

June 15, 2022

By email: mike.mahoney@ago.ca

Mr. Michael Mahoney
Project Director
Art Gallery of Ontario
317 Dundas Street West
Toronto, Ontario
M5T 1G4

Reference: **PRE-CONSTRUCTION SERVICES - AGO GLOBAL CONTEMPORARY
BID NUMBER: RFP 2022-15**

Dear Mr. Mahoney:

The Ontario General Contractors Association represents over 200 general contractors throughout Ontario. We provide the industry with a number of services including the review of tender documents and the entire tendering process. This is done in the belief that a clear, concise and equitable set of bidding documents, combined with a fair, open and transparent tendering process, will benefit all the parties involved: the design professional, the contractor and most importantly, the owner.

We have been directly advised by numerous OGCA contractors that they are very concerned with the onerous provisions contained in the above-mentioned tender.

The OGCA finds on behalf of our members that some of the tender language, tabled in the instructions for submission and in the supplementary conditions, are completely one-sided, onerous and dictatorial in nature and unless the language is amended accordingly, the bidders will have no choice but to qualify their tender submissions or refrain from bidding this project entirely.

The onerous language in question will be indicated below, and the OGCA has provided suggested language to assist in the facilitation of a mutually beneficial outcome. The language is found in the following sections:

Item 1

SUBMISSION FORM B – EXPERIENCE AND REFERENCE FORM

1. EXPERIENCE AND MINIMUM TECHNICAL REQUIREMENTS

Only those Proponents who respond affirmatively to all the questions below and meet the minimum technical requirements will be considered a “pass”. Proponents who do not pass Stage I will not proceed to Stage II of the evaluation process. A blank response for any question below will be interpreted as non-compliant. Proponents must select YES or NO in the Response column for all minimum technical requirements below.

- a. The Proponent confirms that they are in the process of constructing or have completed at least one (1) major museum or art gallery in Canada with a minimum hard cost of \$ 100,000,000 in the past ten (10) years and at least two (2) major cultural projects (theatre, concert hall, performing arts centre) with a value of more than \$75,000,000 each.

The OGCA would like to highlight these conditions as potentially problematic for the Art Gallery of Ontario (AGO) since it will greatly limit the number of qualified bidders that can submit. Typically,

when a project is anticipated to have an approximate budget, then the value of the previous projects to demonstrate ability should be in keeping with similar or like budgets. In the case of this project that budget has been indicated as the following:

Project Delivery:

The preliminary “hard cost” construction value of the new build is expected to be sixty-five million dollars; \$65 M in Canadian funds.

Project Description:

For working purposes, the approximate hard construction cost (design phase allowance, escalation, contingency) of the Project will be assumed to be sixty-five million dollars (\$65,000,000) in Canadian dollars.

In setting your criteria of completed projects to be, “...at least one (1) major museum or art gallery in Canada with a minimum hard cost of \$ 100,000,000 in the past ten (10) years...” is at a threshold of thirty-five percent (35%) higher than the actual anticipated and budgeted costs for the project will greatly limit the number of qualified bidders who can price this project.

Furthermore, adding a secondary component in the same requirement to also include, “... at least two (2) major cultural projects (theatre, concert hall, performing arts centre) with a value of more than \$75,000,000 each,” furthers to limit those contractors that can adequately satisfy this one prerequisite.

If it is the desire of the AGO to create an environment wherein only one or two bidders can qualify, then utilizing this type of requirement will ensure that is satisfied. If it is the desire of the AGO to obtain the greatest number of possible bidders who can also satisfy the criteria, then the OGCA strongly suggests that the threshold requirement of the first criterion be lowered to at least match the preliminary project budget and that the AGO employ the term “or” instead of “and” between the two separate and distinct criterion, since this would broaden the potential pool of qualified contractors that have successfully completed the type of project(s) being requested.

Item 2

SUBMISSION FORM B – EXPERIENCE AND REFERENCE FORM

1. EXPERIENCE AND MINIMUM TECHNICAL REQUIREMENTS

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- c. The Proponent has completed at least three (3) major hospital additions and/or renovations in Canada with a minimum hard cost of \$300,000,000 each.

The above noted criteria, similar to Item 1, only serves to further restrict the potential pool of qualified bidders to one or two. Additionally, the OGCA does not see a direct relation to how having the experience and expertise to construct a major hospital directly relates to the construction of an art gallery. The OGCA sees this criterion as excessive and will only serve to invalidate all bidders but perhaps one. The OGCA sees the inclusion of these types of requirements as a means for the AGO to publicly appear as if they are adhering to Ontario's Broader Public Sector Procurement Directive, but ultimately the criteria are set at a threshold that will clearly only avail one or two possible bidders. The inclusion of this criterion can be interpreted by the industry as a means for the AGO of circumventing the Ontario Broader Public Sector Procurement Directive and should not be employed by an organization of your stature or importance. The OGCA strongly recommends that this criterion be removed.

Item 3

SUBMISSION FORM B – EXPERIENCE AND REFERENCE FORM

1. EXPERIENCE AND MINIMUM TECHNICAL REQUIREMENTS

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- d. Has the Proponent read, understands and is materially in agreement with the Form of Agreement in Appendix A and acknowledges that only minor changes will be entertained?

On the surface this statement may seem innocuous, but upon further investigation this unilateral condition is completely one-sided and dictatorial in nature. Language like this is a means by the AGO to completely limit any risk exposure and instead to download that risk directly onto the contractor through the use of a "yes" or "no" check box in order to qualify. Appendix A is a lengthy agreement that, if not read and assessed completely, will have negative consequences for the contractor. And yet the AGO has decided that if the contractor does not check the "yes" box then said contractor will not qualify for the bid. This is negotiation under duress and not welcomed by the OGCA or by the construction industry as a whole. The AGO is better served in removing this condition and allowing qualified bidders to provide their assessment of the Appendix A agreement without this limiting linkage to a yes or no requirement.

Item 4

SUBMISSION FORM B – EXPERIENCE AND REFERENCE FORM

1. EXPERIENCE AND MINIMUM TECHNICAL REQUIREMENTS

Only those Proponents who respond affirmatively to all the questions below and meet the minimum technical requirements will be considered a "pass". Proponents who do not pass Stage I will not proceed to Stage II of the evaluation process. A blank response for any question below will be

interpreted as non-compliant. Proponents must select YES or NO in the Response column for all minimum technical requirements below.

- e. The Proponent is in the process of constructing or has completed at least three Gold and/or Platinum LEED projects and at least one (1) Net Zero Carbon certified building with a value of over \$50,000,000?

The language being utilized in this condition is rather confusing for bidders and the OGCA would like to highlight that when the AGO notes the term “certified” it carries the connotation of completeness and that the structure was both completed and then went through the certification process.

Additionally, the bundling of this type of criteria linking, “... three Gold and/or Platinum LEED projects **and** at least one (1) Net Zero Carbon certified building...” indicates that the AGO is seeking one or perhaps two contractors. As indicated, these types of requirements may look logical to a layperson or the AGO Board of Trustees, who will not have the requisite knowledge of what this type of conditions entails, but to the construction industry this can be interpreted as an attempt to circumvent the Ontario Broader Public Sector Procurement Directive. The OGCA strongly recommends that the AGO amend the above criteria to make them separate and distinct and to read “or” instead of linking them together through the use of “and” and therein greatly restricting those contractors that will be eligible to bid this project.

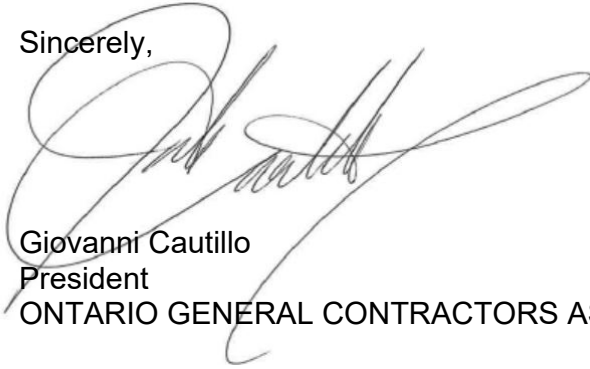
In conclusion, in order for the AGO to ensure that it allows for the maximum number of potential bidders to be allowed to bid this project, the OGCA strongly recommends that the AGO do the following:

1. Refrain from bundling and linking specific criteria together through the use of an “and” statement and instead employ and “or” statement to allow for an either-or scenario;
2. Have the criterion being requested to demonstrate past experience to be in keeping with and at least match the preliminary project budget of \$65 Million and not to be used as a potential limiting factor for bidding;
3. Completely remove the criterion noting that, “the Proponent has completed at least three (3) major hospital additions and/or renovations in Canada with a minimum hard cost of \$300,000,000 each.” The OGCA sees the inclusion of these types of requirements as a means for the AGO to publicly appear as if they are adhering to Ontario’s Broader Public Sector Procurement Directive, but ultimately the criteria are set at a threshold that will clearly only avail one or two possible bidders.
4. Remove the unilateral condition that is completely one-sided and dictatorial in nature noting that, “the Proponent read, understands and is materially in agreement with the Form of Agreement in Appendix A and acknowledges that only minor changes will be entertained.” Language like this is a means by the AGO to completely limit any risk exposure and instead to download that risk directly onto the contractor through the use of a “yes” or “no” check box in order to qualify.

The OGCA would like to work collaboratively with the Art Gallery of Ontario to ensure that all of the above noted recommendations on this construction project are achieved and we are available to meet at your convenience to assist in the overall framework of how to successfully achieve these targets.

Should you have any questions, please feel free to reach out to me at giovanni@ogca.ca or by phone at 905.671.3969.

Sincerely,



Giovanni Cautillo
President
ONTARIO GENERAL CONTRACTORS ASSOCIATION