

projects and construction litigation bulletin

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judicial review - another weapon to challenge government tendering decisions?

A contractor puts its best foot forward in a tender process run by a provincial ministry, only to find that a non-compliant bid has won the contract. The tendering documents waive all liability for damages arising from the non-acceptance of the contractor's bid, so an action for breach of contract may not bear fruit. As an alternative to an action for breach of contract, however, recent case law in Ontario suggests that the contractor may be able to challenge the ministry's decision through an application for judicial review and force either a fair reconsideration of the existing bids or another tender process altogether.

In *Bot Construction Ltd. v. Ontario (Ministry of Transportation)*,¹ the Ministry of Transportation ("MTO") awarded a contract for the widening of Highway 417 near Arnprior, Ontario to Thomas Cavanagh Construction Limited ("Cavanagh"). Bot Construction Ltd. and other corporations party to its bidding team ("Bot") argued that the MTO's decision was subject to judicial review and should be quashed. Bot argued that it was unreasonable to accept Cavanagh's bid because the bid did not comply with certain mandatory tender requirements.

the facts

The MTO's mandate to build public roads comes from the *Public Transportation and Highway Improvement Act* (the "Act").² The Act authorizes the Minister to enter into agreements related to the planning, design and construction of highways and bridges. The tendering process for these contracts is subject to a Procurement Directive (the "Directive") that requires the disqualification of vendors if they fail to comply with a mandatory tender requirement. The Directive also provides for a steel policy which gives a price preference of 10% for Canadian steel products identified in vendor proposals.

In accordance with the Directive, the MTO required each bidder on the Highway 417 project to declare in its tender the value of imported steel to be used on the project. Cavanagh did not declare any value for imported steel in its bid. Bot took the position that Cavanagh's bid was inaccurate and non-compliant because the use of certain rolled steel beams, which were unavailable in Canada, were specified in the tender documents. Bot accordingly argued that Cavanagh's bid should be rejected.

¹ (2009), 99 O.R. (3d) 104 (Div. Ct.).

² R.S.O. 1990, c. P.50.

On notice from Bot, the MTO inquired with Cavanagh as to whether it was, in fact, sourcing the required rolled steel beams from Canada. Cavanagh responded that Canadian-made steel welded to the same specified dimensions as rolled steel was to be used and would better meet the drawing specifications. Satisfied with the answer, the MTO awarded Cavanagh the contract. Bot sought judicial review of the MTO's decision.

the Ontario Divisional Court's decision

a. the MTO's decision was subject to judicial review

Before the Divisional Court, the MTO argued that its procurement decision was a commercial decision made pursuant to the Minister's prerogative power and his broad general mandate under the Act. The MTO further argued that private law remedies were available to Bot if it wished to challenge the MTO's decision. The MTO accordingly urged the Divisional Court to rule that the MTO's decision was not subject to judicial review.

The Divisional Court acknowledged that a private law remedy was available to Bot. However, the Court noted that under the circumstances such a remedy was significantly curtailed, if not eliminated, by the tender provision waiving the MTO's liability for any damages suffered by any bidder by reason of the MTO's acceptance or non-acceptance of any tender.

Perhaps more importantly, the Divisional Court found that judicial review is available to supervise the machinery of governmental decision-making, where the decision affects the rights, interests, property, privileges or liberty of any person. The basis for the broad reach of this remedy, the Divisional Court noted, is the general duty of fairness resting on all public decision-makers:

The tendering decision of the MTO has obvious broad public interest implications that extend beyond the interests of the contracting parties, not only with respect to the construction of public roads but also to the fairness and integrity of the process followed in the expenditure of significant public funds...³

The Divisional Court found that the tendering issues in this case raised public law concerns justifying judicial review of the MTO's decision.

b. standard of review and fairness of the decision making process

Any application for judicial review may entail the judicial review of the merits of a decision and the process by which that decision was reached. The Divisional Court addressed the merits of the MTO's decision that Cavanagh's bid was compliant, and reviewed the process followed by the MTO in arriving at its decision.

The merits of any administrative decision subject to judicial review may be held to either a standard of correctness, or reasonableness. In this case, the Divisional Court held that the deferential standard of reasonableness was appropriate given the expertise and experience of the ministry personnel who ran the bidding process and selected the winning bid.

³ *Supra*, note 1 at para. 24.

The Divisional Court found that rolled steel beams were specified in the design drawings, and that such steel beams were not available in Canada. Cavanagh, therefore, could not have complied with the specifications given its declaration to use only Canadian steel. The Divisional Court accordingly held that the MTO's decision that the Cavanagh bid was compliant was not reasonable.

In relation to the MTO's process, the Divisional Court held that the MTO owed a duty of procedural fairness to Bot in arriving at its decision to chose Cavanagh's bid. The Court explained that Bot had a legitimate expectation that the MTO's evaluation of its tender would be consistent with the MTO's past practice of disqualifying non-compliant bidders and, in particular, those that provided non-compliant information in their steel declarations. The Divisional Court held that the MTO failed to fulfill its duty of fairness in finding that the Cavanagh bid was compliant.

The Divisional Court therefore quashed the MTO's decision to award the contract to Cavanagh and ordered that the MTO either reconsider the existing bids in accordance with the terms and conditions set out in the tendering documents, or commence a new tendering process. The MTO appealed the decision.

the Ontario Court of Appeal's decision

On appeal,⁴ the MTO argued that the Divisional Court erred by:

- i. concluding that the Court had jurisdiction to judicially review the MTO's procurement decision;
- ii. concluding that Bot had a legitimate expectation that was enforceable on its application for judicial review;
- iii. concluding that the MTO's decision declaring that Cavanagh's bid was compliant with the rules of the tendering process was unreasonable; and
- iv. quashing the MTO's procurement decision.

The Ontario Court of Appeal expressly decided the appeal solely on the third ground and stated that expressing any views as to the other grounds was not necessary.

In addressing the third ground, the Court of Appeal considered both the fairness of the process followed in arriving at the decision that Cavanagh's bid was compliant, as well as the reasonableness of that decision. The Court of Appeal held that the investigation the MTO conducted following Bot's inquiry was diligent and genuine, and satisfied any duty of fairness owed by the MTO to Bot. With respect to the merits of the MTO's decision, the Court of Appeal held that "the constellation of facts" that the MTO discovered through its investigation "removed its ultimate decision from the realm of unreasonableness as defined by the case law."⁵ In particular, the Court noted the following:

- both American rolled steel and Canadian welded steel, which Cavanagh intended to use, would meet MTO standards for structural strength and performance;

⁴ 2009 ONCA 879.

⁵ *Ibid.*, at para. 16.

- the amount of steel required for the bridge beams was small (1.14% of the total steel required for the contract) and minor (0.26% of the value of the contract);
- Cavanagh's proposal to use Canadian welded steel better accorded with an explicit MTO policy to use Canadian steel;
- even if the use of Canadian steel required a change in project specifications, the change would be a minor one and would be readily approved; and
- even if Cavanagh had declared imported steel for use on the bridge, it would not have affected the order of bidders between Cavanagh, the lowest bidder, and Bot, the second lowest bidder.⁶

The Court of Appeal accordingly overturned the Divisional Court's decision and dismissed Bot's application for judicial review.

so what about the availability of judicial review?

The Court of Appeal emphasized that it came to its conclusion without expressing any view as to the availability of judicial review as a remedy with respect to the tendering process for government procurement contracts. However, given the Divisional Court's acceptance of the remedy, it appears that a decision of a public body that has not complied with the rules governing its own procurement procedure could be subject to judicial review, particularly if the impugned decision impacts on the rights and interests of bidders and raises public law issues with respect to fairness. While even a successful application for judicial review will not result in the recovery of any contractual damages for a wronged bidder, it could result in the re-evaluation of tenders or a new procurement process which, in some circumstances, may be the preferred result.

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⁶ *Ibid.*, at para. 14.

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a cautionary note

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