

May 6, 2019

Bid Protest No. 2019-BP001

**IN THE MATTER OF ARBITRATION
PURSUANT TO THE ALBERTA BID PROTESST MECHANISM**

BETWEEN:

PARKER JOHNSTON INDUSTRIES LTD.

Supplier

-and-

THE CALGARY BOARD OF EDUCATION

Government Entity

For the supplier

Peter N. Mantas
Fasken Martineau DuMoulin LLP
55 Metcalfe Street, Suite 1300
Ottawa, Ontario K1P 6L5
(613) 696-6886

For the Government Entity

Kenneth P Reh
DLA Piper LLP
1000 250 2nd St W
Calgary, AB T2P 0C1
(403) 698-8720

DECISION

1. This proceeding is under the Bid Protest Mechanism (BPM) adopted under the New West Partnership Trade Agreement (NWPTA) concerning a complaint by Parker Johnston Industries Ltd. (Parker), the supplier, against the Calgary Board of Education (CBE), the government entity, brought under the Canada Free Trade Agreement (CFTA).
2. Parker alleges the CBE requirement for an Alberta Roofing Contractor Association (ARCA) membership and ARCA warranty in its roofing procurement documents is contrary to the CFTA.
3. The CBE argues that the complaint was not brought within the time limits set out in the BPM and alternatively that it is not in breach of the CFTA.

FACTS

4. Parker is a roofing contractor headquartered in British Columbia, with a presence in Alberta.
5. The project in question, involving roofing upgrades for three schools, was opened for bid on December 18, 2018.
6. Parker accessed the solicitation on December 20, 2018.
7. The bid documentation required membership in ARCA and an ARCA warranty. Parker had earlier applied for membership in ARCA but was denied membership.
8. On December 27, 2018, Parker wrote to the CBE asking for pre-approval of alternative warranty security, which it argued was superior to the ARCA warranty. Parker could not supply an ARCA warranty as it was not a member.
9. On January 7, 2019, the CBE and Parker exchanged emails in which the CBE said it would review the proposed warranty when a bid was submitted.
10. On January 9, 2019, Parker again requested pre-approval of an alternate warranty, citing the “amount of effort taken to submit these tenders”.
11. On January 16, 2019, Parker’s counsel wrote the CBE asking that the procurement be postponed.
12. On January 23, 2019, Parker’s counsel filed a request for consultation pursuant to the BPM.
13. On January 30, 2019, CBE’s counsel replied to the request for consultation that Parker was beyond the time limit in the BPM to request consultations.
14. On February 26, 2019, Parker’s counsel requested an arbitration be commenced arguing that consultations were deemed concluded on February 12, 2019, twenty days after the January 23, 2019, request.
15. Counsel for Parker submits that there are two issues in the proceeding:
 - a) Did Parker submit its Complaint in a timely manner?
 - b) Did the CBE breach its obligations under the CFTA?

TIME LIMITATION

16. In order to initiate consultations concerning a specific procurement, Article 2.1 requires the supplier to deliver a written request for consultations within ten

days after the day on which the supplier first knew, or reasonably should have known, of the alleged inconsistency with the trade agreement.

17. Pursuant to Article 2.2, if the supplier fails to request consultations within the time period specified in 2.1, the supplier forfeits the right to proceed with further consideration of the matter under the BPM.
18. The CBE argues that Parker knew of the ARCA membership and warranty requirements when it accessed the solicitation for bids on December 20, 2018. The CBE argues that Parker knew it could not meet the requirements and “was alive to concerns that ARCA warranty requirements, in the Supplier’s view, offended the CFTA”. CBE points to exhibits attached to the affidavit of Robert Parker filed by Parker that discuss the issue and refer to the CFTA in other procurements.
19. Parker claims the ten day limitation period did not start to run until the parties “warranty discussions” had ended. It points to the emails about an alternate warranty as these ongoing discussions. It argues that it did not know if its proposed alternate warranty would be acceptable and therefore was not in a position to know about the inconsistency with the CFTA.

ANALYSIS

20. It is clear from Robert Parker’s affidavit that the ARCA membership and warranty were ongoing issues of which Parker was aware. (exhibit C, Robert Parker affidavit).
21. Absent the December 27, 2018, email and letter concerning an alternate warning the ten day limitation period would have run out on December 31, 2018.
22. Can the December 27, 2018, email and letter be said to have “stopped the clock?”
23. In *IBM Canada Ltd v Hewlett-Packard (Canada) Ltd*, 2002 FCA 284, the Federal Court of Appeal deals with the issue of timeliness noting that, “in procurement matters, time is of the essence” (para 18).
24. Parker cites a number of cases in support of the argument that the limitation period does not begin while the parties are in discussion. In particular, *IBM* cited above and *re Montage-DMC e Business Devices, A Division of AT&T Canada*, [2003] CITT No 97. However, the CBE notes “there was no “clarification” required, as contemplated in the *IBM Canada. V Hewlett Packard (Canada) Ltd.* decision” and no “unclear mandatory requirements as considered in the *Re Montage-DMC eBusiness Services, A Division of ATT Canada* decision. The CBE says, “there is no dispute that the Supplier was

not an ARCA member and, therefore, unable to provide ARCA warranty coverage. The Supplier did not meet this standard and was aware on December 20, 2018, that it did not meet the standard.”

25. Parker also cites *Turbo Expert Quebec Inc. v. PWGSC*, (<http://www.citt-tcce.gc.ca/en/node/8559>). In *Turbo*, the government entity had taken actions that prejudiced the supplier. The Canadian International Trade Tribunal found, “that PWGSC failed to act in a reasonable and diligent manner by letting the bid validity period expire. PWGSC cannot use the expiration of the bid validity period caused by its own lack of diligence to justify not awarding the contract to Turbo Expert”.

DECISION

26. I agree with CBE counsel that “what the supplier sought in its December 27, 2018, correspondence was not clarification of unclear terms. What the Supplier sought was an exception be made for it contrary to the clear and unambiguous terms of the project solicitations”. I also agree that the evidence provided by the supplier establishes that it knew or ought to have known of the “alleged inconsistency” as of December 20 2018.
27. I am therefore of the opinion that the time to request consultations expired on Dec 31, 2018, and that the request for consultation was not made within the timelines specified in Article 2.1 of the BPM. As a result, under Article 2.2 the supplier has forfeited the right to proceed with further consideration of the matter under the BPM.

CFTA

28. Notwithstanding the finding above, as there is provision for judicial review in the BPM and as both parties filed arguments on the merits, I offer the following comment on the merits in the hope that, perhaps, they may assist the parties.
29. On the merits of the case, I would have ruled in favour of the Parker, largely based on the arguments submitted by counsel in paragraphs 79-120 of the Submissions of the Supplier, March 19, 2019. I do not find persuasive, the CBE arguments in defense of the ARCA membership and warranty requirement, and would have recommended deletion of the membership requirement and acceptance of an equal or better warranty in further bid solicitations.

ORDER

30. There will be an order in favour of the CBE, for operational costs of \$5593.30, consisting of \$2750.00 arbiter costs and \$2843.30 administrator's fees and expenses. Tariff costs up to \$5000.00 are awarded to the CBE upon presentation of accounts satisfactory to the Administrator. Costs are to be paid within 45 days of the expiry of the time for judicial review.

Ron Perozzo