



DISCUSSING CURRENT ISSUES
LEGISLATION UPDATES & CASE BRIEFS

In another in a long line of decisions dealing with the law of tendering, the BC Court of Appeal's decision in *Maglio Installations Ltd. v Castlegar (City)* 2018 BCCA 80 reaffirms that local governments must strictly adhere to the terms of the invitation to tender in awarding the contract, or risk being successfully sued by a disappointed bidder.

The case involved a tender for the construction of swimming ponds along the Columbia River in Castlegar. The City issued an invitation to tender that specified that construction was required to take place within specified work windows relating to fisheries and nesting birds. The invitation to tender specified that time was of the essence, and it required that bidders submit a preliminary construction schedule, or PCS, along with their bids. The invitation to tender also set out several milestone dates relating to the project.

The City amended the invitation to tender several times by pushing back the due date for submitting a bid and for project completion. The City also amended the milestone dates by replacing specific dates with such remarks as: "fall 2013 – final dates to be confirmed".

The winning bidder did not submit a PCS with their bid, and instead remarked that a PCS would be submitted once final dates were confirmed and optional items were chosen. Another (unsuccessful) bidder provided a PCS. The two bids complied with the invitation to tender in all other respects.

The unsuccessful bidder successfully sued the City for breach of the invitation to tender (the "Contract A") on the basis that the winning bidder's failure to provide a PCS was a material breach of the Contract A, and that the City should have rejected their bid.

The City appealed the trial decision, on the basis that the failure to provide a PCS was not a material breach of Contract A, and that in any event, the failure to provide a PCS did not provide the winning bidder with a competitive advantage.

The Court of Appeal dismissed the City's appeal. The Court upheld the trial judge's finding that the inclusion of a PCS was a material element of the bid, remarking that the invitation to tender as a whole made it clear that timing was an essential part of the construction contract. For instance, the Court noted that an entire page of the invitation to tender was devoted to the PCS, and the environmental constraints in this case required that the successful bidder perform certain works within specified work windows. For the trial judge these circumstances indicated that the construction scheduling was an important aspect of its assessment of the competing bids. The fact that the milestone dates were yet to be determined, and that the successful bidder had committed to meeting the milestone dates once determined, did not change the Court's view that a PCS was a material element of the Contract A.



This decision affirms the established principles for determining whether a bid is compliant with the invitation to tender, namely:

1. The parties enter into Contract A once a compliant bid is accepted;
2. A discretion clause in the invitation to tender only allows the owner to forgive non-material defects;
3. The test for substantial compliance is a two-part test:
 - a. Did the bidder fail to include an important or essential requirement of the tender documents?
 - b. Was there a substantial likelihood that the defect would have been significant to the owner's decision making?
4. If the invitation to tender requires the submission of certain information on its face and the tender documents indicate that the information is material, this provides prima facie proof of the importance of the information.
5. At the second part of the two-part test, the court must consider the underlying rationale of the law of tendering, which is to effect fair competition and protect the integrity of the tendering process.

Please contact us should you wish to discuss the implications of this decision in more detail.



Denise McCabe
Senior Advisory Counsel
dmccabe@fultonco.com
250.851.2364



Devin Buchanan
Associate
dbuchanan@fultonco.com
250.851.2326

