Two years after *Tercon*: Has procurement law in Canada changed?

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Two years ago, the Supreme Court of Canada issued its eagerly awaited decision in *Tercon Contractors Ltd. v. British Columbia* ("*Tercon*").[1] Before the decision was issued, many wondered what impact it might have on procurement processes in Canada. Would the Court uphold the right of bidders challenging contract awards in competitive procurement processes, or would it, as it had in another case two years earlier, limit the circumstances in which such claims could succeed?

In this paper, I will review the Court's decision in *Tercon*, its practical implications as well as its longer-term impact on the Canadian law of procurement.

Canadian procurement law prior to *Tercon*: An era of uncertainty

A few years before *Tercon* came before the Supreme Court of Canada, most lawyers practising in the area of procurement law would not have predicted the state of uncertainty that prevailed in early 2010. Another Supreme Court of Canada decision in 2007, however, showed that a bidder's right to sue for unfair procurement practices was not clear-cut.

In order to understand how this state of uncertainty arose, it is important to understand the history of procurement law in Canada.

In 1981, the Court had issued its decision in *Ron Engineering*.[2] *Ron Engineering* introduced the "Contract A/Contract B" approach to tendering disputes. Based on this approach, the submission of bids to a tender could give rise to a contract ("contract A") between the issuer (usually referred to as the "owner") and each compliant bidder. The specific terms of contract A would vary, but in general require the owner to treat bidders fairly and in a manner consistent with the terms of the tender. If the owner violated the terms of contract A, for example by selecting a bid that was not compliant with the criteria set out in the tender, the bidder who should have won could sue for damages.

Ron Engineering was enormously important. It gave suppliers in Canada a remedy for unfair tendering processes that suppliers in other countries do not have. In other countries, a bidder challenging a contract award would have to show that the owner violated a specific law, policy or treaty. As a practical matter, this means that suppliers in other countries generally only have a remedy in public procurement

[1] [2010] 1 S.C.R. 69.

[2] *R. v. Ron Engineering*, [1981] 1 S.C.R. 111.

processes. The Contract A/Contract B approach allowed a Canadian supplier to seek damages based on purely private, contractual rights. They could also seek damages equivalent to their actual losses.

In the three decades following *Ron Engineering*, there was increasing pressure on governments and public agencies, as well as publicly-traded companies, to purchase goods and services in transparent processes which minimized the possibility of corruption or unfair advantage. This pressure resulted in the proliferation of laws, treaties and policies requiring public sector buyers to use tendering processes for most purchases. Even in the absence of a law requiring a tender, buyers more and more often opted for a competitive tender process in the belief that it results in better value.

At the same time that tendering became the norm for many purchasers in Canada, suppliers became more aware of their rights as bidders, notably the right to challenge a contract award that was based on a failure to observe the rules set out in the tender, or processes that gave any one bidder an unfair advantage. The increased use of competitive tendering processes and heightened awareness and willingness to challenge tender awards.

These events produced a steady stream of caselaw affirming the Contract A/Contract B analysis first set out by the Supreme Court in *Ron Engineering*. Courts consistently held that an owner owed a duty to bidders to create a level playing field, and to observe the rules governing the tender. Even if the tender contained a clause permitting the owner to cancel the tender process or award a contract to a bidder other than the lowest bidder, the owner still had to respect certain fundamental rules.

In 2007, however, the Supreme Court of Canada's decision in *Double N Earthmovers v. City of Edmonton* revealed a significant difference in approach to tendering law amongst the judges on the Court, and potentially signalled a radical change in Canadian procurement law.[3]

The *Double N* case involved a tender by the City of Edmonton for services needed in its municipal landfill. The tender specified that bidders had to offer heavy vehicles that could not be more than six years old. After bids were submitted, one of the suppliers, Double N Earthmovers, notified the City that another bidder, Sureway, had bid equipment that did not meet the age requirement. The City declined to investigate this information, even though the age of the equipment that Sureway proposed to use could have been verified easily through vehicle registration numbers listed on Sureway's bid submission form. Instead, the City awarded the tender to Sureway When Sureway advised that its equipment did not meet the age requirement in the tender, the City waived the requirement for the purpose of the contract.

Double N sued the City on the basis that it violated the tender rules by awarding the contract to a non-compliant bidder. Based on the weight of the Canadian caselaw on tendering, Double N seemed to have

[3] [2007] 1 S.C.R. 116.

a strong case. The City's decision in Sureway's favour rewarded a bidder who had wilfully misrepresented its ability to meet tender requirements at the expense of a bidder which had taken steps to bring the non-compliance to the City's attention.

To the surprise of many who had followed the case, however, the majority of the Supreme Court held that Double N had no claim against the City. In the majority's view, the age of the equipment was an informality that did not substantially affect the cost or performance of the work. The majority held that the City had no obligation to investigate Double N's allegation during the bid process that the Sureway bid was non-compliant. Moreover, since the City did not actually know that Sureway misrepresented the age of its equipment when it awarded Sureway the contract, it had not breached any duty to Double N when it subsequently entered a contract with Sureway that varied the tender requirements. Double N therefore could not sue the City for a breach of Contract A once Contract B had been awarded.

In a sharply-worded dissent, the minority in *Double N* took the view that the City had violated its obligation of fairness in the tendering process by awarding the contract to a non-compliant bidder. The age requirement for the equipment was not a mere technicality which could be waived. Once the City received notice from Double N that the information in Sureway's bid submission was inaccurate, it should have verified the age of the equipment bid. In the minority's view, the obligation to accept only a compliant bid implied a duty to take reasonable steps to ensure that bids were compliant.

In the wake of Supreme Court's decision in *Double N*, many wondered if it had fundamentally altered the traditional Contract A/Contract B analysis. The majority's approach could be taken to allow owners to reduce or eliminate the risk of being sued by unsuccessful bidders, by engaging in wilful blindness about the potential non-compliance in bid submission forms, then renegotiating the terms of the purchase after contract award. The dissenting judges in *Double N* expressed their disagreement with the majority's decision in unusually strong terms.

The Supreme Court's decision in *Tercon*, therefore, was seen as an opportunity for the Court to confirm or deny that the rules of procurement had changed. *Tercon* was also seen as important because of the specific facts in the case. In *Tercon,* the tender documents contained a clause stating that bidders waived their right to claim damages for any violation of the terms of the tender. The B.C. Court of Appeal had held that this clause prevented an unsuccessful bidder from suing the owner for damages, even though the owners admitted that it had awarded a contract to a bidder who was not qualified to participate in the tender. If the Supreme Court of Canada upheld this view, there would be little to prevent any owner from including the same clause in other tenders.

The facts underlying the *Tercon* decision

In 2000, the British Columbia Ministry of Transportation and Highways issued a request for expression of interest for a major highway design-build project. Six teams of interested contractors responded, including Tercon Contractors and Brentwood Enterprises. Subsequent to receiving the submissions, the Ministry notified the six teams that it had decided to instead design the highway itself and that it would issue a request for proposals limited to the construction of the highway.

Included in the RFP's terms and conditions was a provision that only the six original teams who responded to the RFEI would be eligible to submit a proposal. The RFP also contained a clause that purported to exclude the Ministry from any claims for damages as a result of teams' participation in the RFP. The exclusion clause read:

> Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have and 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.

Brentwood lacked the experience in drilling and blasting identified as a mandatory requirement in the RFP. It therefore proposed a joint venture with Emil Anderson Construction ("EAC") for the project. EAC had not, however, been one of the six teams originally involved in the RFEI and was therefore ineligible to submit a proposal. Brentwood sent a preliminary submission to the Ministry to advise that it had changed its team structure and wished to form a joint venture with EAC, but the Ministry never responded.

The Brentwood/EAC joint venture submitted a bid. Despite the RFP terms clearly limiting bidders to those who had participated in the RFEI, the Ministry did not immediately disqualify the bid. Instead, after review of the proposals, the bids by Tercon Contractors and the Brentwood/EAC joint venture were short listed. Brentwood/EAC was selected for the project.

Tercon Contractors sued the B.C. government on the basis that the Ministry had accepted an ineligible bid and breached an implied duty of fairness owed to the bidders. Because Tercon Contractors was the only compliant bidder short-listed for project award, it claimed damages equivalent to the profit it would have made had its bid been accepted. The trial judge who heard the case ruled in Tercon's favour and ordered the B.C. government to pay $3.5 million in damages. This decision was overturned by the B.C. Court of Appeal, which found that the exclusion clause in the RFP prevented Tercon from suing the government.

The Supreme Court of Canada's decision in *Tercon*

In a split 5-4 decision, the Supreme Court of Canada allowed Tercon Contractors' appeal. While both the majority and dissent agreed on the test that should be applied to exclusion clauses, they disagreed on the application of the test to the facts.

All of the judges agreed that courts should enforce a contractual exclusion clause unless the clause was invalid or inapplicable, or there was a public policy reason not to enforce it. The majority and minority disagreed, however, on the enforceability of the exclusion clause in the RFP at issue in *Tercon*.

In his majority reasons, Justice Cromwell began by reviewing the law on the formation of Contract A in the bidding process and the nature of implied terms in this contract. Justice Cromwell agreed with the trial judge's finding of fact that the Brentwood/EAC bid was ineligible, and that the Ministry knew the bid was non-compliant:

> [The Ministry] had a bid which it knew to be on behalf of a joint venture. Permitting the bid to proceed in this way gave the joint venture a competitive advantage in the bidding process, and the record could not be clearer that the joint venture nature of the bid was one of its attractions during the selection process. The Province nonetheless submits that so long as only the name of Brentwood appears on the bid and ultimate Contract B, all is well. If ever a submission advocated placing form over substance, this is it.[4]

Justice Cromwell found that the Ministry's conduct not only breached "the express eligibility provisions of the tender documents, but also the implied duty to act fairly towards all bidders".[5] The public tendering process requires that the owner conduct a transparent and fair process where all bidders are treated equally.

After concluding that the Ministry was in breach of its obligations, Justice Cromwell then considered whether the exclusion clause successfully excluded the Ministry from liability. He concluded that the exclusion clause in the RFP only applied to "claims arising 'as a result of participating in [the] RFP', not to claims resulting from the participation of other, ineligible parties". The clause was therefore inapplicable and unenforceable in circumstances where the Ministry had permitted participation by a bidder who was not qualified to participate.[6] Justice Cromwell on behalf of the majority accordingly allowed the appeal

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[4] *Tercon*, *supra* note 1 at para 49.

[5] *Tercon*, *supra* note 1 at para 59.

[6] *Tercon*, *supra* note 1 at para 63.

and restored the trial judge's order requiring the Ministry to pay Tercon Contractors $3.5 million in damages.

The dissent disagreed. It was of the view that the exclusion clause did apply because Tercon Contractors had participated in the RFP process, whether or not the process was compromised.[7]

On the question of whether the clause was unconscionable, Justice Binnie wrote that while "Tercon is not on the same level of power and authority as the Ministry", it was nonetheless a major contractor and "well able to look after itself". As a result, in the minority's view there was no "relevant" imbalance of power.[8] With respect to public policy considerations, Justice Binnie stated that while "there is a public interest in a fair and transparent tendering process, it cannot be ratcheted up to defeat the enforcement of Contract A in this case."[9] While acknowledging the validity of Tercon Contractors' complaints about the Ministry's handling of the RFP, Justice Binnie concluded that the Ministry's conduct did not rise to the level required for the court to refuse enforcement on grounds of public policy.[10] The dissent would have dismissed the appeal.

***Tercon*'s practical impact on procurement law**

Tercon signalled a return to the Supreme Court of Canada's approach to procurement disputes in the Ron Engineering era, and put to rest the fear that *Double N* would signal a radical departure in Canadian law. By refusing to subscribe to Justice Binnie's philosophy that bidders could 'take care of themselves", the majority affirmed the existent of robust and meaningful private law remedies in Canadian procurement processes.

The *Tercon* decision also emphasized that the specific rules governing any given procurement vary, depending on the terms of the tender and the context in which it is held. The decision provides guidance in determining what rules apply in any given case, and the impact of a violation of the rules.

Contract Formation

Tercon reinforces the principle that, generally, a bidder accepts an offer by submitting a bid that complies with the tender requirements.[11] However, submitting a compliant bid does not automatically create a

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[7] *Tercon*, *supra* note 1 at paras 127 and 128.

[8] *Tercon*, *supra* note 1 at para 131.

[9] *Tercon*, *supra* note 1 at para 135.

[10] *Tercon*, *supra* note 1 at para 140.

[11] *Maple Reinders Inc. v. Cerco Developments Ltd.*, 2011 BCSC 924, 89 B.L.R. (4th) 295 at para 43.

contract between the parties. The Court emphasised that the specific facts of each case must be analysed before declaring that a contract was formed.

This can create confusion if the terms of the contract and the intentions of the parties are not clear at the time of tender. It is therefore important to review the tender documents and make sure that they clearly reflect the owners' intentions before making them available to bidders. The analysis must take into consideration both the express and implied terms and conditions of a tender.[12]

A good example of how a court will determine whether a Contract A has been formed can be found in *Innovations for Audio Video v. City of Vancouver*.[13] In this case, the plaintiff bidder claimed against the City of Vancouver for lost profit and punitive damages as a result of not being awarded a contract for the installation of a sound system at an ice arena. The RFP contained a clause that the City retained the right to accept or reject any proposal, even if only one proposal was received. Another clause stated that the City was under no obligation to award a contract pursuant to the RFP.

Six proposals were submitted, and Innovations for Audio Video Inc. ("Innovations") submitted the lowest bid. After receiving the bids, the City cancelled the RFP because it had not received the expected funding for the project. A local community centre decided several weeks later to fund the project, and contracted with one of the other five bidders for the sound system.

Innovations argued that the RFP had the same legal effect as an invitation to tender, and that the City was bound to award it the tender. The B.C. Provincial Court noted the statement by the majority in *Tercon* that "a compliant bid in response to a tender call 'may" give rise to a contract.[14] The judge stated that the word "may" indicates that the legal effect of a compliant bid in response to an RFP does not necessarily give rise to a contract; rather, there has to be an intention to create a contract between the parties.

The Court then highlighted two differences between *Tercon* and the Innovations case: 1) the scale of the project in *Tercon* was much greater and required more from the bidders in order to make a compliant bid on the tender; and 2) the express language in the City's RFP was broader than in *Tercon* where the province unequivocally stated that only the six proponents qualified under the earlier RFEI would be considered.[15]

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[12] *Manitoba Eastern Star Chalet Inc. v. Dominion Construction Co. Inc.*, 2011 MBQB 320, 273 Man. R. (2d) 157 quoting *Tercon* as supporting the proposition that a compliant bid may give rise to Contract A, but that the parties' dealings and expectations must also be considered.

[13] *Innovations for Audio Video v. City of Vancouver*, 2011 BCPC 433, [2011] B.C.J. No. 2633 (QL) [*Innovations*], aff'd on appeal 2011 BCSC 1531, [2011] B.C.J. No. 2141 (QL).

[14] *Innovations*, *supra* note 13 at 44.

[15] *Innovations*, *supra* note 13 at para 46.

Based on these considerations, the Court concluded that the City had not breached Innovations' rights when it terminated the RFP process. The language in the RFP unequivocally meant that the City retained the right to terminate the RFP at any time, and that the project itself was contingent on the City receiving funding. Further, the City had treated all the proposals fairly, and under the RFP the City was not required to accept the lowest bidder. On appeal, the B.C. Supreme Court upheld the B.C. Provincial Court's decision.

Duty of Fairness and Equal Treatment

Tercon reaffirmed that an owner owes a duty of fairness to all bidders, must treat all bidders equally, and must follow the rules it sets out in its own tender documents. The Court's summary of the duty of fairness has been quoted and cited by three lower courts in the context of procurement.[16]

The Supreme Court of Canada stated that the duty of fairness is part of a wider transparency requirement owed to the public. In the context of public procurement, the majority stated that

> in addition to the interests of the parties, there is the need for transparency for the public at large. This consideration is underlined by the statutory provisions which governed the tendering process in this case. Their purpose was to assure transparency and fairness in public tenders.[17]

This means that owners are required to only consider compliant bids. An owner should not consider a non-compliant bid because it necessarily does not meet the owner's stated project requirements in the tender documents that it issued. It may be possible to conduct negotiations after the bids are received, so long as this possibility is explicitly stated in the tender documents, the negotiations do not permit bid repair and do not alter the fundamental elements of the procurement process or the contract.[18]

In *CMH Construction Ltd. v. Victoria (Town)*,[19] CMH Construction Ltd. ("CMH") was the only bidder that responded to the Town of Victoria's Notice of Tender. The Notice of Tender itself included privilege clauses that purported to not require the owner to "bind itself to accept the lowest or any tender" for the project, and did not contain any clauses permitting changes to the tendering process or discussions/negotiations to take place after tender closing.

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[16] See, for example, *Rimouski (Ville de) c. 164019 Canada inc.*, 2011 QCCQ 5230, [2011] J.Q. no 5925 (QL) citing *Tercon* at para 70; *Transport Larivière et Fils inc. c. Wentworth-Nord (Municipalité de)*, 2012 QCCS 1439, [2012] J.Q. no 3102 (QL) citing *Tercon* at para 24.

[17] *Tercon*, *supra* note 1 at para 68.

[18] *Tercon*, *supra* note 1 at paras 20-21.

[19] *CMH Construction Ltd. v. Victoria (Town)*, 2010 NLTD 145, 301 Nfld. & P.E.I.R. 67 [*CMH Construction*].

CMH submitted a compliant bid, in an amount that was $63,000 higher than the approved funding from the Department of Municipal and Provincial affairs. Upon reviewing the bid, the town did not cancel the tender, did not notify the public or CMH that the tender was cancelled, did not request or invite CMH to bid on the reconfigured project. It did not communicate at all with CMH, nor did it return CMH's bid security. Instead, the town decided not to award the tender to CMH and to complete the work on a project management basis due to the town's budgetary concerns. The work on components of the project was carried out by contractors other than CMH, according to new specifications.

CMH sued. The town argued that it was not bound to award the contract to CMH because of the privilege clause in the Notice of Tender, and that it chose not to award the contract due to budgetary constraints.

The court agreed that budgetary concerns can be a reason to rely on a privilege clause and not award a contract, but noted that "budgetary concerns do not relieve an owner from its obligation to treat bidders fairly".[20] The town was found to have breached the implied duty of fairness it owed to CMH – first in wasting CMH's time and money on a hopeless bid in breach of Contract A, and second in awarding something other than Contract B to other contractors.[21]

Exclusion Clauses

Parties engaged in the tendering process are governed by the laws of contract,[22] and the laws of contract give commercial parties the freedom to govern their own relationship. This freedom of contract includes the right to include an exclusion clause. The Court's *Tercon* decision does not change this as parties can include an exclusion clause in the tender documents which could be enforced by the owner as long as the clause reflected the parties' true intentions and is not unconscionable or a violation of public policy.

Exclusion clauses will be interpreted strictly. The owner must therefore draft any privilege clause clearly and in a manner that reflects the intentions of parties.[23] The majority in *Tercon* found that the public interest in holding a public procurement process transparently and with integrity was enough to override

[20] *CMH Construction*, *supra* note 19 at paras 74 and 84.

[21] *CMH Construction*, *supra* note 19 at para 114.

[22] See, for example, *Ron Engineering*, *supra* note 1; *Martel*, *supra* note 1; *Fred Welsh Ltd. v. B.G.M. Construction Ltd.* (1996), 24 B.C.L.R. (3d) 52 (BCSC); *Stanco Projects Ltd. v. HMTQ & and Aplin & Martin Consultants Ltd.*, 2004 BCSC 1038; *Mellco Developments Ltd. v. Portage La Prairie (City)*, 2002 MBCA 125.

[23] *Allarco Entertainment 2008 Inc. v. Rogers Communications Inc.*, 2011 ONSC 5623, [2011] O.J. No. 4686 at para 169. This decision, dealing with two alleged breaches of a broadcasting contract, at paras 160 to 171 provides a comprehensive overview and analysis of the three-step exclusion clause test in *Tercon*.

the exclusion clause. Since *Tercon*, no Canadian appeal court has considered how the public policy exception for exclusion clauses should be applied.[24]

The broader implications of the *Tercon* decision

Although only a few lower courts and tribunals have examined and applied *Tercon* in procurement cases, they do not appear to apply *Tercon* in a manner that drastically changes procurement law. Rather, *Tercon* is treated as a continuation of the Supreme Court of Canada's views on procurement law in Canada.

This is in itself significant. What is important about *Tercon* is what it did not do. When it was decided, the Supreme Court faced a choice to either affirm or depart from a uniquely Canadian approach to tendering disputes. Through its decision, the Court confirmed that Canadian suppliers have the right to demand equal and fair treatment through the procurement process, even in the absence of any special law, policy or treaty requiring it.

[24] In fact, we found only one appeal case that considers the public policy exclusion at all. This case is *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, [2012] B.C.J. No. 504, a case involving a waiver signed by a customer of zip-line attraction. The B.C. Court of Appeal stated that the public policy exemption could only be applied where "the party [is] engaged in conduct that is so reprehensible that it would be contrary to the public interest to allow it to avoid liability." It is difficult to reconcile this approach with the majority view in *Tercon*.