

Case Comment -
Substantial Compliance
Overcomes Irregularity in
Public Procurement

LUC #153 [2019]

Primary Topic:

XII Tendering

Jurisdiction:

Ontario

Author:

Ivan Merrow,
Glaholt LLP

CanLII References:

[2019 ONCA 433](#)

ONTARIO

Case Comment - Substantial Compliance Overcomes Irregularity in Public Procurement

The Ontario Court of Appeal's recent decision in *Reaction Distributing Inc. v. Algonquin Highlands (Township)*, 2019 ONCA 433, suggests that substance may triumph over form when it comes to compliance with the contractual requirements of a tendering process. Tenders cannot be lawfully disqualified from tender processes for irregularities if they remain substantially compliant with the tender contract's material terms. As this decision illustrates, such disqualifications may count as a breach of the underlying tendering contract and lead to a successful lawsuit for damages.

This dispute centered on Reaction Distributing Inc.'s ("**Reaction**") tender to win work from the Township of Algonquin Highlands (the "**Township**"). Reaction submitted its tender to the Township in a box. The box was not labelled with Reaction's name, nor was it labelled with a return address. The tender delivered by way of an unlabelled box contravened the contractual tender terms because it was not delivered in a sealed envelope. Even if the box had satisfied the sealed envelope requirement, it also violated the Township's contractual tender terms that required the sealed envelope to be labelled with a name and return address.

The Township disqualified Reaction's tender on the grounds that the unlabelled box was non-compliant with the tender contract, despite the fact that the contract had a provision that permitted the municipality to waive any non-compliance. The Township awarded the contract to the only other company who submitted a tender. Had Reaction's tender been considered by the Township, Reaction's tender would have been the lowest and it would have won the work.

Reaction reacted by commencing an action against the Township for breach of the tender contract.

Reaction was successful at trial. The Honourable Justice Bryan Shaughnessy found that the unlabelled box and lack of a sealed envelope were mere irregularities. He held that Reaction's tender was substantially compliant with the contractual tender requirements and the Township's decision to disqualify Reaction breached the tender contract. The trial judge made a finding that the Township did not act in good faith when rejecting Reaction's tender. The trial judge made further findings that the price of Reaction's tender was lower than its only other competitor, and that had it been considered, Reaction would have won the work. The result was a judgment for damages in favour of Reaction for \$71,063.60 in lost profit against the Township.

The Township appealed on three issues, proceeded with argument on only two issues, and lost its appeal on both counts.

**Case Comment -
Substantial Compliance
Overcomes Irregularity in
Public Procurement**

LUC #153 [2019]

Primary Topic:

XII Tendering

Jurisdiction:

Ontario

Author:

Ivan Merrow,
Glaholt LLP

CanLII References:

[2019 ONCA 433](#)

ONTARIO

Case Comment - Substantial Compliance Overcomes Irregularity in Public Procurement

The first issue was whether the trial judge erred in finding a breach of contract. The Ontario Court of Appeal stated that: “the law is that substantial compliance is the test to be applied in considering tender requirements,” referring to the Supreme Court of Canada’s decision in *Double N Earthmovers Ltd. v. Edmonton (City)*, 2007 SCC 3 (CanLII) (“*Double N*”). In *Double N*, a four-judge panel, dissenting on other issues, stated that, “Substantial compliance requires that all material conditions of a tender, determined on an objective standard, be complied with. A bid is substantially compliant if any departures from the tender call concern mere irregularities [emphasis added, citations removed].”

The Court of Appeal applied *Double N* to uphold the trial judge’s finding that Reaction’s unlabelled box tender was substantially compliant with the contractual tender requirements. The appeal court did not consider whether the contractual requirements for a sealed envelope, labelled name, or labelled return address were immaterial. The appeal court only upheld the trial judge’s finding that the breach itself—the unlabelled box—was a mere irregularity.

The second issue was whether the trial judge erred in finding that the Township did not act in good faith. The Court of Appeal decided that the trial judge’s finding was “a factual one that is not to be interfered with absent palpable and overriding error.” Finding no palpable and overriding error, the Township was unsuccessful on this issue as well. The appeal court did not repeat the trial judge’s evidentiary basis for the apparent absence of good faith. The appeal court did state, however, that there was no evidence put before the trial judge “as to the reasons why [the Township] was not was not prepared to waive the non-compliance.”

This duty to review tenders in good faith pre-dates the Supreme Court of Canada’s seminal decision *Bhasin v. Hrynew*, 2014 SCC 71, where it recognized a general duty of honesty and good faith in the performance of contracts. In *Rankin Construction Inc. v. Ontario*, 2014 ONCA 636, the court found that a public body can apply its discretion to find that non-compliance is more than a formality, whether correct or not, as long as the reviewer acts reasonably and in good faith. In this case, the noted absence of evidence on why the Township was not prepared to waive non-compliance may have significantly limited the Township’s ability to defend itself on the basis that it made its decision reasonably and in good faith.

The third issue was whether the trial judge erred in finding that Reaction “would have been awarded the contract for the work, if [the Township] had considered its tender.” The Township did not proceed with argument on this issue at the appeal.

**Case Comment -
Substantial Compliance
Overcomes Irregularity in
Public Procurement**

LUC #153 [2019]

Primary Topic:

XII Tendering

Jurisdiction:

Ontario

Author:

Ivan Merrow,
Glaholt LLP

CanLII References:

[2019 ONCA 433](#)

Case Comment - Substantial Compliance Overcomes Irregularity in Public Procurement

Reaction's trial judgment was ultimately upheld by the Ontario Court of Appeal. Costs were fixed at \$6,500 against the Township.

The decision serves as a warning to procurement staff who may consider rejecting tenders for strict non-compliance with contractual tender requirements. Where tender contracts provide for the discretion to waive non-compliance, courts may later scrutinize why a party refused to exercise that waiver. To satisfy the court's test from *Double N*, a tender ought not be disqualified if it remains substantially compliant with the tender contract. Lawful grounds for disqualification should refer to non-compliance with a material condition that exceeds mere irregularity. Where tender contracts permit public bodies to exercise discretion to waive non-compliance, tender reviewers ought to be prepared to provide evidence that supports a good faith and reasonable basis for any refusal to exercise that discretion. Otherwise, the evaluating party risks significant exposure to damages, costs and legal expense.

ONTARIO

