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Public Contracts—A New Right for an Unsuccessful Bidder

A disappointed low bidder on a federal government contract brought suit to recover lost profits and expenditures made in preparing his bid. The bids had been solicited under The Armed Services Procurement Act of 1947 which directs that contracts shall be awarded ". . . to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided,* That all bids may be rejected when the agency head determines that it is in the public interest so to do."[1] Seven bids were entered and the contract awarded to the highest bidder. Plaintiff showed that independent tests found plaintiff's product met specifications as well as the successful high bidder's product, and also that the same situation had occurred before with the same bidders involved. The government agency awarded the contract on the grounds that the successful bidder was the only one meeting specifications. In the Court of Claims *held:* Where the government does not invite bids in good faith but invites bids with intent wilfully, arbitrarily, and capriciously to disregard its obligation to accept the bid most advantageous to the government, the expenses of preparing such bid may be recovered on the theory that the government impliedly warrants honest consideration of bids submitted.[2]

The most interesting facet of this case is that it allows a new form of recovery to an unsuccessful bidder. Historically, the unsuccessful bidder has had little success in court.[3] This is particularly

[1] The Armed Services Procurement Act of 1947, 62 Stat. 21, 41 U.S.C.§ 152(b) (1952).

[2] Heyer Products Co. v. United States, 140 F. Supp. 409 (1956).

[3] Exemplary of the holdings on the subject is the following: "The mandamus, being brought solely in behalf of the petitioners, it was incumbent upon them to allege a special pecuniary interest in the matter, showing a clear legal right to the relief asked, which they did not and cannot do, for the reason that the rejection of their bid did not give them any private right which they could enforce by mandamus or otherwise. This is for two reasons: (1) Because the advertisement was not an offer of a contract, but an offer to receive proposals for a contract, and (2) because the statute requiring that contracts be let to the lowest and best bidder was designed for the benefit and protection of the public and not the bidders." State *ex rel.* Johnson v. Sevier, 339 Mo. 483, 485, 98 S.W.2d 677, 679 (1936) overruling State *ex rel.* Journal Printing Co. v. Dreyer, 183 Mo. App. 463, 167 S.W. 1123 (1914) and State *ex rel.* First Nat'l Bank v. Bourne, 151 Mo.

evident in cases against state and federal instrumentalities, as opposed to municipalities.[4] The general theory denying recovery to an unsuccessful bidder is that no vested legal right in the bidder, which would give rise to a cause of action, has been infringed. In applying this theory, the courts have voiced a number of reasons for their reluctance to find a cause of action. The most prevalent reasons are (1) a contract was never consummated, thus failure of performance on either side would not evoke an actionable right for breach,[5] and (2) statutes governing the award of bids are enacted for the benefit of the public and not the bidders, thus a failure to follow the mandates of the statute conferred no actionable right upon the bidder.[6] Some other reasons have been the judicial reluctance to interfere

App. 104, 131 S.W. 896 (1910). Also: Perkins v. Lukens Steel Co., 310 U.S. 113 (1914); Wooldridge Mfg. Co. v. U.S. 235 F.2d 513 (D.C. Cir. 1956); Fulton Iron Co. v. Larson, 171 F.2d 994 (D.C. Cir. 1948); Colorado Paving Co. v. Murphy, 78 Fed. 28 (8th Cir. 1897); Dickey v. Volker, 321 Mo. 235, 11 S.W.2d 278 (1928); State *ex rel.* Doniphan State Bank v. Harris, 265 Mo. 190, 176 S.W. 9 (1915); Anderson v. Public Schools, 122 Mo. 61, 27 S.W. 610 (1894); State *ex rel.* State Journal Co. v. McGrath, 91 Mo. 386, 3 S.W. 846 (1886); State *ex rel.* Nebraska Bldg. and Inv. Co. v. Board of Commissioners. 105 Neb. 570, 181 N.W. 530 (1921). *Contra,* Brown v. City of Phoenix, 77 Ariz. 368, 272 P.2d 358 (1954); St. Landry Lumber Co. v. Town of Bunkie, 155 La. 892, 99 So. 687 (1924); Fourmy v. Town of Franklin, 126 La. 151, 52 So. 249 (1910); State v. York County, 13 Neb. 57, 12 N.W. 816 (1882) (statute conferred ministerial duty only); Sellitto v. Cedar Grove Township, 132 N.J.L. 29, 38 A.2d 185 (1944); Peterson Contracting Co. v. City of Hackensack, 99 N.J.L. 260, 122 Atl. 741 (1923) (statutes construed to be for protection of bidders); State *ex rel.* United District Heating, Inc., v. State Office Bldg. Comm'n, 124 Ohio St. 413, 179 N.E. 138 (1931).

[4] The reason for this is that unsuccessful bidders have frequently brought their actions in the form of a taxpayer's suit. While a taxpayer normally has a cause of action against a municipality, he does not generally have one against the federal government under the doctrine of Massachusetts v. Mellon, 262 U.S. 447 (1923). *Cf.* representative taxpayer suits: O'Brien v. Carney, 6 F. Supp. 761 (D.C. Mass. 1934); Colorado Paving Co. v. Murphy, 78 Fed. 28 (8th Cir. 1897); Adolphus v. Baskin, 95 Fla. 603 116 So. 225 (1928); Seysler v. Mowery, 29 Idaho 412, 160 Pac. 262 (1916); Barber County v. Smith, 48 Kan. 331, 29 Pac. 565 (1892); Hutchinson v. Skinner, 21 Misc. 729, 49 N.Y.S. 360 (1897); City of Tacoma v. Bridges, 25 Wash. 221, 65 Pac. 186 (1901); Jones v. Reed, 3 Wash. 57, 27 Pac. 1067 (1891).

[5] O'Brien v. Carney, 6 F. Supp. 761 (D.C. Mass. 1934); Commissioners *ex rel.* Snyder v. Mitchell, 82 Pa. 343 (1876); Heffner v. Commissioners, 28 Pa. 108 (1857).

[6] Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); American Smelting and Refining Co. v. United States, 259 U.S. 75 (1921); United States v. New York and Puerto Rico Steamship Co., 239 U.S. 88 (1915); Colorado Paving Co. v. Murphy, 78 Fed. 28 (8th Cir. 1897); O'Brien v. Carney, 6 F. Supp. 761 (D.C. Mass. 1934).

with administrative activities[7] and the fear that to entertain such suits would unnecessarily clog the courts.[8] In the present case, the court expressly recognizes and approves of the first two reasons. However, the court holds that beyond these theories an unsuccessful bidder, at least in a suit against the federal government, has another basis for establishing his cause of action, i.e., that one who bids for a contract of the federal government has a right to have his bid honestly considered. This right being present, an implied promise of fair consideration respecting bids submitted accompanies every invitation for bids. An implied contract arises upon the submission of the bid which is breached by failure of the administrative agency to give fair consideration to the bid. From the breach of this implied contract, the unsuccessful bidder's cause of action arises and he may recover the expenses of preparing his bid. As a result of this unprecedented reasoning, the decision in the *Heyer* case is unique among the unsuccessful bidder cases.

The conventional actions potentially available to the unsuccessful bidder are mandamus to compel award of the contract, mandamus to compel readvertising for bids, injunction to stay award of the contract, and a contract action for damages for loss of profits. The first three actions are governed by the varying statutory provisions relating to the award of public contracts. The first problem met in the mandamus actions is whether the government officer authorized to award the contract is granted discretion in making the award. If a strictly ministerial duty involving no discretion is present, the unsuccessful low bidder normally acquires a cause of action and may recover.[9] If some discretion is allowed by the statute, the unsuccessful bidder normally may not recover.[10] The courts have been extremely liberal in discovering authority for discretionary action under the statutes, holding provisions which require an award to "lowest respon-

[7] See Comment, 44 Yale L.J. 149 (1934).

[8] Louisiana v. McAdoo, 234 U.S. 627, 632 (1914).

[9] State *ex rel.* Woodruff-Dunlap Printing Co. v. Cornell, 52 Neb. 25, 71 N.W. 961 (1897); State *ex rel.* Whedon v. York County, 13 Neb. 57, 12 N.W. 816 (1882).

[10] United States *ex rel.* Goldberg v. Daniels, 231 U.S. 218 (1913); State *ex rel.* Doniphan State Bank v. Harris, 265 Mo. 190, 176 S.W. 9 (1915); State *ex rel.* State Journal Co. v. McGrath, 91 Mo. 386, 3 S.W. 846 (1886); State *ex rel.* Nebraska Bldg. and Inv. Co. v. Board of Comm'rs. 105 Neb. 570, 181 N.W. 530 (1921); State *ex rel.* Union Fuel Co. v. City of Lincoln, 68 Neb. 597, 94 N.W. 719 (1903); State *ex rel.* Silver v. Kendall, 15 Neb. 262, 18 N.W. 85 (1883).

sible bidder," "lowest and best bidder,"[11] or allow the rejection of all bids[12] to vest a wide discretion in the administrative officials. Some jurisdictions recognize that there is a limit to the exercise of discretion and allow review where the administrative action has been found arbitrary or fraudulent.[13] Consequently, the unsuccessful bidder's remedy under mandamus actions has been extremely limited.[14] By much the same reasoning, the unsuccessful bidder has little success in maintaining an action for injunction since he cannot show infringement of a right necessary to constitute a cause of action.[15] Finally, since he cannot prove a contract, the bidder's remedy for loss of profits is virtually non-existent.[16]

To determine if the Court of Claims was wise in broadening the restricted remedies available to the unsuccessful bidder, it must be considered whether the policy determinations in recognizing a bidder's right to have his bid honestly considered override

[11] See note 10, supra. Cf. Stanley-Taylor Co. v. San Francisco, 135 Cal. 486, 67 Pac. 783 (1902) (arbitrary action immaterial); State *ex rel.* Dale v. Board of Education, 9 Ohio Dec. N.P. 336, 6 Ohio N.P. 347 (1899) (not limited to considering pecuniary responsibility); Commissioners *ex rel.* Snyder v. Mitchell, 82 Pa. 343 (1876) (may consider judgment and skill, honest mistake does not void discretion); Times Publishing Co. v. City of Everett, 9 Wash 518, 37 Pac. 695 (1894) (bidder who brings suit as taxpayer cannot have mandamus for arbitrary action although can have injunction in taxpayer status).

[12] Stanley-Taylor Co. v. San Francisco, 135 Cal. 486, 67 Pac. 783 (1902); State *ex rel.* Globe Publishing Co. v. Saline County, 19 Neb. 253, 27 N.W. 122 (1866); State *ex. rel.* Shay v. McCormack, 167 App. Div. 854, 153 N.Y. Supp. 808 (1915).

[13] Landsborough v. Kelly, 1 Cal.2d 739, 37 P.2d 93 (1934) (taxpayer may bring suit to control arbitrary abuse of discretion); State *ex rel.* Johnson v. Sevier, 339 Mo. 618, 98 S.W.2d 677 (1936) (bidder has no cause of action although taxpayer may sue for arbitrary abuse of discretion); State *ex rel.* Globe Publishing Co. v. Saline County, 19 Neb. 253, 27 N.W. 122 (1886); State *ex rel.* United District Heating, Inc. v. State Office Bldg. Comm'n, 124 Ohio St. 413, 179 N.E. 138 (1931) (bidder has cause of action and may sue for arbitrary abuse of discretion).

[14] Mandamus requiring readvertising has been allowed. See People *ex rel.* Hilton Bridge Constr. Co. v. Aldridge, 13 App. Div. 24, 43 N.Y.S. 99 (1897). For other mandamus actions see notes 15-17, infra.

[15] Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Colorado Paving Co. v. Murphy, 78 Fed. 28 (8th Cir. 1897); O'Brien v. Carney, 6 F. Supp. 761 (D.C. Mass. 1934).

[16] Wooldridge Mfg. Co. v. United States, 235 F.2d 513 (D.C. Cir. 1956); Royal Sundries Corp. v. United States, 111 F. Supp. 136 (E.D.N.Y. 1953); Talbot Paving Co. v. City of Detroit, 109 Mich. 657, 67 N.W. 979 (1896); East River Gas-Light Co. v. Donnelly, 93 N.Y. 557, 48 Sickels—(1883).

the practical objections to such a suit. An implied promise of fair consideration is not squarely established by any other case authority. Several cases through dictum have indicated that perhaps there should be such a promise.[17] In addition, it might be inferred from the statements of the Comptroller General[18] and the Attorney General[19] that such a right is administratively recognized. The strongest argument, however, is public policy.[20] It is uniformly recognized that a duty of fair consideration is owed to the general public to prevent corruption and to insure economical spending of the public monies. By the same token, it is submitted, without regard to whether the established practice of competitive bidding is wise or not, fair consideration of bids is a necessity to the maintenance of the competitive bidding system. Without such an assurance of fair dealing, many bidders could become unwilling to expend the large sums required to prepare bids. The answer to the objections is more difficult. While the courts quite properly

[17] ". . . The purpose of these statutes and regulations is to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition. In the furtherance of such purpose, invitations and specifications must be such as to permit competitors to compete on a common basis." United States v. Brookridge Farm Inc., 111 F.2d 461, 463 (10th Cir. 1940) (dictum).

"It is true that there is implicit in the invitation to bid . . . an undertaking of good faith on the part of the agency of acquisition, in deciding whether or not to enter into a contract of purchase, once the bids have been received and considered." Royal Sundries Corp. v. United States, 112 F. Supp. 244, 245 (E.D.N.Y. 1953) (dictum).

". . . There must be a point of time at which discretion is exhausted. The procedure for the advertising for bids for supplies . . . to the Government would else be a mockery—a procedure, we may say, that is not permissible but required . . . By it the Government is given the benefit of the competition of the market and each bidder is given the chance of a bargain. It is a provision, therefore, in the interest of both Government and bidder, necessarily giving rights to both and placing obligations on both. And it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own." United States v. Purcell Envelope Co., 249 U.S. 313, 318 (1919) (dictum).

[18] 17 Comp. Gen. 554; 13 Comp. Gen. 274, 277. See Welch, The General Accounting Office in Government Procurement, 14 Fed.B.J. 321, 327 (1954).

[19] 38 Op. Atty. Gen. 555, 558 (1937).

[20] See Comment, 44 Yale L.J. 149 (1934).

are loathe to interfere in matters concerning administrative agencies, it appears that when the agencies are unable effectively to cope with arbitrary and capricious behavior within the scope of their activity,[21] the courts should step in to help right the wrong if it should prove necessary. Another major argument of the courts in denying the unsuccessful bidder suits has been the fear of a flood of litigation that might result.[22] The sheer volume of government contracts poses a tremendous problem.[23] Additional checks upon administrative agencies may help the competitive bidding system to serve its purpose more effectively. Another consideration in allowing such suits appears to be whether such a suit will have any more of a deterrent effect upon corrupt government officials than a Congressional investigation did[24] and whether the costs of maintaining such a suit may consume any recovery which is allowed. The answers will depend upon the circumstances of each individual case. But, despite the fact that the remedy may not be adequate in all cases, it appears that it should have a healthy effect upon competitive bidding. And this new remedy to correct great injustices to bidders should outweigh any disadvantages additional litigation arising from this restricted remedy might produce.

It appears the *Heyer* case achieved a valid result. However, as the court states, the rule of the case should be severely limited. It should not be allowed to disturb the general theory that a bidder has no automatic right of action whenever his bid is rejected. Rather it should only be applied where the presence of irregular circumstances is clearly shown. The necessary prerequisites of

[21] An example is where under identical circumstances and between the same parties as involved in the *Heyer* case the bid was given to the highest bidder. A Senate committee investigated the situation and condemned the occurrence as "a shameful story." A short time later the request for bids which gave rise to the *Heyer* case brought about the same condemned situation. The annual report of the Senate Select Committee on Small Business is very revealing on this point. S. Rep. No. 1092, 83d Cong., 2d Sess. (1954).

[22] Comment, 2 U.C.L.A. L. Rev. 382, 389 (1955); Comment, 44 Yale L.J. 149 (1934); Note, 64 Harv. L. Rev. 679, 680 (1951).

[23] 15 billion dollars of military contracts yearly. 102 Cong. Rec. A271 (1956). ". . . Federal construction during the fiscal year 1954 will approximate 6 billion dollars. The Government of the U.S. will continue to be the largest, most extensive, and prolific client of the construction industry in this country." Gantt, Selected Government Contract Problems, 14 Fed.B.J. 388 (1954).

[24] See generally, S. Rep. No. 1092, 83d Cong., 2d Sess. (1954).

such a suit appear to be (1) a public contract[25] and (2) clear evidence that the administrative agency arbitrarily and capriciously decided, prior to the opening of the bids, who would receive the contract regardless of what each bid offered. Under such circumstances the unsuccessful bidder should be entitled to recover the expenses of preparing his bid.

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