Arbiter's Final Report

April 15, 2019

In the matter of an Arbitration pursuant to Chapter V, of the *Canada Free Trade Agreement* (2017) as amended, and under the *Arbitration Act,* R.S.A. 2000, c. A-45, as amended, (the "Act")

Between

Parkland Geotechnical Consulting Ltd.,
operating as ParklandGEO Consulting Group

(Supplier)

And

Alberta Infrastructure, Procurement Services

(Government Entity)

Arbiter: Ron Perozzo

Representation:

Supplier	**Government Entity**
Chapman Riebeek LLP 300, 4808 Ross Street Red Deer, AB T4N 1X5 Attn: Suzanne Alexander-Smith	Alberta Justice and Solicitor General 9th Floor 10011 – 109 Street Edmonton, AB T5J 3S8 Attn: Alisha Hurley

Introduction

1. This Arbitration relates to the disqualification by Alberta Infrastructure, Procurement Services (AI) of Parkland Geotechnical Consulting Ltd., operating as ParklandGEO Consulting Group ("Parkland") from the procurement of Geotechnical Consulting services for the Red Deer Justice Centre ("RDJC"), for an alleged or perceived conflict of interest or unfair advantage.

Facts

2. On or about November 30, 2018, AI posted a request for proposal (the RFP) for Geotechnical Consulting and Construction Services for the Red Deer-Justice Centre Geotechnical Consulting and Construction Services (PP#019903). It was an open and competitive opportunity, governed by the *New West Partnership Trade Agreement ("*NWPTA")*/Trade and Labour Mobility Agreement* ("TILMA), the *Canadian Free Trade Agreement ("CFTA")* and the *Comprehensive Economic and Trade Agreement* (("CETA").
3. Parkland submitted a proposal in accordance with the RFP outline on December 18, 2018.
4. On January 22, 2019, AI notified Parkland that its proposal was being disqualified due to an irregularity and AI referenced the Conflict of Interest provisions of AI Terms and Conditions, without specifying the actual irregularity.
5. On January 22, 2019 Parkland disputed being in contravention of the Conflict of Interest provisions and sought clarification. On January 28, 2019 Parkland received a response from AI that the perceived conflict related to the possibility of its being in a position to review its own work provided earlier in the process prior to the issuance of the RFP.
6. Parkland invoked the consultation process under the CFTA on February 1, 2019.
7. On February 6, 2019, AI, through counsel, advised Parkland of the Bid Protest Mechanism (BPM).
8. Parkland has proceeded under the BPM.

The Issue

9. The issue in this arbitration is the applicability of the CFTA. AI has not disputed the submission of Parkland that its bid was disqualified due to a conflict or interest or unfair advantage. AI's argument is that, on its face, the CFTA does not apply to a local dispute between local parties that does not impair free movement of trade, investment or labour within Canada. Parkland argues the opposite.
10. I accept AI's argument that the CFTA does not apply in this instance, however I find that the delayed raising of the jurisdictional issue by AI impacts my

award of operational and tariff costs. Below, I briefly set out the arguments and follow with my reasons.

Arguments

11. AI notes Article 100 of the CFTA

> The Parties' objective is to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investments within Canada…

12. AI points to the guiding principles set out in Article 102

> a) The need to eliminate existing barriers and avoid new barriers to trade, investments and labour mobility within Canada and to facilitate the free movement of persons, goods, services, and investments within Canada;
> b) The need to ensure non-discriminatory treatment of persons, goods, services and investment, regardless of where they originate in Canada; and
> c) The need to reconcile occupational standards and regulatory measures to provide for free movement of persons and the removal of barriers to trade and investment within Canada

13. AI argues that neither of the complaints by Parkland, that AI incorrectly found Parkland in a conflict of interest or that Parkland had an unfair advantage relate to the free movement of labour, goods, or services across Canada and thus, do not trigger any violation of the CFTA.
14. AI argues that the Arbitrators "jurisdiction does not encompass reviewing the minutiae of procurement disputes without any cross-territorial component".
15. AI argues that Article 502 sets out the general principles of Chapter 5, which applies to government procurement. Each Party to the CFTA is required to treat goods, services and suppliers originating from any other Party the same way it treats those originating locally. Following on this AI argues that there can be no breach of Article 502 where the complainant is an Alberta company, the proposal for work in Alberta and the respondent is the government of Alberta. Even if it has incorrectly assessed the potential conflict of interest or incorrectly determined that Parkland had an unfair advantage neither error violates Article 502 of the CFTA.
16. AI submits that, even if the potential conflict of interest and unfair advantage were incorrectly assessed by AI, neither would be an error relating to Article 507 which, prevents a procuring entity from requiring a proponent to have prior experience within the territory of with the procuring entity and requires the procuring authority to consider the experience and business activities of the proponent inside and outside the territory in which the project is to be located.

17. Article 515 of the CFTA requires Parties to treat tenders with fairness and impartiality. AI argues that the general duties in Articles 500 and 502 inform these requirements and that the reference to fairness and impartiality is in relation to non-local suppliers of goods and services and as such, even if AI was unfair or impartial such unfairness or impartiality was intended to or has the effect of reducing the free movement of trade, goods or services across Canada, which is the intent of the CFTA.
18. Ai argues that it has complied with the requirement of Article 518 to create administrative review procedures through the establishment of the BPM. It further argues that the BPM is meant to address complaints that the actions taken by a procuring Party have impeded the movement of trade, goods, or services across Canada. AI argues that such allegations have not been made.
19. AI argues that if Parkland's is correct, and this type of complaint is meant to be handled by an arbitrator pursuant to the CFTA, every single procurement dispute with a provincial, territorial, or federal government in Canada, whatever the topic, will fall within the purview of the CFTA and that it stretches credulity to infer that was the intention of the signatories to the CFTA.
20. In summary, AI's argument is that since the alleged actions, do not apply to cross territorial actions or impeded the cross-territorial flow of persons, goods, services or investment within Canada, relief under the BPM should not be available. Further, rendering a judgment in favour of Parkland in a case such as would encourage other proponents to use the CFTA dispute resolution process to pursue disputes over which it was never intended to govern.
21. Parkland argues that the CFTA applies notwithstanding the local character of the Parties. It notes that article 100 of the CFTA more fully reads that the objectives of the CFTA are to "reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, and investments <u>within Canada and to establish an open, efficient and stable domestic market.</u> (emphasis added by Parkland). Parkland notes that the signatories, in the CFTA recognize the need for full disclosure of information and dispute resolution procedures and compliance mechanisms that are accessible, timely, credible and effective. (Articles 102(2)(c) and 102(2)(e).
22. Parkland argues that nothing in the CFTA limits, either explicitly or implicitly, its application to only cross-border complaints. The CFTA, in Parkland's submission, is intended to level the playing field for all suppliers and includes access to an efficient and effective mechanism for participants to resolve disputes.
23. Parkland says the CFTA is aimed at eliminating "barriers" not "borders" and that barriers can be procedural or conceptual in nature and not dependent on location.
24. Parkland argues that AI's interpretation would result in "reverse discrimination" against local suppliers, in that external suppliers would have protections and remedies unavailable to local suppliers.

25. Parkland cites *PMH Insights v. Parkland* and *Parkland Geotechnical Consulting v The City of Red Deer*, cases decided under the NWPA, in support of its argument that the CFTA applies.

Findings

26. Counsel for both parties in this dispute very ably presented their arguments and I am thankful for their efforts. I am persuaded by the arguments presented by AI that the purpose of the CFTA and its dispute resolution process are intended to reduce barriers between Provinces impeding the free movement of goods, services and labour.
27. While there may be cases in which a totally local procurement may fall under the ambit of the CFTA, in this case what is being complained against is a decision of a local authority concerning a local supplier that does not relate to the basic subject matter of the CFTA.
28. I agree that the CFTA procurement rules are not intended to provide an avenue for proponents to challenge any procurement decision made by any Party to the agreement but are intended to ensure free movement of trade, goods and services across Canada by, in part, providing oversight to procurements where there may be restrictions to such free movement.
29. The cases, *PMH Insights v. Parkland* ("PMH") and *Parkland Geotechnical Consulting v The City of Red Deer* ("Red Deer") are distinguishable as they were not cases under the CFTA and both have cross-territorial implications. In PMH the issue was sole-sourcing a technology contract that exceeded the minimums set in the NWTPA for public tender. In Red Deer issues were raised concerning prequalification restrictions as well as restrictions on experience. Both cases limited the ability of contractors from other Provinces competing.
30. I accept AI's argument that it cannot be said to be reverse discrimination when parties, both in and out of province, are entitled to relief in circumstances involving cross territorial issues and both are not entitled to relief when the free movement of trade, labour and investment across territories is not involved.

Costs

31. On February 6, 2019 AI wrote to counsel for Parkland

> We acknowledge receipt of your correspondence dated February 1, 2019. We have had the opportunity to review the documents and facts surrounding the above noted matter with our client.
>
> We understand that you are writing to invoke your clients right under article 518 of the Canadian Free Trade Agreement ("CFTA"). As you are aware article 518(4) of the CFTA allows the procuring entity to timely consideration of the complaint through administrative or judicial review procedure. The Province of Alberta has an

administrative procedure through a bid protest mechanism found in this web link, (web link set out).

32. AI, in its submission in this proceeding, also refers to the BPM as the Alberta Governments response to the need for an administrative review procedure under Article 518.
33. AI argues that it was under no obligation to provide legal advice to Parkland regarding what approach it should take to a dispute and that AI's failure to indicate that it did not believe a complaint under the CFTA was appropriate did not amount in any way amount to a waiver of AI's right to raise the issue before an arbitrator.
34. While AI may not have waived it's right to raise the issue before an arbitrator, it cannot point to the BPM, as it did in the letter to Parkland's counsel, cite the BPM as the administrative dispute mechanism under 518 and then argue that the complaint is so clearly outside the purview of the CFTA and, by extension, the BPM, that they do not apply.
35. Article 2(4) of the BPM begins by stating that the government and the supplier shall make every effort to arrive at a mutually satisfactory resolution of the complaint through consultations and, to that end, shall exchange information sufficient to enable a full examination of the matter.
36. The BPM is the process to resolve complaints. Not all complaints will succeed but the reason for consultation is to attempt to resolve complaints without the expense of arbitration. A party may choose not to consult but I believe an arbitrator has the ability to take that fact into account in awarding costs.
37. AI did not engage in meaningful consultation and as a result put Parkland to expenses that it may not have incurred had consultation taken place. On the material before me it appears that the jurisdictional question was not raised until AI filed its reply.
38. The BPM states that operational and tariff costs shall generally be awarded against the unsuccessful disputant, however it allows the arbiter to apportion costs between the disputants taking into account the circumstances of the dispute.
39. Taking the decision not to consult and the late raising of the jurisdictional issue into account I award operational and tariff costs against AI.
40. The operational costs are, $1699.04, administrator's fees and expenses, $1625.00 arbiter's fee for a total of $3324.04
41. Parkland has said that it will incur tariff costs in excess of $5000.00. I award tariff costs against AI in the amount of $5000.00, provided Parkland can substantiate the expenses to the Administrator.

Order

42. AI did not violate the CFTA.
43. AI was not timely in its delayed disclosure of the jurisdictional challenge.
44. Tariff costs up to $5000.00 are awarded against AI, upon substantiation by Parkland.
45. Operational costs of $3324.04 are awarded against AI.

46. Tariff and operational costs to be paid within 45 days following the expiration of the time for appeal.

Ron Perozzo

Arbiter