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Remedies for Unsuccessful Bidders on Government Contracts

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A contractor who believes that it is the lowest responsive and responsible bidder on a government contract is not awarded the contract. What remedies are available to that contractor?

Where there is an administrative procedure to resolve bid disputes, a disappointed bidder is required to exhaust administrative remedies (*i.e.*, pursue the bid protest to its conclusion) before a court will accept jurisdiction. Thereafter, judicial action can be taken. Disappointed bidders have sought injunctive relief, recovery of lost profit and bid preparation costs. Bid preparation costs include the costs of preparing models, photographs, diagrams, drawings, plans and specifications.

Injunction

Disappointed bidders sometimes seek an injunction to prevent the award of the government contract to another bidder or seek declaratory relief to award the disappointed bidder the contract. Before the court can order a temporary injunction, the complaining party generally must establish: (1) a likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) public interest considerations. If injunctive relief is awarded, a bond is required.

In reviewing the action of the government authority, the unsuccessful bidder has a heavy burden. The unsuccessful bidder must show that the action taken is arbitrary, capricious, a clear violation of a public bidding law or the subject of fraud or corruption. *Overstreet Paving Co. v. State DOT*, 608 So.2d 851 (Fla. 2d DCA 1992); *Santa Rosa Island Authority v. Pensacola*

Beach Pier, Inc., 834 So.2d 261 (Fla. 1st DCA 2002); *Dedmond v. Escambia County*, 244 So.2d 758 (Fla. 1st DCA 1971); *Aurora Pump v. Goulds Pumps, Inc.*, 424 So.2d 70 (Fla. 1st DCA 1982).

In determining whether an action is arbitrary or capricious, courts will not generally interfere even though reasonable men could differ and the decision might appear to some to be erroneous. *System Development Corp. v. Department of HRS*, 423 So.2d 433 (Fla. 1st DCA 1982). Stated differently, where a decision is based on an honest exercise of discretion, that decision will not be overturned by a court. *Central Florida Equipment Rentals, Inc. v. Lowell Dunn Co.*, 586 So.2d 1171 (Fla. 3d DCA 1991).

An example of a clear violation of the bidding laws is where the deviation in the bidding process gives a bidder an advantage not enjoyed by other bidders. *Harry Pepper & Assocs. v. City of Cape Coral*, 352 So.2d 1190 (Fla. 2d DCA 1977); *Tropabest Foods, Inc. v. State Dept. of Gen. Svcs.*, 493 So.2d 50 (Fla. 1st DCA 1986).

Few courts, however, have overturned a governmental decision to make the award to the successful protestor because it interferes with the authority's discretionary right to reject all bids. See *Gtech Corporation v. State of Florida Dept. of the Lottery*, 737 So. 2d 615 (Fla. 1st DCA 1999) ("the remedy for a violation of contract procurement procedures is within the discretion of the agency. Consequently, the court reviews the department's decision by the abuse of discretion standard under [Florida

law]"); *Miami-Dade County v. Church & Tower, Inc.*, 715 So. 2d 1084, 1089 (Fla. 3d DCA 1998) (denying an injunction to prevent award of a contract where the county determined that the contractor seeking the injunction was not a "responsible bidder" based upon disputes between the county and the contractor concerning the performance of the contractor's previous work, which resulted in the contractor being terminated and litigation between the county and the contractor. The county's honest exercise of discretion "will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.").

Lost Profits

Unsuccessful bidders have also sought the recovery of lost profits. Under Florida law, an unsuccessful bidder on a government contract cannot recover lost profits. See, *e.g.*, *Sutron Corp. v. Lake County Water Authority*, 870 So.2d 930 (Fla. 5th DCA 2004) ("Disappointed bidders on public works contracts cannot recover lost profits resulting from an award to another less responsive bidder nor can they in cases where all bids are rejected.).

Lost profits are not recoverable by an unsuccessful bidder even where the public entity admits that it acted arbitrarily and capriciously in failing to award the contract to the low bidder. This was the holding in *Miami-Dade County School Board v. J. Ruiz School Bus Service, Inc.*, 874 So.2d 59 (Fla. 3d DCA 2004). In that case, several bus companies submitted the low bids for certain school bus routes. The bus companies alleged that the school board wrongfully denied them the award of the contracts and filed a lawsuit seeking lost profits. The trial court found that the school board acted arbitrarily and

capriciously and awarded the bus companies lost profits. The school board appealed but did not challenge the trial court's finding that it acted arbitrarily and capriciously. The appellate court reversed and held that lost profits are not recoverable by a bidder who was wrongfully denied a public contract. The appellate court further held that the bus companies were entitled to equitable relief in the form of future comparable contracts, if possible, or, in the alternative, their bid preparation and/or bid protest costs. The appellate court's rationale in rejecting the bus companies' lost profit claim was that taxpayers and that the general public do not benefit from allowing a disappointed bidder to recover lost profits. Although a disappointed bidder on a government contractor cannot recover its lost profits, it may recover its bid preparation costs.

Bid Preparation Costs

Unsuccessful bidders have also sought the recovery of their bid preparations costs. These claims are based upon the theory that an implied contract arises from the government procurement process which imposes on the government a duty to consider all bids fairly and honestly, the breach of which entitles an unsuccessful bidder to recover its bid preparations costs. The theory of implied contract, is more specifically referred to as promissory estoppel. This theory provides a basis to permit a bidding party to recover damages if the governmental entity promises to award the contract to the lowest responsible bidder, the bidding party relies upon that promise in submitting its bid, and the governmental entity improperly refuses to grant the low bidder the contract.

In one case, *Royal American Dev., Inc. v. City of Jacksonville*, 508 So.2d 528 (Fla. 1st DCA 1987), a contractor who bid on a public housing construction contract and was told by the city's public housing authority that its proposals had been tentatively selected was

entitled to recover its preconstruction expenditures (preparation of working drawings and specifications). The city council failed to enact certain ordinances by which the final construction projects were to be approved. The court held that under the doctrine of promissory estoppel the contractor was entitled to rely upon representations made by the housing authority which caused the contractor to incur preconstruction expenditures.

In another case, *City of Tallahassee v. Blakenship & Lee*, 736 So.2d 29 (Fla. 1st DCA 1999), a disappointed bidder on a natural gas line project sued the city for disqualification from bidding. Shortly before the bids were opened, the city informed the bidder that it was not qualified because it did not have significant experience in installing polyethylene pipe. The company's bid was submitted, but was not opened and would have been the low bid. The company challenged the action under the city's bid protest procedure and when the protest was denied, suit was filed in the circuit court. The company argued that the city's notice came too late and sought to recover the costs it expended in preparing the bid and in pursuing the bid protest. The trial court ordered the city to pay the bidder its bid preparation costs, including attorney's fees, incurred in pursuing the bid protest. The appellate court affirmed the award of bid preparation costs but reversed the award of attorney's fees finding there was no legal ground for the recovery of attorney's fees.

Finally, in *City of Cape Coral v. Water Services of America, Inc.*, 567 So.2d 510 (Fla. 2d DCA 1990), an unsuccessful bidder was entitled to recover its bid preparation costs and prejudgment interest where the city failed to honor its representation that the

bid on a proposed contract would not be rejected on the ground that bidder was not a licensed general contractor and where the bidder was induced to incur costs to submit bid. The court, however, held that the bidder was not entitled to recover its lost profits or attorney's fees.

Conclusion

An unsuccessful bidder's remedy at law for wrongful denial of a government contract award is the recovery of damages, which is usually limited to bid preparation costs, and possibly injunctive relief. An unsuccessful bidder cannot recover profit it would have made out of a contract even though its bid was rejected in violation of law or even if the governmental authority acknowledges that it acted arbitrarily and capriciously. ■

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