

## CASE COMMENT

### *Coco Paving (1990) Inc. v. Ontario (Transportation), 2009 ONCA 503*

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Virtual bid rooms and on-line bid submissions...much has changed in the world of tendering since the seminal case in *Ron Engineering* in 1981 but a fundamental principle with respect to bid delivery has not: a late bid creates an unfair advantage and is incapable of acceptance as a compliant bid.

The Ontario Court of Appeal recently had occasion to reconsider the issue of compliance of a late submission, this time within the context of an on-line bidding process. In *Coco Paving*, the Ontario Ministry of Transportation (“MTO”) called for tenders for a contract to perform roadwork. The terms of the tender call provided for bids to be submitted electronically, with a prescribed alternative fax procedure in the event of computer failure. Upon completion of an on-line bid form, the form was to be submitted and received by the MTO servers before the date and time specified as “Tender Closing” in order to qualify as a compliant bid. Both the tender documents and the on-line submission form clearly stated that bids must be received by the deadline.

Coco’s bid was first received by the MTO almost thirty minutes after the Tender Closing. The tender document did not expressly provide for MTO to receive and consider late bids. The lower court judge declared that Coco’s late bid was submitted in compliance with the terms of the tender call and capable of acceptance by the MTO. The court of appeal held that Coco’s compliance could not be supported by the express terms of the tender documents nor could the tender’s privilege clause (permitting the MTO to waive formalities) be used to infer compliance.

*Timing of bid  
delivery is critical  
to a competitive  
tender process –  
accepting late bids  
confers an unfair  
advantage on non-  
compliant bidders*

While this case is largely an affirmation of established principles regarding bid delivery, the MOT’s use of electronic bidding offers some reminders for owners contemplating the use of an on-line process, such as the following: clearly set out a process to address computer system failure; provide an alternative process for bidders to use in the event of a computer glitch; and, have a certifiable way of determining when bids have been received. In this case, the MTO stipulated that bids be *received* by the MTO server by the deadline and the MTO was able to establish that its computer servers were functioning properly at the relevant time.