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## CAN YOU EXCLUDE ALL CLAIMS IN CONSTRUCTION TENDERING: TERCON (SCC)

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The Supreme Court of Canada has finally delivered its judgment in the controversial case of *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*. The Court tried to answer the basic question: Can an owner of a construction project put out a tender in which the owner excludes all liability if it chooses a non-compliant bid from a construction contractor? While the Court did not completely answer the question, there is at least some guidance to owners and contractors on this issue. The facts of the case are rather simple. The Province of British Columbia issued a Request for Proposals (RFP) to six contractors for construction of a highway. The RFP contained the following:

“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.”

At trial one of the bidders, Tercon Contractors Ltd. (“Tercon”) successfully brought an action for damages on the basis that the Province wrongfully awarded the contract to another bidder which by the terms of the RFP was not entitled to be awarded the contract as it submitted a bid with another undisclosed partner. Further, the trial court held that the exclusion clause in the RFP did not bar claim against the Province as this exclusion clause was ambiguous and in any event the Province’s breach was a fundamental one such that it was not fair or reasonable to enforce the exclusion clause. However, the BC Court of Appeal took the contrary view and held the exclusion clause was clear and unambiguous and barred compensation for all defaults. The Supreme Court of Canada on appeal disagreed with the BC Court of Appeal and reversed its decision in a narrow majority. While not completely shutting the door to exclusion clauses in tenders, the court certainly limited the scope for their use in its ruling. The Supreme Court of Canada seems to have been impressed by a number of factors:





- The trial judges finding of fact that the Province acted egregiously by “ensuring that the[true bidder] was not disclosed.”
- The trial judges finding that the breach by the Province “attack[ed] the underlying promise of the [tendering] process”
- The exclusion clause, if properly interpreted does not protect the Province from Tercon’s claim which arises from the Province’s dealings with a party not even eligible to bid, let alone from its breach of the implied duty in tenders of fairness to bidders.
- It is necessary to consider exclusion clauses in light of their purpose and commercial context as well as overall terms.
- Public procurement tenders require transparency and fairness for the public at large which is a “particularly weighty” factor.
- There were mandatory statutory provisions governing the Province’s tendering process.
- It did not make sense to think that eligible bidders would participate in the RFP if the Province could avoid liability for ignoring an express term concerning eligibility to bid on which the entire RFP was premised and which was mandated by the statutorily approved process.
- The closed list of bidders was the foundation of the RFP and there were important competitive advantages to a bidder who could side-step that limitation.
- “Clear language is necessary for breach of such a basic requirement of the tendering process, particularly in the case of public procurement.”
- The exclusion clause was ambiguous as the phrase “participating in this RFP” could reasonably mean “competing against other eligible participants” as much as it means, as the Province contended, “submitting a Proposal.” Accordingly, the rule that the party drafting an ambiguous contractual provision should have it interpreted against then applied such that the exclusion clause would not bar Tercon’s claim.

As a result of these factors it is important, in drafting an exclusion clause into a tender document to do so extremely carefully if it is to have any chance of being enforced. Further, it is virtually impossible that an exclusion clause will be enforced in a public tendering or procurement process, particularly where such a tender process is statutorily mandated. Public procurement in particular demand transparency and the appearance of fairness. In this regard, the case highlights what construction lawyers in these cases often refer to as the “smell test” of fairness. The “egregious” behaviour of the Province in the tender process unfairly treating the other bidders such as Tercon was clearly an underlying factor in this case barring the enforcement of an exclusion clause to protect the Province from claims.

