



## Excluding Liability in Procurement – Say it Clearly!

### *Tercon Contractors v. British Columbia*

Sonia Sahota, P.Eng  
Valkyrie Law Group LLP  
604.461.4042  
ssahota@valkyrielaw.com

This dispute involves the much debated “exclusionary clause” and began in 2000 when the Ministry of Transportation and Highways (the “Province”) issued a request for expression of interest (“RFEI”) for the design and construction of a highway in northwestern British Columbia. Six parties responded to the RFEI, including Tercon and Brentwood Enterprises Ltd. (“Brentwood”). Later, the Province advised that it would be carrying out the design component of the work and would be issuing a request for proposal (“RFP”) only in respect of highway construction. The RFP was issued in 2001 to only the six original proponents and included, most notably, a clause excluding all claims for damages “as a result of participating in this RFP”.

For the purposes of submitting a competitive bid, Brentwood entered into a joint venture with Emil Anderson Construction Co. (“EAC”) and together they submitted a bid in Brentwood’s name. EAC was *not* a qualified bidder under the original RFEI. Brentwood and Tercon were both shortlisted and ultimately the Province selected Brentwood. Tercon disputed the Province’s ability to select an ineligible bidder arguing that it should have been awarded the contract. The seeds of this decade long dispute had been sown.

The trial judge ruled in Tercon’s favour. The court of appeal ruled in favour of the Province. On February 12, 2010, the Supreme Court of Canada reversed the court of appeal decision. The court decided unanimously that a properly worded exclusion clause could operate to exclude liability but was split on its interpretation of the exclusion clause. The majority ruled in favour of Tercon: the exclusion clause did not protect the Province from a claim which arose from the Province’s breach of an express term of the bid contract (to consider only qualified bidders) and its breach of an implied term of the bid contract (duty of fairness to bidders). In other words, while the exclusion clause would operate to bar claims for damages arising from a proponent’s *participation in the RFP process*, the clause could not be interpreted to bar a claim for damages arising from the Province’s unfair dealings with a party that was not entitled to participate in that process – clearly the inclusion of bids from unqualified and ineligible proponents was not part of the RFP process.

What does this mean to local governments? There still exists the opportunity to contractually exclude liability for breach of tendering process requirements, such as an express term of the bid contract or the owner’s implied duty of fairness - the clause used by the Province simply did not contain clear language necessary to achieve this objective. In the case of public procurement in particular, transparency is key and the requirement for clear language to exclude liability for breach of such basic requirements of the tendering process remains essential.