



## CLIENT ALERT! BRAND NEW TENDERING LAW

On February 12, 2010 the Supreme Court of Canada rendered its much anticipated decision in *Tercon Contractors Ltd. v. British Columbia*, a decision which will have far reaching implications for public procurement in the future. The central issue on the appeal was whether the Province could, by including in its tender documents a broad “exclusion of liability” clause, immunize itself from claims by an unsuccessful tenderer that the Province breached its duties to Tercon when it awarded a contract to an ineligible bidder. The Supreme Court was deeply divided in the result. Five Justices allowed Tercon’s claim, and four, would not have. Although the nine Justices on the Court agreed upon the legal approach to interpreting contractual liability exclusion and limitation provisions, they were sharply divided on whether the facts fell within the scope of those provisions.

The facts were straightforward. Following responses to a request for expression of interest (“RFEI”) for the design and construction of a highway, the Province issued a request for proposals (“RFP”). Under the RFP terms, only the six proponents who had responded to the RFEI were eligible to submit a proposal, and those received from any other party would not be considered.

One of the six proponents entered into a pre-bidding agreement with another nonqualified company to bid the work as a joint venture. This arrangement allowed the proponent to prepare a more competitive proposal. Its proposal was submitted in its own name with the unqualified joint venturer listed as a “major member” of the proponent’s team. The Province chose to ignore the fact that the joint venture proponent was not an eligible proponent, and awarded it the contract. Tercon would have been awarded the contract but for the award to an ineligible proponent.

Upon being sued by Tercon for breach of its bid contract, the Province relied in its defence on the liability exclusion clause contained in the tender documents: “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”. Clauses of these nature are commonly found in tender documents and seek to protect the owner from claims by unhappy tenderers. Tercon won its case initially at trial. The B.C. Court of Appeal allowed an appeal by the Province, giving full effect to the liability exclusion clause. Tercon then appealed to the Supreme Court of Canada.

While disagreeing in the result (5:4) all members of the Supreme Court of Canada agreed on the approach to be applied when a party seeks to escape the effect of an exclusion clause to which it has contractually agreed. The first step involves a matter of interpretation, to determine whether the exclusion clause even applies to the circumstances of the case. This will depend upon the Court’s interpretation of the intention of the parties as expressed in the contract. If the exclusion clause applies, the second step is to determine whether the clause is unconscionable and thus invalid at the time the contract was made. If the exclusion clause is valid at the time the contract was formed, the third step is to determine whether the Court should,

nevertheless, refuse to enforce the exclusion clause because of some overriding public policy. The burden of persuasion lies on the party seeking to avoid enforcement of the clause, to demonstrate an abuse of the freedom of contract which outweighs the very strong public interest in their enforcement. Serious criminality or egregious fraud by the owner are examples of situations in which public policy would not give effect to a liability exclusion clause.

The majority of the Supreme Court of Canada held that the Province had breached the express provisions of Tercon's bid contract by accepting a tender from a party who should not have been permitted to participate in the tender process. This "egregious" conduct by the Province was held to have breached the implied duty of fairness owed by the Province to all proponents. The conduct of the Province was characterized as an "affront to the integrity and business efficacy of the tendering process". According to the majority of the Court, the exclusion clause, which barred claims for compensation "as a result of participating" in the tendering process, did not, when properly interpreted, exclude Tercon's claim for damages. The closed list of bidders was the foundation of the RFP. According to the majority of the Court, the exclusion clause could not have been intended by the parties to waive claims for compensation for conduct that struck at the heart of the tendering process: the fundamental requirement that only compliant bids be considered and the implied obligation to treat bidders fairly.

The minority of the Court, which would have upheld the British Columbia Court of Appeal's decision to dismiss Tercon's appeal, interpreted the exclusion clause to apply to the facts and found that the conduct of the Province was not so egregious that the clause ought not to be given effect.

What does this decision mean for owners, tendering authorities, procurement document drafters and tenderers? Simply put, the focus will rest squarely on the language employed in the tender documents and in interpreting the language and scope of the liability exclusion or limitation provisions considered upon the words used, considered in light of the tender documents as a whole. ***Even the majority of the Supreme Court recognized that, if the language of an exclusion clause is sufficiently clear, a Court can give effect to liability exclusion clauses which exclude claims arising out of an owner's failure to award only to compliant bidders or breach of its implied obligation of good faith in the tendering process.*** That said, the majority of the Supreme Court has made it equally clear that only in the clearest cases is it likely that far reaching liability exclusion or limitation clauses, which are found in many public procurement documents and elsewhere, are likely to be given effect. Ultimately, whether an owner can legally immunize itself from legal claims arising out of its own breach of a bid contract or duty owed to tenderers will largely depend on the language of the liability limitation or exclusion clauses that it unilaterally incorporates in the procurement documents.

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