

Fairness in Municipal Procurement

Municipalities often include a clause that states that the municipality has the right to reject any or all offers or to accept non-compliant offers at their discretion when drafting procurement documents. The intention of this clause is to prevent the municipality from being involved in litigation due to alleged unfairness. The following cases demonstrate that the Courts have made wide-ranging decisions as to the enforceability of these clauses.

Maglio Installations Ltd. v. Castlegar (City)¹

The Defendant City of Castlegar invited contractors to tender for a project involving the construction of three pools. The plaintiff Maglio's bid complied in all respects with the requirements given in the procurement documents. Another contractor, Marwest, also submitted a bid, however, their bid was deficient because it did not provide the preliminary construction schedule (PCS) that was required in the tender documents. The City chose to overlook the deficiency and awarded the contract to Marwest.

Maglio commenced a claim alleging that the City breached its implied contract with Maglio. The main issue was whether the City was permitted to ignore Marwest's deficiency and award the contract to them.

Exclusion Clause

The plaintiff argued that the exclusion clause only applied to minor defects and the failure of Marwest to include the PCS was not minor. Therefore, the City did not have the right to waive the requirement.

In its defence, the City attempted to rely on the following wording contained in the tender documents.

"...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..."

This clause is commonly referred to as a discretion or exclusion clause.

Contract A

The Courts have established that when an entity invites contractors to submit a bid for a project, they are essentially making an offer to the contractor to evaluate their bid and measure it against the criteria listed in the tender documents. The contractor accepts that offer by submitting a bid and a contract is formed which the Courts have referred to as "Contract A". Contract A includes implied terms which, case law has established, include that the City was permitted to waive minor irregularities in the bid documents or non-material defects.

Non-material Defects

Common law has demonstrated that Contract A includes an implied term that municipalities will only waive non-material defects in bids. The test to determine if a defect is non-material has two steps. The Court must first assess whether the non-compliance of the bid relates to an important or essential element of the invitation to tender. Second, the Court must determine whether a substantial likelihood exists that the non-compliance would be a significant factor in the deliberations of a reasonable owner.²

The Trial Judge decided that the inclusion of a PCS was material and the City was not permitted to waive the requirement for the PCS. Accordingly, the City was liable for Maglio's damages.

The City also lost on appeal.

Mega Reporting Inc. v. Yukon³

This case had the opposite result. The Yukon government issued a Request for Proposals (RFP) attempting to procure a contractor to provide court transcription services. The tendering process had two stages. The first was a technical evaluation of the proponent's experience and performance. The second was an assessment of the price if the bid met the minimum conditions in stage one. Mega's bid did not meet the minimum technical requirements and, accordingly, the evaluation committee did not consider their bid price which was lower than the successful proponent's.

¹ Maglio Installations Ltd. v. Castlegar (City), 2018 BCCA 80

² M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619 at 633; Graham Industrial Services Ltd. v. Greater Vancouver Water District, 2004 BCCA 5 at para. 30

³ Mega Reporting Inc. v. Yukon (Government of) 2018 CarswellYukon 55, 2018 YKCA 10, 293 A.C.W.S. (3d) 70

When Mega met with government officials to receive feedback on their bid, they learned that they had lost points for criteria not disclosed in the tender documents.

Mega sued the Yukon government for breaching its duty of fairness in reviewing their proposal.

Waiver of Liability

Although the Yukon's procurement regulations and procedures stated that the public procurement process must be fair, open, accountable and transparent; the regulations also included a waiver of liability for costs arising out of unfairness in the RFP process.

The main issue to be determined was whether the Yukon could contract out of its duty of fairness with the waiver of liability clause or if the exclusion clause was unenforceable because it was contrary to public policy. The Trial Judge decided that Yukon had breached its duty of fairness and the waiver could not be enforced because it was contrary to public policy to do so. The Trial Judge stated that: "To give effect to the waiver would allow Yukon to represent to the public that it engages in fair procurement, without suffering any consequences for failing to do so."

The Yukon appealed the decision. Yukon's appeal was allowed and their exclusion clause was enforced because it was clear and valid.

Takeaway

Whether a municipality has included an exclusion clause in their procurement documents or not, when considering bids submitted in response to their invitations to tender, municipalities must ensure that their process is fair. Municipalities should be careful when accepting non-compliant bids that they have only waived non-material defects. Municipalities would be wise to have exclusion clauses drafted by their lawyer that may provide some protection against claims of unfairness in their procurement process.