

Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), 2010 SCC 4

On February 12, 2010, the Supreme Court of Canada released its reasons for judgment in the *Tercon Contractors Ltd.* appeal. At issue on this appeal was whether the successful bidder (a joint venture between Brentwood Enterprises Ltd. and Emil Anderson Construction Co.) was eligible to participate in the tender process instituted by the Ministry of Transportation and Highways and, if not, whether Tercon's resulting claim for damages was barred by an exclusion clause contained in the tender documents.

The majority of the Supreme Court of Canada held that the Ministry breached the express provisions of its bid contract with Tercon by accepting a bid from a party (i.e. the Brentwood / Emil Anderson joint venture) who should not have been permitted to participate in the tender process and by ultimately awarding the work to that ineligible bidder. This egregious conduct by the Ministry also amounted to a breach of its implied duty of fairness owed to all compliant bidders like Tercon. The majority of the Supreme Court concluded that the exclusion clause, which barred claims for compensation "as a result of participating" in the tendering process, did not exclude Tercon's claim for damages. By considering a bid from an ineligible bidder, the Ministry not only acted in a way that breached the express and implied terms of the bid contract, it did so in a manner that offended the integrity and business efficacy of the tendering process.

By way of background, the Ministry issued a request for expression of interest for the design and construction of a highway. Six teams responded with submissions including Tercon and Brentwood. A few months later, the Ministry informed the six proponents that it now intended to design the highway itself and issued a request for proposals ("RFP") for its construction. The RFP set out a specifically defined project and contemplated that proposals would be evaluated according to particular criteria. Under its terms, only the six original proponents were eligible to submit a proposal meaning those received from any other party would not be considered. Importantly, the RFP also included an exclusion of liability clause which 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 that it has no claim."

As it lacked necessary expertise and before it submitted its proposal, Brentwood entered into an agreement with Emil Anderson, which was not a qualified bidder, to undertake the work as a joint venture. This arrangement allowed Brentwood to prepare a more competitive proposal. Ultimately, Brentwood submitted a bid in its own name with Emil Anderson listed as a "major member" of Brentwood's team. Brentwood and Tercon were the two shortlisted proponents and the Ministry, with full knowledge that Brentwood's proposal was made in conjunction with Emil Anderson as a joint venturer, selected Brentwood for the project. Tercon then sued the Ministry for accepting a tender from an ineligible bidder and for breaching its implied duty to treat Tercon fairly and equally in the tender process.

Tercon was successful at trial and was awarded approximately \$3,500,000 in damages and interest against the Ministry. The trial decision was overturned by the British Columbia Court of Appeal on the basis that the exclusion clause was so clear and unambiguous that it barred Tercon's claim.



On appeal to the Supreme Court of Canada, the majority held that the exclusion clause, when interpreted in light of the entire of the RFP, including the statutory provisions which governed it and the commercial context of the tendering process, did not exclude a damages claim resulting from the Ministry unfairly allowing an ineligible bidder to participate in that process. The requirement that only eligible bids be considered and the implied obligation to treat compliant bidders fairly and equally in the process were factors that contributed to the integrity and business efficacy of the tendering process. Accordingly, the majority of the Supreme Court found that the parties did not intend, through the exclusion clause, to exclude claims against the Ministry for conduct that struck at the heart of the tendering process.

The majority of the Supreme Court held that clear and unambiguous language was necessary to exclude liability for the Ministry's breaches of its obligation to accept a bid from only an eligible bidder and its duty to treat Tercon fairly and equally in the tender process. This was particularly so in the context of a public procurement where transparency was essential. In addition, the text of the exclusion clause itself addressed claims that resulted from "participating in this RFP". The majority of the Supreme Court reasoned that central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders (i.e. the process followed by the Ministry) was not the process called for by "this RFP" and being part of that other process was, the majority of the Supreme Court held, not actually "participating in this RFP". In these circumstances, the exclusion clause was rendered inapplicable.

From a bidder's perspective, this decision provides a basis for challenging the application of broadly worded exclusion clauses that are now a common feature of tender packages. It demonstrates that the courts will endeavour to find a way to negate or otherwise limit the applicability or effectiveness of exclusion clauses where it is possible to do so.

From an owner's perspective generally, the majority of the Supreme Court of Canada did not rule that exclusion clauses have no application; rather, it held that such clauses must be drafted with the necessary specificity in order to be an effective shield against breaches of the express and implied duties contained in the tender documents. Accordingly, if the Ministry had drafted the exclusion clause to include its conduct, which was described as egregious, Tercon would likely have had no claim. From a public tendering authority's perspective specifically, the majority of the Supreme Court of Canada held that there is a heightened obligation to ensure that the process is fair and transparent.

The Supreme Court of Canada has previously tasked the courts with protecting the integrity of the tendering process where it is possible to do so under the law of contract. In the end, the majority of the Supreme Court believed that the Ministry's conduct struck "at the heart of the integrity and business efficacy of the tendering process which it undertook". In these circumstances, it is not surprising that the majority of the Supreme Court, based on established principles of interpreting exclusion clauses, found a way to hold that the exclusion clause was inapplicable and thereby allow Tercon's appeal and reinstate the \$3,500,000 trial judgment.

We would be pleased to answer enquiries about the Tercon Contractors Ltd. case. Contact any of our construction lawyers in Vancouver at 604 681.6564