REDUCING LIABILITY IN TENDERING: AN UPDATE

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The firm's 2001 seminar included a presentation entitled "Reducing Liability in Tendering." The paper upon which that presentation was based described three options for reducing a local government's liability exposure in procurement: (1) include a clause in the tender instructions expressly denying any intention to enter a tender process contract ("Contract A") with bidders; (2) allow Contract A's to arise but include clauses that prevent a court from inferring Contract A terms that are difficult to comply with, such as terms implying an obligation to reject materially non-compliant bids or to treat all bidders fairly and equally; and (3) include a clause limiting the quantum of damages for breaches of Contract A.

The 2001 paper briefly discussed a fourth option, being the inclusion of a clause expressly excluding all damages for breaches of Contract A, but suggested that there was some risk that a court would not give effect to a clause excluding all liabilities for contract breaches.

The three options discussed in our 2001 paper have now each been the subject of judicial comment. The fourth option (precluding liability through an exclusion clause) is the subject of a case heard by the Supreme Court of Canada on March 23, 2009 and for which at the time of writing we are awaiting judgment.

In this paper, we will discuss a number of cases in which the above-noted techniques for liability avoidance have been dealt with. We will also include a brief discussion of the *Tercon* case, since the Supreme Court's judgment in that case has the potential to significantly affect the law of tendering.

I. NO CONTRACT A

In *M.J.B. Enterprises Ltd.* v. *Defence Construction (1951) Ltd.*, [1999], 1 S.C.R. 619 *[M.J.B.]*, the Supreme Court of Canada made it very clear that ordinary contractual principles apply in the field of tendering law, such that a particular tender invitation will only constitute an offer to enter a tender process contract (i.e. "Contract A") with bidders if the tender instructions reveal an intention on the part of the owner to be contractually bound to bidders. The Court said the following:

> …
>
> The submissions of the parties in the present appeal appear to suggest that Ron Engineering stands for the proposition that contract A is always formed upon the submission of a tender and that a term of this contract is irrevocability of the tender; indeed, most lower courts have interpreted Ron Engineering in this manner. There are certainly many statements in Ron Engineering that support this view. However, other passages suggest that Estey

> J. did not hold that a bid is irrevocable in all tendering contexts and that his analysis was in fact rooted in the terms and conditions of the tender call at issue in that case. As he stated, at pp. 122-23:
>
> > The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide. There is no disagreement between the parties here about the form and procedure in which the tender was submitted by the respondent and that it complied with the terms and conditions of the call for tenders. Consequently, contract A came into being. The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation On both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tender.
>
> Therefore, it is always possible that contract A does not arise upon the submission of a tender, or that contract A arises but the irrevocability of the tender is not one of its terms, *all of this depending upon the terms and conditions of the tender call.* [emphasis added] To the extent that Ron Engineering suggests otherwise, I decline to follow it.

This passage clearly indicates that it is open to an owner to include in its tender instructions an appropriately worded clause expressly denying any intention to enter Contract A's with bidders and that where the owner does so, no Contract A's will arise.

While the *M.J.B.* case signalled a clear route to owners wishing to avoid liability exposure when conducting procurement processes, i.e., draft the tender instructions to expressly deny any intention to be contractually bound to bidders, the case law continues to be filled with hundreds of cases in which owners have been found liable for breach of a Contract A with a disappointed bidder. This suggests that relatively few owners are taking advantage of this liability avoidance option, despite the ease with which it can be accomplished.

There are, however, a few examples of cases in which owners have avoided liability by inserting "No Contract A" clauses in their procurement documents.

In *Maple Ridge Towing (1981) Ltd.* v. *Maple Ridge (District),* 2001 BCSC 1328 *[Maple Ridge Towing],* for example, the Supreme Court of British Columbia considered whether the District of Maple Ridge might be liable for breach of Contract A with the unsuccessful respondent to a

request for proposals for towing services. The Court held that no claim against the District could succeed, because the only possible claims were breach of Contract A claims and the District had protected itself against such claims by including a clause in the RFP expressly denying intention to create Contract A. The Court said the following:

> I conclude in any event that no contract was formed when the plaintiff submitted its bid. Clause 9.1 of the RFP is in bold type and reads as follows:
>
> > The District of Maple Ridge and the District of Pitt Meadows shall not be obligated in any manner to any Proponent whatsoever until a written agreement has been duly executed relating to an approved proposal.
>
> In my view, this clause is a complete answer to the breach of contract question.
>
> In M.J.B. Enterprises v. Defence Construction (1951) Ltd., [1999] 1 S.C.R. 619 at 632, the Supreme Court of Canada explained that the formation of contract A, like the formation of all other contracts, is dependant on the intentions of the parties. Clause 9.1 shows a clear intention on the part of the District of Maple Ridge and the District of Pitt Meadows not to be contractually bound as a result of the RFP process. The plaintiff cannot establish a breach of contract because no contract could have been formed until a written agreement was duly executed after a proposal was approved.
>
> I conclude that there was no contract on which the plaintiff could rely.

A similar result was reached by the British Columbia Court of Appeal in *Budget Rent-A-Car of B.C. Ltd.* v. *Vancouver International Airport Authority*, 2009 BCCA 22 *[Budget Rent-A-Car]*. In this case, Budget asserted that the airport authority ("YVRA") had become liable to compensate it as a result of its choice to lease Budget's site to Hertz Canada following the issuance of an RFP. The RFP included the following clause 1.6:

> The QTA and Service Centre lands have improvements. During the first five years of the Land Lease, the successful Proponents will not be required to pay any case rent to the Airport Authority for the improvements. If a successful Proponent displaces an existing concessionaire, the successful Proponent shall be required to reimburse the displaced concessionaire an amount equal to one-third the capital cost of those improvements. This payment must be made before March 1, 2005. Part 3, Schedule F sets out in

> detail the capital costs of the QTA and Service Centres. Part 3 also includes drawings of the QTA and Service Centre lands. Proponents are expected to take the cost of such improvements into consideration when making their choice of QTA and Service Centres.

Budget asserted that YVRA had become contractually bound to it by this clause to ensure that the successful proponent (Hertz) compensate Budget after displacing Budget (an "existing concessionaire") following the RFP award.

The Court of Appeal held against Budget on the ground that the RFP included a clause denying any intention to be contractually bound to proponents. The Court put it in this way:

> In its factum, Budget cites no authority to support its contention the RFP was a contract between it and YVR, but relies on provisions of the RFP. In oral argument, counsel for Budget relied on *M.J.B. Enterprises Ltd.* v. *Defence Construction (1951) Ltd.* [1999] 1. S.C.R. 619, and asserted that when the process of submitting proposals closed, a contract, contract A, was formed. The terms of the contract were said to be those of the RFP.
>
> In *M.J.B. Enterprises Ltd*, Iacobucci J., for the Court, stated at para. 15 that "any discussion of contractual obligations and the law of tendering must begin with this Court's decision in [*Ontario* v. *Ron Engineering & Construction (Eastern) Ltd.,* [1981] 1. S.C.R. 111]". In that case, Estey J. held that the tendering process involved two contracts: contract A, which was formed when a tender was submitted in response to a call for tenders; contract B, the contract that was entered into as a result of the acceptance of the tender. He described contract A as a unilateral contract. As noted in *Elite Bailiff Services* v. *British Columbia*, 2003 BCCA 102, Iacobucci J. expressly did not endorse that characterization of contract A (para 18). He affirmed that the submission of a tender can give rise to contractual obligations, but stated whether such obligations arise depends on the terms and conditions of the call for tenders. The inquiry is whether the parties intended "to initiate contractual relations by the submission of a bid in response to the invitation to tender" (para. 23).
>
> In *M.J.B. Enterprises,* the Court determined a contract had been formed, stating at para. 23:
>
> > In the present case I am persuaded that this was the intention of the parties. At a minimum, the respondent offered, in inviting tenders through a formal tendering

> process involving complex documentation and terms, to consider bids for contract B. In submitting its tender, the appellant accepted this offer. The submission of the tender is good consideration for the respondent's promise, as the tender was a benefit to the respondent, prepared at a not insignificant cost to the appellant, and accompanied by the Bid Security.

In *Ron Engineering*, the Court concluded Contract A had been formed, stating at 119:

> There is no question when one reviews the terms and conditions under which the tender was made that a contract A arose upon the submission of a tender between the contractor and the owner.

The gloss that Iacobucci J. put on the decision in *Ron Engineering* was explained in *Martel Building Ltd.* v. *Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860:

> 80. In *M.J.B. Enterprises Ltd*. v. *Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, this Court confirmed that contract A also imposes obligations on the owner. It further explained that *Ron Engineering* does not stand for the proposition that contract A will always be formed, nor that the irrevocability of the tender will always be a term of such contract. Whether the tendering process creates a preliminary contract is dependant upon the terms and conditions of the tender call.

These comments lead to a consideration of the terms and conditions of the RFP.

The parties rely on various provisions of the RFP to support their respective positions. In my view, the answer is in s.13.1(a) which states:

> This RFP does not constitute an offer. No agreement shall result upon submission of Proposals. [YVR] shall not be under obligation to enter into any agreement with anyone in connection with this RFP and responses received. [YVR] will not have any obligation to anyone in connection with this RFP unless [YVR] executes and

> delivers an agreement in writing approved by [YVR's] senior management.
>
> …
>
> In my view, the RFP was not a contract between Budget and YVR. Section 1.6 has no contractual force between these parties.

While *Maple Ridge Towing* and *Budget Rent-A-Car* were both cases involving RFP's rather than more formal tender processes, the decisions in those cases that the owners had avoided Contract A obligations by inserting into the procurement instructions a clause expressly denying contractual intention was not dependant on that fact. It is clear from the reasoning in the cases that even where a tender process is used an owner can avoid Contract A, and the liability exposure associated with Contract A by including a clause denying any intention to be contractually bound to bidders during the tender evaluation process.

Of course, if an owner chooses to limit its liability exposure by avoiding Contract A's entirely, care should be taken to ensure that other provisions of the tender instructions are not inconsistent with the "No Contract A" clause. For example, provisions that impose contractual obligations on bidders, such as clauses requiring bidders to leave their bids open for acceptance for a specified period (and the bid bonds associated with such clauses) should be deleted if an owner wishes to ensure that its tender instructions are not interpreted as revealing an intention to enter Contract A's with bidders. Similarly, owners wishing to exclude Contract A's should avoid phrases such as "the owner reserves the right to" which imply that with respect to subjects outside the reservation the owner may be intending to assume enforceable obligations.

II. CONTROLLING THE CONTRACT A TERMS

In *M.J.B.*, the Supreme Court of Canada affirmed that even in cases where a tender or RFP process gives rise to Contract A the terms of that Contract A are entirely dependant on the provisions of the procurement invitation. As we reproduced above:

> …
>
> The submissions of the parties in the present appeal appear to suggest that Ron Engineering stands for the proposition that contract A is always formed upon the submission of a tender and that a term of this contract is the irrevocability of the tender; indeed, most lower courts have interpreted Ron Engineering in this manner. There are certainly many statements in Ron Engineering that support this view. However, other passages suggest that Estey J. did not hold that a bid is irrevocable in all tendering contexts and that his analysis was in fact rooted in the terms and conditions of the tender call at issue in that case. As he stated, at pp.122-23:

> The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide. There is no disagreement between the parties here about the form and procedure in which the tender was submitted by the respondent and that it complied with the terms and conditions of the call for tenders. Consequently, contract A came into being. The principal term of contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders.
>
> Therefore, it is always possible that contract A does not arise upon the submission of a tender, or that contract A arises but the irrevocability of the tender is not one of its terms, all of this depending upon the terms and conditions of the tender call. To the extent that Ron Engineering suggests otherwise, I decline to follow it.

Despite the Supreme Court's clear statement that the terms of Contract A depend on the language of the particular tender documents at issue, many owners, consultants and lawyers have continued to assume (incorrectly) that every tender process gives rise to certain basic contractual obligations, including in particular an obligation to treat bidders fairly and equally and an obligation not to accept materially non-compliant bids. But as *M.J.B.* should have made clear, there are no inviolable rules of tendering. If an owner wishes to be able (without undue risk of liability for breach of Contract A) to select any bid it wishes, including a bid which may fail iN a "material" way to conform with the tender instructions, all the owner needs to do is to include in its tender documents a clause confirming its right to do so.

In *Kinetic Construction Ltd.* v. *Comox-Strathcona (Regional District)* 2004 BCCA 485 the British Columbia Court of Appeal rejected Kinetic's claim that the Regional District had breached Contract A by awarding a contract to a rival bidder whose bid failed to conform with the tender instructions. The Court rejected the claim because the tender instructions included a clause allowing the owner to accept a non-conforming tender:

> The contract in question between the appellant and the respondent contains the following clause:
>
> 23 ACCEPTENCE

> 1. The Owner reserves the right in its absolute discretion to accept the Tender which it deems most advantageous to itself and the right to reject any or all Tenders, in each case without giving any notice. The lowest or any Tender will not necessarily be accepted. In no event will the Owner be responsible for the costs of preparation or submission of a Tender.
>
> 2. Tenders which contain qualifying conditions or otherwise fail to conform to the instructions to Tenderers may be disqualified or rejected. The Owner may, however, in its sole discretion, reject or retain for its consideration Tenderers, which are non-conforming because they do not contain the context or form required by the Instructions to Tenderers or for failure to comply with the process for submission set out in these Instructions to Tenderers.
>
> The learned trial judge said as follows:
>
> > [42] I am satisfied that the Robinson bid was capable of acceptance by the Regional District. The language of the tender documents clearly provided that the Regional District had the discretion to "reject or retain… Tenders which are nonconforming because they do not contain the content or form required by the Instructions to Tenderers".
>
> There was no breach of contract between the appellant and the respondent because of the clause I have just referred to. Each case must depend on the exact words of the contract between a prospective plaintiff and defendant. Accordingly, I see no error in the conclusion reached by the learned trial judge and I would dismiss this appeal.

The same point was made by Read J. of the Alberta Court of Queen's Bench in the following passage from *NAC Construction Ltd.* v. *Alberta Capital Wastewater Commission* (2005), 46 C.L.R. (3d) 258:

> I do not accept that there is an inviolable rule established through the case law which prohibits parties in a tendering process from agreeing that an owner will be permitted to accept a non-compliant bid, even materially so. There is no reason to conclude that parties in a bidding process should be bound by principles of contract law which are any different from the familiar general principles that exist in any other venue: Except in the rare instances where a contract will be found void for public policy reasons, parties are

> free to contract on any terms they may wish to. They are then bound by their agreement. As Braidwood J.A. said in Kinetic, at para. 4, "[e]ach case must depend on the exact words of the contract between a prospective plaintiff and defendant".

The vast majority of the numerous tendering lawsuits involve claims by an unsuccessful bidder that the owner has breached a Contract A obligation owed to it by awarding the Contract B to a bidder who failed in some fashion to fully comply with the tender instructions. As the above-noted cases make clear, such cases can be easily avoided by the simple mechanism of inserting into the tender instructions an appropriately worded clause giving the owner the express right to accept non-conforming bids, even materially non-conforming bids.

III. LIMITING AND EXCLUDING LIABILITY

There is one other set of measures which may protect owners who are found to have breached their Contract A obligations to a bidder: limitation and exclusion of liability clauses.

By limitation clauses, we refer to clauses that limit a local government's liability for Contract A breach to a certain amount, for example, the bidder's reasonable bid preparation costs.

By exclusion clauses, we mean clauses that would totally exclude local government liability for breach of Contract A.

A. Limitation Clauses

In 2003, the BC Court of Appeal upheld a limitation of liability clause in a tender call for bailiff services: *Elite Bailiff Services Ltd. v. British Columbia*, 2003 BCCA 102. The clause in question read:

> **3.9 Limitation of Damages**
>
> In addition to the preceding paragraph, the proponent, by submitting a proposal, agrees that it will not claim damages in excess of an amount equivalent to the reasonable costs incurred by the proponent in preparing its proposal for matters relating to the agreement or in respect of the competitive process, and the proponent, by submitting a proposal, waives any claim for loss of profits if no agreement is made with the proponent.

The aggrieved bidder argued that the use of the word "agreement" and the phrase "matters relating to the agreement or in respect of the competitive process" in the paragraph were unclear. The Court of Appeal disagreed and held that the limitation clause in this case was enforceable.

B. Exclusion Clauses

In 2007, the BC Court of Appeal released its decision in *Tercon Contractors Ltd. v. British Columbia (Ministry of Transportation and Highways)*, 2007 BCCA 592 [*Tercon*]. The case has since been appealed and at the time of writing we are awaiting the Supreme Court of Canada's decision which, regardless of the outcome, will have a significant impact on tendering law in Canada.

In *Tercon*, the Court of Appeal upheld an exclusion clause shielding the Provincial government from liability for breach of Contract A. The clause read:

> 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 Court of Appeal found that despite the breadth of this clause, the parties were both sophisticated and there was no question of this being an unconscionable bargain. However, the Court of Appeal also acknowledged that the fair and orderly underpinnings of tendering law could be thwarted by excluding owner liability for Contract A breaches, however egregious. Yet the Court of Appeal held that it is up to industry to decide whether to bid on projects where the owner attempts to completely exclude liability for itself in the same manner as the Province did in *Tercon*. Ultimately, they interpreted the clause in a manner that permitted the Province to escape liability for breach of Contract A.

In *Cherubini Metal Works Ltd. v. New Brunswick Power Corp.*, 2007 NBQB 157, Rideout J. of the New Brunswick Court of Queens Bench similarly upheld the following exclusion clause:

> WAIVER
>
> By submitting a Tender, the Tenderer acknowledges NB Power's rights under this Tender and absolutely waives any right, or cause of action against NB Power, its officers, directors, employees or agents by reason of NB Power[']s failure to accept the Tender submitted by the Tenderer, whether such right of cause of action arises in contract, negligence, bad faith or otherwise.

As in *Tercon*, Rideout J. found there was nothing unconscionable about the bargain struck by the parties and the owner was accordingly shielded from liability.

By contrast, however, there is the decision of the Ontario Court of Appeal in *Maystar General Contractors Inc. v. Newmarket (Town)*, 2009 ONCA 675 [*Maystar*]. If *Maystar* is any indication, courts may be inclined to distinguish *Tercon* where the terms of Contract A are equivocal in the sense that the bidder retains rights while the owner purports to exclude liability.

In *Maystar*, the Town of Newmarket argued that it was entitled to accept a non-compliant bid by virtue of the following clauses:

1.12.3.2	The owner hereby reserves the right, privilege, entitlement and absolute discretion and for any reason whatsoever to: ...
.7	Waive any informalities, requirements, discrepancies, errors, omissions, or any other defects or deficiencies in any Bid Form or Bid submission.
.8	Accept or reject any unbalanced, irregular or informal Bids ...
1.12.5	The Bidder acknowledges that the Owner may rely upon the criteria, which the Owner deems relevant, even though such criteria may not have been disclosed to the Bidder. By submitting a Bid, the Bidder acknowledges the Owner's rights under this Section and absolutely waives any right, or cause of action against the Owner and its consultants, by reason of the Owner's failure to accept the Bid submitted by the Bidder, whether such right or cause of action arises in contract, negligence, or otherwise.

The Ontario Court of Appeal considered the BC Court of Appeal's decision in *Tercon*, but decided *Tercon* was distinguishable. The Ontario Court of Appeal held that the language of the RFP in *Tercon* pertaining to exclusion of liability was much broader. In this case, the Ontario Court of Appeal found the exclusion of liability language was ambiguous. The exclusion clause shown as 1.12.5 above was prefaced by other language acknowledging the bidders' rights. Nor, in the Ontario Court of Appeal's judgment, did 1.12.3.7 and 8 permit the Town to accept non-compliant bids. Therefore, on the whole the Ontario Court of Appeal did not interpret the document in a manner that permitted the Town to escape liability for accepting non-compliant bids. It would appear then that some courts may be inclined to distinguish the BC Court of Appeal's decision in *Tercon* and deny enforcing an exclusion of liability clause where the owner does not have a clear right to accept non-compliant bids under the terms of Contract A.

However, as we mentioned earlier, we are awaiting the Supreme Court of Canada's decision in *Tercon*. The authority of the Ontario Court of Appeals decision in *Maystar* may be severely diminished by the Supreme Court of Canada's decision in *Tercon*. Regardless of the result, we

hope that the Supreme Court of Canada's decision will create some certainty around the use of exclusion of liability terms in Contract A's.