



THE LAW ON RFP'S: THE TERCON CASE

TERCON: THE SUPREME COURT OF CANADA DENIES EXCLUSION OF LIABILITY IN CONTRACT A

The Supreme Court of Canada has once again spoken on tender/RFP law. In *Tercon Contractors v. British Columbia*, 2010 SCC 4, the Court denied an owner the benefit of an exclusion of damages clause in circumstances where the owner accepted a proposal from an ineligible bidder.

The *Tercon* case provides important lessons for the drafting of procurement documents and the conduct of procurement processes. Before providing our thoughts on those lessons, we first review the facts and circumstances of the case.

BACKGROUND: THE KINCOLITH ROAD PROJECT

The *Tercon* case involved a road construction project in the Nass Valley in Northern British Columbia. In February 2000, the Ministry issued a Request for Expressions of Interest ("RFEI") for the project. Subsequently, the Ministry decided against proceeding on a design-build basis. As part of restructuring the procurement, the Ministry limited the eligible participants for the RFP to those parties that responded to the RFEI. Four proponents responded to the RFP. In a close competition between the top two proponent teams, Brentwood was awarded the work over Tercon.

BRENTWOOD'S BID (AND EMIL ANDERSON)

The passage of time between the RFEI and the RFP processes, as well as the changes to the delivery model for the work, threatened Brentwood's ability to participate in the RFP. Accordingly, Brentwood

decided to form a joint venture with another contractor, Emil Anderson. Brentwood notified the Ministry of its intention to change its team, as required by the RFP. The Ministry did not respond in writing. Instead, its consultant phoned Brentwood and advised that Brentwood's proposal should be made in Brentwood's name alone as it was the eligible proponent.

EVALUATION OF BIDS AND ENTERING THE ALLIANCE CONTRACT

The Ministry established two panels to govern the selection process. The Project Evaluation Panel (the "PEP") was charged with the responsibility of reviewing the proposals and the Independent Review Panel (the "IRP") was responsible to ensure that the PEP selected the preferred proponent fairly and in accordance with the RFP. After the PEP had established the proponents' scores, ranking Brentwood first, the IRP raised a concern about the fact that the Brentwood bid did not indicate the value of the Emil Anderson sub-contract. The PEP sought information about the agreement between Brentwood and Emil Anderson, in answer to which Brentwood wrote a letter that stated:

The business arrangement between Brentwood and Emil Anderson is structured on a pre bid agreement to form a 50/50 joint venture if successful in the RFP. This agreement was put in place to strengthen our team structure and as such, we have jointly prepared the RFP. The overall structure of the team has not changed and we feel with the involvement of EAC [Emil Anderson] on a 50/50 joint venture arrangement that this only solidifies the ability of two very capable companies to team together and construct a very difficult job in a safe and timely manner.

Ministry meeting minutes showed that some concern was expressed about the eligibility of the Brentwood and Emil Anderson joint venture. Among other steps, the PEP chair sent the proponent selection report to the Ministry's consultant "for revision" which consisted of deleting



references to the joint venture and instead referring only to the “Brentwood team”.

Following selection, Brentwood and Emil Anderson wanted both their names to be included in the contract for the work, but the Ministry ultimately decided that the contract had to be structured to reflect an agreement between the Ministry and Brentwood only.

TRIAL DECISION: BREACH OF CONTRACT A AND NO REFUGE BEHIND THE EXCLUSION CLAUSE

Tercon sued for its lost profits claiming the work was given to an ineligible proponent. In 2006 the British Columbia Supreme Court awarded Tercon \$3.3 million in damages. Madam Justice Dillon found that the Ministry of Transportation and Highways had breached its Contract A with Tercon in two respects: first, in accepting a bid from an ineligible joint venture; and second, in failing to discharge the duty of fairness implied in the tendering process by knowingly awarding the Contract B to an ineligible bidder.

Madam Justice Dillon also found that the Ministry could not rely on the following exclusion clause to avoid compensating Tercon:

Except as expressly permitted in the Instructions to Bidders, no Proponent has any claim for compensation of any kind as a result of participating in this RFP and by submitting a Proposal, the Proponent is deemed to have agreed that it has no claim.

First, she found that the exclusion did not expressly include “fundamental breach” and that it was inconceivable Tercon could have intended the exclusion clause to have allowed the Ministry to accept a bid from an ineligible bidder. Second, she found the Ministry’s behaviour was egregious in intentionally obfuscating the identity of the joint venture which was the true proponent behind the Brentwood bid. Thus, it was appropriate to exercise the Court’s discretion to refuse to enforce the exclusion clause.

BC COURT OF APPEAL: NO LIABILITY BASED ON THE EXCLUSION CLAUSE

In 2007 a panel of three Justices for the British Columbia Court of Appeal unanimously overturned the trial decision. The Court of Appeal found the exclusion clause was “so clear and unambiguous that it is inescapable that the parties intended it to cover all defaults, including fundamental breaches”. It was therefore unnecessary to consider the other ground of appeal, in which the Ministry argued there was no breach of Contract A because the bid was from Brentwood, an eligible proponent, not from an ineligible joint venture.

SUPREME COURT OF CANADA: TRIAL DECISION RESTORED

The full Court confirmed that the doctrine of fundamental breach should be laid to rest in relation to exclusion clauses. Instead, the analysis to apply when considering whether to enforce an exclusion clause is as follows.

- 1 As a matter of interpretation, is the exclusion clause applicable to the circumstances established in evidence? This is assessed by the intention of the parties expressed in the contract.
- 2 If the exclusion clause applies, is it invalid because it was unconscionable at the time it was made? Unconscionability may arise with unequal bargaining power as an example. The important time is when the contract was formed, not upon breach.
- 3 If the exclusion clause is applicable and valid, may the Court nevertheless refuse to enforce the valid exclusion clause because of an overriding public policy?

BREACH OF CONTRACT A

The majority, in reasons written by Mr. Justice Cromwell, reviewed the Ministry’s conduct and found it had failed to abide the rules set out in the RFP and had thereby breached Contract A. It found there was “a mountain of evidence” to support the trial judge’s conclusion that the Ministry knew the Brentwood bid was in fact on behalf of an ineligible joint venture. Furthermore, the joint venture structure was a material consideration which favoured Brentwood in the Ministry’s assessment of its proposal and gave the Brentwood proposal a competitive advantage.



The majority agreed that the Ministry acted egregiously, including when it took steps to revise and draft documentation to obfuscate the identity of the joint venture. The minority also accepted that the Ministry breached Contract A when it contracted with Brentwood knowing the work would actually be carried out by a joint venture that was not an eligible bidder.

EFFECT OF THE EXCLUSION CLAUSE

The majority found the exclusion clause did not apply to the subject of Tercon's complaint, and so did not pass the first step in the analysis. The majority placed particular significance on the words in the exclusion clause that "no Proponent has any claim for compensation of any kind as a result of participating in this RFP..." [emphasis added]. The majority focussed on the fact that only the respondents to the RFEI were permitted to submit proposals for the RFP. No other parties could compete for the work. The majority described the reach of the exclusion clause as follows:

[74]...Thus, central to "participating in this RFP" was participating in a contest among those eligible to participate. A process involving other bidders, as the trial judge found the process followed by the Province to be, is not the process called for by "this RFP" and being part of that other process is not in any meaningful sense "participating in this RFP"...

...

[76]...As the trial judge found, acceptance of a bid from an ineligible bidder "attacks the underlying premise of the process" established by the RFP: para 146. Liability for such an attack is not excluded by a clause limiting compensation resulting from participation in this RFP.

The majority emphasized that the exclusion clause did not apply to exclude liability for conduct that did not support the integrity of the bidding process. This finding was based on the intention of the parties, which the majority considered at paragraph 78:

[78]...In short, I cannot accept the contention that, by agreeing to exclude compensation for

participating in this RFP process, the parties could have intended to exclude a damages claim resulting from the Province unfairly permitting a bidder to participate who was not eligible to do so. I cannot conclude that the provision was intended to gut the RFP's eligibility requirements as to who may participate in it, or to render meaningless the Minister's statutorily required approval of the alternative process where this was a key element. The provision, as well, was not intended to allow the Province to escape a damages claim for applying different eligibility criteria, to the competitive disadvantage of other bidders and for taking steps designed to disguise the true state of affairs. I cannot conclude that the parties, through the words found in this exclusion clause, intended to waive compensation for conduct like that of the Province in this case that strikes at the heart of the integrity and business efficacy of the tendering process which it undertook. [emphasis added]

Having found that the exclusion clause did not apply to the circumstances, it was unnecessary to consider unconscionability or other policy reasons which might also have prevented the Ministry from relying on the exclusion clause.

The minority disagreed and would have enforced the exclusion clause. Mr. Justice Binnie, for the minority, found the exclusion clause applied to the circumstances of the case. The minority agreed with the Court of Appeal in finding the clause clear and unambiguous. Tercon had been "participating in this RFP" beginning with "submitting a Proposal" for consideration. In a strong dissent, the minority said the majority's logic could lead to uncertainty in the law. Binnie J. wrote:

[127] ...To deny that such participation occurred on the ground that in the end the Ministry chose a Brentwood joint venture (ineligible) instead of Brentwood itself (eligible) would, I believe, take the Court up the dead end identified by Wilson J. in *Hunter*:

...exclusion clauses, like all contractual provisions, should be given their natural and true construction. Great uncertainty and needless complications in the drafting of contracts will obviously result if courts give exclusion clauses

strained and artificial interpretations in order, indirectly and obliquely, to avoid the impact of what seems to them ex post facto to have been an unfair and unreasonable clause. [p. 509]

...

[128] I accept the trial judge's view that the Ministry was at fault in its performance of the RFP, but the conclusion that the process thereby ceased to be the RFP process appears to me, with due respect to colleagues of a different view, to be a "strained and artificial interpretatio[n] in order, indirectly and obliquely, to avoid the impact of what seems to them ex post facto to have been an unfair and unreasonable clause".

At the second step of the analysis the minority did not find the clause was unconscionable when the contract was formed. It noted that there are legitimate commercial purposes for exclusion clauses. In this case, although Tercon was not as powerful as the Ministry, it was a relatively sophisticated contractor capable of looking after itself in a commercial context.

The minority did not find any overriding policy that should lead to refusing to apply the exclusion clause. It noted that the public interest in a fair and transparent competitive bidding system did not rise above the freedom of the parties to enter into the particular Contract A which included the exclusion clause. The minority would have found that the intention of the parties was to exclude compensation for awarding the work to an ineligible bidder. At paragraph 136, Binnie J. explained the minority view in this way:

[136] Assertions of ineligible bidders and ineligible bids are the bread and butter of construction litigation. If a claim to defeat the exclusion clause succeeds here on the basis that the owner selected a joint venture consisting of an eligible bidder with an ineligible bidder, so also by a parity of reasoning should an exclusion clause be set aside if the owner accepted a bid ineligible on other grounds. There would be little room left for the exclusion clause to operate. A more sensible and realistic view is that the parties here expected, even if they didn't like it, that the

exclusion of compensation clause would operate even where the eligibility criteria in respect of the bid (including the bidder) were not complied with.

The minority confirmed that Tercon had reason to complain about the Ministry's conduct in this case. Contract A was breached and the trial judge did not inappropriately condemn the Ministry's lack of fairness and transparency in obfuscating the true party bidding and being awarded the work. However, it found the Ministry's misconduct did not rise to the level where the jurisprudence would permit public policy to override a valid exclusion clause.

OUR ANALYSIS

On the 3-part test for exclusion clauses, the majority found that this particular exclusion did not apply to the wrong about which Tercon complained.

The majority did not say that it was not possible to exclude damages for breach of Contract A for accepting a non-compliant bid. Rather, the majority found, based on the "curious" wording of the exclusion clause, that it did not apply in the circumstances. Focussing on the words "participating in this RFP process", the majority found that accepting a proposal from an ineligible proponent was outside of "this RFP process" and thus the clause did not apply.

The majority's reasons suggest that a clause drafted to expressly exclude damages for accepting a non-compliant bid can satisfy part (1) of the analysis. The clause must be clear and unambiguous in the context of the overall terms of the RFP.

Even if an exclusion clause is found to apply to an alleged breach, the Court could find the clause invalid if it was unconscionable at the time Contract A was formed, e.g. if the bidders were unsophisticated and had unequal bargaining power compared to the owner. The Court could also refuse to enforce an otherwise valid clause on public policy grounds, e.g. where the owner has engaged in fraud.

A properly drafted exclusion clause may assist an owner to avoid liability for a breach of express or implied duties under an RFP or tender. Accordingly, owners should consider including such a clause in their procurement documents. More important, however, is to understand





that no exclusion clause can completely shield an owner from liability for all breaches. The best way to avoid liability is to carefully draft tender and RFP documents, understand the rules (both express in the documents and implied by law), and scrupulously adhere to them throughout the procurement process.

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