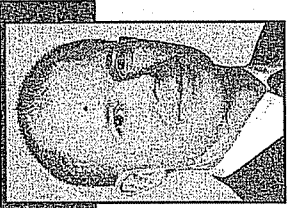




LEGAL SPECS

HIRST



What is the future for the law of tender in Canada? For the last 30 years, tender law has been dominated by a model that contemplates the imposition of an obligation of irrevocability on the part of a bidder, secured by a bid bond or other security, in return for the corresponding obligations of good faith and fair dealing on the part of a procurement authority.

But at the moment, this all hangs in the balance as we

continue to await the Supreme Court of Canada's decision in **Tercon Contractors Ltd. vs. British Columbia (Ministry of Transportation and Highways)**.

At issue in this important case is a clause in a request for proposals that purports 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 accompanying concepts of good faith and fair dealing because they have the effect of removing any sanction for their breach. While these concepts were only first introduced in 1981 by the Supreme Court in **Ron Engineering**, they have been carefully nurtured and expanded upon by Canadian courts ever since.

Freedom of contract advocates argue however, that regardless of the practical impact of such clauses on the law as developed since Ron Engineering, at its core, tendering is contract law, and it is a basic principle of contract law that parties are free to contract to what terms they choose. If the words used in a tender call can only be interpreted in one way, it is not open to the court, even on grounds of equity or

unreasonableness, to declare the clause unenforceable, since this would amount to rewriting the contract "negotiated" between the two parties.

Clearly swayed by an argument of this nature on appeal, the **BC Court of Appeal** found that tendering authorities may be compelled to abandon the use of such clauses, if major contractors refused in a concerted manner to bid on large projects. Alternatively, "the industry may be prepared to accept that the ministry wants to avoid suits for Contract A violations, and the contractors will continue to bid in the hope that the ministry acts in good faith."

Accordingly, the Supreme Court is faced with the likely unwelcome task of finding in favour of Ron Engineering at the expense of centuries of contract

law or reaffirming centuries of contract law at the expense of 38 years of uniquely Canadian-developed tendering law.

Arguments in this case were heard by the Supreme Court in March 2009. We continue to await the decision, which is expected at any time.

If the Supreme Court agrees with the BC Court of Appeal and sides with the principle of freedom of contract, the law of tender could soon change dramatically in Canada. ♦

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