

## VANCOUVER ISLAND CONTRACTOR LOSES APPEAL OF TENDERING CASE

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The British Columbia Court of Appeal recently clarified the nature and the scope of the duty of fairness, when it arises in tendering, in *Hub Excavating Ltd. v. Orca Estates Ltd. et al.* In doing so, the Court of Appeal overturned a trial decision awarding a contractor profits it would have earned had its tender not been rejected by the owners of a multi-phase subdivision project in Nanaimo.

The owners had called for tenders for site work and Hub Excavating submitted the lowest tender. Following the opening of tenders, the owners' representative informed Hub that its tender was "close to the engineer's estimate" of project cost and that he would contact Hub "as soon as he got the go ahead" from the owners. Later, during the 30-day tender-irrevocability period, Hub again contacted the owners' representative who advised that Hub's tender seemed to be in order and that he could see no reason why the project would not proceed. Hub then contacted the owners directly to seek their intention on the award; however, the owners were "non-committal" and simply indicated that a decision would be made the following week. Anticipating the award, Hub decided not to tender on an alternate project.

Ultimately, no contract was awarded to any of the tenderers because all tenders exceeded the owners' project budget. After the expiration of the tenders, Hub was informed that the project would not proceed. Hub then sued, claiming that the owners had breached their implied duty of fairness to Hub when they:

- (1) proceeded with a "futile tendering process" when they knew or ought to have known from the outset that the project was not economically feasible,
- (2) through their representative, made inaccurate statements leading Hub to believe that it would be awarded the contract,  
and
- (3) having decided that the project would not proceed, failed to advise Hub promptly of that decision.

Hub also sued the owners' representative for negligent misrepresentation.

At trial, Hub succeeded on all of its claims and was awarded \$300,000 for its anticipated loss of profits. The owners appealed this decision. The Court of Appeal confirmed the law that, upon submission of a compliant tender, a Contract "A" (Bid Contract) may come into existence with an owner and that a privilege clause in the tender documents ("the lowest or any tender will not necessarily be accepted") permits an owner to consider not merely the tender price but to take a "more nuanced view of costs" in deciding whether to accept a tender. The Court reiterated that Contract "A" includes an implied term that the owner must be fair and consistent in its assessment of tenders. This is the "duty of fairness".

The Court of Appeal then went on to say that it would not substitute its view of whether it made business sense for the owners in this case to decide to call for tenders. Questions as to whether to issue a call for tenders or if it was economically feasible to proceed with a project at all were discretionary business judgments. In the absence of a breach of Contract "A", the Court "should be loath to express its views on such matters". If the owners wished to "test the waters by going to tender," the Court of Appeal said that it would not second-guess that business decision on the basis of an alleged contractual duty of fairness. It was a pre-tender decision open to the owners, and no resulting inconsistent treatment of tenderers—the focus of the duty of fairness—had occurred.

Furthermore, the Court of Appeal held that the owners had no legal obligation to advise tenderers, prior to the expiration of the tender irrevocability period, of their decision not to make any award. The making of alleged inaccurate statements by the owners' representative was decided in the context of the claim for negligent misrepresentation. In this regard, the trial judge was found to have erred in concluding that Hub had reasonably relied upon the representative's statements in deciding not to bid on an alternate project.

On appeal, it was held that the owner's noncommittal responses to Hub's questions belied Hub's claim that it reasonably relied upon the earlier statements of the owners' representative. The only reasonable conclusion that could be drawn from the owners' comments is that there was some uncertainty in relation to an award and Hub should not have been content to rely solely upon the owners' representative's earlier assurances.

The decision in *Hub Excavating* emphasizes that the duty of fairness is a procedural duty to treat tenderers in an equal and consistent manner in the process of receiving, evaluating and awarding tenders. Fundamental economic decisions by an owner will not be interfered with by the courts in the absence of a breach of Contract "A".