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Update

Construction Law

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Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation)

Supreme Court of Canada to Consider Limitation of Liability Clauses in Tender Documents

By Howard Wise

On July 10, 2008, the Supreme Court of Canada granted leave to appeal and will hear the appeal of Tercon Contractors Ltd. ("Tercon"). Previously, the British Columbia Court of Appeal had overturned the trial court's decision which awarded Tercon $3,300,000.00 in damages. At issue in the case is the government's reliance on an exclusion of liability clause contained in the RFP documents that accompanied a call for submissions on a project for the British Columbia Ministry of Transportation ("Ministry").

The Trial Decision

The facts of the case were as follows:

1. The project involved the construction of 25 kilometres of highway over very challenging terrain in the Nass Valley, British Columbia. Tercon responded to Request For Expression of Interest ("RFEI") as did Brentwood Enterprises Ltd. ("Brentwood").

2. In total, six proponents responded to the Ministry's RFEI.

3. Subsequently, an RFP was issued that provided:

> 2.8
> (a) Eligibility
> Only the six Proponents, qualified through the RFEI process, are eligible to submit responses to this RFP. Proposals received from any other party shall not be considered.

4. The RFP also contained a clause precluding the proponents from making any claims for damages relating to their participation in the RFP process.

5. Tercon submitted a bid.

6. Brentwood did not submit a bid on its own but instead joined with Emil Anderson Construction Co. ("EAC") in submitting a bid.

7. The joint venture was not a pre-qualified bidder.

8. The trial judge concluded that the owner was aware that they were dealing with a joint venture and not with Brentwood alone.

9. The trial judge also concluded that the owner went to great lengths to disguise the nature of the relationship in awarding the contract to Brentwood in name only and not the joint venture.

10. The court held that, as the submission was from the joint venture and not from Brentwood, it was non-compliant.

11. The trial judge concluded that the Ministry breached Contract A (the "contract" created when a bid is submitted) in two respects. Firstly, by accepting a bid that was incapable of being accepted by reason of being non-compliant. Secondly, for treating Tercon unfairly in the evaluation process by approving a non-compliant bid. (See paragraph 138 of the reasons.)

12. The court then had to consider the effect of the exclusion of damages clause contained in the RFP documentation.

13. The Ministry relied on paragraph 2.10 of the RFP to protect it from liability. That clause provided:

> "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 it has no claim."

14. The court, having concluding that there was a breach of Contract A by the Ministry, found that the exclusion of liability clause could not be relied upon by the Ministry and, at paragraph 148 of the trial decision, stated:

> Section 2.10 is broadly drafted to exclude 'any claim for any compensation of any kind whatsoever as a result of participating in this RFP'. It does not refer to the contract A agreement or to any specific liability that is sought to be avoided. Particularly, it does not specifically exclude liability for damages for fundamental breach of contract A or for acceptance of a non-compliant bid. It is unclear exactly what 'participating' means. In this case, it is inconceivable that, given the preparation, detail, and expense required to submit a bid based upon elaborate tender documents, the practice and legal requirement to accept only complaint bids, and the eligibility requirements in the RFP, that Tercon would have agreed that the Ministry could accept a non-compliant bid without legal recourse against the Ministry for damages for breach of contract. It is equally inconceivable that the Ministry could expect to fundamentally breach the contract and expect a bidder to accept that they had no legal recourse after it had submitted a compliant bid itself. The ambiguity in section 2.10 must be resolved in favour of the plaintiff. The clause does not apply to these breaches.

16. The court, in dealing with the enforceability of the exclusion clause, went on to state:

> In the circumstances here, it is neither fair nor reasonable to enforce the exclusion clause. Although both parties are sophisticated, it could not have been contemplated that there would be no recourse if the Ministry accepted a non-compliant bid: to suggest otherwise would change the base of the tender system without notice. Enforcement of the exclusion clause in these circumstances would not give effect to the intention of the parties and would render the duty of fairness that underlies the dealings between the owner and bidder meaningless. The conduct of the Ministry deprived the plaintiff any benefit under the contract, including the opportunity to conclude a contract B and to eventually construct the Kincolith Extension. The Ministry acted egregiously when it knew or should have known that the Brentwood bid was not compliant and then acted to incorporate EAC indirectly in contract B whilst ensuring that this fact was not disclosed. These circumstances do not lead the court to give aid to the defendant by holding the plaintiff to this clause.

The Court of Appeal Decision

The British Columbia Court of Appeal, in overturning the trial decision, agreed that there had been a fundamental breach of Contract A, but found the exclusion clause was enforceable. The appeal court stated:

> In my respectful opinion, the judge followed a rational sequence in her analysis on a correct understanding of the law. I differ from her in only one crucial respect, and that is the interpretation of the clause. I appreciate the force of the argument advanced by the respondent that the integrity of the bidding process, especially for public works, should be given high value: see **Graham Industrial Services Ltd. v. Greater Vancouver Water District**, 2004 BCCA 5, 25 B.C.L.R. (4th) 214. But I find the words of the exclusion clause so clear and unambiguous that it is inescapable that the parties intended it to cover all defaults, including fundamental breaches.

The Court of Appeal gave effect to the exclusion clause and overturned the $3,300,000.00 judgment.

The Supreme Court of Canada

When the Supreme Court of Canada elects to hear an appeal and grants leave to appeal, it does not provide reasons as to why it is interested in hearing the appeal. When the Supreme Court of Canada ultimately hears the appeal, it will have the opportunity to deal with the scope and parameter of Contracts A and B, the duty of fairness, the implications of dealing with non-compliant bidders and the exclusion of liability clause that was introduced in the RFP process. The Supreme Court of Canada's decision will hopefully address all of these issues and provide greater clarity of the obligations that parties have to one another in the bidding process and whether an owner can limit or exclude liability in instances where there has been a clear violation of the obligations imposed through the bidding process.

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