

Arbiter's Final Report
Arbiter: Edward Tyrchniewicz

May 2 2019

In the matter of an Arbitration pursuant to Part IV of the New West Partnership Trade Agreement

Between

Parker Johnston Industries Ltd.

(Supplier)

And

The Calgary Board of Education

(Government Entity)

Province of Government Entity: Alberta

Representation:

Supplier

**Parker Johnston Industries Ltd.
6791 Oldfield Road
Saanichton BC V8M 2A2
Alexandra Logvin, Counsel
Fasken Martineau DuMoulin LLP**

Government Entity

**Calgary Board of Education
Procurement Services
1221 8 St SW
Calgary AB T2R 0L4
Kenneth Reh, Counsel
DLA Piper (Canada) LLP**

Introduction

1. This arbitration is pursuant to the bid protest mechanism under Part I of the Bid Protest Mechanism.
2. NWPTA 14.1 States: Parties will provide open and non-discriminatory access to procurements of the following government entities: 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 \$75,000 or greater, for services, (identified in part ii)

The Issues

3. The *Canadian Free Trade Agreement* (CFTA) requires Government Entities to conduct their procurements in a manner that is free from discrimination. In this case, a supplier, Parker Johnston Industries Ltd. of Victoria BC contends that the Government Entity, the Calgary Board of Education conducted a procurement for roofing replacement for two schools that was discriminatory against the out-of-province supplier and favoured suppliers in the Province of Alberta.
4. Parker Johnston Industries Ltd. contends that it did so by specifying an ARCA (Alberta Roofing Contractor Association) warranty as a requirement to bid.
5. The supplier, Parker Johnston Industries Ltd., sought approval of an alternate warranty that it claimed was as good or better than what was required. The Calgary Board of Education interpreted this as a request for pre-approval and indicated that it could not and would not evaluate a competitive bid response or any part thereof prior to the closing of a tender.

6. At the same time the Calgary Board of Education issued an addendum subsequent to the original request for bids amending the solicitation to include warranties and certifications “equivalent” or superior to ARCA’s. Parker Johnston Industries Ltd. contends that what was “equivalent or superior” was not specified, leaving the issue to the procurement authority’s discretion, putting non-ARCA bidders on an unequal footing with those who were ARCA certified.
7. The supplier then requested a consultation with the government entity as per article 2 of the Bid Protest Mechanism (BPM). As I have not seen any record of any response or meeting, I must agree with Parker Johnston Industries Ltd. that the Calgary Board of Education appears to have ignored the request for a consultation.
8. Parker Johnston Industries then requested the initiation of arbitration and the appointment of an arbiter pursuant to articles 3 and 6 of the BPM.

Observations

9. In my review of the procedures followed by the supplier in bringing this case forward I am satisfied that the steps taken were the correct ones as per the stipulations of the Bid Protest Mechanism. In the case of the government entity, however, their apparent ignoring the request for consultation with the supplier, though not in contravention of any regulations, was not conducive to dealing with a legitimate issue.
10. The issuance of an addendum by the government entity during the bid preparation period that broadened the criteria for warranties and certification to be equivalent or superior to those of ARCA was not entirely useful in that it did not provide any specific details. It is my understanding that when a procurement authority, for the purposes of its solicitation, relies on mandatory requirements based on standards or a trade name it is required to set out with precision applicable mandatory requirements pertinent to the solicitation. This

would enable the potential supplier to assess and demonstrate the equivalency requirements. Furthermore, if there is a requirement of a trade name or equivalent, the procuring entity must provide the necessary information to suppliers to assess and demonstrate equivalency. The Calgary Board of Education did not do this with the original request nor with the addendum.

11. The issue of discrimination in the roofing issue has recently been addressed by Alberta Infrastructure, which issued guidelines by way of a template tender document that removed the ARCA warranty requirement. In doing so, Alberta Infrastructure addressed this discrimination, which Parker Johnston Industries Ltd. had identified. The government entity in this case, the Calgary Board of Education, has chosen to ignore Alberta Infrastructure's guidelines.

12. The Calgary Board of Education has awarded the contracts for these two roofing projects and work started in mid-April. Parker Johnston Industries Ltd. submitted bids for both projects, but they were not the successful bidders. Their bids were 7th highest out of 9 bidders on one project and the highest out of 8 on the other.

Recommendations

13. Going forward, the Calgary Board of Education, in compliance with Albert Infrastructure directions, should drop all reference to ARCA warrantees, and should specify in detail its warranty and certification roof requirements, much as it does in other aspects of its project manual for roofs.

14. As part of the arbitration process, Parker Johnston Industries Ltd. has presented a number of options for the arbiter's consideration. These requests are listed below, along with my recommendations. The awarding of costs is covered in the following section.

- a. An Order that the contract be awarded to Parker Johnston Industries Ltd.: deny on the grounds that the contracts have already been awarded, Parker Johnston Industries Ltd. bids were not competitive and the work is already underway.**

- b. In the alternative, an Order that the Board re-evaluate the bids in accordance with the provisions of the CFTA and such other applicable provisions: **deny on the grounds that the contracts have already been awarded, Parker Johnston Industries Ltd. bids were not competitive and the work is already underway.**
- c. In the further alternative, an Order that the Board issue a new solicitation for the procurement: **deny on the grounds that the contracts have already been awarded and the work is underway.**
- d. In the further alternative, an Order compensating Parker in the amount equal to Parker's estimated profits had it been declared the successful bidder: **deny on the grounds that Parker Johnston Industries Ltd.'s bid was not one of the lower cost bids.**
- e. In the further alternative, an Order awarding damages to Parker for lost profits or loss of opportunity: **deny on the grounds that this a hypothetical notion rather than a hard calculation.**

Awarding of Costs

15. NWPTA states in Article 39(1) and BPM Article 7(4) 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. In this case, I have concluded that the Calgary Board of Education is the unsuccessful disputant and should be assessed all of the costs associated with this arbitration.
16. Parker Johnston Industries Ltd. did not request a bid preparation cost award.
17. Parker Johnston Industries Ltd. Requested that it be awarded "tariff costs" in this proceeding pursuant to Article 7 of the BPM (consisting of legal fees and disbursements), supporting documentation such costs will be submitted at the end of the arbitration and in

any event consistent with Article 7. **I concur that these tariff costs be awarded to Parker Johnston Ltd. up to a maximum of \$5000, subject to supporting documentation. These tariff costs should be borne by the Calgary Board of Education. And should be paid within 30 days of the completion of the arbitration process.**

18. The arbiter's fees are \$4375 and are assessed against the Calgary Board of Education.

19. The fees and expenses of the NWPTA administrator are \$705 and are assessed against the Calgary Board of Education.

Edward Tyrchniewicz

Arbiter