Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation of Highways)
2006 BCSC 499

CASE COMMENT

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On March 27th this year, the B.C. Supreme Court in *Tercon Contractors Ltd.* v. *British Columbia (Ministry of Transportation and Highways)* handed down a judgement of considerable significance to the construction industry in British Columbia and elsewhere in Canada. In addition to ordering MoTH to pay Tercon almost $3.3M[1] in damages for breach of the tendering contract ("Contract A" as it is known), the Court addressed three particularly relevant issues in the current construction market: whether a Request for Proposals ("RFP") could give rise to a Contract A, the effect of changes in a proponent's bid team during the procurement process and the application of an exclusion clause purporting to relieve MoTH from liability for breach of Contract A.

The facts in *Tercon Contractors* are complex. However, for the purposes of this case comment, they may be briefly summarized. MoTH issued a Request for Expressions of Interest ("RFEI") for the construction of a 25 kilometre gravel highway between Greenville and Kincolith, a remote coastal village in British Columbia near the Alaska panhandle. Six firms responded to the RFEI, including Tercon and Brentwood Enterprises Ltd. ("Brentwood"), both of whom were short-listed.

Following the RFEI process, the Ministry issued a RFP. It was a term of the RFP that "only those firms who are short-listed as a result of the RFEI evaluation will be eligible to submit proposals for the project". However, leading up to the submittal of its response to the RFP, Brentwood took steps to enter into a joint venture for the project with another firm that had not participated in the RFEI process, Emil Anderson Construction Co. ("Emil Anderson") Through a series of correspondence and discussions, both pre- and post-RFP closing, the Ministry was alerted the fact that the Brentwood proposal was, in essence, a joint venture submission on behalf of Brentwood and Emil Anderson. However, in an attempt to submit a compliant proposal, the Brentwood/Emil Anderson proposal was submitted solely under Brentwood's name.

[1] This amount included an extra $1,000,000 that Tercon's owner, Glen Walsh, insisted be added to the 12% profit margin provided for in the estimate before Tercon's bid was submitted to MoTH.

When the Ministry conducted its evaluation of all proposals, the "Brentwood" proposal received the highest rating. Recognizing the potential problem with the Brentwood submission, the Ministry sought legal advice as to how it might accept the Brentwood proposal despite the fact that it was essentially not a submission by a firm short-listed as a result of the RFEI evaluation. In addition, the Ministry actually amended draft copies of evaluation reports to hide the fact that the Brentwood proposal was truly a submission from a joint venture and amended the terms of the construction contract ("Contract B") to identify Emil Anderson as a "major member of the Contractor's construction team." Ultimately, the Ministry awarded the construction contract to Brentwood and Tercon sued for breach of Contract A.

The first hurdle for Tercon was that this was set up as a RFP process, not a tender and therefore, MoTH argued, no Contract A tendering contract came into being. The Court rejected that argument, noting that the label or name given to the documents was not determinative, but rather the substance of them would be looked at. When the Court looked at the substance of this RFP, it was clearly a tender dressed up in RFP clothing. In the reasons for judgement, the Court sets out a useful list of factors to be considered in determining whether something is a true RFP or a tender. These factors include such things as the irrevocability of the submission, the formality of the procurement process, whether there is a deadline for submissions and for performance of the work, whether there is a requirement for a security deposit, whether there is a right to reject proposals, whether the terms of the ultimate construction contract are set out, and so on.

The Court then turned its attention to Brentwood's submission, which it found to be non-compliant. MoTH's RFP clearly said that only those contractors short-listed by the RFEI process would be eligible to submit proposals. While Brentwood had been short-listed, Emil Anderson and the Brentwood/Emil Anderson JV had not. The result was that the Brentwood/Emil Anderson joint venture entity was not eligible to submit a proposal.

It is not uncommon for there to be material changes to a proposal team between the start and the conclusion of a prolonged procurement process. In this case, the Court concluded that Brentwood's proposal was non-compliant because of such material changes. While this finding turned on the specific language of MoTH's RFP (as it always does), the result serves as a warning to tendering authorities and proponents involved in prolonged, multi-staged procurement processes. More specifically, if any proponent intends to amend its proposal team during the multi-staged tender process, both the proponent and the tendering authority must carefully review

the procurement documents to ensure that the amendment fully complies with the terms of those documents.

Because MoTH had accepted a proposal/bid from a proponent that was not eligible to submit a proposal, the Court found it had breached Tercon's Contract A. The Ministry, however, thought it had an ace up its sleeve – the RFP contained an exclusion clause which was intended to protect the Ministry from liability for breach of Contract A. This exclusion clause read as follows:

> 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.

While that clause appeared, on its face, to be broad enough to protect MoTH from Tercon's claim, the Court did not see it that way. Relying on a Supreme Court of Canada case, the Judge in *Tercon* said that there were two issues that had to be addressed:

1. Does the exclusion clause apply?
2. Should it be enforced?

In what is probably the most important aspect of this case, the Court concluded that, since the exclusion clause did not refer to the Contract A or to any other specific liability that was sought to be avoided, it was unclear what "participating in this RFP" meant. The Judge that said any ambiguity had to be resolved in favour of Tercon and ruled that the clause did not apply to the Ministry's breach of Contract A.

The Court then went on to say that even if the exclusion clause did apply, because of the way MoTH acted, it would not be either fair or reasonable to enforce it against Tercon. She concluded her analysis this way:

> **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 this court to give aid to the defendant by holding the plaintiff to this clause.**

Tercon is a good example of how the Courts in B.C. approach tendering cases. They look closely at what is really going on and, if there is any funny business that makes it unfair to the other proponents, they will ensure that justice is done and that the integrity of the bidding process is preserved. Surely that is a good thing. The full decision can be read on the Court's website at http://www.courts.gov.bc.ca/Jdb-txt/SC/06/04/2006BCSC0499.htm.