

CLIENT ALERT!



Exclusion Clause Negates Liability for Breach of Bid Contract

On December 3, 2007, the British Columbia Court of Appeal gave judgment in *Tercon Contractors Ltd. v. British Columbia (Transportation Highways)*, [2007], BCCA 592. The decision has important implications for those involved in the procurement of construction services. The Court of Appeal held that a properly drafted liability exclusion clause contained in Request for Proposal (“RFP”) and Tender documents will be effective to exclude or limit liability for claims by tenderers or proponents for damages for breach of bid contractual duties.

Different procurement methods are in common use, ranging from RFP’s to Invitations to Tender. The “two contract” model in tendering law holds that, upon submission of a compliant tender, Contract “A” arises between a tenderer and the owner or tendering authority, whereas only upon the acceptance of a successful tender does Contract “B” come into existence.

Contract “A” is commonly referred to as the “Bid Contract”! The terms of Contract “A” generally include the obligation of the party inviting tenders to consider a compliant tender and to give each compliant tenderer fair and equal treatment in evaluating the tenders and awarding Contract “B”. The terms of Contract “A” are both express and implied. The express terms are found in the tender documents themselves. One typical implied term is that the party calling tenders cannot award Contract “B” to a non-compliant tenderer. A non-compliant tender is one which fails to conform substantially to the requirements of the Invitation to Tenderers.

In *Tercon Contractors*, the Trial Court found that the Ministry of Transportation had awarded Contract “B” for the construction of a \$26 million public works project to a non-complaint tenderer, and by doing so, had fundamentally breached its Contract “A” obligations to Tercon, including its duty of fairness. The Trial Judge awarded Tercon damages of \$3.23 million, representing Tercon’s loss of profits upon not being awarded the construction contract (Contract “B”). The Trial Judge considered, but refused to give effect to, a liability exclusion clause in the tender documents, as follows:

“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.”

The Trial Judge found that the Ministry’s awarding of Contract “B” to a non-compliant tenderer, in the circumstances, was so egregious as to amount to a fundamental breach of Contract “A” between Tercon and the Ministry. She decided that it would be unconscionable to give effect to the liability exclusion clause.

The Ministry appealed to the B.C. Court of Appeal, which unanimously allowed the appeal. The B.C. Court of Appeal held that the liability exclusion clause which formed a term of Contract “A” between the Ministry and Tercon, should be interpreted and enforced according to its plain meaning. Thus, although the Ministry had fundamentally breached its Contract “A” obligations to Tercon, nevertheless it was entitled to rely upon the liability exclusion clause as a complete defence to Tercon’s claim for lost profits. In the face of Tercon’s argument that, to give effect to the liability exclusion clause would render nugatory the tendering process, the B.C. Court of Appeal said that the resolution of tendering disputes “... lies not in judicial intervention in *commercial dealings like this but in the industry’s response to all-encompassing exclusion clauses. If the major contractors refuse to bid on highway jobs because of the damage to the tendering process, the Ministry’s approach may change. Or ... the contractors will continue to bid in the hope that the Ministry acts in good faith.*”

The decision of the B.C. Court of Appeal is compatible with its earlier decision in *Elite Bailiff Services Ltd. v. British Columbia*, 2003 BCCA 102. Both of these cases make it clear that it is open to a party inviting tenders to exclude or limit liability for its breach of Contract “A” by proper drafting. The emphasis of the Court is now expected to be focused upon interpreting the scope of liability exclusion or limitation clauses to determine whether they are broad enough to immunize the party inviting tenders from the ordinary consequences of its breach of Contract “A”.

FOR MORE INFORMATION CONCERNING THIS ISSUE OR OTHER TENDERING LAW ISSUES, PLEASE CONTACT

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