

A classic battle pitting the cherished ideal of freedom of contract against the public policy goal of protecting the integrity of the tendering process is about to be waged in the Supreme Court of Canada.

In *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)*, the Supreme Court will be asked to examine the enforceability of "no claims" clauses in the context of a public procurement process.

At issue is a clause in a request for proposal that purports to exclude any claims for damages by bidders: "... no Proponent shall have any claim for compensation of any kind whatsoever as a result of participating in this RFP." The significance of this case lies in the fact that exclusion clauses like this are finding their way into many procurement documents as owners attempt to dampen the enthusiasm for litigation arising within the procurement context.

At the Court of Appeal, Tercon argued that such exclusion clauses, to the

extent they excuse the acceptance of non-compliant bids, thwarted the public interest in an orderly and fair scheme for tendering in the construction industry.

In its decision, the Court of Appeal agreed with Tercon that this was a valid point but held that the answer to this point lay not in judicial intervention in commercial tenders but "in the industry's response to all-encompassing exclusion clauses." The court stated that tendering authorities may be compelled to abandon the use of such clauses if major contractors refused in a concerted manner to bid on large projects but, alternatively, that "the industry may be prepared to accept that the ministry wants

to avoid suits for 'Contract A' violations, and the contractors will continue to bid in the hope that the ministry acts in good faith."

Clearly, the Court of Appeal jumped into the battle in favour of the principle of freedom of contract. The likely result of the Court of Appeal's decision, should it be upheld at the Supreme Court, will be an even wider adoption of exclusion clauses reserving to tendering authorities unlimited discretion without any right of judicial intervention where there has been a violation of the principles of fairness and good faith.

In other words, the Contract "A" and Contract "B" analysis will be reduced to

nothing more than a theoretical law school exercise, as breaches of Contract "A" will no longer result in adverse consequences for tendering authorities.

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Interestingly, Ontario has now joined the battle on the side of the contractor, Tercon, and has taken a position contrary to that of British Columbia. Ontario intends to

argue at the Supreme Court that the duty of fairness owed by a tendering authority cannot be contracted out of in the terms of the tender call.

Ontario will argue on this point that tendering law is essentially a unique area of law and that general principles of contract law that have not been developed within the tendering context should not be applied where to do so would "undermine the utility, certainty and reciprocity" of the tender process.

British Columbia, on the other hand, will be arguing that limitation of liability clauses must be analyzed in light of the general rules of contract interpretation and that if the words used in the tender call can only be interpreted in one way, it is not open to the court, even on grounds of equity or unreasonableness, to declare the clause unenforceable, since this would amount to rewriting the contract negotiated between the two parties.

In support of this point, the province will no doubt be relying on a long line of authority to the effect that exclusion clauses as between

two sophisticated commercial parties must be given effect as written.

Tendering law in Canada for the last 30 years has been dominated by a model which contemplates the imposition of an obligation of irrevocability on the part of a bidder, secured by a bid bond or other security, in return for the corresponding obligations of good faith and fair dealing on the part of a procurement authority.

It will be interesting to see whether the Supreme Court of Canada will condone the use of exclusion clauses and effectively allow a tendering authority to reserve to itself all the advantages of this model without any corresponding obligations. ♦

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