

Supreme Court of Canada Decision in Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways), 2010 SCC 4

On February 12, 2010, the Supreme Court of the Canada released its long-awaited judgment in the tendering law case of Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways), 2010 SCC 4 (“Tercon”).

In 2006 the British Columbia Supreme Court, at the trial level, held the Ministry liable for over \$3 million in damages for breach of contract. The trial decision is discussed in the Spring 2007 Issue No. 61 of LoGo Notebook. In 2007 the British Columbia Court of Appeal allowed an appeal by the Ministry on the basis of a “no compensation” clause included in the tender documents. The appeal decision is discussed in the Winter 2007/2008 Issue No. 64 of LoGo Notebook.

In a split 5-4 decision, the Supreme Court of Canada has allowed Tercon’s appeal, overturned the decision of the Court of Appeal, and restored the award of damages made at trial.

The Supreme Court of Canada as a whole agreed that exclusion, or “no compensation” clauses are a permissible component of tendering documents, and that parties to the tendering process, including government departments, are generally free to contract as they wish. Likewise, there was no controversy over the finding that the Ministry had breached its contractual obligations in this case. The Ministry had breached the express terms of the contract by accepting a bid from an ineligible bidder, and in doing so had also breached its implied obligation to treat all bidders fairly.

Where the SCC split is on the issue of whether the exclusion clause applied in the circumstances of this particular case. That clause states as follows:

“Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for 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.”

The majority found that the Ministry’s conduct was “egregious” and “an affront to the integrity and business efficacy” of the tendering process. It must be recalled that in this case Ministry staff had knowingly breached the contract, and had taken active steps to cover up that breach. In those circumstances, the majority reasoned that the parties could not have intended for the exclusion clause to apply. In the majority’s view, the conduct complained of arose from the Ministry contracting with an ineligible party, therefore that conduct arose outside of the tendering process, and did not arise “as a result of participating in this RFP”.

The dissenting minority found that the meaning of the exclusion clause was clear and unambiguous, and that it applied in the circumstances. Justice Binnie states, at paragraph 128 of the court’s reasons:

“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 interpretation 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’.”

In other words, the dissenting minority would not have re-written the contract agreed to between Tercon and the Ministry, two commercially sophisticated parties, despite the apparent unfairness of the exclusion clause.

So, where does this decision leave owners? Things might be somewhat simpler had the dissenting view won the day, but there are nonetheless some helpful conclusions to be drawn.

First, it should be noted that the decision of the SCC does not make any fundamental changes to the law of tendering. The tendering process is governed by the law of contract, subject to implied obligations on the part of owners to accept only compliant bids, and to treat all bidders fairly. These implied obligations may be modified, but only by express language in the tendering documents.

Second, the type of exclusion clause at issue in Tercon would still appear to be applicable to claims that arise within the confines of the tendering process. If the owner's conduct relates to a bidder or bidders that are eligible to bid, and can therefore be said to be "participating" in the tender process, then any claim relating to such conduct should be subject to the exclusion clause.

Third, if owners wish to avoid liability in the sort of circumstances that were in issue in Tercon, it may be possible to draft an exclusion clause with even broader language; however, it remains to be seen whether contractors would bid in the face of such language.

Ultimately, whether an owner chooses to use an exclusion clause like the one in Tercon, or something stronger, it should be included in tendering documents only as a failsafe, and a means of avoiding liability in the face of an honest mistake. It is never advisable to treat such an exclusion clause as a licence to treat bidders unfairly, or otherwise breach the obligations of the tendering contract. As many, many cases, including the latest decision of the Supreme Court of Canada in Tercon demonstrate, the courts do not look favourably upon conduct lacking in fairness and transparency, and they will often strive to hold owners liable for such conduct.

There are comments in the Tercon decision that suggest this may be especially the case where owners are public bodies. Justice Cromwell, for the majority, states at paragraph 68 that the obligation to treat all bidders fairly is "particularly weighty in the context of public procurement", and at paragraph 71 that "clear language is necessary to exclude liability for breach of such a basic requirement of the tendering process, particularly in the case of public procurement". The decision stops short of establishing any special rules of fairness that apply to public bodies, but the majority's comments may perhaps lay the foundation for the argument to be made in some future case. Only time will tell.

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