

In the matter of an arbitration pursuant to Part IV, B of the New West Partnership Trade Agreement (2010) together with all Protocols of Amendment since the signing of the Agreement ("NWPTA) and under the *Arbitration Act*, R.S.A. 2000, c. A-43 as amended, (the "Act")

Between:

PMH Insights Inc.

(Supplier)

And

Parkland County

(Government Entity)

Arbiter's Final Report

Date of Final Report: April 5, 2017

Province of Government Entity: Alberta

Arbitrator: Shauna Finlay

Representation:

Supplier	Government Entity
McAnsh Law 44 Chestnut Street Ottawa, Ontario K1S 1A1 P: (613) 294-1156 F: (613) 482-5177 Attention: Scott McAnsh	Parkland County 53109A Hwy 779 Parkland County, Alberta T7Z 1R1 P: (780) 968 3230 F: (780) 968 8413 Attention: Arlan Delisle, County Solicitor/Director, Legal and Legislative Services

I. Introduction

1. This arbitration is pursuant to the Bid Protest Mechanism under Part IV (B) of NWPTA. Under Article 35, Part IV(B) applies to disputes relating to a specific procurement covered by Article 14(1). Article 14(1) provides that Parties to NWPTA will provide open and non-discriminatory access to procurements of a number of government entities. Among other matters, Article 14(1)(c) provides that the government entities to which Article 14(1) applies includes regional, local, district or other forms of municipal government where the procurement value for services is greater than \$75,000.
2. PMH Insights Inc. (the "Supplier") claims that Parkland County (the "County") failed to provide open and non-discriminatory access to its procurement of management software because it sole sourced a software contract to another party in December of 2016.
3. The County claims that it was not required to provide open and non-discriminatory access to its procurement of management software because the procurement value did not exceed the Article 14(1)(c) threshold of \$75,000. Parkland County also claims that the Supplier's request for consultations regarding the alleged inconsistency was not made within the time limit set out in Article 36(1) of NWPTA and, therefore, there should be no further consideration of the matter.
4. I was contacted by the NWPTA administrator to determine my availability to act as an arbitrator in these Bid Protest proceedings. I was subsequently advised by the administrator that both the Supplier and the County had agreed with my appointment as arbitrator and neither party objected to me determining this matter. As the County is located in Alberta, pursuant to Article 37(10), this proceeding is deemed to take place in Alberta.

II. Issues

5. The issues arising in this arbitration are:
 - (i) Has the initial inclusion by the Supplier of without prejudice consultation correspondence irreparably prejudiced the County in these proceedings?
 - (ii) Was the Supplier's request for consultations with the County out of time pursuant to Article 36(1) of NWPTA?
 - (iii) Was the management software contract entered into by the County covered by Article 14(1) because the procurement value met or exceeded \$75,000?
6. With respect to issue (a) above, the Supplier agreed with the County that the communications were without prejudice and asked that these communications be removed from its submission. This issue was flagged for me at the time I was provided with the parties' submissions and those

communications were removed. I have not considered those communications in making this Final Report. Therefore, I do not find that the County has been irreparably prejudiced in these proceedings.

III. Summary of Submissions and Evidence of the Parties

7. The initial request for the appointment of an arbitrator under Part IV(B) of NWPTA was submitted to the NWPTA administrator by the Supplier on February 24, 2017. The response of the County was submitted to the NWPTA administrator on March 9, 2017. The Supplier provided a reply to the County's submissions on March 16, 2017. Both parties provided additional materials on March 29, 2017 with respect to "recoupment award" and "procurement value" as those terms are defined in NWPTA.

A. The Supplier

8. The Supplier submitted the following relevant facts:
 - An employee of the Supplier approached the County in June 2016 regarding management software it was offering for sale. A voicemail was left on June 7, 2016 and a follow up call was placed on June 10, 2016. Another call was made on June 15, 2016 and the parties met on July 4, 2016.
 - At the July 4, 2016 meeting, the Supplier presented the software to an employee of the County and that the County appeared to be interested in the product. The County indicated it would follow up with the manager of the County and most likely arrange another demonstration.
 - The Supplier followed up with the County on August 2, 2016 to inquire about the status. The County advised the Supplier that there hadn't been an opportunity to canvas the matter with the manager of the County, but that they would soon.
 - The Supplier followed up again with the County on August 24, 2016 and was advised by the County that it may not purchase the management software from the Supplier.
 - On September 2, 2016, the Supplier was advised by the County that the County would not be purchasing the management software from the Supplier.
 - On January 18, 2017, the Supplier was advised that the County had purchased different management software in December 2016. The Supplier alleges the County stated that a factor that influenced the decision to purchase different software was because it had "more ability to integrate additional products in the future."

- Having previously sold the same type of software to other municipalities, the Supplier alleges the procurement value of the contract entered into by the County would exceed \$75,000.
 - Therefore, the Supplier submits it should have been given an opportunity to submit a tender for the management software contract.
9. The Supplier provided an affidavit of Mr. Philip Hick dated March 15, 2017 which attached correspondence from other municipalities that set out the total amounts those municipalities had spent on the same type of management software that Parkland County contracted to purchase in December 2016. However, this correspondence did not include any details regarding the contracts or terms pursuant to which these amounts were paid and no breakdown was provided with respect to the what amounts were paid in which years (i.e. first year vs third year etc.). Finally, while the affidavit included the census profile of Parkland County and the other two municipalities, no explanation was provided as to why the population size of the municipality would determine or influence the value of the management software contract or the amounts spent pursuant to such a contract. Therefore, I was unable to relate the information provided with respect to other municipality's management software expenditures to the contract entered into by the County. In other words, there was insufficient information provided for me to conclude that the amounts spent by the other municipalities were representative of what Parkland County would be spending.
10. Mr. Hick's affidavit stated that standard practice in the industry is to seek the longest term of commitment in a sales contract but that the minimum he would aim for is two years and he believes his competitors do the same.
11. The Supplier initially requested a recoupment award in the amount of the value of a minimum one year sale price of \$38,400.00. However, upon making submissions regarding the meaning of the term "recoupment value" in NWPTA, it revised its recoupment claim to \$37,100. The Supplier calculated this amount by multiplying Mr. Philip Hick's hourly rate (\$400/hr) by the amount of time spent by Mr. Philip Hicks, a principal of the Supplier, between January 1, 2017 to March 28, 2017 dealing with the process under Part IV(B) of NWPTA. The evidence of the Supplier with respect to this cost was provided by way of affidavit of Mr. Hicks dated March 28, 2017.
12. The affidavits provided by Mr. Hicks stated that the amounts incurred for legal fees in connection with the Bid Protest were as follows:
- (i) Up to March 15, 2017: \$2315.26
 - (ii) Between March 15, 2017 and March 28, 2017: \$1304.63
 - (iii) Additional amounts: \$472.50 not yet invoiced.

B. The County

13. The County submitted the following:

- In 2016, the County spent \$36,750.00 on its management software and that in 2017, it will be spending no more than \$28,455.00 and, therefore, the procurement value is \$65,205.00. It is of note that in 2016, at best, the contract was in place for one month having been entered into sometime in December 2016 – a date the County does not contest.
- The County also submits that because the Supplier knew on September 2, 2016 that it would not be awarded the management software contract, its entitlement to protest would have terminated ten days after September 2, 2016. It is of note that, as of September 2, 2016, no procurement or contract had been entered into by the County. Therefore, as of this date, there would not have been any procurement to protest. Consequently, this cannot be the date from which the ten days would start to run.

14. The County provided a statutory declaration from a corporate planner employed by the County which stated that in 2016, the County spent \$36,700.00 on the procurement and that in 2017 the County is planning to spend no more than \$28,455.00 on the procurement and that the amount Parkland County plans to spend on this procurement will not exceed \$65,205.00. It also stated that Parkland County does not plan to procure additional software modules. The County provided copies of its budget for 2016 and a copy of a Vendor Transaction sheet which is stated to represent the amounts paid for the management software in 2016.

IV. Findings

a. Was the Supplier's request for consultations with the County out of time pursuant to Article 36(1) of NWPTA?

15. I find that the Supplier initiated the process under Part IV(B) within the time limits set out in Article 36(1) of NWPTA.

b. Was the management software contract entered into by the County covered by Article 14(1) because the procurement value met or exceeded \$75,000?

16. I find that the County was obligated to comply with Article 14 and provide open and non-discriminatory access to the procurement of its management software. In sole sourcing the management software procurement, I find the County acted inconsistently with NWPTA.

V. Reasons and Analysis

a. Was the Supplier's request for consultations with the County out of time pursuant to Article 36(1) of NWPTA?

17. Article 36(1) of NWPTA provides:

"The supplier may deliver a written request for consultations to the government entity with a copy to the administrator **within ten days after the day on which the supplier first knew, or reasonably should have known, of the alleged inconsistency with the applicable obligations....**"

18. The alleged inconsistency in this case is that the County sole sourced a contract to purchase management software that, the Supplier alleges, should have been procured pursuant to a process that complied with Articles 3 and 4 of NWPTA. So, the relevant questions in this case are:

- (i) When did the Supplier in this case first know, or reasonably should have known, that the contract had been made with another party?
- (ii) Within ten days after this date, did the Supplier deliver a written request for consultations to the government entity with a copy to the administrator under NWPTA?

19. With respect to question (i) above, according to the Supplier, they were advised by Ms. Swain in a phone call on January 18, 2017 that the County had purchased management software from another supplier. The County did not contest this statement, nor provide any evidence to the contrary. The County did not provide any evidence or indication that the Supplier would have known, or should have known, prior to January 18, 2017 that the County had entered into a contract for the management software with another party. Therefore, I find that the Supplier first knew of the alleged inconsistency with the applicable obligations on **January 18, 2017**.

20. With respect to question (ii) above, the Supplier stated in its original request for an appointment of arbitrator, and in its reply submissions dated March 16, 2017, that it wrote to the County on January 25, 2017. While I have not reviewed this letter in accordance with the parties' agreement that these without prejudice communications be removed from the documents and materials before me, I note the Supplier's characterization of the January 25, 2017 letter as a request for consultations. Indeed, if it were not such a letter, presumably there would be a question as to whether the correspondence was covered by Article 36(6). Therefore, I find that the Supplier initiated the process under Part IV(B) within the time limits set out in Article 36(1).

b. Was the management software contract entered into by the County covered by Article 14(1) because the procurement value met or exceeded \$75,000?

21. Open and non-discriminatory access to procurements is only required for municipalities with respect to services or services if the procurement value is \$75,000 or greater. The Supplier alleges the procurement value of the County's contract to acquire the management software

had a procurement value that exceeded \$75,000. The County's position is that the procurement value did not exceed \$75,000.

22. Procurement value is a defined term under NWPTA. It means:

"...the estimated total financial commitment resulting from a procurement, not taking into account optional renewals when the compulsory part of the contract is of at least one year's duration;"

23. Procurement is also defined. It means: "the acquisition by any means, including by purchase, rental, lease or conditional sale, of goods, services or construction, but does not include..."

24. So, the central question here is, what is the estimated total financial commitment resulting from the County's contract to purchase the management software?

25. In my view, this estimate has to consider all amounts estimated to be paid over the life of the procurement, excluding any optional renewal periods if the contract is a multi-year contract.

26. In this case, however, neither party has provided evidence or information of the actual terms on which the County purchased the management software, including what would be optional purchases and what purchases would be mandatory or reasonably necessary. The only party with knowledge or access to this information would be the County. In terms of providing this information, the County could have described the nature of the contract (i.e. does one acquire the software and pay for upgrades? Is there a term of the contract during which additional purchases are expected or likely to be made? Are there additional support services for which additional fees are incurred?) or the County could have included a copy with any necessary redactions.

27. The County has stated on page 2 of their March 29, 2017 submissions that the procurement value is \$65,205.00 and that this includes all forms of remuneration to be paid. The County also states on p. 2 of its March 29, 2017 submission that it could have taken the position that the estimated total financial commitment at issue was really the \$45,000 budgeted in 2016 and that this would have satisfied the NWPTA definition of procurement value. However, no explanation is given for how this could have been an estimate of the total financial commitment, particularly where it is acknowledged that additional funds will be paid in 2017. The fact that additional funds have been budgeted for management software under this procurement in 2017 suggests, in fact, that \$45,000 would not have been a reasonable estimate of the total financial commitment.

28. The procurement value calculated by the County is stated to consist of amounts paid by the County in 2016 and budgeted for in 2017. The statutory declaration of Ms. Swain states that the County does not intend to procure additional software modules. However, it is unclear whether

this means that no additional amounts will be spent pursuant to this procurement. It would have been helpful to know if the fact that no additional software modules were anticipated to be acquired meant that no additional other fees would be incurred pursuant to the procurement.

29. In my view, the information from the other municipalities does not assist because it is unclear what the basis of comparison would be. If one were to simply review the amounts paid by the County since it contracted to purchase the software, these amounts are less than the amounts the Supplier states were paid per year by a municipality with a smaller population. This suggests there may be considerable variation in the amounts paid for the management software.
30. The information and evidence required to support the County's estimate of the total procurement value could only have come from the County. This raises the question of whether an adverse inference should be drawn against the County. An "adverse inference" is an inference against a party who is in the best and sometimes sole position to adduce evidence relating to an issue. Where that party fails to adduce the evidence, the inference is that the evidence would not support their case. I note that in the decision of *Johnston v. Murchison*, [1995] P.E.I.J. No. 23, 127 Nfld. & P.E.I.R. 1 at para. 36 it is noted that the weight which may be given to such an adverse inference is "clearly" within the discretion of the trial judge.
31. In this case, I do make an adverse inference against the County with respect to its failure to adduce any evidence of the contractual terms on which the procurement was made. Therefore, I find that, if such evidence were produced, such terms would not support the County's contention that the total financial commitment was under \$75,000.
32. Therefore, I find that the County was obligated to comply with Article 14 and provide open and non-discriminatory access to the procurement of its management software. In sole sourcing the management software procurement, I find the County acted inconsistently with NWPTA.

Award

A. Cost Award

33. Article 39(1) of NWPTA provides that a cost award shall in principle be issued against the unsuccessful disputant. Cost award is defined under NWPTA as "an award by the arbiter to reimburse a disputant for the demonstrable and reasonable costs incurred relating to the bid protest in respect of (a) the fees and expenses of the arbiter; (b) services provided by the administrator; and (c) the costs for legal representation.
34. In terms of the costs of this bid protest,

- (i) the fees and expenses of the arbiter, calculated in accordance with Schedule 5 of NWPTA are: \$2096.59
- (ii) the fees and expenses of the administrator are: \$2218.50
- (iii) the costs of the Supplier for legal representation up to March 29, 2017 are: \$4092.39.

35. Therefore, I award to the Supplier, a cost award of \$8407.48.

B. Recoupment Award

36. A recoupment award is defined under NWPTA as an award to “reimburse a supplier for the demonstrable and reasonable costs incurred by the supplier in preparing a response to a procurement opportunity.”

37. In determining the amount of any recoupment award to be issued against the government entity, Article 39(2) provides that the following factors shall be taken into account:

- (a) the complexity of the specific procurement at issue;
- (b) the dollar value of the specific procurement at issue;
- (c) the complexity of the bid prepared and submitted by the supplier;
- (d) the complexity of the bid protest proceeding;
- (e) the efforts made by the government entity and supplier to arrive at a mutually satisfactory resolution to the dispute under Article 36; and
- (f) any other factor considered relevant by the arbiter.

38. The Supplier argues that the inclusion of these factors suggests that the definition of recoupment award includes amounts costs incurred protesting the bid. In my view, the wording of the definition of recoupment award is not so broad. While the complexity of the bid protest proceeding may be a factor in determining the extent of a recoupment award, the limit in terms of what can be included are the reasonable and demonstrable costs incurred by the supplier in response to a procurement opportunity.

39. In this case, the only expenses identified in terms of costs related to the procurement opportunity, are the \$1,500.00 in costs related to sales efforts with the County. The balance of the expenses claimed are not, I find, eligible for inclusion in a recoupment award because (i) they were not incurred in response to a procurement opportunity, and (ii) there is no evidence that these costs were actually incurred or paid by the Supplier. In my view, \$1500 is a reasonable recoupment award, considering approximate dollar values that are in issue and the minimal steps taken to pursue this procurement opportunity. I do not find there to be any reason to reduce this amount.

40. Therefore, I award to the Supplier, a recoupment award of \$1500.00.

41. The total value of the awards issued pursuant to this award is: \$9,907.48

42. This final award was issued this April 5, 2017 at Edmonton, Alberta.



SHAUNA N. FINLAY