

Arbiter's Final Report

March 01, 2018

In the matter of an Arbitration pursuant to Part IV (B) of the New West Partnership Trade Agreement (2010) together with the Protocols of Agreement since the signing of the Agreement (NWPTA).

Between

Parkland Geotechnical Consulting Ltd.

(Supplier)

And

The City of Red Deer

(Government Entity)

Province of Government Entity: Alberta

Arbiter: Lorne Dennis

Representation:

Supplier

Chapman Riebeek LLP
Suite 300, 4808 Ross Street
Red Deer, AB T4N 1X5
P: 403-346-6603
F: 403-340-1280
Attention Suzanne Alexander-Smith Q.C.

Government Entity

City of Red Deer
Suite 600, 4808 Ross Street
Red Deer, AB T4N 1X5
P: 403-406-8648
F: 403-342-7321
Attention: Gordon Beck Q.C.

Preamble

1. This arbitration is pursuant to the bid protest mechanism under Part IV (B) of NWPTA, (the Agreement). Specifically, Article 35, Part IV(B) of the Agreement, which addresses resolution of disputes for procurements covered under Article 14(1) .
 - 1.1. NWPTA 14.1 States: *Parties will provide open and non-discriminatory access to procurements of the following government entities...*
 - 1.2. Thereafter, part (c) identifies: *regional, local, district or other forms of municipal government, school boards, publicly-funded academic, health and social service entities, as well as any corporation or entity owned or controlled by one or more of the preceding entities where the procurement value is:*
 - 1.2.1. *\$75,000 or greater, for services, (identified in part ii)*
2. Parkland Geotechnical Consulting Ltd. (PGC) asserts that the City of Red Deer (CRD) through their management of a request for Pre-Qualification – RFPQ (Reference number AB-2017-03693) violated the Agreement by:
 - 2.1. Restricting the trade of non-parties
 - 2.2. Restricting the size of and ability to qualify for inclusion in a multi-use list, ostensibly used to both award CRD contracts to Consultants, and as an approved-source list for Consultants contributing to (third party) Developer submissions
 - 2.3. Failing to adequately identify evaluation and weighting criteria for the RFPQ
 - 2.4. Failing to provide appropriate de-briefing
3. As a matter of procedure: CRD states that PGC did not comply with the bid protest process – specifically that PGC delivered a written request for consultations after the time identified for delivery had expired
4. CRD further states that:
 - 4.1. Trade was not restricted in any way or at any level
 - 4.2. The NWPTA bid protest mechanism is an inappropriate tool for addressing CRD protocols regarding third-parties

- 4.3. CRD's protocols with regard to third-party use of only CRD-approved Consultants is acceptable as a *legitimate objective* under the Agreement: The objective identified by CRD is *public safety*
- 4.4. CRD has, subsequent to the RFPQ, agreed to allow access to the multi-use list, beginning in the first half of 2018
- 4.5. CRD's evaluation and weighting criteria were correctly and fully identified in the RFPQ
- 4.6. CRD was not obligated under NWPTA to provide de-briefing to PGC

Issues

5. Issues arising are:
 - 5.1. Did PGC meet the time requirements for entry into the NWPTA Bid Protest mechanism
 - 5.2. Does the NWPTA Bid Protest mechanism have jurisdiction and authority to address third-party issues
 - 5.3. Did CRD conduct the identified RFPQ in compliance with the NWPTA?
 - 5.3.1. Was the development, posting, evaluation, award, and de-brief of this RFPQ aligned with the Agreement

Procedural Determinations

6. With respect to 5.1 above, the critical question is when PGC knew or should reasonably have known of CRD's alleged inconsistency with NWPTA.
 - 6.1. CRD stated in the instructions and rules of the RFPQ, (Section 11: Cancellation) that it *may cancel or amend the process without liability at any time.*
 - 6.2. CRD stated in the instructions and rules (Section 5: Evaluation and Selection): *The successful respondents will be advised in writing by the City's Purchasing Section.*
 - 6.3. CRD used their discretion to change the outcome of the RFPQ by increasing the number of qualified respondents in the ESA Investigations area to eight from their stated target of five.
 - 6.4. As CRD allowed themselves wide discretionary authority within the RFPQ process and used that authority once to make a substantive change, clearly they

could do so again at any time. Thus, PGC could not know the final outcome of the RFPQ process until they were informed of the outcome by CRD – either in writing by their Purchasing Section or through some other credible, official method (e.g. posted results on APC)

- 6.5. The list of successful Contractors was posted on APC at 3:09 PM on November 29, 2017.
 - 6.6. PGC's request for a de-briefing immediately subsequent to the posting of successful Consultants on APC, is a reasonable expectation - and based on Ima Udoh's November 30 email to Monica Gaudet, was a relatively normal practice for CRD. The inherent fluidity of CRD's process offered PGC the hope of influencing change through a de-briefing. CRD's refusal to grant this de-brief was the signal to PGC that the process was truly over and the outcome was truly fixed. Thus, it is only upon refusal of the de-briefing that PGC could know or reasonably have known the protested RFPQ process was finalized, no longer subject to change, and incorporated the alleged NWPTA inconsistencies.
 - 6.7. PGC has met the time requirements for filing a protest under NWPTA Part IV (B)
7. With respect to 5.2, above, NWPTA does not anticipate that the bid-protest mechanism will address third-party relationships arising from a procurement process, or alternately from dispute of a procurement process. The NWPTA mechanism is designed to determine the outcome of disputes between two parties: A supplier/vendor and a Government entity
 - 7.1. An RFPQ is a tool designed to reduce the number and refine the quality of proponents/vendors involved in a procurement process. The expected outcome of this process is a contract (or contracts) for services
 - 7.2. In the case of the protested RFPQ, the tool was used firstly for pre-qualifying vendors (i.e. Consultants) to be used by CRD for their own purposes (Environmental Site Assessment, Remediation, Risk Management, Co-existence Plans, and Third-Party Review)
 - 7.2.1. In this case the descriptor "Third-Party" relates to Consultant reviews of other Consultants work-product, while under contract to CRD. Thus, the NWPTA has direct application. CRD confirmed in their February 20 response to my request for additional information, that this work will be awarded by contract to vendors who have pre-qualified through the RFPQ process

- 7.3. The RFPQ was also used for an alternative Third-party application: To act as a mandatory source list for Environmental Consultants used by Developers when submitting applications to CRD
- 7.4. CRD, in their February 05, 2018 written reply, suggests that in the mandatory use of the RFPQ for Developers, NWPTA rules do not apply: If PGC wishes to pursue a challenge in this area, they should: ... *choose a different forum than a NWPTA bid protest.*
- 7.5. However, CRD stated in their posting on APC, in the text of the RFPQ Instructions and Rules, and in their submissions to the Arbiter that they desire and intend the RFPQ to be compliant with NWPTA –this necessarily must include their responsibilities under the bid protest mechanism
- 7.6. Contracting parties always identify the legal jurisdiction which will apply in case of a dispute. CRD has identified through their posting and their RFPQ documentation that they intend and expect any disputes regarding this RFPQ to be determined by the applicable Trade Agreements – in this specific case, the NWPTA
- 7.7. Thus, within the scope of the bid protest mechanism, the Third-party mandatory source-list will be addressed

Summary of Submissions and Evidence relating to the RFPQ process

8. Request for appointment of an Arbiter under Part IV (B) of NWPTA was submitted to the NWPTA Administrator by PGC's legal counsel on January 19, 2018. The response from CRD was submitted to the NWPTA Administrator on February 05, 2018. PGC presented the Administrator with a reply to CRD's submission on February 12, 2018. Both parties provided additional materials on February 20, 2018, regarding contract awards, third-party communications, and expected outcomes of the protested RFPQ process.
9. The following facts were evident in the text of the RFPQ:
 - 9.1. CRD issued an RFPQ for specific Consulting Services on June 2, 2017, posting it that same day on the Alberta Purchasing Connection website (APC)
 - 9.2. A total of five Consultants were to be chosen in each of the five categories

- 9.3. The listing of pre-qualified Consultants was to be in effect for five years. No ability to add additional Consultants to the list was identified - however CRD could remove a Consultant if they were not satisfied with that Consultant's services
- 9.4. Five evaluation categories were identified, and weightings provided for each category
- 9.5. The RFPQ was not only designed to provide a list of qualified Consultants from which to award CRD contracts (through an appropriate competitive process): A secondary purpose was identified. Only Consultants who were pre-qualified through this process could be used in Development applications received by CRD

Parkland Geotechnical Consulting Ltd. (PGC)

10. PGC submitted the following relevant facts:

- 10.1. PGC offered the requested five-stage response to the RFPQ on June 27, 2017
- 10.2. PGC's responses were evaluated, thus CRD must have deemed them compliant
- 10.3. PGC was unsuccessful in qualifying in any of the five identified categories
- 10.4. PGC requested a breakdown of their RFPQ evaluation scores from CRD on December 4, 2017, and was provided verbally with some information – however the level of detail was not sufficient to satisfy PGC
- 10.5. Legal counsel for PGC requested RFPQ scoring information and policy documents from CRD on January 04, 2018. That information was provided on January 05, 2018. The documents proffered were not at the level of detail desired. Requests for additional detail were refused by CRD, as in their opinion release of the requested information *would risk the integrity of the bidding process*

11. PGC has requested:

- 11.1. A recoupment award to be determined by the Arbiter
- 11.2. Reimbursement of legal costs expended by PGC for advancing the bid protest, estimated at \$21,000
- 11.3. A declaration that CRD's process in the protested RFPQ violates NWPTA

- 11.4. A recommendation that CRD not use the lists arising from the RFPQ until it offers ongoing access to qualify for those lists
- 11.5. A recommendation that CRD removes quotas from the lists
- 11.6. A recommendation that CRD, without delay, advises of a process for as yet non-qualified Consultants to access qualification and thus, the lists
- 11.7. A recommendation that CRD remove from Developer applications, the requirement to use only pre-qualified Consultants
- 11.8. A recommendation that CRD provide *meaningful information* on the methods of weighting and criteria
- 11.9. A recommendation that CRD provide *reasonably detailed feedback* to respondents, including scoring per category

The City of Red Deer (CRD)

12. CRD has provided the following information:

- 12.1. CRD determined during the course of the RFPQ process that the lists of pre-qualified Consultants would be expanded beyond five, if warranted, and indeed did expand a list beyond that initial target

13. CRD claims costs and such further remedies as the Arbiter may deem just

Findings

Was CRD's RFPQ process compliant with NWPTA?

14. I find that the RFPQ and CRD's management thereof was not compliant with NWPTA

Analysis and Reasons

a) Did CRD meet its obligations under NWPTA with regard to posting, measurable evaluation criteria, disclosure, and debriefing?

15. The Guidelines to Procurement Obligations of Domestic and International Trade Agreements are found at: http://www.newwestpartnershiptrade.ca/pdf/13-08-21_Procurement_Guidelines_final%20for%20distribution.pdf . These guidelines

contain a blend of Best Practices and requirements for government entities covered by a variety of Trade Agreements - including the NWPTA

- 15.1. For procurement postings (including RFPQ), government entities must provide suppliers with a reasonable period of time to submit a tender
 - 15.1.1. NWPTA does not identify a specific posting-time requirement
 - 15.1.2. CRD had the RFPQ posted on APC for 25 days
 - 15.1.3. CRD has met the obligation for allowing suppliers a reasonable time to submit responses to the RFPQ
- 15.2. NWPTA requires that: *...procuring entities identify measurable criteria that will be used in the evaluation of bids (including the weighting of each criteria)*
http://www.newwestpartnershiptrade.ca/faq_vendor_contractor.asp
 - 15.2.1. CRD, on page 11 of the RFPQ included a table showing the criteria and category of evaluation, along with the relative weighting of each category
 - 15.2.2. CRD has met the obligation for measurable evaluation criteria
- 15.3. Provision of detailed evaluation data and scoring to vendors is not a Best Practice, and is not specifically addressed in the NWPTA. CRD is under no obligation to provide such data, and has no compliance issues in this regard
- 15.4. Debriefing of Vendors for the purpose of enhancing their ability to submit successful future responses and proposals is a Best Practice, is recommended by procurement and contracting associations (SCMA, APICS, NCMA), and required (above threshold) by the Canada/EU Trade Agreement (CETA). However, vendor debriefing is not required by the NWPTA. Under the NWPTA, participation in vendor de-briefs occurs at the absolute discretion of procuring government entities. CRD has no obligation under the Agreement to provide a detailed debriefing, and has no compliance issues in this regard

b) Did CRD and their RFPQ meet the primary NWPTA obligations of *Non-Discrimination, and No Obstacles?*

16. The RFPQ did not contain in its text or its implementation by CRD any elements which would offer preferential treatment to any entity or group. The obligation of Non-Discrimination was met.

17. The RFPQ did establish boundaries, timetables, and exclusions, that restricted access to qualified Consultants. The obligation of No Obstacles was not met in the text of the RFPQ

- 17.1. Restricting the pre-qualified Consultants to only five in each category unreasonably reduced the pool of acceptable respondents
- 17.2. Restricting access to the pre-qualification process to once every five years unreasonably reduced the pool of acceptable respondents and incorporated the additional negative effects of exclusivity: Only the top ranked Consultants during the initial RFPQ evaluation were listed. Should alternative, fully qualified Consultants become available at some future date - yet within the five year exclusion window - they would not be able to obtain access to the work
- 17.3. NWPTA requires a minimum re-posting for pre-qualifications of one-per-year, allowing access to new, qualified vendors.
http://www.newwestpartnershiptrade.ca/faq_government_public_entity.asp

18. CRD decided during the evaluation process to expand the list of qualified Consultants, should bid-scoring warrant such an expansion. In one of the five categories, eight Consultants were, indeed, pre-qualified

- 18.1. This process modification rectifies the non-compliance identified above in section 17.1
- 18.2. Mitigation of the non-compliance identified in section 17.1 is deemed to be complete. This process modification occurred prior to PGC's filing of the Bid Protest, thus, the initial non-compliant position of CRD will not be considered in the findings of this Bid Protest and no censure for that initial position will be attributed

19. CRD have stated that they will be conducting further pre-qualifications *in the first half of 2018*, in order to comply with Trade Agreement obligations

- 19.1. CRD confirmed their *intention to procure additions to the ESA Consultant lists on a number of occasions*
- 19.2. Although no contracts have yet been awarded, CRD will ensure that *all contracts awarded to pre-qualified Consultants for 'peer review' of ESA*

reports will be trade-agreement compliant. (i.e. awarded through a competitive process)

The process modifications outlined by CRD - when engaged - will eliminate the 'obstacle' noted above in section 17.2. However, due to the timing of implementation, the proposed changes do not affect the facts or findings within this Bid Protest. Until the pre-qualified list is re-posted and re-opened, the obstacle continues and CRD's RFPQ process remains non-compliant with NWPTA

c) Is the mandatory use of pre-qualified Consultants by third-party Developers a restriction on, or impairment of Trade, as outlined in NWPTA?

20. CRD's use of the RFPQ for this purpose is unusual and is not anticipated within the Bid Protest Mechanism.

20.1. The Mechanism is designed to: *...resolve complaints that specific procurements by government entities were not conducted in compliance with the Agreement (i.e., in an open, transparent and non-discriminatory manner)*

20.2. CRD's actions relating to third-parties are addressed in the Agreement, but are more appropriately examined under Article 5: Standards and Regulations.

20.2.1. Pre-qualifying Consultants is setting a 'standard', mandating the use of only those Consultants who meet the standard – no matter what it may be called – is a form of license or regulation

20.2.2. NWPTA states that: *... Parties shall, where appropriate and to the extent practicable, specify standards and regulations in terms of results, performance or competence*

20.3. CRD has not only the right, but the duty to set standards and regulations appropriate for use and function within the scope of their Land Use Bylaws

20.4. CRD fully disclosed this intended use of the RFPQ

21. Although the RFPQ process does contain some objective standards of competence, (e.g. *...must have at least one Project Team member that holds a valid professional designation*), the process also includes substantive subjective evaluation, (e.g. Value-add, References, Process methodology). The NWPTA goal of competence and

performance based standards is better accomplished through the use of other selection tools

22. Developers and Consultants will not be able to effectively complain or to challenge the third-party process as the bid dispute mechanism does not contain the necessary instruments of discovery or provide appropriate remedies

As noted in paragraph 21, the Bid Protest mechanism does not contain the correct toolset for discovery, or remedies for relief, relating to Article 5 of the Agreement. Thus, determination of potential Trade impairment in this context is not possible.

Nevertheless, use of a procurement-based evaluation to set a competence standard, then enforcing that standard via mandate/regulation, is an incorrect and inappropriate use of the RFPQ process.

Award

Cost Award

23. NWPTA states in Article 39(1) that *a cost award shall in principle be issued against the unsuccessful disputant. The award parameters are: ...to reimburse a disputant for the demonstrable and reasonable costs incurred relating to the bid protest in respect of (a) the fees and expenses of the arbiter; (b) services provided by the administrator; and (c) the costs for legal representation.*

- 23.1. The unsuccessful disputant in this Bid Protest is CRD

24. Respecting the cost of this Bid Protest,

- 24.1. The Schedule 5 fees and expenses of the Arbiter are: \$ 3,950.00

- 24.2. The fees and expenses of the Administrator are: \$ 2837.29

- 24.3. The costs of PGC for legal representation are estimated to be: \$21,000.00

- 24.3.1. As PGC's legal costs are estimated, corroboration to the administrator via invoice will be required for full reimbursement

Recoupment Award

25. A Bid Protest Recoupment award is issued against the government entity and its purpose is: *...to reimburse a supplier for the demonstrable and reasonable costs incurred by the supplier in preparing a response to a procurement opportunity*
26. The amount of award is determined by - Article 39(2):
- 26.1. The complexity of the specific procurement at issue
 - 26.2. The dollar value of the procurement at issue
 - 26.3. The complexity of the bid prepared and submitted by the supplier
 - 26.4. The complexity of the Bid Protest proceeding
 - 26.5. The efforts made by the government entity and the supplier to arrive at a mutually satisfactory resolution to the dispute under Article 36
 - 26.6. Any other factor considered relevant by the Arbiter
 - 26.7. The bid protest mechanism is designed to protect suppliers from the effects of non-compliant government entity procurements. However, it does not provide automatic cost-recovery , even when the government entity is found to be non-compliant
 - 26.7.1. In the January 19, 2018 Statutory Declaration of Mark Brotherton, Tim Ainscough from CRD is purported to have told Mr. Brotherton: *Parkland's five proposals submitted were all evaluated to be deficient. In general, the main issue was poor methodology sections*
 - 26.7.2. Similar information was offered to PGC in Ima Udoh's November 30 email to Monica Gaudet
 - 26.7.3. Upon review of the responses submitted by PGC, I find that the methodology sections (which are weighted with 40 of the 100 potential evaluation points) are indeed lacking in detail and description. Poor evaluation scores from CRD for these responses is a reasonable expectation and outcome
 - 26.7.4. Based on the above, no Recoupment award is warranted

Recommendations

27. I recommend that CRD pursue its goal to improve the level of Environmental reporting in Development applications, but not use procurement tools to accomplish

this goal. Determine appropriate, objective standards for Consultant contributions, discuss those standards with all stakeholders and implement them via regulation

27.1. I recommend that in the interim, CRD does not impose upon Developers, exclusive, mandatory use of Consultants qualified through the protested RFPQ process

28. I recommend that PGC formally follow-up, after allowing CRD a reasonable time to modify their practices. In six months I suggest that PGC confirm that CRD has: a) opened the RFPQ to additional Consultants for qualification, and b) used an appropriate competitive process to award contracts to pre-qualified Consultants.

28.1. Should either of these CRD commitments not be implemented, PGC may wish to consider initiating another Bid Protest

A handwritten signature in black ink, appearing to read "L. Dennis", written in a cursive style.

Lorne Dennis
Arbiter