SUPREME COURT DECISION WILL BE BINDING ON ALL PROCUREMENTS IN CANADA

Contract A Law at a Crossroads

by Maureen Sullivan

On July 10, 2008, the Supreme Court of Canada agreed to hear the appeal by Tercon Contractors on the ruling in Tercon Contractors Ltd. v. British Columbia, [2006] B.C.J. No. 657. This is a much-anticipated step in a case that has long been controversial.

As we have reported in previous issues of The Legal Edge, Tercon Contractors sued the B.C. government after the then-Ministry of Transportation and Highways awarded a contract to a joint venture that was non-compliant. In 2006, the B.C. Supreme Court agreed with Tercon, and awarded it damages of some $3.3 million.

The province appealed that decision, and in December 2007, in Tercon Contractors Ltd. v. British Columbia (Transportation and Highways), [2007] BCCA 592 (British Columbia Court of Appeal), the appeal court overturned it. The Court held that the very broadly worded exclusion clause in the solicitation document protected the province from all liability. The Court of Appeal found “the words of the exclusion clause so clear and unambiguous that it is inescapable that the parties intended it to cover all defaults, including fundamental breaches.”

Lawyers and procurement professional alike have been debating this controversial ruling since it was rendered, and we held our collective breath, wondering if the Supreme Court of Canada – one of our fundamental sources of law that governs procurement and contracts – would wade in.

Now, it has.

What the Appeal Implies

By agreeing to hear this appeal, the Supreme Court appears to be recognizing that an incongruence exists between the very clear implied obligations of fairness that it made law in Her Majesty the Queen in the Right of Ontario and the Water Resources Commission v. Ron Engineering & Construction (Eastern) Ltd., [1981] 1 S.C.R. 111, and the ability to ‘contract out’ of those very same obligations with legal impunity.

In essence, two areas of law are colliding at the moment: regular contract law that depends on the express language agreed to between the parties, and our unique competitive bidding law designed to protect the integrity of the process.
So which set of laws will prevail? What will the Supreme Court of Canada decide? Is the integrity of process that was so critical to our highest court in 1981 no longer in need of judicial protection?

If the Appeal Succeeds

If this appeal succeeds, the Supreme Court will hold that the exclusion clause does not protect the province, in spite of its clear wording, and the Court will restore the finding of damages payable to Tercon Contractors for breach of Contract A obligations. This will be a clear signal that organizations cannot play fast and loose with the implied obligations of fairness and expect to be fully protected by carefully crafted exclusion clauses.

It will be helpful for us all to get some judicial clarity on where the line is ... how far is too far when it comes to excluding fundamental contractual obligations in a competitive procurement situation?

If the Appeal Fails

If the appeal is not successful, the law will stand as set out in the 2007 B.C. Court of Appeal decision. The choice to contract out of all implied obligations of a competitive process will be legally sanctioned by the highest court in the land.

This will leave procurement professionals wrestling with the business decision of whether including such language is wise for any given procurement. Even if the decision is to include such language merely as a legal ‘safety net’ for an intended fair and transparent process, there are still many other considerations. Is there robust competition for this opportunity, or is there a very limited pool of contractors? Will such broad language deter suppliers who may see it as onerous? Will it create confusion internally about the extent of obligations owed? What is your organization’s reputation for fairness of process, and how will such clauses affect that reputation? Do your organization’s policies and applicable trade-agreement obligations affect your ability to include such clauses?

What Happens Next

For the moment, the debate is far from over. Now we look forward to some clear guidance from the Supreme Court of Canada on balancing the major risks and opportunities associated with a competitive procurement process.

And no matter which way the Court decides, its judgment will be binding on all trial and appeal courts across Canada.

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