

Tercon reversal

Tendering law goes into a tailspin

This article is excerpted from the forthcoming 2nd edition of Paul Emanuelli's *Government Procurement* textbook.



by Paul Emanuelli

IN ITS DECEMBER 2007 decision in *Tercon Contractors Ltd. v. British Columbia*, the British Columbia Court of Appeal enforced a limitation of liability provision contained in a government tender call and reversed a trial decision that had originally awarded over \$3 million in damages against the government.

Original trial decision awards \$3.3 million

The original March 2006 decision of the British Columbia Supreme Court overrode the limitation of liability provision in the government's tender call and found the British Columbia Ministry of Transportation and Highways liable for \$3,293,998.00 for awarding a contract to a non-compliant bidder. The case involved a tender call for the construction of a gravel highway in the Nass Valley of British Columbia. One of the unsuccessful bidders sued, alleging that the contract was awarded to a non-compliant competitor.

The tender call rules clearly prohibited joint venture bids. Notwithstanding this rule, the government awarded the contract to a low bid submitted by a joint venture. While the awarded contract was styled to reflect only one of the two joint venture parties as the prime contractor, the trial court saw through the government's attempted bid repair. The government was found to be in breach of its tendering law duties.

The trial court then considered the applicability of the following limitation of liability provision contained in the tender call:

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.¹

The trial court noted that the courts have discretion to limit the enforceability of such exclusionary clauses: (a) within the tendering context due to policy considerations; and (b) more generally under contract law based on doctrines such as fundamental breach, unconscionability, unfairness and unreasonableness. The trial court concluded that it would not allow the government to shield its conduct behind the exclusionary clause contained in the tender call.

Court of Appeal's reversal

However, in December 2007, the British Columbia Court of Appeal granted the government's appeal and reversed the trial decision's finding of liability. The Court of Appeal found the above noted limitation of liability clause to be enforceable and allowed the gov-

ernment to avoid liability after accepting the non-compliant bid. With respect to the significant public policy implications of allowing government institutions to receive binding bids while contracting out of their corresponding legal duties, the Court of Appeal concluded that the solution rested in bidders opting out of such tendering processes rather than in further judicial intervention.

Law and order meets wild west?

To allow purchasers to avoid their fairness duties in formal tendering processes by relying on limitation of liability provisions seems to fly in the face of the more nuanced treatment of privilege clauses in prior decisions. For example, in its April 1999 decision in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, the Supreme Court of Canada limited the scope of the privilege clause (which typically reserves the right to "reject any and all tenders, low bid not necessarily accepted") by finding that it did not permit the purchaser to accept non-compliant bids. As *M.J.B.* illustrates, the purchaser's discretion is typically limited to the pool of compliant bids and tempered by its overarching duty to act fairly and in good faith. This protects the integrity of the bidding process and recognizes the rights of compliant bidders.

However, *Tercon* purports to allow a purchaser to receive binding bids under a formal bidding process and to then bypass fairness obligations or judicial scrutiny by using a broad limitation of liability provision. This judicial "hands off" approach seems at odds with the traditional role of the court as protector of the integrity of the bidding process. It will now be left for future cases to clarify how the balanced approach to reserved rights and implied duties reflected in the *M.J.B.* decision can be reconciled with the *Tercon* reversal, which apparently empowers purchasers to dispense with any duties by simply substituting a limitation of liability provision in place of a traditional privilege clause. Until these matters are reconciled, this will serve as a source of significant uncertainty for purchasers and bidders in the years to come. ~~~

¹ *Tercon Contractors Ltd. v. British Columbia*, British Columbia Court of Appeal, December 3, 2007, para. 140.

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