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SUMMARY OF RECENT SCC DECISION ON TENDERING LAW AND EXCLUSION CLAUSES

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The Supreme Court of Canada (“SCC”) has issued its reasons on the appeal of *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, (B.C.C.A., December 3, 2007) (32460). This decision addresses the enforceability of limitation of liability clauses in tendering packages and the implied duty of fairness in dealing with the tendering process.

BACKGROUND

The facts underlying this appeal are as follows. The Province of British Columbia issued a Request for Expression of Interest (“RFEI”) for the design and construction of a highway. Six teams responded with submissions (the “Proponents”), including Tercon and Brentwood. A few months later, the Province informed the six Proponents that it now intended to design the highway itself and issued a Request for Proposals (“RFP”) for its construction. The RFP set out a specifically defined project and contemplated that proposals would be evaluated according to specific criteria. Under its terms, only the six original Proponents were eligible to submit a proposal; those received from any other party would not be considered. The RFP also included an exclusion of liability clause which provided:

“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”.

Brentwood lacked expertise in drilling and blasting and therefore entered into a pre-bidding agreement with another construction company, which was not a qualified bidder, to undertake the work as a joint venture. This arrangement allowed Brentwood to prepare a more competitive proposal. Brentwood submitted a bid in its own name with the blasting contractor listed as a “major member” of the team.

Brentwood and Tercon were the two short listed Proponents and the Province selected Brentwood for the project. Tercon successfully brought an action for damages against

the Province. The trial judge found that the Brentwood bid was, in fact, submitted by a joint venture and therefore the Province breached the expressed provision of the tendering project by awarding the bid to an ineligible bidder. The trial judge also held that the limitation of liability clause was ambiguous and did not limit the Province's exposure to Tercon.

The BC Court of Appeal overturned the trial judge's decision. The Court of Appeal held that the limitation of liability language was clear and unambiguous and therefore Tercon was prohibited from claiming damages as a result of participating in the tendering process.

THE SCC DECISION

The SCC overturned the BC Court of Appeal and upheld the trial decision. The SCC held, first, the fact that Brentwood submitted its bid as a joint venture made the bid non-eligible. In other words, the joint venture was an ineligible bidder based on the defined criteria set out by the Province. The Province therefore ought not to have considered or granted the bid to the Brentwood joint venture.

The SCC then turned to the enforceability of the limitation of liability clause. The SCC interpreted the limitation of liability clause narrowly to mean that the Province could only exclude liability for claims made by the bidders within the specific parameters set out in the RFP. The limitation of liability clause did not exclude liability in relation to claims arising from an award of the contract to an ineligible bidder. Justice Cromwell wrote as follows:

“ My view is that, properly attributed, the exclusion clause does not protect the Province from Tercon's damage claim which arises from the Province's dealing with a party not even eligible to bid, let alone from its breach of the implied duty of fairness to bidders. In other words, the Province's liability did not arise from Tercon's participation in the process that the Province established, but from the Province's unfair dealing with a party that is not entitled to participate in that process”.

The SCC went on to find that the owner, in this case the government, is in control of the tendering process and may define the parameters for a compliant bid. Once the owner sets the rules it must itself play by those rules in assessing the bids and awarding the main contract. The closed list of bidders was a foundation of this RFP and there were important competitive advantages to a bidder who could side-step that limitation. The SCC found that both the integrity and the business efficacy of the tendering process support an interpretation that would allow the exclusion clause to operate compatibly with the eligibility limitations that were at the very route of the RFP. The same may be said with respect to the implied duty of fairness.

The SCC reiterated the principal that there is an implied obligation to treat all bidders fairly and equally which is consistent with the goal of protecting and promoting the integrity of the bidding process. 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.

CONCLUSION

The most significant point of this decision is that the Courts will interpret limitation of liability clauses very narrowly. In this instance, the SCC held that a limitation of liability clause did not exclude liability where the lowest bidder was ineligible. Most tendering lawsuits involve circumstances where a party is claiming the lowest bidder is ineligible, or that the owner accepted a bid without following the conditions set out in the tendering package.

As the Courts will be required to follow the SCC's decision they will be required to interpret these limitation clauses narrowly. Owners should therefore feel little comfort in limiting their exposure to liability by including these clauses. It is not to say that they could not be upheld when the limitation of liability language is clearly articulated and the claim clearly falls within the strict wording of the limitation of liability clause language. However, even with clear and specific language the Courts will also impose a duty of fairness on the owner. The owner always must demonstrate that the process was administered fairly.