

## SUPREME COURT OF CANADA HOLDS LIABILITY EXCLUSION IN TENDER DOCUMENTS INEFFECTIVE

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On February 12, 2010, the Supreme Court of Canada rendered its much anticipated decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, a judgment that could have far-reaching implications for public procurement in the future. The central issue in the appeal was whether the Province of British Columbia could, by including in its tender documents a broad “exclusion of liability” clause, immunize itself from claims by an unsuccessful tenderer.

The tenderer, Tercon Contractors, claimed that the Province breached its duties when it awarded a contract to an ineligible bidder. In the result, the Supreme Court found itself deeply divided. Five justices allowed Tercon’s claim and four would not have. While all nine justices agreed upon the legal approach to interpreting contractual liability exclusion and limitation provisions, the thin majority determined that the facts in *Tercon* fell outside the scope of those provisions while the dissenting justices disagreed.

The facts of the case were straightforward. Following responses to a request for expression of interest (RFEI) for the design and construction of a highway, the Province issued a request for proposals (RFP). Under the RFP terms, only the six proponents who had responded to the RFEI were eligible to submit a proposal—those received from any other party would not be considered. One of the six proponents entered into a pre-bidding agreement with another, non-qualified, company and tendered a proposal as a joint venture

The arrangement allowed that proponent to prepare a more competitive proposal than it would have been able to had it bid alone. Its proposal was submitted in its own name with the unqualified joint venturer listed as a “major member” of the proponent’s team. The Province chose to ignore the fact that the joint venture proponent was ineligible and awarded it the contract. Otherwise Tercon would have received the award.

Tercon sued the Province for breach of its bid contract. In its defence the Province relied upon a liability exclusion clause contained in the tender documents which stated that: “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.”

These types of terms are commonly found in tender documents and are intended to protect the owner from claims by unhappy tenderers.

Tercon won its case initially at trial in B.C. Supreme Court but the B.C. Court of Appeal allowed an appeal by the Province, giving full effect to the liability exclusion clause. Tercon then appealed to the Supreme Court of Canada.

While disagreeing in the result, all members of the Supreme Court of Canada concurred on the approach to be applied when a party seeks to escape the effect of an exclusion clause to which it has contractually agreed. The first step involves a matter of interpretation — to determine whether the exclusion clause pertains to the circumstances of the case. This will depend on a court's understanding of the intention of the parties as expressed in the contract.

If it does pertain, the second step is to decide whether the clause was unconscionable — and thus invalid — at the time the contract was made. Whether there was an inequality of “bargaining power” and a lack of sophistication in one party may be considered. Where an exclusion clause is found to be valid at the time the contract was formed, a court will undertake a third step — to decide whether it should refuse to enforce the exclusion clause because of some overriding public policy.

The burden of persuasion at this last stage lies on the party seeking to avoid enforcement of the clause; it must demonstrate that there has been an abuse of the freedom of contract which outweighs the very strong public interest in its enforcement. Serious criminality or egregious fraud by the owner are examples of situations in which public policy considerations may result in a court refusing to give effect to a liability exclusion clause.

The majority of the Supreme Court of Canada held that the Province had breached the express provisions of Tercon's bid contract by accepting a tender from a party that should not have been permitted to participate in the tender process. The Court held that the Province's “egregious” conduct breached the implied duty of fairness it owed to all proponents. The majority characterized the conduct of the Province as an “affront to the integrity and business efficacy of the tendering process.” The exclusion clause, which barred claims for compensation “as a result of participating” in the tendering process, did not, when properly interpreted, exclude Tercon's claim for damages, according to the majority of the Court.

The majority reasoned that the closed list of bidders (limited to those that had qualified through the RFEI) was the foundation of the RFP and the parties could not have intended that the exclusion clause waived compensation claims for conduct that struck at the very heart of the tendering process. The fundamental requirement of the RFP (that only compliant bids be considered) and the implied obligation to treat bidders fairly had been breached by the Province. The four members of

the Court, who dissented in the result and would have upheld the B.C. Court of Appeal's decision to dismiss Tercon's appeal, interpreted the exclusion clause as applying to the facts. They considered the conduct of the Province as not so egregious as to prevent the clause from being given effect. A sharp philosophical division relating to contractual freedom underlies this judicial split.

What does this decision mean for owners, tendering authorities, procurement document drafters, and tenderers? In a nutshell, if owners and tendering authorities seek to limit or exclude liability for breaches of the procurement rules, they must draft the tender documents extremely carefully. The courts will now be increasingly more reluctant to interpret these clauses for the benefit of the contract breaker. ***Even the majority in this case recognized that, if the language of an exclusion clause is sufficiently clear, a court can give effect to liability exclusion clauses which exclude claims arising out of an owner's failure to award only to compliant bidders or a breach of the owner's implied obligation of good faith in the tendering process.***

Ultimately, an owner's ability to legally immunize itself from legal claims arising out of its own breach of a bid contract or duty owed to tenderers will largely depend on the language of the liability limitation or exclusion clauses that it unilaterally incorporates in the procurement documents. To fully understand their rights and responsibilities, owners and tenderers alike will now want to clearly focus on the drafting of such clauses. Existing procurement documents should be reviewed for conformity with the new approach arising out of the *Tercon* decision.