

LEGAL SPECS

STREU



HIRST



Many people hoped that the Supreme Court's decision in Tercon would provide some clarity to the muddled law of tender. Unfortunately, such hopes were dashed when this long-awaited decision was finally delivered.

Most readers will recall that in **Tercon Contractors Ltd. vs. British Columbia (Ministry of Transportation and Highways)**, the Supreme Court was asked to examine the enforceability of "no claims" clauses in the context of a public procurement process.

At issue was the clause in a request for proposals that purported to exclude any claims for damages by bidders, "no Proponent shall have any claim for compensation of any kind whatsoever as a result of participating in this RFP."

The problem with such exclusion clauses is that they undermine the very essence of tendering law, which imposes legal obligations on those involved in the tendering process. If an owner can simply insert an exclusion clause and avoid liability for the breach of those legal obligations, tendering law loses all its teeth.

As the Supreme Court put it, "the appeal thus brings into conflict the public policy that favours a fair, open and transparent bid process, and the freedom of contract of sophisticated and experienced parties in a commercial environment to craft their own contractual affairs."

After nearly a year of deliberations, the court held that the use of exclusion clauses in the public procurement context was permitted and the court laid out the following three-part analysis to be used to determine the enforceability of such exclusion clauses.

The first stage of that analysis is to determine whether the exclusion clause applies to the situation in question. If the clause does apply, the second stage is to then determine whether the exclusion clause is valid in the sense that it is not "unconscionable."

If the exclusion clause applies and if it is valid, the third and final stage is to determine whether there is an overriding public policy reason that would compel a court to refuse to enforce the clause.

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Somewhat surprisingly, five of the nine judges of the Supreme Court found that the exclusion clause used by the province, which barred claims for compensation "as a result of participating" in the tendering process, did not, when interpreted "properly," exclude Tercon's claim for damages. In other words, the clause failed the first stage of the three-part test enunciated by the court.

The majority held that the exclusion clause when interpreted "in harmony" with the rest of the RFP in issue, and in light of the commercial context of the tendering process, did not exclude the damages sought.

Essentially, the court found that since the winning bidder was not an eligible bidder, the unfairness complained of by Tercon was not something that arose as a result of Tercon's participation in the RFP, but from something outside of that RFP process.

If you find this interpretation confusing, you are in good company.

The four judges comprising the minority found that the clause was "clear and unambiguous" and that no legal ground or rule of law permitted the court to override the freedom of the parties to a contract with respect to this term, or to relieve Tercon against its operation.

The minority judges concluded that the language was clear and the strained interpretation the majority judges adopted was an "artificial interpretation in order, indirectly and obliquely, to avoid the impact of what may seem [after the fact] to have been an unfair and unreasonable clause."

Contractors across Canada celebrated this decision as support for the integrity of the tender process. However, the most likely result of this decision will be the further encouragement of litigation over the appropriate interpretation of exclusion clauses used in the procurement context. While owners will likely seek to broaden the scope of their exclusion clauses, the door will remain wide open to unhappy bidders to challenge even the most apparently straightforward interpretations of such exclusion clauses.

As a result, there is little to celebrate in the Supreme Court's decision in Tercon. ♦

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