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Construction File:

Tercon Decision Important for Construction Industry

“Egregious behaviour”. Behaviour seen as “an affront to the integrity and business efficacy of the tendering process”. So said the Supreme Court of Canada in its reasons for judgment in the Tercon Contractors Ltd. Appeal. They were referring to the actions of the BC Ministry of Transportation and Highways, during the tendering phase of a public construction project. The case involved an RFP for the construction of a highway and only six previously qualified bidders were allowed to submit a bid. Despite having clearly laid out the rules of engagement, the Ministry allowed and ultimately awarded the contract to a bidder that was not one of those qualified six. The Ministry planned to rely on its cleverly drafted exclusion clause to escape liability for this tendering transgression. It almost worked. Fortunately, it did not. In a five to four decision the Supreme Court gave the win to Tercon.

The case was an important one for the construction industry. Construction lawyers are already busy “commenting” and forming their arguments for and against the future use of exclusion clauses. Some will focus on the majority decision and others will find reasons to support the dissent and we at BCCA have little doubt that there will be a significant amount of billable hours put in on creating the next great, bullet-proof, exclusion clause for use by any with the deep pockets to pay. We aren’t lawyers and we would not presume to try to interpret the finer points of law discoursed upon by the very capable and intelligent Supreme Court Justices. What we do know, however, is there are some fundamental truths to the public construction tendering process that we would all be wise to pay attention to if we want to promote the economy of this province and protect the tax-payers of British Columbia. Here is our take on it.

No matter how sophisticated a contractor might be, they will never be equal to the power wielded by the big “G” Government at any level. However, while Government can afford to hire lawyers to draft amazingly clear and concise exclusion clauses that might save them from losing a few lawsuits when they act egregiously—although a failsafe one hasn’t been discovered yet—should they? Why is it important to have a public

procurement process that is fair open and transparent? We suggest that there are at least three answers to that question and they involve the following:

1. Open: A healthy competitive marketplace;
2. Fairness: when spending taxpayer dollars and;
3. Transparent: squeaky clean elected officials.

Maintaining a competitive marketplace is essential to our economy. The construction industry, in particular, *thrives* on competition. An unfair procurement process will sour relations in areas where competition is sought as a means to partnership. Without a clean and fair tendering process contractors will not feel comfortable bidding on public work, especially the smaller contractors (about 90% of our industry in BC) who likely don't have access to sophisticated legal advice. Fewer bidders mean higher prices. Lack of opportunity to compete leads to a contraction in the industry and the potential loss of small to medium sized companies who, quite frankly, are huge contributors to employment and training in this province. The construction industry is one of the cornerstones of our economy. Ultimately, running a robust and fair tendering process is the key to maintaining a strong sector.

Public agencies operate on taxpayers' dollars, so we all have a vested interest in achieving the best price through healthy competition. It is also in the public's best interest that unnecessary litigation be avoided, and that risk is dealt with in such a manner as will best protect the public. There is a need to be transparent about the tendering, evaluation and awarding processes and to stick to fair dealing so that no one can shout 'foul' post-contract award. Litigation is disruptive and expensive for all concerned, and it is worth remembering that people only challenge if they are unhappy, not only with the outcome, but with the process itself. If a procurement phase is well run, fair, clean and efficient, then most bidders will be satisfied and content with walking away without challenge. Keep in mind, at the end of the day, when things go wrong it will ultimately be the taxpayer on the hook.

Finally, politicians would do well to remember the old adage that those who ignore history are doomed to repeat it. [Capital expenditure by governments presents a source of fertile ground for corruption](#). There are

countless examples around the world of governments losing the support of the electorate due to even perceived, never mind real, back-room dealing in the tendering process. Having a truly open and transparent process is essential to ensuring that such a taint will not stain their reputation.

Construction litigation is not going to disappear any time soon but, at the very least, we should insist that our public officials do their very best to avoid expensive lawsuits and support a competitive marketplace on behalf of the taxpaying industry and the taxpaying consumers. Fair and open deals—it is not too much to ask for.

Learn the lesson provided by the Tercon case, which is, in our opinion Don't place your faith in lawyers' drafting abilities, just do the right thing.