Tendering And Procurement Will Your Liability Clause Withstand The Tercon Test

By Lisa Stiver

THOMPSON DORFMAN SWEATMAN LLP

201 Portage Ave, Suite 2200 | Winnipeg, Manitoba R3B 3L3 | 1-855-483-7529 | www.tdslaw.com

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The law of tendering and procurement for goods and services has been an area of mounting litigation over the past few years, the result of which is a breadth of case law rapidly emerging in this already complex and confusing area of law. However, one case stands out among the masses and has people sitting up to take notice – the decision of the Supreme Court of Canada in February of this year of Tercon Contractors Ltd. v. British Columbia (Tercon). This case has been considered by experts to be the most significant case in procurement law since the seminal Ron Engineering case in 1981 (Ontario v. Ron Engineering and Construction Eastern (Ltd.)). For those of you familiar with the law of tendering, Ron Engineering created the now-famous "Contract A" concept that is arguably at the root of a majority of the cases that come before the courts in this area of the law. Now, nearly thirty years after Ron Engineering, along comes a case that further defines, and arguably blurs, procurement law in Canada.

In Tercon, the British Columbia (BC) government issued a Request for Expressions of Interest (RFEOI) to hire a company to design and build a highway in that Province. Several months later, after receiving and evaluating six responses to its RFEOI, the BC government decided to instead design the highway themselves and issue a request for proposals (RFP) to construct it. After receiving approval under its provincial legislation which would otherwise obligate it to tender the work more broadly, the BC government was permitted to limit the issuance of the RFP to only the six proponents who had earlier responded to its RFEOI. Tercon was one of these six proponents.

The instructions in the RFP stated that only bidders who had previously responded to the RFEOI were eligible to submit a bid in response to the RFP. The same original six proponents submitted proposals in response to the RFP, and a company called Brentwood Enterprises Ltd. (Brentwood) was awarded the contract with the BC government.

Tercon, who had submitted a proposal in response to the RFP but who was not selected as the preferred proponent, sued the BC government on the basis that Brentwood had teamed up with another company which was not one of the six bidders who had originally responded to the RFEOI. Therefore the "winning" bid from Brentwood was submitted by an ineligible bidder. At the trial level, Tercon succeeded with its claim, and was awarded damages in the approximate amount of $3.5 million dollars. The BC government appealed this decision, and cited, among other reasons, the fact that the RFP contained what is known as a privilege or exclusion clause. The privilege clause in question provided that:

…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.

This clause, it was argued by the BC government, should prevent Tercon from recovering any of its costs or lost profits in connection with the RFP and the proposal it submitted. The Court of Appeal found in favour of the BC government and reversed the trial judge's decision. However, it was a short lived victory, as Tercon won its appeal at the Supreme Court of Canada, who reinstated the trial judge's award of nearly $3.5 million in damages.

The Tercon case re-affirmed the "Contract A" principles in Ron Engineering, however, it did not provide further clarity in the area of procurement law surrounding the use of the privilege clause. The Supreme Court did not state that a privilege clause would never be enforced, nor did they clearly enunciate the circumstances under which such a clause would withstand scrutiny. Rather, the Court agreed on a new three-part test for determining when and under what circumstances such a privilege clause would be upheld. The test asks the following three questions: whether the disclaimer or privilege clause applies to the facts, whether the clause itself is unconscionable and therefore unenforceable, and whether the clause should be voided due to public policy considerations. The Court was split 5-4 on the basis of whether or not, after applying this new test, the privilege clause in the Tercon case should be enforced. Hardly a resounding endorsement for their new test.

So now the debate is on as to whether the Tercon case has created any further certainty in this muddy area of law. Some would argue that it has created chaos for government entities, Crown corporations, and quasi-government bodies who all heavily rely on the privilege clause to insulate them from claims by unsuccessful proponents. Buyers and purchasers have scrambled to review and re-draft the privilege clauses in their RFP templates in an attempt to preclude such awards from being leveled at their organizations. However, this may not be the best way to address the issues raised in Tercon. Rather, clear drafting and a more refined procurement process is arguably the best way to insulate a buyer against damages claimed by an unsuccessful proponent. Purchasers should take more care in the drafting of RFP documents and in determining what type of RFP format best suits their needs. Time and resources expended on clarifying these aspects of the RFP process are a purchaser or owner's best defence against the risk of a Tercon-style judgment in the tendering process.

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ABOUT THE AUTHOR

Lisa Stiver

Phone: 204.934.2375 | Email: ljs@tdslaw.com | Web: www.tdslaw.com/ljs

Lisa Stiver's practice focuses on corporate and commercial law, with particular emphasis on commercial transactions, and on real property conveyancing, leasing and financing. As well, Lisa has significant experience in providing advice on tendering and procurement in both the private and public sector, and healthcare law matters.