

# Blakes Bulletin

## Litigation/Construction

### Ontario Court of Appeal Reinforces Integrity of Tender Process and Prohibition Against Improper Bid Repair in Maystar Decision

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A September 24, 2009 decision of the Ontario Court of Appeal (the Court) in *Maystar General Contractors Inc. v. Newmarket (Town)* rejected an owner's attempt to amend and accept an otherwise non-compliant bid in the absence of express language allowing it to do so in the tender documents. The Court held that the public owner had breached its contractual duty of fairness to the other contractors in the tendering process and that it could not rely on a good faith defence.

#### BACKGROUND

This decision arose from a dispute between the respondent contractor Maystar General Contractors Inc. (Maystar), and the appellant municipality Town of Newmarket (the Town), based on Maystar's claim that the Town had breached its obligations to Maystar in a tender call by amending and accepting a competitor's non-compliant bid.

The Town invited bids from four pre-qualified contractors, including Maystar and the ultimately successful bidder, Bondfield Construction Company (Bondfield), for the construction of a recreation facility. After bidding closed, the Town publicly read out and recorded the prices tendered. The unofficial results were that Maystar was the lowest compliant bidder and that Bondfield's bid was the second lowest. Upon further review, the Town determined that Bondfield had made a pair of mathematical pricing errors in its bid and, when corrected, Bondfield's bid was actually the lowest. The Town amended Bondfield's bid and then accepted unsolicited correspondence from Bondfield which clarified the pricing discrepancies. Maystar immediately objected to the Town's revised tender results and subsequent awarding of the contract to Bondfield at the corrected bid price. Maystar sought over C\$3.3-million in damages.

#### THE APPLICATION JUDGMENT

The Ontario Superior Court of Justice held that the errors contained in Bondfield's bid made it impossible to identify its tender price from a review of the bid form. The Court affirmed that price is an essential element of a bid and that an offer that is uncertain as to price cannot form the basis of a binding contractual relationship. Given that the price tendered was uncertain, Bondfield's bid did not comply with the tender documents and was incapable of acceptance by the Town.

The Town argued that various provisions in the Instructions to Bidders allowed it to correct the price discrepancies in Bondfield's bid. Justice L.A. Pattillo disagreed. The Instructions to Bidders lacked the clear and straightforward language necessary to allow the Town to rectify Bondfield's bid. The Town's approval of Bondfield's corrected bid was prohibited by the terms of the tendering process. The tender documents expressly provided that amendments to bids would not be considered or accepted. By awarding the contract to Bondfield, the Court held that the Town had breached its contractual duty of fairness to Maystar by not giving equal treatment to all of the bids it received.

#### ONTARIO COURT OF APPEAL DECISION

On appeal by the Town, K. N. Feldman J.A., delivering the judgment of the Court, considered the law governing the tendering process for public construction contracts. The Court reiterated the basic principles for interpreting and applying the terms of tender documents, including the implied term that an owner owes a duty of fairness to all contractors to accept only compliant bids. In order to be compliant, a bid need not be in strict compliance but rather *substantial* compliance with all material conditions of a tender, as expressly stated in the tender documents. The Court affirmed that it would not be worthwhile for contractors to engage in the expensive and time-consuming tendering process if the owner could then circumscribe this process and accept a non-compliant bid.

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Applying these principles to the Bondfield bid, the decision of the application judge was confirmed. Bondfield's bid was not in substantial compliance with the tender documents because of its price discrepancies. As a non-compliant bid, it was incapable of acceptance by the Town. The Instructions to Bidders did not contain any express provisions that would have allowed the Town to amend or waive the errors in the Bondfield bid so as to bring it into substantial compliance with the tender requirements. The Court did not address the issue of whether Bondfield's unsolicited clarification communications amounted to improper post-bid negotiations since the Town had unilaterally corrected Bondfield's bid prior to receiving these. The Town's improper correction of Bondfield's bid broke the rule against post-tender bid repair, which places an implied duty on owners to reject bids that are not in substantial compliance with the tender requirements. By awarding the contract to Bondfield, the Town breached the duty of fairness it owed to *Maystar*.

The Court noted that the Town was in a difficult situation. After expert consultations, and with the best interests of its citizens in mind, the Town approved the Bondfield bid which, on one reading, could have been the lowest. The Court believed the Town was acting in good faith and had not engaged in bid shopping. However, it held that a good faith defence is not available to a claim for breach of contract.

In the result, the Town's appeal was dismissed, with costs fixed in the amount of C\$30,000.

### CONCLUSION

#### The Integrity of the Tender Process

The Court in *Maystar* reinforced the integrity of the tendering process. Implied duties of fairness exist for both contractors and owners who elect to engage in calls for tenders. Contractors expend time, effort and expense to put forward tenders. This creates an obligation on owners to treat all bids fairly, orderly and equally vis-à-vis the terms set out in the tender documents. For reasons of business efficacy, a non-compliant bid cannot form the basis of a contract and, as such, bids that do not substantially comply with the tender requirements are incapable of acceptance by owners and ones from which contractors could technically withdraw.

#### Implications of the Decision for Owners

The *Maystar* decision endorses the policy that owners and contractors engage in the tender process because of the procedural certainty guaranteed by the common law and the tender documents. To the extent that the law of contracts permits, owners have the option of including express provisions in the tender documents that permit them to correct, waive or seek clarification on non-compliant bids. However, post-submission tender negotiation is prohibited by the rule against bid repair to ensure equal treatment. The overall effect of the *Maystar* decision for owners is that they should be very cautious when assessing bids for compliance as they have an obligation to reject non-compliant bids. Owners who consider correcting or waiving erroneous tenders should act with extreme care and only under the express terms of the tender documents. The Court also reiterated that an owner cannot rely on a good faith defence if it breaches the terms of its own tendering process.

#### Implications of the Decision for Contractors

Contractors should be wary of tenders that clearly permit the acceptance of non-compliant bids. As can be found in the *Maystar* decision, such calls for tenders are possible notwithstanding that they frustrate the public interest in an orderly and fair bidding process. While owners may expressly provide that non-compliant bids are capable of acceptance, the Court recognized that contractors may refuse to bid where such clauses govern. Contractors who choose to engage in calls for tenders should not rely on the tender documents to bring their otherwise unacceptable bid into substantial compliance. Regardless of what an owner may encourage, the rule against bid repair prohibits contractors from post-submission tender negotiation. The ability to withdraw from non-compliant bids protects contractors from being bound to erroneous tenders that are lower than the intended bid price. The *Maystar* decision confirms that contractors who substantially comply with tender requirements have recourse to recover damages against owners who do not.

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