

## Interesting Update on Tercon Case

On March 27, 2006 the Supreme Court of British Columbia found in favour of Tercon Contractors Ltd in a tendering case against the BC Ministry of Transportation and Highways.

Tercon had been one of six contractors eligible to bid on a highway project and their bid had come in second lowest. The lowest bid had been submitted by a joint venture consisting of one contractor that was eligible to bid and one that was not. The Ministry disguised the bid of the joint venture to appear to be a bid only from the eligible contractor and awarded them the contract. The trial judge found that the award had been to a non-compliant bidder and that the Ministry had breached their duty of fairness.

The Ministry appealed this decision relying on the following clause found in the Instructions:

*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 Appeal Court agreed with the Ministry and on December 3, 2007 the BC Court of Appeal allowed the Ministry's appeal. The Court of Appeal felt that this clause could indeed act as a complete bar to Tercon's claim. Tercon was sophisticated enough to understand that they would have no redress against the Ministry even in the face of potential mistreatment in the tendering process.

Fortunately for the industry, this was not the end. On July 10<sup>th</sup> of 2008, the Supreme Court of Canada granted Tercon's application of leave to appeal.

The Supreme Court will be able to consider the following questions:

- Does the law permit a person calling for tenders to use a "no claims" clause as a licence to breach the duty of fairness - even when that person is knowingly and egregiously unfair?
- Is there an implied term in Contract A that a person calling for tenders (particularly government) is required to evaluate tenders not only fairly, but in good faith? If so, can this requirement be breached with impunity by resort to a "no claims" clause?
- Does the law permit government, by private law of contract, to use a "no claims" clause as a licence to make decisions unfairly and contrary to the provisions and policy of governing legislation - even if its officials have concealed their unfair actions?

The hearing date is set for March 23 of this year.

There is one final twist. The Province of Ontario stood up and requested the right to intervene in this case, citing the fact that they are one of the biggest public procurers in the country. The Court agreed and they were granted intervener status. At first glance it would appear that one provincial government was jumping in to support another provincial government. Not so, however. The Province of Ontario seeks to support Tercon! They noted

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that Ontario strives for fairness, certainty and efficiencies in its procurement practices. In their view, where Contract A is formed a duty of fairness is indeed owed to compliant bidders and it cannot be contracted out of in the terms of a tender call, nor can liability for breaches of it be limited by exclusion clauses.

So the stage is now set for March with a decision likely to be handed down within 3 – 6 months. The results will be of critical interest to the industry and could well shift the Contract A/ Contract B world of construction tendering.

## Mid-Rise Wood-Frame Residential Construction

Premier Gordon Campbell has announced new BC Building Code provisions which increase the maximum building height for mid-rise wood-frame residential construction from four to six storeys.

These new code provisions were approved in early January 2009 and will take effect on April 6, giving the residential construction sector time to prepare for implementation.

An online public consultation on these changes closed on December 15, 2008 and the feedback received from building industry stakeholders, local governments and the general public was considered in finalizing the changes to the new

code requirements. A clear majority of consultation respondents supported the proposed changes and several adjustments were made to the original proposals in response to feedback. The exterior cladding proposal was altered to clarify the performance basis of fire resistance requirements, the shear wall integrity proposal was adjusted and the yielding diaphragm proposal was withdrawn.

The new BC Building Code provisions can be viewed on this website:

[http://www.housing.gov.bc.ca/building/wood\\_frame/](http://www.housing.gov.bc.ca/building/wood_frame/)

## Building BC in the New Reality

BC Construction Association Construction Industry Summit

Friday, February 27, 2009

Delta Ocean Point Resort & Spa, Songhees Suite, 45 Songhees Road, Victoria, BC.

Hosted by the BC Construction Association, the Industry Summit will provide a look at the impact of Federal and Provincial stimulus packages through three lenses: Labour Market and HR Requirements, Procurement of Construction Services and, Sustainability. Given the significance of the changing economic environment the subject matter will be more than relevant to everyone active in the construction industry.

Please refer to the BCCA website at: <http://www.bccassn.com/events.html> for details on sessions and registration information or contact: Kim Crevatin, Executive Assistant, BC Construction Association. Tel: 250-475-1077 Email: [kim@bccassn.com](mailto:kim@bccassn.com)



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The mission of the BCCA is to provide leadership and excellence in the representation of and service to British Columbia's construction industry