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Major Shift in Law Relating to Bidding and Tendering

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A simple clause in an RFP document excluding liability has the potential to alter the business tendering landscape.

For over 25 years, the law has imposed binding contractual obligations on owners and bidders when a tender goes out a measure designed to protect the integrity of the bidding process. Now, a recent decision of the British Columbia Court of Appeal has the potential to change that.

The landmark case is *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)* ([2007] B.C.J. No. 2558 (B.C.C.A.)), which was released in December of 2007.

Tercon Contractors Ltd. ("Tercon") was one of the bidders for a highway construction proposal run by British Columbia's Ministry of Transportation and Highways ("MOTH"). The Request for Proposal ("RFP") was issued to six companies only, and only those six companies were permitted to bid.

One of the bidders was Brentwood Enterprises Ltd. ("Brentwood"). Brentwood was facing difficulty meeting the requirements of the RFP on its own, and joined forces with Emil Anderson Construction ("EAC") in a 50-50 joint venture. Brentwood wrote to the MOTH prior to the closing of the RFP to tell them of the change and the MOTH did not respond.

Although the MOTH was aware of the proposed joint venture between Brentwood and EAC, they proceeded on the assumption that the joint venture would only be entered into if Brentwood was successful in being awarded the contract. At the conclusion of the evaluation process, the MOTH selected Brentwood as the preferred proponent.

Tercon sued for its lost profits, taking the position that the MOTH should not have awarded the contract to Brentwood because the actual proponent was a joint venture between Brentwood and EAC and that such an entity was not one of the six pre-qualified participants.

THE "EXCLUSION OF LIABILITY" CLAUSE

At trial, the court concluded that the Brentwood proposal was materially non-compliant. The court held that the proposal had really been submitted by a joint venture, which was an ineligible proponent. Brentwood's proposal was not capable of acceptance by the MOTH, and Brentwood should not have been awarded the contract.

Stuck with the finding that they had selected an ineligible bidder, the MOTH relied on the exclusion of liability clause in the RFP documents. The clause stated that:

"Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for any

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."

The MOTH argued that this exclusion clause was a complete defence to Tercon's claim. The trial judge disagreed and held that the wrong committed by the MOTH was so egregious that it was neither fair nor reasonable to enforce the exclusion clause and damages would be awarded.

The British Columbia Court of Appeal overturned this ruling and upheld the exclusion of liability clause. The appellate court held that the words used in the clause were sufficiently clear and unambiguous in covering the wrong in question and the clause therefore exempted the MOTH from liability.

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