

NEW WEST PARTNERSHIP TRADE AGREEMENT

IN THE MATTER OF A COMPLAINT BY COMMERCIAL TRUCK EQUIPMENT CORPORATION AGAINST BEAVER EMERGENCY SERVICES COMMISSION PURSUANT TO THE BID PROTEST MECHANISM IN THE NEW WEST PARTNERSHIP TRADE AGREEMENT

DECISION

July 29, 2021

Introduction

[1] Beaver Emergency Services Commission (BESC) issued a Request for Proposal, Water Tank Apparatus RFP #20210127 TAN on January 25, 2021 for a tanker unit with a 3000 USG tank and enclosed transfer pump closing February 26, 2021.

[2] Commercial Truck Equipment Corporation (CTEC) advised BESC on February 9, 2021 that there were certain inconsistencies in the RFP #20210127 TAN, specifically, a variance in the evaluation criteria between the equipment specifications document and the RFP. It also raised concerns about specifications that appeared to favour one potential bidder and that there was confusion about whether the tank's specification was to have a tank capacity in US gallons or imperial gallons. BESC suspended the original request for proposal and issued a Revised RFP, Rev #20210311 with a closing date of March 31, 2021 that made changes to specifically answer the issues raised by CTEC.

[3] BESC received four bids to the revised RFP (details of which will be dealt with later). All the bids were reviewed, recorded and distributed to the Capital Purchasing Committee (CPC). All the proposals were scored using the methodology contained in the Revised RFP as set out in Schedule A. On the basis of this scoring, Fort Garry Fire Trucks (Fort Garry) received the highest score and the CPC recommended that the Board of BESC accept Fort Garry's bid. The Board

accepted the bid and by a unanimous resolution, agreed to purchase the tanker unit from Fort Garry for \$427,536 with approval up to \$430,000 on May 12, 2021.

[4] Subsequent to the awarding of the contract to Fort Garry, CTEC requested consultations pursuant to Article 2, the Bid Protest Mechanism (BPM), with the result that the process was suspended. Consultations were unsuccessful.

[5] By letter dated June 21, 2021, CTEC requested the appointment of an arbiter pursuant to Article 3(1) of the BPM to review and set aside the awarding of the contract to Fort Garry pursuant to the Revised RFP and to award the contract to it or alternatively to re-evaluate the tenders. It also requested an award for either lost profit or costs in preparation of the bid, including all legal costs as well as all operational costs as set forth in the agreement between the parties.

[6] The parties agreed that I have been properly appointed pursuant to Article 3 of the New West Partnership Trade Agreement, Bid Protest Mechanism, to arbitrate the matter and that I am required to deliver my decision by August 1, 2021.

Process

[7] Under the BPM, the Government Entity, in this case BESC, had 14 days to reply following the request for the appointment of an arbiter pursuant to Article 3(1) and pursuant to Article 5(1) of the BPM, to respond to the following:

- (a) The response to each of the supplier's allegations of inconsistency;
- (b) If applicable, a response to the supplier's request for a bid preparation cost award;
- (c) If requesting a tariff cost award, supporting documentation relating to which tariff costs; and,
- (d) Submissions on the allocation of operational costs.

[8] The supplier may deliver a written counter reply to the Administrator with a copy to the Government Entity, in this case, BESC. That counter reply is to be limited to the matters specifically provided for in Article 3(1) and the items previously noted as (a) to (d) in Article 5(1).

[9] The BPM specifically provides in Article 5(4) that the arbiter, in rendering a decision, shall only consider the written material that is filed in accordance with this process and the obligations of the applicable trade agreement.

[10] Article 5(7) of the BPM sets out that the arbiter's report shall contain findings of fact, the determination of whether the specific procurement at issue is consistent with the applicable trade agreement; if applicable, recommendations for corrective action to have a government entity bring itself into compliance with the applicable trade agreement; and, the amount of any awards determined in accordance with Article 7, and the time within which the award shall be paid.

Issues

[11] CTEC alleges a number of errors occurred in the awarding of the contract to Fort Garry that require the contract be set aside and awarded to it. Specifically, it raises the following issues:

- (a) The utilization of the wrong scoring method;
- (b) That the specifications in the request for proposal favoured the successful bidder;
- (c) Bias in the awarding of the contract; and
- (d) Failure to adequately examine CTEC's bid and in particular, a failure to consider information submitted to District Fire Chief, Station 1 Tofield, Dave Oleksyn.

Analysis

(a) Utilization of the wrong scoring method

[12] All of the bids for the Revised RFP remained sealed until the bid opening on April 13, 2021 by the Commercial Proposal Committee (CPC) that was made up of a Commissioner of

BESC, Dale Pederson, Chair; Regional Emergency Manager, Allan Weiss; and Fire Chief Tofield Station 1, Dave Oleksyn. All of whom were in attendance at the opening of the bids.

[13] All four proposals were reviewed by the Committee. All the proposals were scored by the Committee Chair, Dave Pederson, in consultation with committee members before being submitted to the BESC Board for its final approval and the awarding of the contract.

[14] All four bids were evaluated using the binary scoring methodology provided for in the Revised RFP as set out in Schedule A under the heading “Tender Evaluation.” Using the binary method, each bidder either received full 10 points for satisfying each of the requirements and specifications or received zero (0) points for failing to meet the requirements or specifications of any item.

[15] The Committee thoroughly reviewed all bids using this methodology. All of the bids were scored based on the methodology set out in the Revised RFP in Schedule A. The notes of the Chair of the CPC set out in detail the evaluation of all of the four bids notwithstanding that CTEC’s bid did not comply with or conform to all of the requirements of Article 2 of the Revised RFP. Fort Garry received the highest score.

[16] The Revised RFP specified that certain procedural requirements be complied with in order for the bid to be considered. CTEC’s bid was noncompliant in the following respects:

- (a) Failing to provide sufficient copies of each proposal contrary to Section 3.1;
- (b) Failing to include company information on the whole of the Revised RFP bid form contrary to Provision 3.5; and,
- (c) Entering into private discussions with the District Fire Chief and not Allan Weiss contrary to Instruction 2.1.

[17] CTEC’s failure to bid a tanker unit with a 3000 imperial gallon tank is surprising because it drew BESC’s attention to the discrepancy between the boiler plate that specified a tank of 3000 US gallons and the specifications that called for a tank of 3000 imperial gallons. In addition to

failing to specify a tank of 3000 imperial gallons CTEC did not provide a PTO and the “pump and roll” as specified under the Specifications, Item 3.2.1 of the Revised RFP.

[18] Notwithstanding all of these deficiencies CTEC’s bid was considered by BESC and scored in the same way as all the other bidders. This scoring rubric that was used as set out in Schedule A of the Revised RFP is based on 200 points. Fort Garry was the only bidder to include the required 3000 imperial gallon tank and the PTO in its bid, and as a result received 25 points for having complied with item number 10 on the scale —“Tender meets specs”.

[19] CTEC’s bid did not meet all the specifications—it failed to provide a 3000 imperial gallon tank and the requisite PTO, and received a Zero for item 10. It was, however, the best noncompliant bidder.

[20] The Revised RFP sets out in Schedule A that all bidders will be evaluated on a point system that is clearly set out. It further stated that a failure to submit requested documents may result in the tender being refused or zero points being assigned. It further provides that evaluation of points being received in each section set out under the heading “Tender Evaluation”, is at the discretion of the purchaser/fire department.

[21] Finally, category 12 of the Revised RFP scoring was price. CTEC contends it had the lowest price and it should have been awarded the contract. However, CTEC’s bid was noncompliant and Fort Garry was the only bidder that received points for compliance with item 10—Tender meets specs—and as a result Fort Garry was the only bidder capable of receiving points for price on item 12 of the scoring rubric. Under the terms of the Revised RFP, BESC is not obligated to select the lowest bidder.

[22] CPC’s recommendation to the Board of BESC was that it purchase the tanker unit from Fort Garry for the price of \$427,536 with the addition of other discretionary specifications set out in the recommendation.

[23] The notes of the meeting of CPC made by Allan Weiss, Regional Emergency Manager, indicated that Fire Chief Dave Oleksyn was present at the opening of the tenders on April 13, 2021 but his comments about the Revised RFP were not received until May 14, 2021, attached to an email sent to info with a copy to debdueck49@live.ca with the note on the cover page “just noticed this email never went through the other day.” The letterhead of BESC indicates that its email address is info@bsc.ca. That was two days after the Board of BESC received and considered the report from the CPC with the recommendation of the Chair of the CPC as set out in full in tabs D and F of BESC’s reply to CTEC’s request for an arbiter pursuant to Article 3(1), that it purchase the tanker unit from Fort Garry.

[24] From this I find that BESC had not received and was not aware of the comments of Fire Chief Oleksyn attached to the email prior to May 14, 2021.

[25] The Revised RFP specifically provides that all technical inquiries are to be directed in writing to Allan Weiss by email. That was not what happened here. The contact by CTEC was with the Fire Chief Dave Oleksyn, in violation of the Revised RFP.

[26] There are other reasons for not considering CTEC’s bid. It was noncompliant with the tendering process that specifically required: “The Proponent shall provide one (1) original and four (4) copies of the proposal”. Schedule A under the heading “Tender Evaluation” states “Failure to submit requested documents may result in your tender being rejected or zero points being assigned.” That failure alone was reason enough to reject the proposal but, notwithstanding this failure to comply with the terms of the Revised RFP, CPC scored the CTEC proposal. The result was that Fort Garry received the highest number of points, had the best overall benefit to the purchaser, and was recommended by CPC to the Board of BESC as the bidder to supply the tanker unit.

[27] I find, based on the documents contained in BESC’s reply to CTEC’s request pursuant to Article 3(1) and the counter proposal of CTEC, that there was no error or failure to properly score the bids as required by the Revised RFP. All the bids received the scores indicated in the rubric for compliance. If they complied with an item, they received 10 points and if they did not

comply with an item on the rubric, they received zero. Thus, Fort Garry scored 25 points for complying with all the specifications and CTEC received a zero because it did not comply with item 10 of the specifications, “Tender meets specs”. Fort Garry also received points under item 12 by reason that it was the only bidder that fully complied with all the requirements of the Revised RFP.

(b) and

(c) The issue of specifications that favoured Fort Garry and bias in the awarding of the contract can be dealt with together.

[28] CTEC complained to BESC about the terms of the original RFP, notably that there were inconsistencies in the boiler plate and specifications; that there were two different scoring mechanisms contained in the RFP; and more importantly, the specifications appeared to have been written by an employee of one of the potential bidders.

[29] After receiving these complaints from CTEC set out in Tab B of the reply of BESC, the original RFP was revised to take into account the comments. The result was that the Revised RFP was re-drafted to specifically respond to CTEC’s concerns and are based on performance that expanded the pool of potential bidders. The original RFP, as was pointed out by CTEC, favoured Fort Garry, but the revisions proposed by CTEC and accepted by BESC effectively removed that advantage and created a neutral process.

[30] The bids submitted to the Revised RFP were considered by the CPC and as the notes of Mr. Weiss set out in Tab G, show all were scored in accordance with the scoring matrix described in Schedule A of the Revised RFP. The tender submitted by CTEC, which did not comply with the tender requirements, was scored along with all other bids that were compliant. The result was that Fort Garry scored higher and was found to have the best overall financial advantage to BESC and was recommended by CPC to the Board of BESC as the supplier for the purchase of the tanker for the price set out in the resolution referred to earlier.

[31] In the result I find no evidence of bias or that the Revised RFP was designed to favour Fort Garry.

(d) The final issue raised by CTEC is the failure of BESC to consider the comments of Fire Chief Dave Oleksyn.

[32] CTEC alleges that the failure to consider Fire Chief Oleksyn's comments that were expressly contemplated in the Revised RFP on page 3 of 7 contravenes this provision of the Revised RFP. That provision in relevant part states, "BESC reserves the right ... to discuss or negotiate the RFP or any proposal it receives with any interested parties as BESC in its absolute discretion deems advisable". The submission by CTEC, in my opinion, misconstrues the intent of the power reserved to BESC in the Revised RFP. The provision CTEC seeks to rely on only permits BESC to discuss or negotiate any proposal it receives pursuant to the Revised RFP. It does not contemplate a supplier lobbying a member of the CPC with respect to the tender. It is alleged by CTEC that Fire Chief Dave Oleksyn contacted it to discuss the tanker size but that is not clear from the email of May 14, 2021 sent by Fire Chief Oleksyn as set out in Tab E sent from Station 1 to info with a copy to debdueck49@live.ca.

[33] As has been previously noted, notwithstanding the fact that he was present at the opening of the tenders on April 23, 2021 when the bids were opened and apparently scored by the Committee, he did not submit his email with the attached comments until May 14, 2021, three weeks after the bids were reviewed and two days after the successful bid was accepted by the BESC Board. CTEC alleges that the Fire Chief contacted it concerning certain shortcomings in its bid but a review of the documents does not support that allegation. A review of the documents in Tab F favours the finding that CTEC in fact, contacted the Fire Chief in connection with its bid in an attempt to modify it in certain respects, notably to specify the size of the tank in imperial gallons instead of US gallons and to supply a PTO in accordance with the specifications. In the circumstances I find that the CPC and the Board of BESC did not err in failing to consider these late comments of Fire Chief Dave Oleksyn and the modified bid of CTEC.

(d) Finally, CTEC requests that it be compensated for the preparation of the bid, including loss of profits and legal costs.

[34] I find that CTEC is not entitled to costs for the preparation of the bid and legal fees given that its bid was noncompliant and that the Revised RFP specifically provides that the "... Request

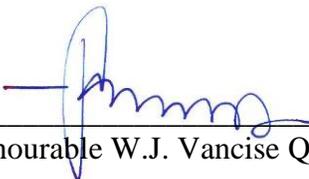
for proposal does not commit BESC to ... pay any cost incurred in the preparation of a proposal ...” Nothing that BESC did in the evaluation and awarding of the tender to the successful bidder merits the awarding costs of preparation or legal fees to CTEC. The process was open, fair and transparent. That claim is specifically rejected.

Disposition

[35] The claim of CTEC is rejected in its entirety.

[36] CTEC shall pay to the Administer in accordance with the terms of the BPM, Operational Costs of \$4,817.83 (the total of the Arbiters and Administrator's fees and disbursements) within 30 days of the release of the report.

[37] All of which is respectfully submitted.


The Honourable W.J. Vancise Q.C., Arbitrator