the one described in the RFP. Additionally, the RFP did not specify how the qualifications of the evaluators would be assessed by PCA. The RFP merely referred to the evaluation board as having a *cross-section* of professional qualifications and experiences, implying that the qualifications and experiences of the evaluators would be varied.

[21] The Tribunal’s finding in this regard is consistent with previous cases. For instance, in *Berlitz*,<sup>16</sup> the Tribunal noted that the applicable trade agreement stipulated that the procuring entity shall award the contract in accordance with the criteria and essential requirements specified in the tender document.<sup>17</sup> As such, absent specific provisions in the RFP with respect to the qualifications of the evaluators, the procuring entity could not be found to be in breach with respect to its assignment of evaluators.<sup>18</sup>

[22] Insofar as the RFP provided no detailed standards regarding the “professional qualifications and experience” of the evaluators, and Baja considered it necessary that the evaluators possess certain “practical experience” in relation to projects like the one contemplated in the RFP, the onus was on Baja to seek clarification regarding, or request amendments to, the provisions of the RFP governing the composition of the technical evaluation board before the RFP’s closing date. The Tribunal has previously stated that bidders are responsible for obtaining clarification on any questions that arise before submitting an offer. Bidders cannot adopt a “wait-and-see attitude” in procurement complaints in which time is of the essence, and the procurement review process does not provide for grievances to be accumulated and then presented only when a proposal is rejected.<sup>19</sup> At that time, it is too late to complain about perceived deficiencies in the conditions specified in the RFP or allege that the procuring entity should be held to standards that are not set out in the solicitation documents.

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<sup>16</sup> *Berlitz Canada Inc.* (18 July 2003), PR-2002-066 (CITT) [*Berlitz*].

<sup>17</sup> In the present case, PCA was subject to the same obligation, under article 515(5) of the Canadian Free Trade Agreement, to award the contract based solely on the evaluation criteria specified in the RFP.

<sup>18</sup> In *Berlitz*, the Tribunal found that the RFP did not require that qualified pedagogical personnel be assigned to evaluate the bids.

<sup>19</sup> *ADR Education v. Department of Public Works and Government Services* (18 October 2013), PR-2013-011 (CITT) at para. 59; *Temprano and Young Architects Inc. v. National Capital Commission* (26 February 2019), PR-2018-036 (CITT) at paras. 21, 22. The Tribunal has also discussed, in prior cases, the scope of the procuring entity’s obligation to disclose the qualifications of the individual evaluators. See *Nations Translation Group Inc. v. Department of Public Works and Government Services* (23 June 2020) PR-2019-071 (CITT) [*NTGI*] at para. 37; *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation and Innovapost Inc.* (27 August 2014), PR-2014-006 (CITT) at para. 66. These precedents do not support the view that the trade agreements impose a general obligation to disclose the identity and personal qualifications of the evaluators, even during a debrief meeting.

[23] Moreover, the Tribunal finds that the screenshots of individual employment profiles online<sup>20</sup> are unpersuasive as evidence that the evaluators were not qualified to evaluate the bids. As discussed above, Baja has not indicated the applicable qualification standards that would have applied according to the terms set out in the RFP. Without any such standards, the online profiles do not demonstrate that the evaluators did not possess adequate qualifications or experience for their role in evaluating the bids.<sup>21</sup> In fact, in the Tribunal's opinion, the limited evidence provided by Baja concerning the identity and qualifications of the alleged evaluators rather suggests that they represented a broad cross-section of professional qualifications and experience, as was contemplated by the RFP. The Tribunal also notes the following statement from PCA's correspondence to Baja on January 25, 2022, regarding the issue of the evaluators' qualifications:

PCA has no concerns in relation to the experience or ability of the evaluation board members involved with the evaluation of the bids received for this project. *The basis of your information about the evaluation board members, as previously mentioned, is not up to date and should not be relied upon for the purposes of determining the suitability of any evaluation member.*<sup>22</sup>

[Emphasis added]

[24] For the reasons above, the Tribunal has no reasonable basis to second-guess PCA's decision with respect to its evaluators or conclude that the purported members of the technical evaluation board were not qualified to perform the evaluation of the bids.

[25] Finally, with respect to Baja's submissions concerning deficiencies in the evaluation of its bid, as noted above, these were to demonstrate that the evaluators lacked the appropriate qualifications. In the Tribunal's view, alleged deficiencies with respect to the scoring of the bid is not in itself indicative of unqualified evaluators. To find otherwise would amount to the Tribunal substituting its own judgment for that of the evaluation board, something that, as it stated repeatedly, it refrains from doing unless there is evidence that the evaluation was unreasonable.<sup>23</sup> Just like any issue with respect to an evaluator's qualifications must be weighed against applicable requirements set out in the RFP, any issues with respect to the evaluation itself must be assessed against the evaluation criteria set out in the RFP.

[26] In this regard, Baja failed to specify which evaluation criteria were not properly assessed by the evaluators. The Tribunal is also unable to find that Baja substantiated its incidental allegations concerning deficiencies in the evaluation itself with cogent evidence that would provide a reasonable indication of any wrongdoing on the part of the evaluators.

[27] Indeed, it is manifest that Baja did not raise a separate ground of complaint with respect to the evaluators' consideration of the RFP's evaluation criteria. In its letter to Baja dated January 21, 2022, the Tribunal sought clarification as to whether there were any grounds of complaint in addition to the allegation concerning the qualifications of the evaluators. The Tribunal indicated that, if there were any other grounds of complaint, a detailed explanation was required. The

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<sup>20</sup> Exhibit PR-2021-068-01.A at 65–67.

<sup>21</sup> Previously, in *Doran Canadian Expo Consortium* (12 February 1999) PR-98-029 (CITT), the Tribunal found that there was no evidence on the record on which to base the complainant's allegation that the members of the evaluation board were not qualified.

<sup>22</sup> Exhibit PR-2021-068-01.A at 39.

<sup>23</sup> See, for example, *Excel Human Resources Inc.* (2 March 2012), PR-2011-043 (CITT) at para. 33.

Tribunal provided as an example that, if there was a ground of complaint related to the evaluation of a particular requirement of the RFP, the requirement should be identified (with reference to the relevant section of the RFP) and accompanied by an explanation as to how the evaluation was not conducted in accordance with the trade agreements.<sup>24</sup>

[28] In its additional submissions, Baja confirmed that its grievance was with respect to PCA's constitution of the RFP's evaluation board and how this led to an unfair solicitation process. While Baja submitted that its bid was fully compliant with the tender documents, it provided no indication with regard to the relevant criteria in the RFP that were not properly evaluated and did not explain how it should have received more points for certain criteria in light of the information contained in its bid. The Tribunal is unable to consider a matter for inquiry in the absence of some evidence in support of a claim. In this regard, the Tribunal has consistently held that mere allegations are insufficient to establish a reasonable indication of a breach of the trade agreements.<sup>25</sup> Therefore, even assuming for the sake of argument that Baja challenged the evaluation itself, the Tribunal finds that its allegations in this respect are not adequately supported.

[29] In summary, on the Tribunal's review, the information provided with the complaint does not disclose a reasonable indication that the evaluators did not apply themselves in evaluating Baja's proposal, ignored vital information provided in its bid, wrongly interpreted the scope of a requirement, based their evaluation on undisclosed criteria or otherwise acted unfairly.

## DECISION

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

Georges Bujold  
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Georges Bujold  
Presiding Member

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<sup>24</sup> Exhibit PR-2021-068-02 at 1.

<sup>25</sup> *NTGI* at para. 23; *Smiths Detection Montreal Inc.* (5 August 2020), PR-2020-016 (CITT) at para. 25; *Talmack Industries Inc.* (20 November 2018), PR-2018-040 (CITT) at para. 13.