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CASE UPDATE: TERCON CONTRACTORS LTD. V. BRITISH COLUMBIA (TRANSPORTATION AND HIGHWAYS)

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The Supreme Court of Canada recently released its decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*. We summarize below that portion of the decision dealing with the bid process. You will see that it contains lessons for both owners and contractors. For owners, "be fair" – you set the rules and you must abide by them. For contractors, "submit compliant bids" – the rules are there to be followed and you fail to do so at your peril.

In this case, the Government of British Columbia ("BC") wanted to build a road. It issued a request for expressions of interest ("the RFEI") and received responses from six proponents, including Tercon Contractors Ltd. ("Tercon") and Brentwood Enterprises Ltd. ("Brentwood"). BC later issued a request for proposals for construction of the road ("the RFP").

The RFP explicitly stated that only the six proponents who had responded to the RFEI were eligible to submit tenders in response to the RFP. Because of this limitation on who could submit tenders, the RFP process deviated from a traditional public tender. Approval for this deviation was requested from and granted by the responsible Minister.

Tercon submitted a bid in response to the RFP.

Brentwood was not in a position to submit a competitive bid alone and entered into a pre-bidding agreement with another company, Emil Anderson Construction Co. ("EAC"). The agreement stipulated that, if awarded the contract, Brentwood and EAC would enter into a Joint Venture Agreement whereby they would share equally in the costs, expenses, losses and gains of the project. Brentwood and EAC submitted a preliminary bid as a joint venture and a subsequent bid in Brentwood's name alone.

Tercon and Brentwood were the only two bidders to make the short list and BC awarded the job to Brentwood. Then BC, Brentwood and EAC took steps to hide the degree of EAC's involvement in the Brentwood bid: BC asked that EAC be re-cast as a subcontractor and the final contract entered into by BC was made solely with Brentwood.

Tercon sued BC for damages on the basis that BC had breached its contractual obligations to Tercon by accepting a bid from an ineligible bidder.

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BC denied liability to Tercon on two grounds. First, it argued that the Brentwood bid was not ineligible and therefore BC had not breached its contractual obligations to Tercon. Second, it argued that even if it had accepted a bid from an ineligible bidder, any liability to Tercon was excluded by a provision of the RFP documents that read:

Except as expressly and specifically permitted in these Instructions to the Proponents, no Proponent shall have any claim for 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.

In a 5-4 decision, the Supreme Court of Canada found in favour of Tercon on both points.

On the first point, the SCC held that BC knew that the Brentwood/EAC joint venture was an ineligible bidder, because it had not submitted a bid to the RFEI. By accepting the Brentwood bid, BC gave Brentwood an unfair advantage as compared to the other compliant bidders. BC's actions breached its contractual obligation to Tercon, as set out in the RFP. In addition, BC's actions breached the duty of good faith that it owed to the bidders.

On the second point, the SCC held that the language of the RFP did not exclude BC's liability to Tercon. The SCC started its analysis by noting that effective tendering relies on the integrity and business efficacy of the tendering process. A key element of this process, especially in public procurements, is the equal treatment of bidders. The Court held that only clear contractual language could exclude BC's liability for such an egregious breach of the foundational term of the RFP (i.e. the limit on eligible bidders) and of the duty of fairness owed by BC to all bidders.

The SCC held that the language in the RFP was not sufficiently clear to achieve this end: when Tercon accepted the terms of the RFP by submitting a bid, it agreed to waive its right to seek compensation for those damages resulting from its participation in the bidding process. But, it did not waive its right to seek compensation for damages arising from the Government taking steps that fell outside of the contemplated tender process, such as accepting a bid from an ineligible bidder.

The SCC restored the trial award to Tercon of \$3.5 million in damages and interest.

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