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Ontario General Contractors Association welcomes Supreme Court tender contract ruling

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staff writer

A Supreme Court of Canada decision that found that British Columbia breached its own tender contract preserves the integrity of tendering and bidding, states the Ontario General Contractors Association.

"Waiting for this decision has had us on tenterhooks for months," said Clive Thurston, President of OGCA. "We were waiting to see if we are going to return to the days of the Wild West.

"Our industry has become increasingly complicated. ... The rule of the law is important to maintain a fair, open and transparent bidding and tendering process."

The court recently ruled, in an appeal case between Kelowna-based Tercon Contractors Ltd. and the B.C. Ministry of Transportation and Highways (MOT), that the province breached its own tender contract on a highway project.

The broad use of an "exclusion of liability" clause in the province's tender documents cannot protect it from claims by an unsuccessful bidder, the court found. Also, the MOT breached the provisions of its bid contract with Tercon when it accepted and awarded a bid to a party which was not eligible to be part of the tender process.

"If this decision had gone the other way it would've been devastating in the industry for suppliers, subtrades, general contractors and even for owners," added Thurston.

In the case, the MOT issued a request for expressions of interest in 2000 for designing and building a \$35 million highway in northwestern B.C. Under the terms of the Request for Proposals (RFP), six original proponents, including Tercon Contractors and Brentwood Enterprises Ltd, were eligible to submit a proposal.

The RFP, which was formally issued in January 2001, included a clause excluding all claims for damages as a result of participating in this RFP. Brentwood lacked expertise in drilling and blasting so it entered into a pre-bidding agreement with Emil Anderson Construction Co to undertake the work as a joint venture.

Emil Anderson was not a qualified bidder but this arrangement allowed Brentwood to prepare a more competitive proposal.

Brentwood and Tercon were the two short-listed

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proponents and the province selected Brentwood for the project.

Tercon won the original case in 2006 when it sued the provincial government in B.C. Supreme Court and was awarded \$3.3 million in damages. The B.C. Court of Appeal reversed the lower court decision in 2007 which resulted in Tercon taking the case to the Supreme Court of Canada.

OGCA sees cases similar to the Tercon situation a few times annually thanks to the inclusion of clauses like the exclusion of liability clause. Thurston said the courts have proved that privilege clauses are not absolute and that owners do not "have the freedom to play around with the bids."

The tight split by the nine court justices — five in favour of Tercon's claim and four against — indicated deference given to a fair, open and transparent tendering process this time around, compared to past cases when contract language prevailed, noted **Glenn Ackerley**, newly elected Toronto Construction Association chairman and **WeirFoulds partner**.

"This decision unfortunately sustains the state of uncertainty for those who deal with tendering or public procurement issues that we face every day," said Ackerley. "When we are asked for advice on 'what we should do' unfortunately that answer does not come from Tercon."

Ackerley said the decision highlights the ongoing tension between the concepts of fairness and preservation of tendering versus a contractual process with terms of contracts made by individuals on which people are not obligated to bid.

"The decision will feed the whole effort to come up with better, more comprehensive wording," explained Ackerley. "Also, the (court) majority went on to say that no matter what wording you come up with, it is still open to the court not to enforce it. That is where the uncertainty comes from."

— with files from Richard Gilbert

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