

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Maglio Installations Ltd. v. Castlegar (City)*,
2017 BCSC 870

Date: 20170525
Docket: 18789
Registry: Nelson

Between:

Maglio Installations Ltd.

Plaintiff

And

The Corporation of the City of Castlegar

Defendant

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiff:	T.W. Pearkes
Counsel for the Defendant:	D.L. Romanick
Place and Date of Trial:	Nelson, B.C. May 10, 2017
Place and Date of Judgment:	Nelson, B.C. May 25, 2017

Introduction

[1] The defendant is a municipality located in the West Kootenay area of B.C. In 2013 it wished to construct three pools on the bank of the Columbia River. The pools were to be for public use and recreation. The defendant put the construction project out for tender. The invitation to tender was issued on

February 25, 2013. Several interested construction companies responded to the invitation. For the purposes of this proceeding, only the bids made by the plaintiff and Marwest Industries Ltd. are relevant.

[2] The plaintiff's bid complied in all respects with the invitation to tender. The Marwest bid was deficient in that it did not provide the required preliminary construction schedule. The defendant purported to exercise its discretion to overlook that deficiency and awarded the construction contract to Marwest.

[3] The central issue in this summary trial is whether the deficiency in the Marwest bid was of a type that permitted the defendant to forgive it. If the deficiency was not of that type, then the defendant's decision to award the construction job to Marwest was in breach of its contract with the plaintiff to deal with all of the bidders on an even handed basis and in accord with the material terms and conditions of the invitation to tender.

[4] The parties agree and I concur that the liability element of this proceeding is suitable for disposition by summary trial.

Background

[5] Among the many things the invitation to tender required was the bidder's confirmation that it would comply with the milestone dates as stipulated by the defendant.

[6] When it was issued in February 2013, the invitation to tender defined the Milestone dates as follows:

Milestones

- a) Tender Award date: March 11, 2013.
- b) Authorization to proceed in the week commencing March 18, 2013 provisional on the Owner obtaining the required environmental permits and confirmation of adequate water supply).
- c) If required, change order to be issued by the City for essential mechanical works - anticipated March 18, 2013
- d) Bulk earth moving, compaction, and sub-surface installation may commence March 25, 2013.
- e) All Earth works and structures adjacent or on the Columbia River must be completed by week of April 29, 2013.

- f) Substantial completion May 13, 2013.
- g) Total Performance May 24, 2013.

[7] Owing to various intervening events, on several occasions the defendant revised the Milestone dates. The last revision of the Milestone dates was contained in Addendum No. 3 to the invitation to tender. Addendum No. 3 was issued on March 19, 2013, and was circulated to the interested bidders including the plaintiff and Marwest. The relevant portion of Addendum No. 3 provided:

DELETE:

- a) Tender Award date: March 22, 2013.
- b) Authorization to proceed no later than March 27th, 2013 (provisional on the Owner obtaining the required environmental permits and confirmation of adequate water supply).
- c) Substantial completion May 20, 2013.
- d) Total Performance May 27, 2013.

ADD:

- a) Tender Award date: June 25, 2013.
- b) Authorization to proceed in the fall, 2013 (provisional on the Owner obtaining the required regulatory permits and confirmation of adequate water supply). Final dates to be confirmed. Authorization to proceed anticipated in September 2013 as receding water levels in the Fall provide more flexibility in construction sequencing than rising water levels in the Spring.
- c) If required, change order to be issued by the City for essential mechanical works - anticipated in the fall, 2013.
- d) Bulk earth moving, compaction, and sub-surface installation may commence in the fall, 2013, final dates to be confirmed.
- e) All Earth works and structures adjacent or on the Columbia River must be completed in the fall of 2013, final dates to be confirmed.
- f) Substantial completion in the fall/winter 2013, final dates to be confirmed.
- g) Total Performance in the fall/spring 2013, final dates to be confirmed.

[8] The invitation to tender also required the bidder to complete a Preliminary Construction Schedule. The form of the bidder's PCS was set out in Appendix 2 of the invitation to tender. The PCS was to be in the form of a bar chart. Appendix 2 stipulated that the bidder:

Indicate Schedule with bar chart with major item descriptions and time.

[9] The major items to be described comprised the various stages of the construction process; those items were, for example: general requirements including things like surveying and setting up traffic regulation and site work including things like clearing the land and installing a liner for the pool bottoms.

[10] The time element of the PCS bar chart comprised the number of weeks the bidder represented that each major item would take to complete.

[11] To complete the PCS, the bidder was to write the major item of work in the leftmost column of the chart's first row and draw a line through the number of weeks that the bidder represented that item would take to complete. The bidder was to use the next row down to indicate the next major item of work and the number of weeks it represented that item to take to complete, and so on. When completed, the PCS formed a simple Gantt chart showing the process of the various states of the construction progress over time.

[12] At several points in the invitation to tender, the defendant stipulated that time would be of the essence.

[13] The plaintiff's bid included a completed Gantt chart in Appendix 2.

[14] Marwest's bid did not include a completed Gantt chart at Appendix 2. Instead, Marwest wrote this in the leftmost column of the chart's first row:

To be submitted after final dates are confirmed and optional items are chosen.

[15] The defendant accepted Marwest's bid notwithstanding Marwest's failure to provide a PCS by completing the chart in Appendix 2. It is not clear whether the defendant actually turned its mind to that deficiency when it made its decision. That failure was certainly not brought to the attention of the defendant's city councillors when they voted to award the construction contract to Marwest. For the purposes of this proceeding, the defendant takes the position that it did or that it could have relied on the language of paragraph 4.8 of the invitation's instructions to tenders:

4.8 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. ...

[16] Language of this sort has come to be known as a discretion clause.

Issue

[17] The issue is whether the lack of a PCS in Marwest's bid was the sort of deficiency that would permit the defendant to forgive its absence.

Parties' Positions

Plaintiff

[18] The plaintiff argues that the PCS was an essential and important element of the bid. It was an element that the invitation to tender required be supplied. The plaintiff maintains that there was nothing about the Milestone dates as they were finally defined in Addendum No. 3 that prevented Marwest from providing the defendant with a PCS. In short, the plaintiff argues that the PCS was a material element of the bid.

[19] The plaintiff says that it was not open to the defendant to waive the material defect in Marwest's bid. In deciding to award the contract to Marwest, the plaintiff alleges that the defendant breached the terms of its contract with the plaintiff to consider all bids on the premise that a material defect in a bid would disqualify that bid from consideration.

[20] The plaintiff seeks a finding that the defendant breached its contract with the plaintiff and an order that the quantum of the plaintiff's claim be assessed at a later date.

Defendant

[21] The defendant maintains that the PCS was not a material element of the bid. It argues that what was material in Appendix 2 was the bidder's promise and undertaking to comply with the milestone dates. It points out that Marwest made that promise and so satisfied the essential aspect of Appendix 2.

[22] Further, the defendant says that because Addendum No. 3 described some milestone dates in general terms (e.g.: "anticipated in the fall, 2013" and "may commence in the fall 2013") or in indefinite terms (e.g.: "final dates to be determined"), no bidder could have sensibly completed a PCS. In essence,

the defendant submits that the final version of the milestone dates was so imprecise as to render the requirement to provide a PCS impossible to satisfy.

[23] The defendant argues that on either theory it was open to it to exercise its discretion to waive the deficiency in the Marwest bid. The defendant says that it was therefore entitled to award the construction contract to Marwest, that it did not breach its contract with the plaintiff, and that the plaintiff's claim must be dismissed.

The Law

[24] The plaintiff's claim is founded on its allegation that the defendant breached a term of its contract with the plaintiff. The parties agree that the defendant's invitation to tender operated as an offer to the plaintiff to evaluate the plaintiff's bid against the terms, conditions, and requirements of the invitation and, further, to apply that same evaluation criteria to its consideration of all competing bids. The plaintiff accepted that offer when it submitted its bid. Thus the parties formed what in the jurisprudence of tender and bid is called contract A, see: *R. v. Ron Engineering* [1981] 1 SCR 111.

[25] The parties agree that clause 4.8 allowed the defendant discretion to accept bids that did not comply with the terms, conditions, and requirements of the invitation. The parties further agree that the defendant's discretion to forgive defects was not unfettered. They agree that insofar as the discretion to waive defects is concerned, their contract included an implied term that the defendant could only forgive minor irregularities or non-material defects. This is consistent with the law; see for example *M.J.B. Enterprises v. Defence Construction (1951) Ltd.* [1999] 1 SCR 619 at para. 22, and *Graham Industrial Services Ltd. V. Greater Vancouver Water District*, 2004 BCCA 5 at para. 30.

[26] The parties do not quarrel over the principles that govern the determination of whether a defect is material or not material. The compliance of a bid must be measured objectively and the measurement must be as of the time that the bid was submitted, see: *M.G. Logging & Sons Ltd. v. British Columbia*, 2015 BCCA 526 at para. 48. In this context, Finch, CJBC described the test for materiality thus:

[32] "Material" is defined in the Concise Oxford Dictionary to be "important, essential, relevant...concerned with the matter not the form of reasoning...".

Black's Law Dictionary, 7th ed. (West Group: St. Paul, 1999) includes in the definition for material: "of such a nature that knowledge of the item would affect a person's decision-making process; significant, essential".

[33] This Court also considered the definition of materiality recently in *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610, [2003] B.C.J. No. 2588 ¶27. In the context of determining disclosure obligations of a seller under a contract for purchase and sale of a gold mine, Levine J.A. held that a material fact is one where there is

...a substantial likelihood that disclosure of the omitted fact would have assumed actual significance in the deliberations of the reasonable purchaser, or would have been viewed by the reasonable purchaser as having significantly altered the total mix of information made available.

[34] According to these definitions, in the context of the present case, material non-compliance will result where there is a failure to address an important or essential requirement of the tender documents, and where there is a substantial likelihood that the omission would have been significant in the deliberations of the owner in deciding which bid to select.

Graham, supra, at para 32 – 34

[27] The test for non-material compliance is, therefore, a two stage affair. The court must first assess whether the defect was as to an important or essential element of the invitation to tender and second determine on an objective basis whether there was a substantial likelihood that the defect would have been significant in the deliberations of the owner in deciding which bid to select. Again, the parties agree that this test applies to the present case.

[28] A last point of consensus – the parties are together in accepting the proposition that if the Marwest bid contained a material defect, then by selecting the Marwest bid the defendant breached the terms of its contract with the plaintiff. In that case judgment for liability should go against the defendant and the issue of damages should be tried at a later date.

Discussion

[29] Turning to the facts of this case, I start by noting that the invitation to tender stipulates in the clearest of terms that the bidder must provide a Preliminary Construction Schedule by completing Appendix 2. There is nothing optional about that requirement.

[30] Neither does the invitation articulate the requirement for a PCS in a footnote or in tiny print on the last page or in some other obscure location. The requirement is front and center in the document. The PCS itself occupies an entire page of Appendix 2. It is not easy to overlook.

[31] Further, at several places in the invitation the defendant declared that time would be of the essence. A construction schedule is, by definition, a description of what things will be done within what time frames. A defendant who says in its invitation to tender that time is of the essence cannot in the same breath assert that the time frame for construction is somehow a minor or unimportant detail.

[32] I find that any objective assessment of the invitation as a whole must yield the finding that the provision of a PCS was an important and essential element of the invitation to tender.

[33] The requirement to include a PCS in a bid therefore satisfies the first stage of the *Graham* test for materiality.

[34] I go next to the second stage of the test: would the PCS be a significant factor in the defendant's deliberation on which bid to accept? Again, the defendant's insistence on time being of the essence strongly suggests that it was interested in satisfying itself that the bidder could complete the various construction tasks within the time frame established by the Milestone dates. After all, would not an owner in the defendant's position want to know from the bidder that the bidder was confident that it had the expertise and resources necessary to do the job required?

[35] In considering this issue, the facts in play when the invitation was made are significant. The defendant knew that the pace of construction had to fit within certain windows of opportunity. Those windows were determined in part by the rise and fall of the nearby river and in part by permissions granted to the defendant by government authorities. Given those circumstances, the bid selection process of any reasonable owner in the defendant's position would certainly be informed by the bidder's PCS. A PCS indicating that a given bidder would expend, say, 90 percent of the available construction window on preliminary issues would surely influence the owner's confidence in the

bidder's ability to carry out the balance of the needful work in the available time.

[36] I recognize that the defendant's representative Mr. Barlow has in his affidavits proffered various reasons for not giving much weight to the PCS Gantt charts in the bids that the defendant received. Those reasons include the fact the deletions and additions contained in Addendum No. 3 limited the defendant to no more than an estimate of when the construction project would start and that it could not stipulate precisely when it would require the project to end. While I accept that Mr. Barlow wishes to be accurate in his evidence and that he does not wish to mislead the court, I regret that I can give little weight to the excuses he offers. That is because that evidence is clearly the product of *post hoc* thinking.

[37] The fact is that Addendum No. 3 did provide the bidders with a concept of when the project was expected to start. It was to start in the fall of 2013. The fall season spans a period of some three months. There was no great uncertainty as to within what time frame the construction was to occur. For example, at clause e) of the Addendum, the time frame for completion of earthworks was stipulated thus:

- e) All Earth works and structures adjacent or on the Columbia River must be completed in the fall of 2013, final dates to be confirmed.

[38] Would an owner in the defendant's position, knowing that its invitation required for example that the earth works be done in a three month period, have been influenced by a bidder's assurance that it could comply with that requirement? Of course it would.

[39] For these reasons I find that there was a substantial likelihood that the provision of a PCS was an element of the invitation to tender that would have been a significant factor in an owner's deliberation on which bid to accept. I have come to this conclusion by assessing the circumstances of the invitation to tender on an objective basis. It is of no help to the defendant that, as I find that it did, it simply did not turn its mind to Marwest's complete failure to provide a PCS and that it now offers subjective evidence in support of its decision.

Conclusion

[40] I find that the requirement of a Preliminary Construction Schedule in Appendix 2 was a material element of the invitation and that there was a substantial likelihood that it would have been a significant factor in the defendant's deliberations on which bid to accept.

[41] I find that it was not within the scope of the defendant's discretion to waive or overlook Marwest's failure to provide a Preliminary Construction Schedule.

[42] The defendant's decision to accept Marwest's bid in the face of its material non-compliance constituted a breach of the defendant's contract with the plaintiff.

[43] The plaintiff is entitled to judgment on liability and to damages to be assessed.

[44] Having reached this conclusion, it is not necessary for me to consider the plaintiff's alternate argument that the defendant acted improperly and in breach of contract by exercising its privilege to prefer the Marwest bid over the plaintiff's bid.

Costs

[45] The costs of this leg of the proceeding will be at the discretion of the judge who tries the quantum of the claim.

"Rogers J."