

The Nature and Scope of an Owner's Duty of Fairness: *Hub Excavating Ltd. v. Orca Estates Ltd.*

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In 2007, the British Columbia Supreme Court in handing down its decision in *Hub Excavating Ltd. v. Orca Estates Ltd.*¹ arguably expanded the nature and scope of the duty of fairness owed by an owner to bidders in the tender process. That decision, however, was appealed by the owner and on April 17, 2009, the British Columbia Court of Appeal allowed the appeal and overturned the trial judge's decision.² In its decision, the Court of Appeal clarified the nature and scope of an owner's duty of fairness in the tender process.

The Facts

In this case, the owner had, over a period of years, developed several phases of a residential development project. In 2002, the owner had considered proceeding with "Phase 12" of the project but decided to defer it in favour of proceeding with a different phase that was considered more profitable after the owner had received a written estimate from its engineer estimating construction costs for Phase 12 at \$825,000.00. One of the issues with Phase 12 was uncertainty about the amount of rock that needed to be removed and the cost of doing so.

In 2004, the owner again considered options for proceeding with Phase 12. The owner's engineer provided an oral estimate of construction costs for Phase 12 of \$600,000 or \$650,000. Based on this estimate, the owner proceeded with putting Phase 12 out to tender and tender documents were sent out to invited bidders in April 2004. The tender documents contemplated a lump sum price and included a privilege clause which provided that the owner was not obliged to accept any of the tenders. In addition, the tender documents provided for a 60 day irrevocability period which was later reduced by an addendum to 30 days.

Shortly after putting Phase 12 out for tender, the owner's engineer revised his estimate of construction costs for Phase 12, increasing the estimate to \$950,000 with a note stating, "I knew I should never have given you a guess cost the other day. I was way out". At trial, the engineer stated that he must have been "brain dead" when he gave the original estimate of \$650,000.

¹ 2007 BCSC 1512, with supplementary reasons for judgment at 2008 BCSC 21.

² 2009 BCCA 167

After receiving the revised estimate, the owner continued with the tender process, deciding to wait to see what the bids came in at, still hopeful that the tender would result in good prices being received. Upon the tender closing on May 21, 2004, the low bidder's price was \$1,080,914.

Upon all the tenders being received, the engineer advised the contractor that its bid was "close to the engineer's estimate" and that he would advise the owner of the bids and would get back to the contractor "as soon as he got the go ahead". The contractor took this to mean that the owner would be proceeding with the project promptly and would award the contractor the job.

Shortly after the closing of the tender, the owner reviewed the bids and decided not to proceed with the project as the prices received were too high. The owner, however, failed to advise the contractor, Hub Excavating Ltd., or other bidders of its decision until the expiry of the irrevocability period.

The contractor, having learned that its bid was close to the engineer's revised estimate of \$950,000, commenced an action against the owner alleging negligent misrepresentation³ and that the owner had breached its duty of fairness by using the bidding process to obtain market information with no intention of proceeding with the project.

The Decision of the BC Supreme Court

While the trial judge accepted that the owner's decision not to proceed with the project was made for valid economic reasons, the Court focused on the owner's decision to put the project out for tender in the first place. There was no suggestion by the trial judge that the owner did not intend to proceed with the project if the bids came in at the range of the engineer's original oral estimate of \$650,000, rather, he found that the owner had no "*bona fide* belief" or "realistic expectation" that the price would come in at or under the oral estimate and had treated the contractor with "callous indifference". The trial judge did not hesitate to review the reasonableness of the owner's business decision to proceed to tender and held that the owner had no reasonable expectation of the bids being near the oral estimate and, as a result, the owner was in breach of its duty of fairness.

The Court's reasoning at trial arguably expanded the nature and scope of an owner's duty of fairness. Perhaps the most significant potential expansion to the duty of fairness was the Court's general comment that the duty of fairness could arise even before a contractor has submitted a bid, in this case being the owner's decision to proceed to tender. This represented a significant extension to the duty of fairness from previous case law and raised the question as to how an owner could be subject to a contractual duty when the contract creating that duty, being Contract A which arises upon a compliant bid being submitted, has not yet arisen.

³ While the focus of this article is on the duty of fairness, the contractor also succeeded at trial in proving negligent misrepresentation by the engineer, for which the owner was held to be vicariously liable. The finding of negligent misrepresentation was also overturned on appeal on the basis that there was no reasonable reliance by the contractor.

At trial, the Court held that the owner breached its duty of fairness in three ways:

- (1) In proceeding with a futile bidding process when it knew or ought to have known from the outset that the project was not economically feasible;
- (2) By the owner's engineer making inaccurate statements that led the contractor to believe it would be awarded the job; and
- (3) In failing to advise the contractor promptly of its decision not to proceed with Phase 12.

The Decision of the BC Court of Appeal

The owner appealed the trial decision and the British Columbia Court of Appeal allowed the appeal, holding that the trial judge had mischaracterized the nature and scope of the implied duty of fairness.

First, the Court of Appeal held that the trial judge erred in finding that the duty of fairness arose before the formation of Contract A. The Court of Appeal, relying on their earlier decision in *Midwest Management (1987) Ltd./Monad Contractors Ltd. v. BC Gas Utility Ltd.*⁴, stated that there is no free-standing duty of fairness in the bidding process independent of the contractual duty of fairness.

Second, and perhaps more importantly, the Court of Appeal held that the duty of fairness is procedural in nature. That is, the duty of fairness is "an obligation to treat all bidders fairly and equally in the process of assessing the bids" and does not extend to other aspects of the tendering process.

While the contractor argued that the Courts ought to scrutinize an owner's decision to proceed with a futile tender call on the basis that such conduct strikes at the heart of the integrity of the tender process, the Court of Appeal disagreed. The Court affirmed an owner's entitlement to make its own business judgments, refusing to substitute its view of what makes business sense for that of the owner, stating:

...Questions such as whether to go to tender, or whether it is economically feasible to proceed with a project with any of the bids submitted, are discretionary business judgments. Unless the owner has breached a contractual term, the court should be loathe to express its views on such matters...

⁴ 2000 BCCA 589

The Court of Appeal noted that the judicial scrutiny the contractor called for would create uncertainty for owners as to what pre-bid investigation and economic certainty would be required in order to avoid liability before going to tender.

In the present case, there was significant uncertainty about the amount of rock on site and cost of removal of the rock which presented challenges as to whether the project was economically feasible. The owner had decided to "test the waters" by putting the project out to tender stipulating a lump sum contract. The tender documents made it clear to the bidders that the owner was not obliged to accept any bids. While noting that the engineer's estimate of \$600,000 to \$650,000 was "clearly unrealistic", the Court of Appeal held that the answer was not judicial intervention to second guess the owner's business decision to go to tender on the basis that it was a breach of the contractual duty of fairness as the duty does not extend that far. Instead, in an approach reminiscent of the Court of Appeal's decision in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*⁵, the Court looked to industry response to curb such behaviour, noting that any perceived unfairness in the owner's conduct will be felt by the owner in damages to its reputation and its future opportunities in its business community.

The Court of Appeal also held that the alleged misrepresentation by the owner's engineer could not support an allegation of a breach of the contractual duty of fairness as it did not produce unequal or inconsistent treatment in the bid process. The misrepresentation did not affect how bids were assessed or the owner's decision not to proceed with the project. As such, the misrepresentation was only relevant to the contractor's claim for negligent misrepresentation.

With respect to the trial judge's findings that the owner breached the duty of fairness in failing to promptly advise the contractor of its decision not to proceed with the project, the Court of Appeal held that the trial judge had ignored that the tender documents provided for a 30 day irrevocability period and that the implied duty of fairness could not override that express contractual term.

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⁵ 2007 BCCA 592