Either way **you lose**

Last year's decision of the Supreme Court of Canada in the Tercon Contractors Ltd. *versus* British Columbia case has created a good deal of renewed interest in the idea of trying to "bulletproof" RFP and tender documents.

by Stephen Bauld and Kevin McGuinness

As readers may recall, the Tercon case involved an attempt by a government department to afford itself bulletproof protection against liability for misconduct of a tender through a limitation of liability provision. The case left the government liable to the plaintiff for millions in damages and legal costs. Given this background, one would have thought that public authorities would now be moving as quickly away from the strategy of trying to protect their tender documentation as possible. Instead, many have moved in the opposite direction. They have tried to enhance the wording of their documents so as to afford even greater protection.

In our view, for two reasons this strategy needs some serious reconsideration. First, it is fraught with a considerable risk of failure. Second, even if sufficiently clear protective language is sufficient to protect public authorities against the risk of civil liability for a poorly conducted tender process, the victory would be a Pyrrhic one. The costs resulting from the adoption of this strategy are likely to exceed the benefits to which it might lead.

In discussing this question, let us first consider what is meant by "bulletproof" documentation. The term is often used, but rarely explained. The term "bulletproof" essentially means impenetrable, impervious to assault, damage, or failure. For contract terms to meet this objective,

they must be directed to a clear purpose and be effective for that purpose, irrespective of the circumstances. Only rarely is contract language capable of such a degree of effectiveness.

Bulletproofing language in government contract documentation is usually directed towards three specific ends: giving the government unilateral rights inconsistent with the normal reciprocal nature of contract obligations; limiting liability; and, attempts to allocate risk in an atypical manner favoring the government. One basic principle of contract law that works in favour of such efforts is that contractual rights and obligations are in principle defined by the parties themselves. In principle, if contractual language is clear enough, the parties can agree to define, expand or contract their rights and obligations in such manner as they may agree. The operative phrase here is "if the contractual language is clear enough."

A number of rules of contractual interpretation undermine efforts to draft satisfactory language. For instance, under the *contra proferentum* rule, any ambiguity in documents that were drafted unilaterally will be construed against that party. Originally employed by the courts as a means of consumer protection, this rule now works against governments conducting contract competitions by way of tender or RFP. Other rules of interpretation qualify the scope of general language in contractual clauses. On the other hand, where specific language is used, then that language is interpreted as having a narrow scope.

Indeed, the Tercon case itself demonstrates the difficulty of trying to draw up language that is sufficiently "clear" to protect a government from liability. In that case, the terms of the RFP stated that "no Proponent shall have any claim for any compensation of any kind whatsoever, as a result of participating in this RFP." It was held that this language was not sufficiently broad to protect the government from liability where it permitted an ineligible bidder to participate in the tendering process. The problem with this line of reasoning was the plaintiff's claim could only arise as a result by virtue of the fact that it had participated in the RFP. In effect, the clause was so narrowly construed that it was rendered inoperative. In short, one-sided contract provisions rarely work in practice.

According to one website advocating the bulletproofing approach, the goal of this strategy is to discourage disgruntled suppliers from calling their lawyers, and to discourage those lawyers from attacking the contract award process. In light of the Tercon decision, it is doubtful that many seasoned litigators will be so discouraged irrespective of what the contract language may say. In far too many cases, bulletproofing language affords only an illusion of protection – and the more serious the apparent unfairness in what has happened, the less likely it is that the protection will work.

Yet even if such language was effective, it would still work against the long-term interest of the governments which employ it. In general, governments appreciate that their economic interests are best served by conducting tenders fairly. A government which develops a reputation for arbitrary or abusive behavior is not likely to attract the best bidders. Excessively one-sided documents discourage bids even if tenders are conducted with scrupulous honesty and in a fully transparent manner. Further, bulletproofing language increases the level of risk associated with a contract to the suppliers who are asked to be bid for it. The higher the level of risk associated with a contract, the higher the prices that will be quoted.

Since governments are good credit risks and since they offer high prestige projects, government contracts should attract the best suppliers and the prices bid for government work should be the best available in the market. Too often this is not the case. When governments employ the bulletproof approach, they discourage the most efficient suppliers from bidding for their work. The products and services of top quality suppliers are in great demand. They do not need to take work that presents exceptional risk. If they abandon the market for government work, this has three especially serious implications:

- Lost business efficiency: Top quality companies are invariably the most efficient. They are able to bind the most competitive price. The result of their leaving the market for public contracts is that the government concerned must choose from the bids of less efficient contractors, whose prices will be correspondingly higher.
- Lost technical expertise: Since the top quality companies are usually the most experienced, they are better able to identify and avoid the risks that are associated with the execution of a given contract. They are also the companies that are best able to identify innovative, cost-saving solutions when problems are encountered. They buy their inputs on a larger scale and therefore, in the norm, can secure more favourable pricing. They also tend to attract the top quality workers and subcontractors.
- Higher prices: Those suppliers who are willing to bid for contracts will likely include a hedge factor in their bid prices to account for the additional risk that they perceive.

In summary, governments that seek to bulletproof their tender, RFP and contract documentation are actively discouraging the very type of suppliers that they should be anxious to secure. As a result, they are exposed to a serious risk of a worst-case result. On the one hand, the terms which they employ to protect them from liability are unable to work should they get sued. On the other, these clauses present a sufficient concern to any risk adverse suppliers either to discourage them from bidding, or to cause them to increase their bid prices if they do bid.

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