

Todd Brothers Contracting Ltd. V. Algonquin Highlands (Township), 2015 ONCA 737

A: Introduction

On November 3, 2015 the Ontario Court of Appeal released *Todd Brothers Contracting Ltd v. Algonquin Highlands (Township) 2015 ONCA 737*. This decision dealt with the ability of the Township to rely on a waiver agreement with a tendering contractor that prohibited the contractor from seeking compensation from the Township in the event the project was cancelled. The case stands as a general reminder of the value of properly worded contractual terms in protecting local governments from liability and, specifically, obtaining a release in circumstances where the performance of a bid contract may be delayed or in jeopardy as the result of external factors.

B: Summary of *Todd Brothers*

Todd Brothers brought a claim for damages against the Township as a result of its alleged breach of a construction contract. In April 2009 the contractor had been the lowest bidder for a project involving the construction of a new runway and extension of the Haliburton-Stanhope Airport terminal. Shortly after the tender process closed, the Canadian Environmental Assessment Agency (CEAA) unexpectedly decided to review the project. As a result, Todd Brothers and the Township signed an agreement to extend the time for acceptance of its tender until July 15, 2009.

By late June 2009 the CEAA review was not yet complete so the Township decided to seek approval from the Ministry of Agriculture, Food and Municipal Affairs (OMAFRA) to complete the project in three phases. Breaking the project into phases partially obviated the need for CEAA approval. Todd Brothers agreed to the phasing

of the project and, once again, to extend the timeline for acceptance of its tender bid.

In September 2009 the Township council passed a resolution accepting Todd Brothers' tender according their bid, but subject to CEAA approval. However, no formal construction contract was actually entered into between the two parties.

Prior to the passing of this resolution Todd Brothers signed a "Compensation Waiver Acknowledgement" which provided that the Todd Brothers would:

not seek any compensation for ... work identified but not completed ... in the event that the Township cannot proceed to any of the phases as a result of matters beyond the control of the Township of Algonquin Highlands, or delays resulting from the review being completed by the CEAA ... any other public issues/concerns or the withdrawal of funding from applicable sources.

The CEAA approved the project in December 2010¹. However, the newly elected Township council, whose members campaigned against the project, passed a resolution to defer the airport expansion until a further review was conducted.

In January 2011 the Ministry of Natural Resources (MNR) proposed a joint airport improvement project that, pursuant to the Township's agreement with OMAFRA, it was required to consider. The Township decided to pursue this joint project as it was concerned that any other course of action would risk the loss of government funding for any airport improvements. It then relied on the waiver Todd Brothers signed to cancel the original project without paying the contractor any consideration. Todd Brothers then sued the Township for breach of contract.

Todd Brothers argued that there was no evidence of any “public issues/concerns”. However, the Court of Appeal recognized that there was significant public outcry with the project and the MNR’s proposal for a different, joint project were “public issues.” Further, there was a provision in the Township’s agreement with OMAFRA requiring it to notify the Ministry if any more cost effective opportunities arose. The court interpreted this to mean that this funding would be in jeopardy if the joint project was rejected – and this triggered the funding aspect of the waiver.

Both the motion judge in the original decision and the Court of Appeal agreed that the Township’s decision to pursue the joint project was permissible and its reliance on the waiver with Todd Brothers to cancel the original project was valid.

C: Implications for Local Governments

As between a local government and a contractor, when issuing tender documents or during the period between the close of tender and the acceptance of a bid and signing of a formal agreement, a broadly worded waiver agreement may be useful for limiting a local government’s liability to the preferred bidder in the event there are intervening issues with commencement of the project. The courts in Ontario have interpreted “public issues/concerns” broadly and are appreciative of the issues local governments face in terms of securing both public support and funding from higher levels of government.

By requiring a contractor to sign such a waiver a local government may be able to shield itself from contractual claims brought by a preferred bidder in the event commencement of a project becomes contingent on regulatory or funding approvals.

Please contact us should you wish to discuss the implications of this decision in more detail.