

Featured Article, September 2009

[Coco Paving \(1990\) v. Ontario \(Transportation\)](#)

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**Late Bid Not Compliant with
Electronic Tender Call**

Coco Paving (1990) v. Ontario (Transportation), Ontario Court of Appeal, 2009

Overview

On June 19, 2009 the Ontario Court of Appeal, on an expedited appeal, overturned a declaratory order by Nolan J. of the Ontario Superior Court of Justice, on the grounds that the lower court judge had misinterpreted the relevant provisions of a Ministry of Transportation for Ontario (“MTO”) tender call and had erred in law.

The lower court decision had declared a bid by the applicant, Coco Paving (1990) Inc. (“Coco”), to be compliant with the terms of the MTO’s tender call, despite the undisputed fact that it was submitted late – after the prescribed “Tender Closing” deadline. MTO had determined that the late Coco bid was non-compliant with the terms of the tender call and had, therefore, excluded it from consideration. Coco brought an application in the Superior Court of Justice to have its bid declared to be compliant on the basis that the timely receipt of its bid had been prevented by a computer system failure emanating from the MTO.

On the application, Nolan J. reasoned that the cause of Coco’s late bid submission was a failure on the part of MTO to provide assistance to Coco when Coco was unable to submit its bid through the prescribed MTO electronic on-line bidding system. On appeal, that reasoning was rejected by a panel comprised of Cronk, Gillese and Armstrong JJ.A. The Court of Appeal unanimously dismissed Coco’s application, finding that Coco’s bid was not compliant with MTO’s prescribed terms for bid submissions. In making its ruling, the Court of Appeal applied accepted principles of tendering law and found that MTO’s tender documents could not be construed to allow it to accept for consideration a bid submitted after the deadline specified in the tender call.

As a consequence of the Court of Appeal's decision, the Bot Group of companies ("Bot"), which was a party intervenor on Coco's application, and the Appellants on the appeal, became the lowest compliant bidder, and has since been awarded the MTO road construction contract that was the subject of the Coco application.

Lower Court Ruling

On May 4, 2009, on short notice, Coco brought a motion for an interim injunction. That motion came before Ducharme J. and was adjourned to May 14th to be heard on a priority basis, as an application, with the relief sought, changed from an injunction to a declaration. On May 5th, Coco commenced the application that was ultimately the subject of the appeal, seeking the following relief:

- a declaration that the bid submitted by Coco was submitted in compliance with the terms prescribed in MTO's tender documents, and
- a declaration that the MTO ought to accept the Coco bid and list the Coco bid on MTO's posted bidder's list (with the other three compliant bids).

Although Bot was not served with Coco's initial motion for injunctive relief, nor a party to the submissions for the adjournment, it was served with Coco's revised application materials and Bot's General Counsel attended at the return of the application before Nolan J., and obtained an order allowing Bot party intervenor status (an order that proved critical to Bot's ultimate success), but was not allowed to file any affidavit materials.

Coco's application ultimately came before Nolan J. on May 15th at Windsor, Ontario. Both MTO and Coco filed affidavits, but neither conducted any cross-examinations. On May 19th (amended on May 25th) Nolan J. granted the declaration sought by Coco.

MTO's tender call required bids to be submitted electronically to an MTO website. The prescribed "Tender Closing" was April 29, 2009. The evidence on the application was that Coco, which was familiar with MTO's electronic tendering system, had experienced a problem submitting its bid before the submittal deadline. The evidence was not conclusive on why MTO was unable to receive Coco's bid electronically, as MTO was able to receive the bids of three other bidders, including Bot, before the Tender Closing deadline. Here, Justice Nolan stated:

[para 5] In my view, it is not necessary to determine conclusively whether the computer system failure, which resulted in the bid from Coco not being received by the MTO, was the product of a malfunction of the former's computer system or the latter's computer system.

Nolan, therefore, held as follows:

I find that this is an appropriate case in which to make the declaration sought. In coming to this determination, the MTO is only directed to consider the Coco bid along with the other bids received by the MTO prior to 3 p.m. on April 29, 2009. This declaration does not interfere with the right of the MTO, found in Article 11.1 of the Instructions to Bidders, to not be required to accept any, including the lowest Bid.

Bot's Stay Motion to the Court of Appeal:

MTO chose not to appeal Nolan J.'s judgment, so on May 24th, Bot, the otherwise lowest compliant bidder, in its capacity as a party intervenor, commenced an expedited appeal to the Ontario Court of Appeal and on May 25th Bot brought a motion before a single judge of the Court of Appeal to stay the lower court's declaratory judgment pending the determination of the appeal. Since the tender irrevocability period was to expire 30 days from the Tender Closing date of April 29th, Bot sought to have the Court of Appeal hear the stay motion on or before May 28th. In the meantime, Bot and the other two bidders whose bids had been received by MTO before Tender Closing, wrote to MTO extending the irrevocability period for their bids for a further 30 days or until such time as the Court of Appeal could render a decision. Coco did not similarly extend its bid past the 30-day period from the Tender Closing.

Bot's stay motion came before Cronk J.A. on May 28th and in a brief endorsement released on May 28th at approximately 2:30 pm, with further reasons subsequently released, her honour granted a stay of Nolan J.'s order and ordered that an expedited appeal be heard by the Court of Appeal on June 18th.

In reaching her decision, Cronk J.A. was satisfied that Bot had met all of the required criteria for a stay, namely: (i) that there were serious questions of law and issues to be determined on the appeal, (ii) that the denial of a stay would result in irreparable harm to Bot, and (iii) that the balance of convenience favoured the granting of a stay.

On the serious issue test, Cronk J.A. found, among other things, that the events giving rise to the litigation called into question the integrity of the MTO's electronic tender and bidding system.

On the irreparable harm test, Cronk J.A. accepted that if the stay was not granted, Bot would suffer irreparable harm as it could reasonably be anticipated that Coco, as the lowest bidder, would be awarded the contract, which the evidence showed was worth approximately \$60 million. In support of its argument, and in response to Coco's contention that Bot's remedy, if any, was in damages, Bot referred to the following provision in MTO's Instructions to Bidders, by which MTO sought to immunize itself from damages:

The Ministry shall not be liable for any costs, expenses, loss or damage incurred, sustained or suffered by any bidder prior, or subsequent to, or by reason of the acceptance or the non-acceptance by the [MTO] of any Tender, or by reason of any delay in the acceptance of a Tender, except as provided in the tender documents.

Bot also adduced evidence of MTO's reliance on the identical provision in its defence of a current Ontario Superior Court of Justice action by an unsuccessful bidder on another MTO tender. Cronk J.A. accepted Bot's argument, stating:

*[20] If the requested stay is not granted, and Coco secures the Contract, irreparable harm to the Bot Group may well result. I note, in this regard, that an inability to collect damages if a stay is not granted was recognized in **RJR-Macdonald** at para. 64 as giving rise to irreparable harm.*

On the balance of convenience issue, both MTO and Coco argued that timely performance of the construction project could be imperilled if MTO were delayed in awarding the Contract.

However, Justice Cronk found the following considerations tipped the scales in favour of granting the stay in Bot's favour:

- (1) notwithstanding MTO's affidavit evidence filed on the day of the motion identifying numerous alleged difficulties if the Contract was not awarded by May 28th, such difficulties were prospective possibilities only. Moreover, the record indicated that MTO had already twice agreed to extend the Contract award deadline, and as such, a stay order, for a short time, would simply result in a further extension of that deadline;
- (2) Bot and the other 2 compliant bidders' agreement to make their bids irrevocable for an additional 30 days or such further time as may be required for the determination of the appeal, which undercut MTO's concerns over potential financial penalties to be shouldered by the successful bidder;
- (3) Bot's willingness to expedite the appeal and argue it as soon as possible;
- (4) the industry-wide concerns raised by the decision on Coco's application, and the importance of affording those concerns, beyond the litigants, to be assessed by the court; and
- (5) finally, that a stay of the declaratory relief would not legally prevent MTO from awarding the Contract, although that might be the practical effect.

Ontario Road Builders Association ("ORBA") Intervenes

On the return of the motion for the stay and expedited appeal, the Ontario Road Builders Association ("ORBA") brought a motion to be allowed intervenor status on the appeal. ORBA's motion was adjourned to be heard by the Chief Justice, at which time it was granted.

Court of Appeal Decision

The expedited appeal was heard on June 18, 2009, with the Court of Appeal releasing its reasons on the following day. The Court set aside the decision of the court below and granted judgment dismissing Coco's application.

The Court of Appeal's reasons provide strong support for the sacrosanct nature of tender deadlines in the competitive tendering process, absent clearly expressed language to the contrary. In this regard, the Court held that the specific language in MTO's tender documents, that no bids received after the deadline would be accepted for consideration, was sufficient to preclude an implied basis for the acceptance of late bids. Referencing the decisions of the Alberta Queen's Bench and Alberta Court of Appeal in *NAC Constructors Ltd. v. Alberta (Capital Region Wastewater Commission)*, the Court of Appeal held that a general discretion provision in MTO's tender documents allowing it to "waive formalities" with respect to bid submissions could not be construed to allow MTO to accept late bids. Further, citing its decision in the *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board* case, the Court of Appeal stated:

[12] Moreover, the timing of bid delivery is not a mere formality in the tendering process. As emphasized by the appellants, bid closing time is sacrosanct in the competitive tendering process.

In support of these determinations, the Court emphasized the need for strict rules to prevent unfairness to other bidders:

[13] Strong public policy considerations underlie these controlling principles. Confidence in the integrity of government bidding processes is a matter of considerable public importance. The Ontario Road Builders' Association, an intervenor in this proceeding, put it aptly in is factum ... The Association said:

The tendering process is, and must always be, a carefully controlled process, since the opportunity for abuse or distortion is ever present. Even in the absence of abuse or distortion, the process must nonetheless be and be seen to be fair to all bidders.

...

[A] bidder who submits its bid even a few minutes late has the potential to obtain a tremendous advantage over his competitors if it can obtain a last-minute lower bid from a subcontractor.

In reaching its decision, the Court of Appeal emphasized that the onus was on Coco, not MTO, to ensure that its bid was received on time. On the facts of the case this was important because there was no conclusive evidence as to the cause of the electronic tendering difficulties. Accordingly, it was impossible to determine whether it was Coco or MTO's computer system at fault in frustrating the timely submission of Coco's bid, or alternately whether the bid was simply held up in an Internet 'traffic jam.' In these circumstances the Court of Appeal reasoned as follows:

[23] ...we agree with the Bot Group's submission that, unlike other bidders, Coco took a calculated risk in deciding to delay accessing the MTO electronic bidding system until [less than 30 minutes before the deadline for bid submission]. It was open to Coco, as it was to the other bidders, to submit its first bid well in advance of Tender Closing and to update it thereafter. Unlike the other bidders, Coco chose not to avail itself of this opportunity.

...

*[25] As we have said, there is no evidence before us, nor any finding by the application judge, as to the origins of the computer difficulties experienced by Coco. Nor is there evidence of what happened to the bid that Coco attempted to send on-line before 3:00 p.m. It may simply have been lost or stalled in 'cyberspace'. In any event, on this record, it is speculative to conclude that Coco's bid entered MTO's information system before 3:00 p.m. Under the tender requirements, which repeatedly emphasized the time of the MTO's **receipt** of a bid, this was critical. Merely 'sending' a bid does not establish **receipt** by the MTO.*

Finally, the Court of Appeal did not agree with the lower court Judge's finding that a provision in MTO's tender documents (section 4.6) impliedly required MTO to render assistance to Coco when it was unable to submit its bid electronically, and that MTO's failure to have done so justified a declaration that Coco's bid was compliant. Section 4.6 of MTO's Instructions to Bidders, in part 4.0 "Electronic Bid Submission Procedures", read as follows:

4.6. Upon submitting an on-line Summary Bid Submission Form, bidders will receive an on-line receipt notifying that the Ministry has successfully received the Summary Bid Submission Form. Bidders not receiving an on-line receipt must contact the Ministry's Help Desk....

The Court of Appeal found that nothing in section 4.6 relieved against the stipulation that bids had to be received by MTO before the stated Tender Closing deadline. Here, the Court of Appeal stated:

Section 4.6 is merely directed at ensuring that a bidder who submitted an on-line Summary Bid Submission Form and did not receive confirmation of receipt of that form from the MTO had the means to obtain such confirmation (an MTO receipt) by contacting the MTO's help desk. Although we agree with the application judge's implicit suggestion that the language of s. 4.6 would benefit from clarification, especially concerning its interplay with Article 5 of the tender documents, there is nothing in s. 4.6 to support the conclusion that it is intended to override the specific provisions of the tender documents relating to the deadline and process for the MTO's receipt of bid submissions.

Conclusion

Owners and bidders, alike, should take note of the *Coco Paving* decision. Its emphasis on the criticality of the bid closing deadline, in the absence of a clearly expressed overriding provision, is advantageous to all parties in ensuring fairness in the competitive tendering process.

Here, the procedural approach adopted by the appellants was critical in the circumstances, and involved: (1) intervention by Bot, as the lowest compliant bidder, allowing it to initiate the appeal, when the tendering authority (MTO) elected not to do so; (2) the immediate obtaining of a stay order; which effectively prevented MTO from awarding the contract to Coco; (3) the obtaining of an order for an expedited appeal, in combination with the voluntary extension of the bids of the compliant bidders, which assisted the Court of Appeal with its determination on the balance of convenience test for a stay; and (4) the intervention of the relevant trade association (ORBA) to provide important context to the court in regards to the public policy considerations.

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