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NICE TRY

In the beginning, before Ron Engineering, the tender scene was fluid. If a general could demonstrate that it made a mistake in its tender amount, then an owner could not pounce on that mistake and hold the general to the tender amount. Conversely, nothing bound the owner to accept any particular tender; it contracted with whom it wished.

Then along came Ronnie in 1981 and turned the law of tender on its ear. In essence, the Supreme Court of Canada refused to allow a general to withdraw a bid after tenders were opened unless there was an arithmetical mistake that was apparent on its face, something that almost never happens. As part of that change in the law, owners were supposed to award the contract to the low bidder. Sounds fair: the general gives, the general gets – and similarly the owners.

However, owners simply do not play fair. They are pleased to accept the benefits of a general being bound to its tender, but keep inserting clauses that limit or even remove their duties to award the contract to the low tenderer.

First, they inserted the privilege (weasel?) clause (i.e. the low or any tender need not be accepted). The Supreme Court said that the privilege clause was not sufficient to eliminate an owner's liability if the owner breached its duty to treat tenderers fairly, which included an obligation on the owner not to accept a non-compliant tender. The owners then inserted another clause, with different variations, by which a general would agree that it would have no cause of action even if an owner breached its duties under tendering law

and played fast and loose.

One such clause was the subject of Tercon Contractors Ltd. v. British Columbia, a February 2010 decision of the Supreme Court of Canada.

Dispute

The Province of British Columbia issued an RFP for the construction of a highway. It limited the bidders to six generals who had been involved in a prior expression of interest that the Province had issued for the same project.

One of the bidders decided that it did not have sufficient expertise in aspects of the construction of the highway and teamed up with another non-approved general on a joint venture basis sharing profit, loss, and risk. The bidder pretended in its response documents that the new general was but a subcontractor. However, this was a ruse and the Province knew of it and agreed to it.

After the Province accepted the tender of the non-eligible bidder, the low compliant bidder sued for its lost profit.

The Province argued that the chosen bidder was compliant, but the trial judge and all judges of the Supreme Court disagreed. The Province did exactly what the Supreme Court of Canada said that an owner could not do: it accepted a tender from a non-eligible bidder and in so doing not only breached its implied duty of fairness, it breached the express terms of the RFP.

The Province, however, argued that, even with the breach, it was still not liable.

Exclusion

The Province, in its wisdom, had inserted the following clause into the RFP:

Except as expressly and specifically permitted in these Instructions to Proponents, no Proponent shall have any claim for 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. [Emphasis added.]

All members of the Court agreed on the legal principles applicable to an exclusion clause that purports to limit legal liability, but split 5-4 as to their application to the facts of the case. These principles are:

1. Does the clause do what it purports to do? Is it worded specifically enough to limit liability? This will depend on the court's assessment of the intention of the parties as expressed in the contract.
2. If the clause applies, was it unconscionable at the time the contract was made (e.g. due to unequal bargaining power)? This deals with contract formation, not breach.
3. If the clause was not unconscionable at the time it was inserted, should the court still refuse to enforce it because of an over-riding public policy?

In applying the second and third principles, the court must weigh the value that society places on enforcing contracts against the abhorrence of enforcing a clause that would shock the court's conscience.

Minority View

The minority dealt with the three principles as follows.

1. The clause says that a proponent has no claim for compensation because of "participating in this RFP." "Participating in this RFP" begins with submitting a proposal and ends with the Province choosing a successful proponent. The clause is not ambiguous and a proponent can claim no compensation.

2. Although the disgruntled general did not have the same level of power and authority as the Province, it was a major contractor and was well able to look after itself in a commercial context. It did not have to bid and therefore there was no relevant imbalance in bargaining power.

3. Although there is a public interest in a fair and transparent tendering process, the Province's performance could not be characterised as so aberrant as to forfeit the protection of the exclusion clause because:

- a) The successful bidder was a legitimate competitor.
- b) The work required a large team of trades.
- c) Although using the non-approved general as a joint venturer, not a subcontractor, did give the bidder a competitive advantage, it was not a sufficiently important breach.

Majority View

The majority dealt with the first principle differently. The Province wanted the court to interpret "participating in this RFP" to mean "submitting a proposal." The majority, however, interpreted the clause to mean "participating in a contest among those eligible to participate." It noted that (i) this interpretation made the clause compatible with other provisions of the RFP, (ii) the interpretation would not mean that every action would escape the clause, just those that

were completely outside the process, and (iii) the RFP reserved the right to the Province to cancel the RFP and propose a new RFP allowing additional bidders, a clause that would be unnecessary if the exclusion clause were as broad as the Province suggested.

If the majority had not preferred its interpretation, it would have held, alternatively, that the clause was ambiguous at best. In that case, it would have interpreted the clause in a manner that was most favourable to the bidder rather than the Province, who had drafted the clause.

Since the majority held that the exclusion clause did not apply, it did not deal with the applicability of the second and third principles.

Subs

Subs should not assume that these (unfair?) exclusion clauses only apply to

generals. Subs are deemed to be bound by the same tender clauses by which generals are bound. If an owner has an exclusion clause, then the generals have the same exclusion clause regarding the subs. Subs have fought hard to ensure that their tenders cannot be bid shopped by generals. It will all be for naught if these clauses are enforceable.

Solidarity

We see these clauses used primarily in public tenders, in particular in municipal tendering packages. The generals and subs should refuse to bid these tender calls. Once public tendering authorities note that the tenderers have gone from, say, six to three, they may get the hint that these clauses are causing an uncompetitive bid situation and a higher price. In the alternative, the generals should have the Ontario General Contractors Association or the Canadian Construction Association start some political or, dare we say, some union type action to boycott these tender calls.

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