

**New West Partnership Bid Protest Mechanism Arbitration
HWY-20126, Saskatchewan**

West-Can Seal Coating Inc

(Requesting Party)

v.

Ministry of Highways and Infrastructure for the Province of Saskatchewan

(Responding Party)

Decision

Representation

Requesting Party

**Dentons Canada LLP
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**Attn: Paul Lalonde
Sean Stephenson**

Responding Party

**McKercher LLP
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Saskatoon, SK S7K 1M5**

**Attn: Bruce Harrison
Collin Hirschfield**

Introduction

1. This is an arbitration pursuant to the Bid Protest Mechanism (BPM) under the New West Partnership Agreement (NWPA) and the Canada Free Trade Agreement (CFTA) between West-Can Seal Coating Inc. (“West-Can”), an Alberta based company, and the Ministry of Highways and Infrastructure for the Province of Saskatchewan (the “Ministry”).
2. The procurement issue relates to contract number HWY-H20126 (“H20126”) for micro surfacing of particular sections of highway.

3. West-Can argues that the particular procurement is only one example in a long pattern of discrimination against out-of-province suppliers by the Ministry. It says the Ministry's approach has resulted in 100% of micro-surfacing contracts tendered by the Ministry since 2017 being awarded to Saskatchewan bidders. West-Can argues that it has experienced a systematic and unfair pattern of favouritism for local bidders that has resulted in various contracts lost to the same local bidder, notwithstanding West-Can having made the low bid in those contracts and competitively met all other relevant tender criteria.

4. The Ministry argues that there is nothing amiss and that it is simply following its procurement rules concerning this contract. The Ministry further says that West-Can is unable to show any unfairness with respect to this contract.

Preliminary Issues

5. At the start of this arbitration West-Can made a Motion for Production and Disclosure, of documents that had been provided to West-Can during the consultation period. The Ministry argued against the use of the documents. I ruled against West-Can on the basis that consultations are privileged and confidential pursuant to Article 7 of the Bid Protest Mechanism and that ordering disclosure could set a precedent that would discourage open and full participation in future consultations. West-Can argues that lack of production of the documents prior to and during this arbitration allows me to make an adverse finding against the Ministry.

6. West-Can has also made Freedom of Information Act requests pursuant to the relevant Saskatchewan legislation for documents that it says are required to be disclosed. The Ministry has not ruled on West-Can's application, citing this proceeding as a reason.

Facts

7. The essence of this dispute revolves around three scoring processes used by the Ministry to evaluate contracts. These are

Work Zone Traffic Audits ("WZTA") 5 points out of 110

Contractor Performance Evaluation ("CPE") 10 pts out of 110

Community Benefits 25 pts out of 110

The remaining 70 points are allocated based on the total bid amount.

8. The dispute is over the application of these processes to West-Can and a claim of differential application to a Saskatchewan company, Morsky Construction Limited ("Morsky").

9. West-Can claims that the Ministry unfairly favours Morsky and says that, but for the Ministry's biased and discriminatory conduct related to CPE and WZTA scores assigned to West-Can and Morsky, West-Can would have been the selected bidder for contract H20126. The Ministry disputes this claim and argues that the tendering process was fairly handled.

10. The parties agree to the following facts:

- A) The procurement at issue opened on October 15, 2020.
- B) The procurement process included a question and answer process. West-Can submitted several questions throughout this process.
- C) On October 30, 2020, the closing date for tenders was extended to November 10, 2020, from its initial closing date of November 3, 2020.
- D) The criteria for evaluating contract H20126 were set out in the Bid Form and the various documents that amended this form. The evaluation was based on the following:

- 5 points for the Work Zone Traffic Audit Score
- 10 points for the Contractor Performance Evaluation
- 25 points for Community Benefits

- 70 points for the Total Amount of Bid

- E) The bids were evaluated on a 110 point scale. The Bid Form notes that Selection of the successful Bidder will be based on the best evaluated submission.
- F) In relation to the WZTA scores, the evaluation criteria were based on the following:
 - 1) Contractors who have provided the CPE & WZTA Score Authorization form will be assigned the WZTA audit score set forth in the latest Verification email sent by the Ministry to that Contractor prior to bid close, unless the Contractor has requested a correction prior to bid close.
 - 2) Contractors who have not provided the CPE & WZTA Score Authorization form will be assigned a WZTA audit score based on the average of that Contractor's WZTA audit scores in the Ministry's WZTA database.
 - 3) Contractors who do not have any WZTA audit scores in the Ministry's WZTA database will be assigned a WZTA audit score based on the average of all WZTA audit scores in the Ministry's WZTA database.

- 4) Only WZTA scores based on contracts entered into on or after April 1, 2017 and are contained in the Ministry's WZTA database.

G) The CPE evaluation criteria was set out as follows:

1) Contractors who have provided the CPE & WZTA Score Authorization form will be assigned the CPE score set forth in the latest Verification email sent by the Ministry to that Contractor prior to bid close, unless the Contractor has requested a correction prior to bid close.

2) Contractors who have not provided the CPE & WZTA Score Authorization form will be assigned a CPE score based on the average of that Contractor's finalized CPE scores in the Ministry's CPE database.

3) Contractors who do not have any CPE scores in the Ministry's CPE database will be assigned a CPE score based on the average of all the finalized CPE scores in the Ministry's CPE database.

4) Only CPE scores based on contracts entered into on or after April 1, 2017 and are within three years of the contract close date are contained in the Ministry's CPE database.

5) The Bidder achieving the highest score will be assigned the maximum score allowed in this section; subsequent Bidder scores will be pro-rated as follows:

Bidder's Performance Score-40

Highest Bidder's Performance Score-40 X 10

Finalized CPE Score means one of the following:

6) The 28 calendar day appeal period is open but the Bidder has confirmed in writing to the contact indicated on the Contractor Performance Evaluation Form with copy to (email address), that it accepts the score.

7) An appeal was filed and the results of the appeal are known.

8) The appeal period has expired without the appeal being filed.

H) Community Benefits. The Ministry of Highways and Infrastructure has taken measures to support regional economic development and enhance quality of life across the province of Saskatchewan. This Project is located in an area that has experienced a dramatic drop in employment and economic activity. Generating local community benefit is considered an objective of this Project (as defined in the Contract) and the Contractor's (as defined in the Contract) ability to offer these benefits will be assessed in this competitive process. The Ministry of Highways and Infrastructure is interested in achieving a specific commitment from the Contractor to generate economic development in the region and maximize the on-site employment opportunities for Local Persons on this Contract as defined below.

1) For the purpose of this Contract, the following definitions will apply: [...]

Local Person means an individual who has a permanent residence in Saskatchewan and is directly employed with the Contractor or an individual who has a permanent resident in Saskatchewan and is directly employed with a subcontractor providing services at the Project Site (as defined in the Contract).

I) Community benefits were defined as follows based on the declared costs of local labour:

Points will be assigned based on the Declared Local Labour Cost Ratio using a sliding scale as outlined:

Declared Local Labour Cost Ratio (%) Points Assigned

100% 25
 ≤60% 0

J) To the extent that bidders are not able to achieve the stated local labour stated in their bid documents they face economic penalties, including a lump sum \$25,000 deduction to the price paid under the contract. Additionally, contractors CPE scores are affected, and contractors may face additional deductions up to 5% of the contract value.

K) On November 10, 2020, West-Can submitted a bid for contract number H20126.

L) The tender results for contract number H20126 were made publicly available on November 23, 2020.

M) The contract was awarded to a local Regina-based bidder, Morsky.¹

Work Zone Traffic Audits

11. The Ministry notes that WZTA audits have been performed for several years in the road construction industry and provide a benchmark safety record for contractors performing work for the Ministry.

12. WZTA scores were chosen by the Ministry as a safety evaluation tool through extensive consultation with the Saskatchewan Heavy Construction Association. The Ministry says these audits are performed by two independent consultants that have done all of the audits since 2017.

13. West-Can alleges discrimination and differential treatment in WZTA use on two grounds: 1) that the Ministry continues to use a WZTA score from contract H18006 in the calculation of West-Can's WZTA average, and 2) that Morsky had its WZTA score changed in bidding on an earlier contract (H18087)

Contract H18006

14. The Ministry revised its bid documents in November 2018 to incorporate WZTA Scores.

15. WZTA scores were used for procurements advertised on or after December 1, 2018. Scores based on audits performed in contracts commencing in April 1, 2017, are used in determining a WZTA score. Contract H18006 was audited on August 1, 2018. The audit was finalized on August 2, 2018.

16. West-Can argues that there were errors in the H18006 audit and that the audit that was performed before the November 2018 revision to the bid documents is of such a different nature that it should not be used in calculation of West-Can's WZTA score.

17. West-Can notes the following differences between the process before November 2018 and after it became part of the scoring criteria:

- "The name of the form used in 2018 was, "Work Zone Traffic Audit", post revision the name of the form is currently titled "Work Site Audit".
- The new audit tool provides a scope for items that will be graded which includes work site and zone safety, equipment safety, worker safety, traffic management, applicable safety legislation and requirements.
- The August 2018 document solely scored traffic control, the revised November 2018 document not only scores traffic control but also incorporates site wide safety measures which contractors are graded on.

¹ West-Can Initiation of Arbitration paragraphs 31-40, Ministry Reply paragraph 3

Among the highlights, the differences between the two documents include: Emergency fails to address the minimum age of workers, emergency response plan, site specific safety program, site safety policy, workplace violence & harassment, requirements for site safety meetings, the availability of safe operating practices and procedures, workplace hazard assessments and control, work site safety inspections, incident investigations, requirements for occupational health and safety committees, requirements for first aid supplies, toilet facilities, fire safety and preparedness, worker orientations and training, sub contractor orientation and training, limitations on working alone, the safe operation of construction vehicles and equipment, employee qualification to operate the equipment and sub-contractor management.

- Prior to implementing WZTA scores as an evaluation criterion, such evaluations differed in terms of evaluation criteria. For example, the evaluation for H18006 included Safety Manual 1100-300 OHS Violations Summary, whereas other audits afterwards did not.
- There is no reference to the Traffic Control Device Manual for Work Zones in the August 1, 2018, H18006 audit.
- Critically, the August 1, 2018, H18006 audit provided no scoring for safety measures; it only scored traffic signs, whereas scoring for safety measures is included and blended with the overall work site audit for all audits that occurred after November 23, 2018.”²

18. West-Can notes that but for this one score its WZTA average would be perfect. It argues that the difference in scores between the August 1, 2018 score, and its other scores are so significant that the former score is irreconcilable with the new WZTA scoring method.

19. West-Can did not contest its score at the time of the audit as WZTA scores were not used in procurement evaluation at that time and the only consequence it knew of was that the deficiencies would constitute a first warning.³

20. In its acceptance letter for H18006, the Ministry included the following paragraph:

“Please note that the Ministry will undertake an evaluation of the successful Bidders’s performance on this project and may use that information, in part, to determine which bid provides best value to the Ministry on future competitions. The main categories that may be used to rate the successful Bidder’s performance during this project include schedule, quality, project delivery, safety and environment,”⁴

² West-Can Reply paragraph 29

³ West-Can Initiation of Arbitration, paragraph 57

⁴ Ibid, paragraph 59

21. On May 22, 2020, West-Can received email notification that its CPE and WZTA scores had been updated. That same day West-Can responded to the email requesting its audit score and noted that its 2018 score for H18006 should be removed if correct information cannot be supplied.⁵

22. On May 25, 2020, the Ministry responded and provided the audit information.⁶

23. On September 3, 2020, West-Can received an additional report relating to its CPE and WZTA scores.⁷

24. On November 12, 2020, West-Can notified the Ministry that it was formally contesting its August 1, 2018 score for H18006. It said:

“As a follow up to our conversation, West-Can is contesting our August 1, 2018 score on H18006. This score is being used against West-Can when it was never conveyed to contractors that WZTA scores would affect bid rating. Contractors can’t be scored and then told at a later date that these scores will now affect bid ratings. Any rating prior to the WZTA score forming part of best value process must be discarded. Once again, we are officially contesting our August 1, 2018 score...”⁸

25. On November 30, 2020, after the contract had been awarded, the Ministry advised West-Can that it was rejecting its request to disregard the August 1, 2018, audit of H 18006 on the basis that the time to raise concerns is before the audit is finalized, not two years later.⁹

26. The Ministry argues that West-Can had ample opportunity to contest its score at the time of the audit and in the intervening years,¹⁰ that it had notice that the score might be used in future procurements in the contract award letter for H18006,¹¹ and that West-Can appealed its WZTA score after bidding had closed on H20126.¹²

H 18007

27. West-Can points to the Ministry’s treatment of the bidding process for H18087 as differential treatment amounting to discrimination.

⁵ Ibid, paragraph 63

⁶ Ibid, paragraph 64

⁷ Ibid, paragraph 65

⁸ Ibid, paragraph 66

⁹ Ibid, paragraph 69

¹⁰ Ministry Reply, paragraph 41

¹¹ Ibid, paragraph 43

¹² Ibid, paragraph 44

28. After close of bid but pre-contract award, Morsky's WZTA score was adjusted after it was recommended that West-Can be awarded the contract with a bid of \$2,059,622 versus Morsky's \$2,092,932.¹³

29. In e-mail correspondence between Ministry officials, one official comments, "If ***(Morsky) isn't successful they will enquire at high levels so we need to make sure we have scrutinized everything".¹⁴

30. Another official comments, "I am having a problem with the thought of awarding out of province for ***** the difference. Can you discuss this up the chain and let us know?"¹⁵

31. Another official comments, "In this case, West-Can received the highest points based on our best value criteria, and therefore that is who the contract should be awarded to".¹⁶

32. West-Can was not awarded the contract. An adjustment was made to Morsky's WZTA score and Morsky was awarded the contract.¹⁷

33. The Ministry says the situations are not analogous. Morsky did not request a change to its score. A ministry employee realized that a safety audit score from an unrelated supplier had been erroneously included in the calculation of Morsky's WZTA and recalculated the WZTA score to exclude the incorrect entry. The Ministry further argues that it did not review or overrule the findings of the auditor. It simply removed the incorrect entry so that the correct WZTA Score could be used.¹⁸

34. The Ministry further says that as these situations differ significantly it cannot be said that Morsky received better treatment.

Contractor Performance Evaluation

35. West-Can complains of unequal treatment on the basis that not all of the contracts that Morsky participates in have been awarded CPE scores. In particular West-Can refers to contract H18005 completed in 2018 and never graded.

36. The Ministry has sued both Morsky and the supplier of the asphalt for faulty work in relation to H18005. Morsky blames the supplier and the supplier blames Morsky for contract deficiencies. West-Can argues that the inclusion of a CPE score for Morsky for a contract that the Ministry alleges was faulty would lower Morsky's overall score. The

¹³ West-Can Initiation of Arbitration, paragraph 23(b)

¹⁴ Ibid, paragraph 25

¹⁵ Ibid, paragraph 26

¹⁶ Ibid, paragraph 27

¹⁷ Ibid, paragraph 27

¹⁸ Ministry Reply, paragraph 45

Ministry counters that it would be unfair to include a score when the matter is in litigation. West-Can also argues that the lack of a score has benefited Morsky for over two years.

Community Benefits

37. The community benefits provision is scored on a sliding scale with the maximum 25 points awarded for those contractors using 100% local labour and 0 points for those using 60% or less. West-Can describes the practical effect of the community benefits provision as requiring hiring a local workforce to be successful in obtaining public contracts from the government of Saskatchewan.

38. The Ministry argues that the general principles of non-discrimination for procurements in Article 502 are limited to goods, services and suppliers, which demonstrates a clear intention to exclude workers from the application of Chapter 5. The Ministry also notes that West-Can scored the maximum points on this contract.¹⁹

39. West-Can, in its reply to the Ministry's response notes that the Government of Saskatchewan after the commencement of this arbitration appears to be removing the community benefits provision for future contracts.²⁰

Contract Award

40. On November 23, 2020, H 20126 was award to a Regina based bidder, Morsky. West-Can's bid was \$57,580 lower than Morsky's. The WZTA and CPE scores assigned to West-Can and Morsky were the crucial factor in award of the contract.

Interpretation of the CFTA

41. Article 500 of the CFTA states:

“The purpose of this Chapter is to establish a transparent and efficient framework to ensure fair and open access to government procurement for all Canadian suppliers”.²¹

42. West-Can notes, that the CITT (Canadian International Trade Tribunal) has interpreted the CFTA's predecessor the AIT (Agreement on Internal Trade), in light of general-purpose provisions. This interpretation includes “requiring the government institution to show that the manner in which it treated the tenders received amounted to a fair, open and transparent procurement procedure.” West-Can argues this means “not only the black letter of a government institution's measures must meet this standard, but their effect, in fact, must also meet this standard.”²²

¹⁹ Ibid 55

²⁰ West-Can Reply, paragraph 82

²¹ Canada Free Trade Agreement, Article 500

²² West-Can Initiation of Arbitration, paragraph 98

43. Article 502 (1), (2) (b) provides

- 1) Each party shall provide open, transparent, and non-discriminatory access to covered procurement by its procurement entities.
- 2) With respect to any measures regarding covered procurement, each Party shall accord to
 - a. ...
 - b. The suppliers of goods and services of any other Party, including those goods and services included in construction, contracts, treatment no less favourable than the best treatment the Party accords to its own suppliers of such goods and services.²³

44. West-Can argues that interpretation of 502 does not require a determination of an intent to discriminate.

45. Article 503 (3) (b) includes a prohibition on local content, which West-Can argues extends to provisions requiring local work forces.

Article 503 (3) states:

- 3) A procuring entity shall not impose or consider in the evaluation of tenders or the award of contracts, local content or other economic benefits criteria that are designed to favour
 - a.
 - b. The suppliers of a particular Province or region of such goods or services²⁴

46. West-Can argues that 503 (3), which prohibits both local content and other economic benefits, should be interpreted and applied broadly. It further argues that Saskatchewan and the Ministry are bound through this broad obligation not to engage in market-distorting industrial policy activities that favour local suppliers and discriminate against suppliers from other provinces.²⁵ West-Can notes the rationale for prohibiting performance requirements as follows:

“the main rationale for prohibiting performance requirements in trade and investment agreements is that their use distorts international trade and investment flows. As noted by Professor Giorgio Sacerdoti:

The real objection to these policies pertains rather to their distortive trade effects. By artificially promoting exports or restricting the demand for imports through local content requirements, such provisions may be considered equivalent to export subsidies or import restrictions, deemed incompatible with the spirit if not always the letter of GATT.

²³ Canada Free Trade Agreement, Article 502

²⁴ Ibid, Article 503

²⁵ West-Can Initiation of Arbitration, paragraph 109

Widespread concern has been raised as to the economic soundness and trade effects of such governmental policies, since they may result in “beg your neighbour” practices. They would reciprocally offset themselves and generate a cumulative loss of revenues to the countries concerned, while encouraging a red tape and unproductive administrative interference with trade flows.²⁶

47. West-Can argues that taking the broad wording of 503 into account, alongside the rationale for the prohibition of performance requirements such as local content, it is clear that this provision prohibits any requirement of local workforces in procurement tenders.²⁷

48. Article 507 provides, in part:

In assessing whether a supplier satisfies the conditions for participation, a procuring entity shall:

b. base its evaluation on the conditions the procuring entity has specified in advance in its tender notices or tender documentation²⁸

49. West-Can summarizes the impact of 507 as follows:

“In short, to the extent that tender evaluation criteria are not applied strictly throughout the evaluation of a bid there is a conflict with the obligation in the CFTA. Further, to the extent evaluation criteria that are not disclosed in the tender documentation may result in a breach of the CFTA transparency obligations.²⁹

50. Article 515 of the CFTA deals with the treatment of tenders and award of contracts. It states, in part:

- 1) A procuring entity shall receive, open, and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process, and the confidentiality of tenders
- 2) ...
- 3) ...
- 4) Unless a procuring entity determines that it is not in the public interest to award a contract, the procuring entity shall award the contract to the supplier that the procuring entity has determined to be capable of fulfilling the terms of the contract and that, based solely on the evaluation criteria specified in the tender notices and tender documentation, has submitted:

²⁶ Meg Kinnear, Andrea Kay Bjorklund, et al., *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11, Supplement No. 1, “Article 1106 Performance Requirements”* (Kluwer International, 2006 at 1106

²⁷ West-Can Initiation of Arbitration, paragraph 115

²⁸ Ibid, paragraph 116

²⁹ Ibid, paragraph 123

- a. the most advantageous tender; or
- b. if price is the sole criterion, the lowest price.³⁰

51. In short, West-Can says, “there is an obligation to treat all bidders fairly and equally.”³¹

Findings

52. Prior to setting out my findings, I would like to note some other issues raised.

53. West-Can argues that the Ministry has chosen not to provide any non-confidential and public documentary evidence that the Ministry has in its possession to refute West-Can’s claims but, instead, relies on a single affidavit as evidence.

54. West-Can says the Ministry had the opportunity to provide supporting evidence, if such evidence existed, but chose not to do so. The Ministry has also not ruled on West-Can’s Freedom of Information request.

55. West-Can says that this information is not confidential.

56. West-Can asks that I make an adverse inference against the Ministry as a result of its refusal to produce such documentation.

57. West-Can notes that suppliers will generally hesitate long and hard to file legal actions against purchasing authorities that offer ongoing bidding opportunities. What finally led West-Can to file this claim was, in its view, repeated unfairness and discrimination.³²

58. In this vein, West-Can argues that the procurement process complained of is the latest instance in a demonstrated pattern of behaviour. It says. “The specific complaint at issue is simply the first time that the pattern has been brought forward through the BPM. The fact that West-Can has not raised formal objections in relation to each and every instance of unfair treatment in the past should not be a consideration in this case.”³³

59. In general, taking into account all arguments submitted, including the Ministry’s lack of an evidentiary response, it is my opinion that West-Can has not been treated equally and fairly under Part V of the CFTA, and the Ministry is in breach of Part V of the CFTA

³⁰ Canada Free Trade Agreement Article 515

³¹ West-Can Initiation of Arbitration, paragraph 128

³² West-Can Reply, paragraph 15

³³ Ibid, paragraph 16

WZTA Scores

60. I agree with the arguments submitted by West-Can that the use of West-Can's WZTA score from the H18006 audit, which occurred before the revision of the Work Zone Traffic Audit Process on November 23, 2018, was unfair.

61. In that respect I accept the evidence of West-Can that:

- a) The audit process before November 23 was substantially different from the process used after that date.
- b) West-Can did not have effective notice that the score would be used in future bid evaluations. I do not accept that the contract letter with H18006 was sufficient given future implications.
- c) West-Can has not been provided with a meaningful opportunity to contest the score.
- d) The treatment of West-Can and Morsky, in relation to WZTA scores, was markedly different.

62. The result is a breach of the following articles,

- a) 500- ensure fair and open access
- b) 502- treatment no less favourable than the best treatment the Party accords to its own suppliers
- c) 507- evaluation based on the conditions specified in advance in its tender notices or tender documentation
- d) 515- procuring entity must open and treat all tenders under procedures that guarantee the fairness and impartiality of the procurement process

63. For these reasons, the H18006 audit should not be included in the calculation of West-Can's WZTA Score

Contractor Performance Evaluation

64. West-Can makes two claims with respect to CPE scores: 1) that the lack of a CPE score for H18005 unfairly benefits Morsky, and (2) that the Ministry unfairly withheld scoring or applied Morsky's CPE scores so as to artificially inflate Morsky's CPE score to the detriment of West-Can

Contract 18005

65. As set out above, Morsky and the Ministry are in litigation over performance on contract H18005. The Ministry says it would not be fair to give a CPE score until the litigation is over.

66. There are only two contractors with individual CPE scores, Morsky and West-Can. The rest use the industry average.³⁴ Thus any benefits that accrue to Morsky are detrimental to West-Can in a bidding situation and contrary to the equal, and national treatment requirements of articles 500, 502 & 515 of the CFTA.

67. The Ministry in its Statement of Claim in its lawsuit against Morsky has already taken a position on Morsky's performance. It says that "failure was caused by the Defendant Morsky's breach of its aforementioned contractual obligations" and "the Plaintiff Government suffered damage as a result of its reliance on the representations of the Defendant Morsky."³⁵

68. West Can argues:

"Despite Saskatchewan's claim of faulty work on this job, Morsky has never received a CPE for this contract as the Ministry refuses to issue the final acceptance of the contract. There is no law, policy or regulation governing when to issue the final acceptance of a contract and, therefore, no basis for Saskatchewan's reluctance to issue the CPE score.

Morsky has thus been able to participate in three full contractual bidding seasons without any effect on its evaluation scoring stemming from its reported poor performance on contract H18005 (as claimed by the Ministry itself). The very thing that CPE scores are supposed to assess, the risk of poor performance, is being sidestepped to Morsky's benefit in relation to contract H18005."³⁶

69. This situation would appear to illustrate a problem with the CPE process. A contractor that may be in line for an unfavourable CPE evaluation could avoid that score by initiating litigation. If there are only two contractors using CPE scores and one is in province while the other is out of province, differential treatment would result. I urge the Ministry to carefully examine and consider issuing a CPE score to Morsky based on the best judgement of its professional engineers. Should the Ministry conclude that it is unable to issue a CPE score I recommend reworking the CPE policy to ensure equitable and timely assignment of CPE scores.

³⁴ West-Can Reply paragraph 58.

³⁵ Ibid. paragraph 68

³⁶ West-Can Initiation of Arbitration, paragraphs 87 & 88

CPE Score Timeliness

70. West-Can makes the following argument on timeliness of CPE scores:

“Through careful analysis of the scores, and given that there are only two competitors with CPE averages, West-Can is actually able to reverse engineer its competitor’s score. In this regard West-Can knew Morsky’s score increases were simply not possible, given the range of possible scores that Morsky could achieve. Indeed, through its ability to reverse engineer Morsky’s score, West-Can has reasonable grounds to believe Morsky’s CPE scores are not properly counted. Based on the available information, it is statistically impossible for Morsky to have achieved the increases in scoring that would have been needed in order to achieve the CPE score Morsky needed to win the contracts it won.”³⁷

71. In deference to the Ministry’s argument about commercial confidentiality, I have not set out the statistical argument. The argument is simply a mathematical calculation using West-Can’s scores, the Ministry’s formula and assigning Morsky the highest possible score.

72. West Can concludes by asking that I make adverse inferences against the Ministry as a result of its failure to adduce evidence to counter West-Can’s assertions. Without making a direct finding on that point, I conclude that the argument has raised sufficient questions about unequal treatment to lead me to recommend that the CPE program be thoroughly reviewed. I will make a recommendation to that effect.

Community Benefits

73. I agree with West-Can that the community benefits program is contrary to Articles 500 and 503 of the CFTA which provide, in part;

Article 500: Purpose

The purpose of this Chapter is to establish a transparent and efficient framework to ensure fair and open access to government procurement opportunities for all Canadian suppliers

Article 503: General Procurement Rules

3) A procuring entity shall not impose or consider, in the evaluation of tenders or the award of contracts, local content or other economic benefits criteria that are designed to favour:

a....

b. the suppliers of a particular Province or region of such goods or services.

³⁷ West-Can Reply, paragraph 54

74. The community benefits provision encourages the use of local labour and penalizes contractors unable to obtain appropriate local labour. They will either face a points penalty if they bring in experienced staff from another province or incur the extra training costs if they hire inexperienced staff from the local market. Either way the provision benefits a resident company with trained resident staff to the detriment of out of province suppliers.

Recommendations

75. For the reasons set out above I make the following findings and recommendations;

- 1) A declaration that the Ministry breached the articles 500, 502, 503, 507, and 515 of the Canada Free Trade Agreement;
- 2) A recommendation that the Ministry remove West-Can's August 1, 2018 score for contact H18006 from its WZTA score;
- 3) A recommendation that the Ministry carefully examine and consider issuing a CPE score to Morsky based on the best judgement of its professional engineers. Should the Ministry conclude that it is unable to issue a CPE score to Morsky, I recommend reworking the CPE policy to ensure equitable and timely assignment of CPE scores.
- 4) A recommendation that the Ministry remove the Community Benefits provision, including the related penalty, from all future procurements, whether they are derived from stimulus or non- stimulus funding sources;
- 5) A recommendation that the Ministry review its procurement practices to ensure compliance with the transparency and fairness obligations in the CFTA and other trade agreements, including a) objective standards for how and when CPE and WZTA scores are added to contractor scores; b) transparency measures to ensure that that all contract scores have been assigned, including the publication of WZTA and CPE scores; c) clear guidelines for when CPE and WZTA scores will not be used; d) developing a clear and transparent process for challenging WZTA scores.

Costs

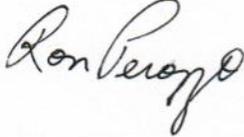
76. Costs are assessed against the Ministry in the following amounts:

- a) Bid preparation costs of \$30,232.00
- b) Tariff cost of \$5,000
- c) Operational costs, arbitrator, \$7,696.00 and administrator, \$3,019.50

77. Costs are to be paid within 45 days following the expiration of the time to apply for judicial review.

78. I thank all counsel for their submissions.

Ron Perozzo

A handwritten signature in black ink that reads "Ron Perozzo". The signature is written in a cursive style with a large, looped "R" and "P".

March 29, 2021