

ARBITER'S REPORT
June 7, 2024

BETWEEN:

JC WILLIAMS INC. (JCW)

Supplier

AND

ALBERTA HEALTH SERVICES (AHS)

Government Entity

Arbiter: Shawn Robbins

Representation:

FOR JC WILLIAMS INC.:
Jason Williams, Director – Operations
PO Box 19534
Cranston PO
Calgary AB T3M 0V4

FOR ALBERTA:
Matthew Schneider, Senior Associate
Borden Ladner Gervais LLP
Centennial Place, East tower
1900 520 3rd Avenue SW
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I. Introduction

1. This arbitration proceeding is pursuant to the Bid Protest Mechanism (BPM) under the New West Partnership Trade Agreement (NWPTA).
2. The supplier has identified that the Canadian Free Trade Agreement (CFTA) will form the basis of the dispute for this specific procurement.

II. Issue

3. The supplier, JC Williams (JCW) claims that this Request for Initiation of Arbitration is based on new information that became apparent and was unknown at the time of filing of the previous Request for Initiation of Arbitration.
4. The government entity, Alberta Health Services (AHS) argues that JCW has, under its previous Request for Initiation of Arbitration, forfeited any further rights under this process to have a complaint administered in respect of the subject RFP.

III. Facts

5. Solicitation # AHS-2023-1052 (RFP) was issued by AHS on October 24, 2023.
6. Following consultations between the disputing parties, which were initiated by JCW on February 4, 2024 and concluded on April 1, 2024, on April 14, 2024, JCW submitted a Request for Arbitration and Initiation of Arbitration (Request) pertaining to the above specific procurement and subject RFP.
7. Within that request, JCW identified that the New West Partnership Trade Agreement (NWPTA) would form the basis of the dispute for that specific procurement.
8. The required security deposit was received on April 17, 2024. The required signed Schedule 2 (Form of Consent to Arbitration) was not included in the Request.
9. A written reply from AHS to that Request pursuant to Article 5(1) of the BPM was not received.
10. On April 17, 2024, JCW initiated a concurrent request for consultations relating to the same specific procurement and subject RFP.
11. On April 18, 2024, the complaint under the April 14, 2024, Request was deemed resolved by the Administrator. This was because the required security deposit was due on April 15, 2024, the same day as the Request.
12. On May 10, 2024, JCW submitted a Request relating to the same specific procurement and subject RFP.
13. It was identified that the Canadian Free Trade Agreement (CFTA) will form the basis of the dispute relating to this same specific procurement and subject RFP.

14. The required security deposit was received on May 9, 2024.
15. However, the required signed Schedule 2 (Form of Consent to Arbitration) was not received as part of the Request.
16. A written reply from AHS to the Request, pursuant to Article 5(1) of the BPM was not received.
17. An email on May 14, 2024 from AHS legal counsel to the Administrator stating that the second Request restates the arguments raised in the first Request and urges the Administrator to disregard the second Request.

IV. Analysis and Findings

18. My review will examine only the procedural issues, more specifically, whether the May 10, 2024, Request from JCW has met the criteria required under the BPM for it to proceed.
19. The May 10, 2024 Request made by JCW identified the CFTA as the agreement forming the basis of the dispute.
20. Article 3(4)(b) provides the following:

Article 3: Selection of the Arbiter and Initiation of Arbitration

(4) For the purposes of paragraph 3(e), if the government entity is from:

b) Alberta, Saskatchewan or Manitoba, the supplier must identify one trade agreement that forms the basis of the dispute. Once the supplier has filed a request for an arbiter with respect to an alleged inconsistency with one trade agreement, that supplier cannot initiate a concurrent or subsequent complaint under this process relating to the same specific procurement under another trade agreement.

Article 3(3)(e):

The request pursuant to paragraph 1 shall contain the following:

(e) subject to paragraph 4, the name of the trade agreement that forms the basis for the dispute;

21. However, JCW had previously filed its Request on April 14, 2024, for this same specific procurement and subject RFP, and identified the NWPTA as the agreement that formed the basis of that dispute.

22. With respect to the claim by JCW that the May 10, 2024 Request is based on new information that became apparent and was unknown at the time of filing of the April 14, 2024 Request, it remains that the May 10, 2024 Request relates to the same specific procurement and subject RFP.
23. As a result, pursuant to Article 3(4)(b), JCW has no recourse under the BPM for this specific procurement under the CFTA or any other of the applicable trade agreements.
24. The required financial deposit was not received from JCW until April 17, 2024.
25. Article 3(2)(a)(b) states:

Article 3: Selection of the Arbiter and Initiation of Arbitration

2. If the supplier fails to submit a written request pursuant to paragraph 1 within the time period specified, or fails to provide the signed consent and financial deposit required by paragraph 3(k):

(a) the complaint shall be deemed to be resolved and the administrator shall issue a notice in writing to the disputants to that effect; and

(b) the supplier will thereby forfeit the right to proceed with any further consideration of its complaint relating to that specific procurement under this process.

26. The BPM is clear with respect to time limits. As the disputing Parties are in agreement that the consultations period concluded on April 1, 2024, the Request and all of its required elements would need to have been received by the administrator no later than April 15, 2024, fourteen (14) days following the conclusion of consultations.
27. On April 18, 2024, an email from the administrator was sent to the disputing Parties stating:

As both parties to this dispute agree that the consultations concluded at the end of the day on April 1, 2024, then the expectation for submission of a Request for appointment of an arbiter was that it included all required elements and would be done on or before April 15, 2024.

As the complainant failed to provide the required financial deposit until April 17, 2024, it is the administrator's decision that the complaint shall be deemed to be resolved. This communication shall serve as the written notice to the disputants to that effect.

28. Also on April 18, 2024, an email from JCW to the administrator and AHS requested that the above decision by the administrator be reconsidered.
29. The BPM does not contain a provision to allow for a reconsideration of the administrator's decision. Therefore, I conclude that the administrator's decision is final.
30. On April 19, 2024, an email from AHS counsel to the administrator and JCW states in part:

AHS is proceeding on the basis that the complaint has been deemed to be resolved and that the supplier has forfeited the right to proceed with any further consideration of its complaint, as expressly set out in the Bid Protest Mechanism.

31. My analysis also discovered that the required Schedule 2 (Form of Consent to Arbitration) was not included in either the April 14, 2024, or the May 10, 2024, Requests. Instead, included was Schedule 7 (Form of Consent to Arbitration Article 37.4).
32. There are a number of differences between the two forms. Most significant of those differences is that Schedule 7 applies only to the NWPTA Part IV, whereas Schedule 2 applies to the Bid Protest Mechanism.

Article 1: Application of the Bid Protest Mechanism states:

The process set out below applies to the avoidance and resolution of disputes between suppliers and the Provinces' government entities relating to a specific procurement covered by any one of the NWPTA (Article 14), CFTA (Chapter 5), GPA, CETA (Chapter 19), or, upon the entry into force of the CPTPP for Canada, the CPTPP (Chapter 15).

The limited applicability to only the NWPTA under Schedule 7 is provided under paragraphs 4 and 5 in part:

4...The complainant specifically consents to submitting this dispute to an arbiter under Part IV(B) of the Agreement and agrees to do so wholly in accordance with this consent and the procedures specified in the Agreement.

5. In doing so, the complainant acknowledges and agrees that those procedures provide as follows:

- (a) Proceedings under Part IV(B) of the Agreement are governed by the Agreement.

33. The current version of the NWPTA does not contain Part IV(B). Therefore, I must conclude that Schedule 7 is an outdated form and does not form part of this BPM.
34. In consideration of whether JCW would have had knowledge of the required forms and elements to be included in the Request, I refer to an email from the administrator to JCW on April 11, 2024 which reads in part:

Please ensure that you have read and followed the steps provided in Article 3 of the Bid Protest Mechanism pertaining to Selection of the Arbiter and Initiation of Arbitration.

If you have any questions please let me know.

35. It is evident from this that the applicable agreement is the Bid Protest Mechanism (and not the NWPTA Part IV) and that JCW knew or reasonably should have known, understood and followed the steps provided in Article 3 of the Bid Protest Mechanism pertaining to Selection of the Arbiter and Initiation of Arbitration.
36. Finally, a “Frequently Asked Questions” document is provided on the BPM website. Included in that is a Supplier’s Checklist for submitting a Request under Article 3 of the BPM. It lists in part:

BPM Request for Arbitration, Article 3.3
Supplier Submission Checklist:

NOTE: A request for arbitration is not considered to be complete until all items on this checklist have been sent to the administrator.

...

- A signed consent in accordance with Schedule 2 of the BPM.
- Financial deposit of \$2500 payable to the administrator in accordance with Schedule 2 of the BPM.

V. Decision

37. The May 10, 2024, Request by JCW does not meet the criteria under the BPM to proceed for the following reasons:
 1. JCW had previously filed a Request on April 14, 2024 relating to the same specific procurement and subject RFP. As it identified that the NWPTA would form the basis of that dispute, it cannot initiate a concurrent or subsequent Request under this process relating to the same specific procurement under the CFTA or another trade agreement.

This is consistent with Article 3(4)(b) of the BPM.

2. Furthermore, all of the required elements of the April 14, 2024, Request including the security deposit and the signed Schedule 2 were not received by the deadline of April 15, 2024.

Written notice was provided by the administrator to the disputants that the complaint relating to the previous April 14 Request was deemed resolved and that JCW had forfeited its right to any further consideration under this process regarding this specific procurement and subject RFP.

This is consistent with Article 3(2)(b) of the BPM.

VI. Costs

38. The BPM states that operational and tariff costs shall generally be awarded against the unsuccessful disputant, in this case, JCW.
39. JCW shall pay the operational costs to the administrator in accordance with the terms of the BPM, payable to WDC Consulting.
40. Operational costs totaling \$8514.46 (total of arbiter's \$3934.46 and administrator's fees and disbursements \$4580.00) shall be paid within 30 days of the release of this report.

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