

Featured Article, January 2010

Maystar General Contractors Inc. v. Newmarket (Town), 2009 ONCA 675



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ONTARIO COURT OF APPEAL RE-AFFIRMS THAT THE INTEGRITY OF THE TENDER PROCESS IS ESSENTIAL TO FOSTER FAIR AND ORDERLY BIDDING

Maystar General Contractors Inc. v. Newmarket (Town), 2009 ONCA 675

In a decision released September 24, 2009, on an appeal heard March 24, 2009, the Ontario Court of Appeal unanimously dismissed the Town of Newmarket's appeal from the decision of Justice Laurence Pattillo dated May 6, 2008 [reported in L.U.C. #75]. The application judge found the Town to be in breach of contract with Maystar for accepting the non-compliant bid of Bondfield Construction Company Inc. for the construction of a recreation centre.

The central issues on this appeal were:

1. Did the application judge err in law by failing to apply the principles in the Ontario Court of Appeal's decision in [Bradscot \(MCL\) Ltd. v. Hamilton-Wentworth Catholic District School Board](#) (1999), 42 O.R. (3d) 723 (C.A.) and by distinguishing the case on the facts?
2. Did the Town's tender documents allow it to accept Bondfield's bid?
3. Did the application judge err by finding that a discrepancy in price necessarily rendered Bondfield's bid non-compliant?
4. Was the Town entitled to accept a non-compliant bid and did the Town's Instructions to Bidders prevent Maystar from suing the Town?

Issue 1: The applicability of the Bradscot decision

Madam Justice Feldman, writing for the Court of Appeal, agreed with the application judge that the *Bradscot* case was distinguishable on its facts from the circumstances in this case.

Specifically, the Court found that Bondfield's bid price was uncertain and therefore incapable of forming the basis of a contract. The stipulated price in Bondfield's bid, as set out in words

and in numbers, was \$33,000,528. However, the GST amount was stated as \$2,346,960, which was not 7% of \$33,000,528, but 7% of \$33,528,000. Further, the stated total cost of the work figure (for stipulated price plus GST) was \$33,874,960, which was the GST sum of \$2,346,960 plus \$33,528,000. The Court found that in this case it was unclear whether Bondfield intended the stipulated price to be as stated, or to be what the stipulated price would be working back from the total cost of work and GST values.

The Court further agreed with the application judge that, in this tender, unlike the tender at issue in *Bradscot*, the GST and total cost of work amounts were neither superfluous nor subordinate to the stipulated price, but were an important component of the Bondfield tender. Further, upon examining the provisions in the Town's Instructions to Bidders, the Court of Appeal concluded that "[t]hese articles suggest that it is the stipulated price rather than the total bid price that is the superfluous figure".

The Court also accepted Maystar's argument and the application judge's finding that the nature of Bondfield's error was similar to the error at issue in the Ontario Court of Appeal's decision in [*Ottawa \(City\) Non-Profit Housing Corp. v. Canvar Construction \(1991\) Inc. \(2000\)*](#), 3 C.L.R. (3d) 55. Although the *Canvar* case involved a low bidder defending a damages claim on the grounds of a mistaken bid, the Court, in that case, found that when Canvar's tender form and accompanying bid bond prices were read together it was unclear which amount was the intended bid price.

The Court further agreed with the application judge's finding that the Town had clearly corrected the Bondfield Bid, stating:

"[The Town] chose to view the stipulated price as the price intended by Bondfield rather than the total cost amount, then corrected the G.S.T. calculation and the total cost amount to conform with its choice." (paragraph 34)

Finally, the Court found that the application judge was entitled to draw the inference that, in making the contract award, Town Council had considered a letter sent to the Town by Bondfield 5 days after the opening of tenders, which purported to explain the discrepancy between the stipulated price and G.S.T. and asked the Town to accept its bid based on the lower of these values. A copy of Bondfield's letter was included in a report submitted by Town staff to Town Council before the contract award, in support of Town staff's recommendation to award the contract to Bondfield.

The Court of Appeal acknowledged that the Town was in a difficult situation and may have believed that it was acting in good faith, but stated as follows:

". . . the Supreme Court has made it clear in the cases it has decided that the integrity of the tender process is essential in order to foster a fair and orderly bidding process where contractors will expend the time, effort and expense to bid, knowing they will be treated fairly and equally. A public owner cannot undermine that process by purporting to accept a bid with an uncertain price, or to encourage contractors to believe that they can communicate with owners after the fact to clarify or explain inconsistencies in their bids. In *M.J.B. Enterprises*, at para. 54, Iacobucci J. pointed out that good faith on the part of the owner is not a defence to a claim for breach of contract."(paragraph 38)

Issue 2: Did the Town's tender documents allow it to accept Bondfield's bid?

The Town sought to rely on provisions in the Instructions to Bidders, which allowed it to check arithmetic extensions to ensure they were correct, consider the bidder's intent, waive any discrepancies, errors or other defects in the bid form, and accept an unbalanced, irregular or informal bid. The Court of Appeal rejected this submission finding that the application judge had properly considered the effect of the specific provisions of the tender documents and had "...concluded that the discrepancy and consequent uncertainty in the bid price submitted by Bondfield constituted a fundamental error that was not able to be unilaterally corrected or waived using any of the provisions of the Instructions to Bidders".

Issue 3: Did the application judge err by finding that a discrepancy in price necessarily rendered Bondfield's bid non-compliant?

The Town submitted that the application judge erred by treating the price discrepancy as an automatic non-compliant bid and argued that the discrepancy in the presentation of the price figures in the Bondfield bid did not materially affect the price and gave Bondfield no unfair advantage within the tender process. The Court of Appeal found there to be no merit to this submission, stating:

"The reason the price was materially affected in this case, unlike in *Bradscot*, was because there was uncertainty as to which price was the intended bid price until the correction was made. That after the fact correction gave Bondfield an unfair advantage over other bidders and was not compliant with the terms of the tender documents." (paragraph 44).

Issue 4: Was the Town entitled to accept a non-compliant bid and did the Town's Instructions to Bidders prevent Maystar from suing the Town?

The Town's final argument was that it was entitled to rely upon the privilege clause in its Instructions to Bidders to accept Bondfield's bid as "unbalanced, irregular or informal" without any breach of its Contract A with Maystar.

The Court of Appeal dismissed this argument, agreeing with the application judge that the language of the articles relied upon did not clearly entitle the Town to accept a non-compliant bid. The Court also distinguished the Town's privilege clause from the one at issue in [*Tercon Contractors Ltd. v. British Columbia \(Minister of Transportation and Highways\)*](#), [2008] 2 W.W.R. 410, finding that it was not as broad as the *Tercon* clause and did not specifically allow the owner to accept a non-compliant bid.