

● Client Advisory

Date March 11, 2010

Subject **Supreme Court of Canada grants Tercon's appeal and provides guidance on limitation of liability clauses designed to shelter owners from tender claims**
Tercon Contractors Ltd. v. B.C. (Ministry of Transportation and Highways), 2010 SCC 4

We recently had the good fortune to argue successfully before the Supreme Court of Canada that to preserve the integrity of the tendering process it is imperative that bidders be treated fairly and equally. As confirmed by the majority of the Supreme Court of Canada on February 12, 2010, the rationale for this is straight-forward – it is to foster a fair, transparent and accountable tendering system.

In 2001, Tercon was the second bidder on a highway project north of Terrace. It lost to a joint venture that was not on the list of eligible bidders. Tercon sued on the basis that the Ministry's decision not to disqualify the joint venture was unfair. Tercon was successful at trial.

The Ministry appealed to the B.C. Court of Appeal and in 2007 was successful in reversing the trial decision. The B.C. Court of Appeal was of the view that Tercon was not entitled to complain because the tender conditions contained a "no claims" clause that said:

Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP, and by submitting a proposal each Proponent shall be deemed to have agreed that it has no claim.

The majority of the Supreme Court of Canada held that this clause did not apply to a breach of the duty of fairness as "the clause only applies to claims arising 'as a result of participating in [the] RFP', not to claims resulting from the participation of other, ineligible parties". In the words of the majority, "clear language is necessary to exclude liability for such a basic requirement [fairness] of the tendering process, particularly in the case of public procurement."

From an owner's perspective, the Supreme Court of Canada has clearly given the green light to include in their calls for tenders exclusion clauses which attempt to exclude liability for a breach of the duty of fairness. However the court has also warned that to be effective, these clauses will have to be factually specific to the particular breach.

Bidders can take some comfort from the decision – fair and equal treatment of bidders is essential to tendering. However, tender documents will have to be read carefully to determine if an owner is signaling an intention to engage in an unfair tender process by insertion of a clause excluding liability for a certain unfair conduct.

In order to provide a summary of the case, we have set out below the introduction from the majority judgment.

● *The judgment of LeBel, Deschamps, Fish, Charron and Cromwell JJ. was delivered by CROMWELL J. —*

“... The appeal arises out of a tendering contract between ... Tercon Contractors Ltd., who was the bidder, and ... the Province of British Columbia, who issued the tender call. The case turns on the interpretation of provisions in the contract relating to eligibility to bid and exclusion of compensation resulting from participation in the tendering process.

“The trial judge found that ... (...the Province) breached the express provisions of the tendering contract with Tercon by accepting a bid from another party who was not eligible to bid and by ultimately awarding the work to that ineligible bidder. In short, a bid was accepted and the work awarded to a party who should not even have been permitted to participate in the tender process. The judge also found that this and related conduct by the Province breached the implied duty of fairness to bidders, holding that the Province had acted ‘egregiously’ (...at para. 150). The judge then turned to the Province’s defense based on an exclusion clause that barred claims for compensation ‘as a result of participating’ in the tendering process. She held that this clause, properly interpreted, did not exclude Tercon’s claim for damages. In effect, she held that it was not within the contemplation of the parties this clause would bar a remedy in damages arising from the Province’s unfair dealings with a party who was not entitled to participate in the tender in the first place.

“The Province appealed and the Court of Appeal reversed Dealing only with the exclusion clause issue, it held that the clause was clear and unambiguous and barred compensation for all defaults.

“On Tercon’s appeal to this Court, the questions for us are whether the successful bidder was eligible to participate in the RFP and, if not, whether Tercon’s claim for damages is barred by the exclusion clause.

“In my respectful view, the trial judge reached the right on both issues. The Province’s attempts to persuade us that it did not breach the tendering contract are, in my view, wholly unsuccessful. The foundation of the tendering contract was that only six, pre-selected bidders would be permitted to participate in the bidding. As the trial judge held, the Province not only acted in a way that breached the express and implied terms of the contract by considering a bid from an ineligible bidder, it did so in a manner that was an affront to the integrity and business efficacy of the tendering process. One must not lose sight of the fact that the trial judge found that the Province acted egregiously by ‘ensuring that [the true bidder] was not disclosed’ (para.150) and that is breach ‘attacked[d] the underlying premise of the [tendering] process’ (para.146), a process which was set out in detail in the contract and, in addition, had been given ministerial approval as required by statute.

“As for its reliance on the exclusion clause, the Province submits that the parties were free to agree to limitations of liability and did so. Consideration of this submission requires an interpretation of the words of the clause to which the parties agreed in the context of the contract as a whole. My view is that, properly interpreted, the exclusion clause does not protect the Province from Tercon’s damage claim which arises from the Province’s dealings with a party not even eligible to bid, let alone from its breach of the implied duty of fairness to bidders. In other words, the Province’s liability did not arise from Tercon’s participation in the process that the Province established, but from the Province’s unfair dealings with a party who was not entitled to participate in that process.

“I would allow the appeal and restore the judgment of the trial judge ...”

Further information is available from Brian McLean, Chris Armstrong, or William McLean at 604-925-0672 or chrisarmstrong@mcleanarmstrong.com.