

Tender Law:

*Maglio Installations Ltd. v. The Corporation of the City of Castlegar*¹

The plaintiff, Maglio Installations Ltd. ("Maglio"), was one of several bidders to the City's invitation to tender for the construction of three public pools. Maglio's bid was compliant with the invitation to tender in all respects. Marwest Industries Ltd. ("Marwest") also submitted a bid, though its bid had failed to include a preliminary construction schedule in the form of a bar chart. The schedule was intended to illustrate the bidder's plan and commitment to finishing the works within the stipulated time frame established by the specified milestone dates. Notwithstanding Marwest's failure to provide the schedule, the City awarded the work to Marwest, having relied upon the discretionary clause of the tender to overlook Marwest's non-compliance. The discretionary clause contained language typically used for such purposes, and in this case read as follows:

The City reserves the right to reject any or all tenders, to waive defects in any bid or tender documents and to accept any tender or offer which it may consider to be in the best interest of the City...

The central issue raised in this case is whether Marwest's failure to provide the preliminary construction schedule could be forgiven by the City on the basis of the discretion clause. The legal assessment in such scenarios involves, firstly, a consideration of whether the non-compliance is as to an important or essential element of the tender (i.e. schedule, price, time) and, secondly on an objective basis, whether the non-compliance would have been significant in the City's deliberations in deciding which bid to select.

Not surprisingly, the judge sided with Maglio's position and determined that the Marwest bid contained a *material* non-compliance that could not be saved by the discretion clause. By selecting Marwest as the preferred bidder, the City had breached a term of its bid contract (i.e. Contract A) with Maglio.

In this case, the submission of a preliminary construction schedule was a mandatory, not optional, requirement. This coupled with the fact that the tender stated that time would be of the essence led the court to determine that the schedule was, in fact, an important or essential element of the tender.

Further, the court determined that there was a substantial likelihood that the provision of a preliminary construction schedule was indeed an element of the tender that would have been a significant factor in the City's deliberation on which bid to accept. This is due not only to the presence of a time of essence clause but the fact that the construction window for stream-side construction was limited by regulatory approvals. Clearly, timing and the bidder's ability to meet milestone dates would have been an important consideration for the City. The discretion clause did not operate to forgive the *material* non-compliance.

The City's decision to accept Marwest's bid, notwithstanding its material non-compliance, was a breach of the City's contractual obligation to Maglio to accept only compliant bids.

This case reinforces the legal limits that operate for owners wishing to exercise their discretion when evaluating bids. An assessment of Maglio's damages was not determined in this decision; however, an award of the net profits that Maglio may have earned had they been rightly awarded the contract is not outside the realm of possibility. For owners within the public sector in particular, the decision is another reminder of the significant—and avoidable—costs associated with the risk of not following tender rules strictly.

¹ 2017 BCSC 870