

## FAIR PLAY AND ACCURACY ESSENTIAL DURING TENDERING PROCESS

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The importance of fair dealing and imparting accurate information in the tendering process was highlighted in a recent British Columbia Supreme Court decision, *Hub Excavating Ltd. v. Orca Estates Ltd.* In this case, the defendant hired a consulting engineer to oversee the tendering process and invite bids for a contract to clear and service the land for a Nanaimo residential subdivision called Rocky Point.

The plaintiff contractor, Hub Excavating, submitted the low bid, which was, however, approximately \$500,000 above the engineer's first estimate for bid acceptance purposes. Several hours after the bid closed, but before formal determination of an award, the engineer told the contractor that the bids were low and Hub's bid was close to the engineer's own estimate. The engineer further said he would so advise the developer and notify the contractor as soon as approval was received.

However, anticipating lower bids and citing budget overruns, the developer cancelled its planned development and sold the property. After the project's collapse, Hub questioned whether the developer ever really intended to proceed with the project or if they simply used the competitive bidding process to obtain market information on the costs of building. Hub sued the developer and its engineering consultant for the costs it had incurred in preparing its bid and for its loss of opportunity to bid on other projects.

The history of the Rocky Point project showed that, early in the design stage, the consulting engineer verbally estimated the cost of clearing and servicing the land for the 30-lot subdivision would be \$600,000. After further consideration, the engineer provided the developer with a revised written estimate of \$950,000. At that cost, the project would not have made financial sense but, even so, the developer did not withdraw the tender call. When the bids came in, Hub's \$1.1 million bid was the lowest and the consulting engineer told the contractor that its bid was "close to the engineer's estimate". Expecting to receive the Rocky Point contract, Hub did not pursue other projects. To its surprise, Hub was then told that the construction costs were too high and Rocky Point would not proceed.

Because of the special relationship of reasonable reliance, owners and their consulting engineers owe a legal duty to provide bidders with information that is accurate and sufficiently detailed to enable them to bid properly; furthermore, this duty arises before and after a contractor submits a bid. In this case, the Court held that the developer, through its engineer, misled the bidders when it said that it had prepared and approved a budget. Bidders were further misled when they were told that the project would proceed if the bids were within the range of the engineer's budget. The Court concluded that Hub reasonably relied on those representations when it decided not to submit a tender on another project.

The Court stated that an engineer retained by an owner to put together a tender package and oversee bidding must not mislead a bidder; in particular, an engineer should not cause a bidder to believe that its bid would likely be accepted by the owner. Engineers have a "special relationship" with bidders and must meet the requisite standard of care by ensuring that all bidders are treated fairly until the final decision is made, typically (although not in this instance) the awarding of a contract. In this case, the engineer had behaved unfairly — and breached his duty — by suggesting that Hub's bid, was " 'close to the engineer's estimate', when it was substantially higher". This unfairness was compounded by a delay in advising Hub the project would not proceed (after advising Hub that it had submitted the low bid) even though that decision had been made shortly after the bid opening.

The judge held that the engineer had a special relationship with the bidders since he prepared the contract documents, provided estimates for costs to complete the project, reviewed the bids, and completed an initial assessment of bid compliance; in addition, he acted as a conduit between the bidders and the developer. Further, this special relationship meant that a finding of vicarious liability against the engineering firm and developer did not bar a finding of personal liability against the engineer. The engineer had misrepresented matters by saying that the contractor's bid was close to the engineer's expectations and by indicating that the contractor's bid would be promptly accepted by the developer.

The judge found there was no conflict between the engineer's contractual obligations to the owner and his duty of care to each tenderer to provide accurate and timely information. The contractor had reasonably relied on the engineer's representations in its decision not to submit a tender for a later project that it likely would have won. Damages were based on putting the contractor back to the same position as if the representation were true. Since the engineer's misrepresentations were considered inadvertent — rather than a callous disregard — the engineer's personal liability was limited; even so, this decision effectively warns engineers that they must act appropriately when making statements to bidders during the tendering process or risk personal liability for breach of duty.

The developer, on the other hand, had deliberately misled the bidders, the Court found. In addition, it breached the duty of fairness and good faith owed in the tendering process by treating them — Hub, in particular — with “callous indifference throughout the process”. The judge declared that the owner “knew, or ought to have known,” that the engineer’s initial oral estimate of construction costs was “inaccurate” and therefore it should not have put the job out for tender “in the ‘hope’ that a contractor would make a similar mistake, and submit a low bid.”

The tender package in this case contained standard privilege clause which said that the owner was not obligated to accept any tender. But a privilege clause does not, the Court said, shield an owner from liability for negligent misrepresentation or a breach of the duty of fairness in the tendering process. Accordingly, Hub was awarded damages for the negligent misrepresentation and breach of the tender contract in the amount of \$300,000, representing the profit it likely would have earned on the subsequent foregone project. Liability was assessed at 80 per cent to the developer and 20 per cent to its consulting engineer personally. Both the developer and the engineer are pursuing an appeal.