

## NEW TENDERING CASE SIGNIFICANTLY EXTENDS OWNERS' DUTIES

J. Marc MacEwing  
Shapiro Hankinson & Knutson Law Corporation  
Barristers and Solicitors

The recent decision of the Supreme Court of British Columbia in *Hub Excavating Ltd. v. Orca Estates Ltd.*, 2007 BCSC 1512, appears to have significantly broadened owners' contractual duties to bidders under the tendering "Contract A". Contract A is the contract which is deemed to exist between an owner and all bidders and which has as its express terms the provisions of the tender documents.

The case involved a tender for the construction of a subdivision. The Court found that the owners had proceeded with the tendering process despite having received estimates which indicated that the project could not be constructed within their available budget. The Court also determined that the owners' engineering prime consultant had misled the low bidder Plaintiff as to the prospects for its tender being accepted, in reliance on which information the Plaintiff decided not to submit a tender for another project. The Plaintiff recovered judgment against the owners for \$300,000.00, which the Court calculated to be the profit which the Plaintiff would have earned on the other project, based on its further finding that the Plaintiff would have been the successful bidder on that project.

The case was largely decided on the basis of what the Court found to be misrepresentations made to the Plaintiff by the consultant as agent for the owners, which was held to justify the Plaintiff's recovery of damages for the lost opportunity on the other project. With respect to the Contract A/Contract B analysis of the tendering process, the case is noteworthy for stating the concept that an owner's contractual duties to bidders under Contract A commence prior to the submission of tenders:

"... The duty between the Joint Venture Defendants and Hub is based on the duty of fairness which arises when the Contract A is entered into. I consider that the duty extends beyond that, and arises even before the contractors submitted bids."

, and for extending the scope of the owner's implied duty of fairness to all bidders under Contract A.

The Court identified the following ways in which the owner, either directly or through its consultant, breached Contract A:

1. Putting the project out for tender without a bona fide belief that bids would come in at or less than the amount of the prevailing estimate.
2. Not providing the bidders with accurate information necessary for them to make an accurate bid.
3. Telling the bidder that its bid was on budget when it was not.
4. Failing to promptly advise the bidder that the bids came in too high.
5. Failing to promptly advise the bidder of the decision not to proceed with an award of contract.
6. Failing to promptly advise the bidder of the alleged non-compliance of its tender with the requirements of the tender documents.
7. Incorrectly suggesting that the bidder would get the go-ahead on the project.
8. Treating the bidder with "callous indifference".

With respect, the decision appears open to question on the following grounds:

1. It significantly restricts an owner's entitlement to look after its own interests in the formalized negotiation process of tendering. The Court specifically found that the owners decided not to proceed with the award of contract for valid economic reasons. However, it found to be wrongful bid manipulation conduct of the owners which might more innocently be characterized as hopeful testing of the market.
2. In finding "callous indifference" toward the bidders to be a breach of Contract A, it focussed on behaviour which falls far short of fraud or bad faith, which had previously

been the extremes needed to establish liability for improper motivation in the treatment of tenders.

3. It postulates that contractual duties under Contract A arise in advance of tenderers' submission of bids, when all previous case authority has identified submission as the event which creates Contract A.
4. In identifying an owner's responsibilities to promptly advise bidders concerning matters of tender compliance, budget and determination to proceed with contract award, it ignored the owners' right to rely on the irrevocability of the tenders in taking up to 60 days to determine and communicate their intentions.

It remains to be seen whether the case's extension of owners' duties will stand the test of time. Pending its possible appeal and consideration in other cases, the decision in *Hub Contracting* may perhaps best be regarded as just another step in the ebb and flow of the common law's treatment of owners' and bidders' rights and responsibilities in the tendering process.

For further information contact J. Marc MacEwing.