Nebraska Law Review

Volume 36 | Issue 4 Article 10

1957

Contracts—Municipal Corporations—Right of an Offeror to Withdraw Bid before Acceptance

Floyd A. Sterns
University of Nebraska College of Law

Contracts—Municipal Corporations—Right of An Offeror to Withdraw Bid Before Acceptance

Plaintiff, city housing authority, invited bids for construction work reserving the right to reject any and all bids. Defendant surety's principal submitted the low bid along with the requisite bid bond, the bond being conditioned upon the withdrawal of the bid within thirty days, failure to enter the contract and perform. The Commissioners of the plaintiff adopted a motion to award the contract to the principal "subject to the approval of the Public Housing Administration." The next day the principal notified the plaintiff of a mistake in computation of his bid and withdrew. Almost three weeks later, plaintiff approved the bid and the principal declined to execute the contract. Plaintiff sues defendant surety for the difference between bid price and next lowest bid. The trial court directed a verdict for the plaintiff. *Held,* reversed with directions to enter judgment for defendant.[1]

The defendant surety offered two defenses to the action on the bond contract: (1) An offer may be withdrawn at any time before it is accepted; and (2) Even if the offer was accepted, mistake vitiated the contract. The second point was never reached because the court allowed the defense in point one.

An elementary rule of contract law is that an offer may be withdrawn at any time before acceptance.[2] The rule is predicated

[25] A public contract appears to be a necessary requisite for this type of suit. In the governmental field it is essential that competitive bidding be kept alive to insure stringent application of the taxpayer's funds. A different situation exists in a private contract. There, not only are a limited number of persons affected by the mismanagement of funds instead of the general public, but also in the case of corporations, stockholders appear to have a more direct control through election of directors as contrasted to the appointment of government administrative officials.

[1] Peerless Casualty Co. v. Housing Authority, 228 F.2d 376 (1955).

upon the assumption that consideration is necessary to the formation of a contract and that until acceptance there is no consideration by the offeree.

Although applied by the court, this rule has no relevance to the case. The suit was on the bond, a sealed instrument, which, by state statute,[3] was presumed to have been executed for consideration. The court converted the suit on the bond into a suit for damages for breach of contract by stating (1) that the liability of the surety was the same as the liability of the principal, (2) that the bid and the bond should be read together, and (3) that a bid bond ought to be treated the same as a cash bid deposit. Since the court treated the action as one for damages for breach of contract, the important issue in the case is whether or not ordinary contract principles apply to an offer to a governmental body in which the bid is to be left open for a certain length of time.

A few courts have made an exception to this rule. The first clear-cut federal decision recognizing this exception was *Refining Associates v. United States.*[4] It held that a bid on a United States Government contract, where the bid was invited under a provision that it would not be withdrawn within fifteen calendar days, could not be withdrawn during that time. The court relied heavily on *Scott v. United States.*[5] In the *Scott* case the bidder was allowed to withdraw his bid but his deposit was forfeited. The *Refining Associates* case simply bridged the gap from the *Scott* case holding that a deposit was forfeited to its holding that the bid itself could not be withdrawn and said that damages would lie. Whether or not the *Refining Associates* case follows logically from the *Scott* case is debatable, but even so the consequences as applied to the parties are completely different. The measure of damages in the *Refining Associates* case is that actually sustained, but only by the remotest chance would a bid deposit forfeiture as in the *Scott* case equal the actual damages.[6]

Regardless of the dissimilar practical effects of the two cases,

[2] 1 Williston, Contracts § 55 (Rev. ed. 1936).

[3] Ga. Code Ann. § 20-301 (1936).

[4] 109 F.Supp. 259 (1953).

[5] 44 Ct. Cl. 524 (1909).

[6] Id. at 525 the court states that the highest bid to purchase the government land was 5¼ cents per acre, but because of the withdrawal the government was forced to accept the next highest bid, 3¼ cents per acre. That bid was $11,535 so it is mathematically certain that the government was deprived of considerably more than the $500 forfeited bid deposit.

it is clear that both bind the offeror for the expressly agreed period of time. Both cases acknowledge the general contract rule that an offer may be withdrawn at any time before it is accepted, and each considers its factual situation as warranting an exception. The *Scott* case does not state that consideration is not necessary and advances no theory for binding the offeror. The court in the *Refining Associates* case offered the rationale that where there was no mistake, unreasonable delay, or the like, there could be no injustice in holding the bidder to the conditions of the invitation for bids, and found consideration to leave the bid open for fifteen calendar days in the right of the bidder to have his bid considered fairly. The court said:

> Plaintiff submitted its bid subject to . . . [provisions of the Armed Services Procurement Regulations] and agreed that defendant should have 15 days from the date of opening to consider the bids. In so doing, plaintiff was accorded the right of having its bid considered on its merits, and this right was conditioned on the premise that the bid would remain open during the time specified.[7]

In any event if the court is advancing a vested right concept into government contracts it has found acceptance in *Heyer Products Co. v. United States*[8] in which a bidder was awarded damages for expenses incurred in preparing a bid where it was shown that the government did not invite bids in good faith. The federal government, then, if the *Heyer Products* case is to be followed, in enjoying special favors when dealing with bidders as it did in *Refining Associates* case, must reciprocate by good faith considerations of the bids.

In the field of municipal corporation law there has been practically no break from the general contract rule. However, in *Lupfer v. Board of Chosen Freeholders*,[9] although allowing a bidder to regain his bid deposit because the county had waited an unreasonable length of time before accepting (no time limit being set by statute or invitation for bids) the court said in dictum:

> A competitive bid submitted under statutory privilege and regulation is in the nature of an option to the municipality, based upon a valuable consideration, to which the principles of law governing options, generally, are applicable. The consideration passing is the privilege of bidding and the legal assurance to the successful bidder of an award as against all competitors. Such an option pending action consistent with its terms, expressed or implied, is

[7] 109 F.Supp. at 262.

[8] 140 F.Supp. 409 (1956).

[9] 87 N.J. Eq. 491, 100 Atl. 927 (1917).

> a vested right of contract, of which the municipality cannot be deprived, except perhaps by its consent, and is remediable at law by an action for damages, or enforceable in equity by specific performance, if feasible, or may be summarily dealt with by forfeiture of the penalty prescribed, To sanction any other rule would open the door to fraud, and render wholly abortive the legislative scheme for public competitive bidding.[10]

This result binds the offeror on the basis that consideration is found in the privilege of bidding—a completely different rationale than that found in the *Scott* case but similar to the rationale of the *Refining Associates* case.[11]

In private contract law the general rule has been seriously questioned in only two fields. These are firm offers and auctions without reserve. The firm offer is an arrangement by which a general contractor submits a bid in reliance on firm offers from his subcontractors or suppliers. An illustrative example is *Northwestern Engineering Co. v. Ellerman*[12] in which a subcontractor was held to his bid on the theory of promissory estoppel.

The auction situation is expressed in the Restatement of Contracts as follows:

> At an auction, the auctioneer merely invites offers from successive bidders which he may accept or reject unless, by announcing that the sale is without reserve or by other means, he indicates that he is making an offer to sell at any price bid by the highest bidder. In that case after a bid has been made the auctioneer cannot withdraw. . . .[13]

It is submitted there are at least two policy considerations which should be considered when bids are submitted to governmental bodies in which government officers are restricted in accepting bids to a greater extent than officers of private corporations.[14]

Where the contracting agency is bound by law to accept the lowest bid or the lowest and best bid or by similar restrictions, if that bid is allowed to be withdrawn after bids are opened and before acceptance, the bidder is allowed to make an unreasonably low bid and if before acceptance by the governmental body, material prices, labor costs, and the like turn in the bidder's favor, he will not

10 Id. at 930.

11 See note 7 supra. It should be noted that the correctness of this statement rests upon the premise that the rationale in the *Refining Associates* case is based upon a vested right concept.

12 69 S.D. 397, 10 N.W.2d 879 (1943).

13 Restatement, Contracts § 27 (1932).

14 See, e.g., Neb. Rev. Stat. § 39-205 (Reissue 1952).

withdraw. In effect, the bidder is hedging his bid and if a favorable change in prices does not come about the governmental body is put to the task and expense of proceeding through the bidding process again or more probably accepting another bid, thereby losing the competitive bid advantages. The second policy consideration is the patent possibilities of collusion among bidders which could result in considerable loss to the municipalities. For example, a municipality requests bids on a certain project and receives bids from A, B, C and D. A and B collude—A submits a bid upon which he believes he will make a small profit; B submits a bid upon which he could make a substantial profit. When the bids are opened it is found that A had the lowest bid and B the next lowest. A withdraws and B gets the bid. If A is the lowest bidder and B is third or fourth lowest bidder, A does not withdraw if he thinks he has sufficient margin to take the chance. Of course, A may not have the lowest bid or B may not have the next lowest bid and the scheme will not work, but where the bidders are few in number such as is the usual case where small municipalities are involved, the mathematical possibilities of working the scheme are manifest. If the governmental subdivision could accept a bid at the time of the opening of the bids without going through any statutory formalities of acceptance the possibilities of detriment to it are removed just as they are when an agent of a private corporation is empowered to accept any bid he deems best immediately upon opening.

It is the time lag between bid opening and bid acceptance in public contract letting which justifies an exception to the general contract rule which allows the offeror to withdraw at any time prior to acceptance. Ordinarily, a private party can exercise almost unlimited discretion in selecting bids and, save where there is a need for checking complex specifications, can award a contract as soon as bids are opened. But, being restricted to the lowest or lowest and best bid or the like, and also restricted as to finality of selection by the statutory requirements of ratification by a legislative body with its attendant slowness of action the agent of a governmental body is particularly vulnerable to the aforementioned practices of withdrawal of bids.

This precise problem has not been decided in Nebraska but Nebraska, following the general rule, has held that the offeror may be released on grounds of mistake.[15]

[15] See Olson Const. Co. v. School District of Scottsbluff, 153 Neb. 451, 45 N.W.2d 164 (1950).

It seems probable that the Nebraska Court will be faced with this problem and increased municipal activity makes this probability almost a certainty. It is submitted that where a revocation is not founded upon impossibility or mistake, serious consideration should be given to a deviation from ordinary contract rules. It is true that even if bidders are not allowed to withdraw, all possibilities of fraud are not eliminated. Agreements to refrain from bidding among prospective bidders and collusion of all or a part of the parties who would be eligible to bid are other possibilities. This does not vitiate the proposition that the proper method to deal with this situation is to follow the rule which reduces fraud possibilities as much as possible.

HISTORICAL NOTE

During the Civil War, General Grant complained of the problem thus:

> I learned from undoubted authority that there was a combination of wealthy and influential citizens formed . . . for the purpose of monopolizing the army contracts. . . .
>
> The modus operandi for getting contracts at a high rate, I suppose, was for a member of this association to put in bids commencing at as low rates as the articles could be furnished for, and after they were opened all would retire up to the highest one who was below any outside person, and let him take it. In many instances probably they could buy off this [outside] one for a low figure by assuring him that he could not possibly get the contract, for if he did not retire it would be held by the party below.[16]

Floyd A. Sterns, '57

[16] Letter to Congressman E. B. Washburne, quoted at p. 151 in Woodward, Meet General Grant (Premier ed. 1957).