



CASE COMMENT

Hub Excavating Ltd. v. Orca Estates Ltd., 2009 BCCA 167

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The BC Court of Appeal decision of April 17, 2009 in *Hub Excavating Ltd. v. Orca Estates Ltd.* has overturned the BC Supreme Court finding that contractual duties under Contract A (the bid contract formed between the owner and each compliant bidder) arise in advance of the tenderer's submission of bids.

In this case, a joint-venture owner of a proposed development had proceeded with the tendering process for the construction of the project despite having insight that the project could not be built within the projected budget. The owner ultimately rejected all bids and decided not to proceed with the project for economic reasons. Hub claimed that representations made by the owner's engineer after bid closure led Hub to believe that it would be awarded the construction contract (Contract B) and caused it to forgo another bid for a nearby project that it would have likely been awarded. In addition to a negligent misstatement claim, Hub brought a claim against the owner for breach of an implied contractual duty of fairness owed to Hub under Contract A. Hub was successful on both fronts and was awarded \$300,000, representing Hub's lost profits that it would have earned on the nearby project.

The BC Supreme Court determined that the owner's contractual duty of fairness to the bidders under Contract A arose before the formation of Contract A – that is, prior to the submission of tenders – and that the owner breached this duty by issuing the tender call based on budget information which it knew, or should have known, was inaccurate.

The BC Appeal Court has rejected the lower court's interpretation of the scope of the owner's duty which it says, as an implied term of Contract A, only comes into existence when that contract is formed. Furthermore, the duty is limited to the owner's obligation to treat all bidders fairly and equally in the bid evaluation process - the duty does not extend to other aspects of the tender process. This case does not eliminate the risk of a finding of bid shopping by the owner in other circumstances.

The risk of an expanded scope of duty upon owners for their pre-bid decisions has now been curtailed by this appeal decision, an outcome that should come as a welcome relief to owners.