Workshop B: Creative Collateral Claims Against Public Entities and their Agents

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INTRODUCTION

It is often the case that a low bidder for a construction project is not awarded the contract. When this occurs, the disappointed low bidder may suspect it was not given the contract because of inappropriate reasons, such as prior disputes with the owner or its design engineer, the contractor’s reputation, or the owner’s subjective desire to do business with a different contractor regardless of the bids submitted. The contractor may be correct, but its legal options are generally limited. Most states and local municipalities either do not permit or severely restrict the rights of disappointed bidders to challenge non-federal construction contract awards. One such case was Cedroni Assoc. v. Tomblinson, Harburn Assoc., 492 Mich. 40 (2012), where it was alleged by the disappointed bidder that the engineer tortiously interfered with its right to be awarded the contract as the lowest responsible bidder. While the plaintiff in Cedroni was not successful in pursuing its claim, there are other legal options available for a disappointed low bidder to challenge a public owner’s award or alternatively to seek to recover lost profits, where it should have been awarded the contract but was not due to the wrongful acts of a third party.

This paper begins with a description of the Cedroni case, in which the Michigan Supreme Court held that a disappointed low bidder cannot sue the owner for tortious interference with a business expectancy where the award is subject to the owner’s discretion and conditioned on the submission of a “responsible” bid or “qualified” bidder. The paper goes on to describe several types of legal recourse a disappointed bidder can pursue.

I. An Introduction to Cedroni Associates Inc. v. Tomblinson, Harburn Associates

The Cedroni case originated with a school construction project at Holly Academy where Cedroni Associates, Inc. was the contractor and Tomblinson, Harburn Associates (“THA”) was the design professional. During construction, there were disagreements between Cedroni and
THA over the proper ballasts to use: Cedroni took the position that the ballasts recommended by THA were not suitable. The owner ultimately replaced THA with another design firm. Thereafter, Cedroni found evidence that THA provided negative – and factually untrue – feedback to the bid evaluation committee organized by Davison Community Schools regarding the Holly project and other projects in which THA and Cedroni were involved. The school district awarded the contract to the second-lowest bidder, at an increased cost to taxpayers of over $50,000. Cedroni then sued THA, alleging that THA tortiously interfered with its business expectancy as low bidder.

The trial court granted THA’s motion to dismiss on the basis that there was no evidence of Cedroni having a reasonable or valid expectation of entering a business relationship with the school district and had likewise failed to show that THA did anything improper. The Court of Appeals reversed. See Cedroni Assoc. v. Tomblinson, Harburn Assoc., 290 Mich. App. 577 (2010). The opinion examined the terms of the school district’s bid management policy in detail, and noted the requirement that “[b]ids shall be awarded in compliance with applicable bidding obligations imposed by law to the ‘lowest responsible bidder.’” (emphasis added in opinion). Id. at 591. The opinion went on to analyze the legal criteria for determining the lowest responsible bidder, and then held that “the multiple provisions reserving the right to reject bids are subject to the provision requiring an award to be made to the lowest responsible bidder, otherwise, the ‘lowest responsible bidder’ provision is rendered meaningless and nugatory.” Id. at 593. Because the evidence submitted to the trial court created an issue of material fact as to whether Cedroni was a “responsible” bidder in addition to being low, the Court of Appeals reversed and remanded. Id. at 597. The opinion did note in passing that Cedroni’s low bidder status alone did not give it an actionable business expectancy. Id.
The Michigan Supreme Court reversed the Court of Appeals and reaffirmed the trial court’s order dismissing Cedroni’s claims. The Supreme Court first reasoned that because a disappointed low bidder has no cause of action against a municipality when its bid is rejected, Cedroni had no business expectancy in the award and could not sue the design firm, either. *Cedroni Assoc.*, 492 Mich. 40, 46 (2012). The court further concluded that the definition of “lowest responsible bidder” afforded so much discretion to the school district that the court would not second-guess its judgment, and that Cedroni’s apparent satisfaction of many of the factors defining “lowest responsible bidder” was not enough to give Cedroni a business expectancy. *Id.* at 52-53.

*Cedroni* was distinguished later in 2012 by a federal court applying Michigan law, however. *See 360 Const. Co. v. Atsalis Bros. Painting Co.*, 915 F. Supp. 2d 883 (E.D. Mich. 2012). 360 involved the plaintiff construction company’s low bid to the Michigan Department of Transportation (MDOT), which was undermined by a rival bidder who repeatedly made false statements to MDOT that the plaintiff was simply a restructured successor to a defunct company, Allstate Painting, that had a questionable history and reputation. In reality, there was some overlap between current 360 and former Allstate personnel, but the defendant’s claims that the two companies were essentially the same entity with the same checkered past were demonstrably false. The court distinguished *Cedroni* on two grounds in denying the defendant’s summary judgment motion. First, MDOT had already sent 360 a signature copy of the contract for the project, and scheduled a “preconstruction meeting” for 360’s representatives to attend. *Id.* at 900. Second, the MDOT contract was bid out under a statute requiring an award to the low bidder, not the “lowest responsible bidder.” *Id.* at 901. The court concluded that “[a] jury therefore
reasonably could conclude that the expectancy held by 360 had passed the point of ‘wishful thinking’ and matured to a ‘reasonable likelihood or probability,’ as Cedroni requires.” Id.

II. State Law on Tortious Interference Claims by Disappointed Low Bidders

The law in states that have addressed a disappointed low bidder’s right to sue for tortious interference falls into three general categories: (1) a disappointed bidder has no recognized business expectancy and therefore no cause of action; (2) the disappointed bidder’s right to sue depends upon the specific circumstances of the bid process, such as whether fraud occurred or whether the bidder had reason to expect the award based on its business history; and (3) a low bidder can be presumed to have an actionable interest in the project award.¹

A. No Business Expectancy

When no statute specifies the requirements for awarding a project, some states agree with the Alabama Supreme Court’s assessment of an owner’s rights: “You pays your money, and you takes your choice.” Stuart Const. Co., Inc. v. Vulcan Life Ins. Co., 285 So.2d 920, 923 (1973). Stated less colorfully, “[d]etermining whether a certain bidder is ‘responsible’ generally entails an evaluation of the bidder’s trustworthiness, quality, fitness, capacity, and experience . . . It is a complex matter dependent, often, on information received outside the bidding process and requiring, in many cases, an application of subtle judgment.” Roy Allan, supra, at 2 Cal. 5th 505, 519 (internal quotations and citations omitted). In both of these cases, a disappointed low bidder’s tortious interference claims were rejected based on the project owner’s right to choose a “responsible” bidder. In Roy Allan, an additional factor was the absence of a business expectancy due solely to the plaintiff’s submission of a low bid, even though the low bidder ultimately turned out to have violated applicable wage laws in calculating its bid:

¹ Several of these cases analyze private bids instead of public bids because tortious interference claims arise more commonly when there is no statute or ordinance specifying the conditions under which a bid must be awarded.
Here, when [successful bidder] allegedly submitted illegally deflated bids, plaintiffs were only one of several bidders on these public works contracts. No one knew if plaintiffs would be the lowest bidder, and the public entities had not yet decided whether or not to award the contracts. Plaintiffs cannot rely on the outcome of later events to prove that [defendant] interfered with an existing economic relationship.

_Id._ at 518 (emphasis in original). Thus, _Roy Allan_ goes even further than _Cedroni_ in rejecting a low bidder’s business expectancy, because _Cedroni_ at least recognizes that an owner’s “discretion to accept or reject bids will only be controlled by the courts when necessary to prevent fraud, injustice or the violation of a trust.” _Cedroni, supra_ at 11. _Roy Allan_ holds that even when there is fraud and/or injustice in bid process, the award of a contract remains so uncertain that a low bidder still has no recognized business expectancy.

Florida case law is similar: in both the public and private bid contexts, a competitive bidding process itself cannot establish a protected business relationship. “This is so for two principal reasons. A solicitation for bids, such as an RFP, is not a contract, but merely a request for offers from interested parties … And since a solicitation for bids encourages parties besides a plaintiff bidder to submit offers in response, the bidding process itself cannot serve as evidence that the solicitor probably would have entered into a contract with the plaintiff but for the defendant’s interference.” _Duty Free Americas, Inc. v. Estee Lauder Cos._, 946 F. Supp. 2d 1321, 1338-39 (S.D. Fla. 2013) (citations omitted). Rather, “a plaintiff must allege additional facts indicating that the relationship went beyond the bidding process and into negotiations which in all probability would have been completed.” _Id._ at 1339.

In Delaware, a low bidder on a public contract does not have an expectancy at all, because public contracts are intended to benefit taxpayers, not bidders. _James Julian, Inc. v. Dept. of Transp. Of State of Delaware_, 1991 WL 224575, at *11 (Del. Ch. Oct. 29, 2011).
B. Expectancy Depends on Factual Specifics

Other jurisdictions take the position that the existence of a business expectancy by a disappointed low bidder depends on a factual inquiry, in particular: (1) whether there was fraud in the bid process; and (2) whether the disappointed bidder’s history with the owner and work experience gave that bidder more than an aspiration of winning the award.

In McClure Enterprises Inc. v. Gen. Ins. Co. of Am., a federal court applied Arizona law to hold that a disappointed bidder stated a claim for interference with a business expectancy when it would have been the low bidder if the winning company had not committed fraud. Specifically, the “low” bidder was alleged to have listed its drivers as independent contractors and filed fraudulent insurance certificates to keep its bid down. 2009 WL 73677 at *1 (D. Ariz. Jan. 9, 2009). The court held that this was sufficient to allege tortious interference with the plaintiff’s business expectancy. Id. at *5.

The Illinois Court of Appeals recognized that interference with a business expectancy could support a tort claim if the means of competition employed by the winning bidder were wrongful or motivated by malice. Soderlund Bros. v. Carrier Corp., 278 Ill. App. 3d 606, 615-16 (1995). Although the court noted that “acts of competition which are never privileged include fraud, deceit, intimidation or deliberate disparagement,” id. at 619, it found that because the defendant merely raised a question as to whether the plaintiff (and low bidder) had the experience required for the project, and the plaintiff did not claim the information on which the defendant based this statement was false, the plaintiff could not support its claim. Id. at 621.

In Connecticut, a subcontractor can state a claim for tortious interference with its relationship with a contractor based on its business history. In Merola Enterprises v. Ericson, 1999 WL 482303 (Sup. Ct. June 21, 1999), a subcontractor had a series of contracts with a
contractor but subsequently was under-bid by one of its own employees, who was awarded the contract and started the work. *Id.* at *1. The former employee testified that he made efforts to keep his bid secret from the subcontractor, and the subcontractor’s principal testified that if he had known there were other bidders, his company would have likely reduced its own bid. *Id.* at *2. The court held that on these facts, the plaintiff subcontractor had stated a claim for tortious interference: “The plaintiff had a contractual relationship with [contractor] which, although not guaranteed for perpetuity would have been extended for at least one more contract.” *Id.* at *3.

Indiana law is similar: if a low bidder has a longstanding relationship with an owner and another bidder commits fraud to win the contract, the low bidder has an actionable business expectancy. See *U.S. ex rel. Durcholz v. FKW Inc.*, 997 F. Supp. 1143 (S.D. Ind. 1998). The plaintiff in *Durcholz* alleged that the winning bidder committed fraud and violated the False Claims Act by undercutting the plaintiff’s bid and submitting fraudulent invoices to the owner. *Id.* at 1153. The court found that because the plaintiff alleged that it had worked for the owner (the government) for over 20 years and would have contracted with the owner had the defendant not illegally interfered, the plaintiff had stated a tortious interference claim. *Id.*

In Virginia, another entity’s fraud can support a tortious interference claim, but the “plaintiff must demonstrate not only that it has a fair chance to win the contract, but that it is likely to win the contract.” *Patriot Contract Svs., LLC v. American Overseas Marine Corp.*, 2006 U.S. Dist. LEXIS 98575, at *36 (E.D. Va. 2006). In *Heard Construction, Inc. v. Waterfront Marine Construction Co.*, 2015 WL 12804564 at *3 (Va. Cir. Mar. 9, 2015), the court found that the plaintiff had stated a tortious interference claim where it was the second-lowest bidder, but the winning bidder committed fraud by misrepresenting itself as a small business in order to obtain advantages in the bid process.
C. Presumption of Business Expectancy

There are a few jurisdictions where a disappointed low bidder is presumed to have an actionable business expectancy. The Missouri Court of Appeals agreed with this viewpoint in *Killian Const. Co. v. Jack D. Ball & Assoc.*., 865 S.W.2d 889 (Ct. App. 2d Dist. 1993):

Under normal circumstances it would be expected that a school district, in order to save $24,000, would make its contract with plaintiff and not [higher bidder]. Where a proper bid is made, we cannot say as a matter of law that the lowest bidder by a substantial amount could not have a valid business expectancy that it would receive the contract if awarded. *Id.* at 892. The alleged tortious conduct at issue was simply the school district’s design consultant representing to the district that it would have recommended plaintiff for the job if the building was going to be a high-rise, but because it was going to be a single-story building it recommended a different bidder for the job. *Id.* The consultant then allegedly conspired with the winning bidder to propose more favorable project terms than those in the bid, without giving the plaintiff the opportunity to meet those terms. *Id.* at 893.

New York law has also recognized that a low bidder has a business expectancy in a public or private contract award that can support a tortious interference claim. *See Techcon Contracting, Inc. v. Village of Lynbrook*, 2004 WL 2339796, at *2 (Nassau Cty. Sup. Ct. Oct. 14, 2004). The *Techon* plaintiff alleged it was the low bidder on five projects subsequent to a project with a public owner from which it was terminated. The plaintiff claimed that Village personnel made defamatory statements to other owners about its work on the Village’s project that prevented its low bids from winning the subsequent projects. *Id.* at *1. The court did not address the likelihood that the plaintiff would have been awarded any of these projects based on its low bid, but ruled that the plaintiff had stated a claim for tortious interference because it alleged the defendant had harmed its prospective economic advantage through wrongful means. *Id.* at *2. In
the public contract context, the court determined in *Avant Graphics Ltd. v. United Reprographics, Inc.*, 252 A.D.2d 462, 463, 676 N.Y.S.2d 160, 161 (1998) that a low bidder had stated a prima facie claim of tortious interference despite the court’s finding that the bidder had no contract with the public entity, and that “[a]ll it had was a determination that it was the lowest bidder."

III. PROCEDURAL DUE PROCESS CLAIMS BY CONTRACTORS

The Fourteenth Amendment to the United States Constitution provides that no state “shall . . . deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV. The Fourteenth Amendment's due process clause contains both procedural and substantive components. “Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). This component requires the government to provide certain procedural protections whenever it deprives a person of interests that the person has acquired in certain benefits. *Bd. of Regents v. Roth*, 408 U.S. 564, 576 (1972).

Although the specific procedures required by due process vary to a degree “appropriate to the nature of the case,” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950), generally, “[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey v. Piphus*, 435 U.S. 247, 259 (1978).

“The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’” *Mathews*, 424 U.S. 348 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring)). To sustain a valid procedural due process claim, a plaintiff must show that the

This Section analyzes what constitutes property and liberty interests for the purpose of sustaining a due process claim by disappointed bidders on public construction projects.

**A. Can Contractors Maintain Procedural Due Process Claims Based on Claimed Deprivations of their Property Interests?**

To establish a claim under 42 U.S.C. § 1983, a plaintiff must show that it had a property interest which was abridged under color of state law without adequate due process. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). “Property interests . . . are not created by the Constitution.” *Id.* at 577. “Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Id.* *See also Bishop v. Wood*, 426 U.S. 341, 344 (1976) (holding that whether such claim of entitlement exists, and the sufficiency thereof, is determined “by reference to state law”). To prove a property interest in a particular benefit, one must show a “legitimate claim of entitlement” to the interest. *Id.* “[A]n abstract need or desire for it” or a “unilateral expectation” is insufficient. *Id.* Thus, whether a contractor may maintain a due process property interest claim under § 1983 varies from state to state.

Usually, whether a contractor can maintain a property interest claim depends on the state statute related to awarding public contracts. For example, in Texas, the Collin County (“County”) Purchasing Act set forth that the County could award the contract to the lowest
responsible bidder or reject all bids and publish a new bidding notice. *DRT Mech. Corp. v. Collin Cty.*, *Tex.*, 845 F. Supp. 1159, 1162 (E.D. Tex. 1994) (citing Tex. Loc. Gov't Code Ann. § 262.027(a)). The Eastern District of Texas held that, “[s]ince the county had the right to reject all of the bids and rebid the Project, the bidding statute did not create for [the plaintiff] a ‘legitimate claim of entitlement’ to the award of the contract. Moreover,

*Id.* This line of reasoning is most common. Alabama, Alaska, Arizona, Colorado, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Mississippi, Maine, Maryland,

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3 *Laidlaw Transit, Inc. v. Anchorage Sch. Dist.*, 118 P.3d 1018, 1025 (Alaska 2005) (because the relevant statute gave the defendant “discretion not to award the contract to any bidder, [it] cannot properly be read as having created a property interest”).
4 *Grand Canyon Pipelines, Inc. v. City of Tempe*, 816 P.2d 247, 250 (Ct. App. 1991) (“We hold, therefore, that Arizona follows those jurisdictions that find a bidder has no claim of entitlement to a public works contract and, therefore, no property interest in the contract.”).
5 *Ewy v. Sturtevant*, 962 P.2d 991, 995 (Colo. App. 1998), as modified on denial of reh’g (June 25, 1998) (“Bidders, as bidders, have no standing to challenge the propriety of an award of a public contract to another bidder.”).
6 See *Hi-Tech Rockfall Const., Inc. v. Cty. of Maui*, No. 08-00081, 2009 WL 529096, at *14 (D. Haw. Feb. 26, 2009) (adopting the holding of *Teleprompter of Erie, Inc. v. City of Erie*, 537 F. Supp. 6 (D. Pa. 1981) that where an “unsuccessful bidder had made only a proposal for a contract that was not accepted” that bidder “had no legitimate expectation of receiving a contract until it was actually awarded,” and thus “ha[d] not been deprived of a property interest that warrants procedural due process protection.”).
7 See *Kim Const. Co. v. Bd. of Trustees of Vill. of Mundelein*, 14 F.3d 1243, 1246–47 (7th Cir. 1994) (citing *Polyvend, Inc. v. Puckorius*, 395 N.E.2d 1376 (Ill. 1979), appeal dismissed for want of substantial federal question, 444 U.S. 1062 (1980) (Illinois Supreme Court holding that when a state entity’s advertisement for bids contains explicit language reserving its right to reject any and all bids, no bidder can claim a constitutionally protected property interest in being awarded the contract); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1080 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988) (a disappointed bidder for a public contract lacks a property interest in the award, even if that bidder has submitted the lowest conforming bid for the project).
8 *All-Star Const. & Excavating, Inc. v. Bd. of Pub. Works*, 640 N.E.2d 369, 371 (Ind. 1994) (holding that low bidder did not have any entitlement to the award of a contract that derived from statute, from legal rule, or from mutually explicit understanding, and thus no due process property interest).
Missouri,16 Montana,17 Nevada,18 New Mexico,19 New York,20 North Carolina,21 Oklahoma,22

9 Dickinson Co. v. City of Des Moines, 347 N.W.2d 436, 441 (Iowa Ct. App. 1984) (“Because of the large discretion conferred upon the city in awarding a public contract, “[i]n the absence of fraud or conspiracy, an action by an unsuccessful bidder for public work will fail . . . . As a mere bidder, [the plaintiff] had no legally enforceable contract right, property interest or entitlement which was harmed by the city's mistaken consideration of intervenors' first bid.”).
10 Interior Contractors, Inc. v. Bd. of Trustees of Newman Mem'l Cty. Hosp., 185 F. Supp. 2d 1216, 1229 (D. Kan. 2002) (holding that Kansas competitive bidding statute provides a bidder only “a unilateral hope of being awarded the contract based on its initial bid and later revised bids,” and that the State’s “considerable and substantial discretion . . . undermines any legitimate claim of entitlement by the disappointed lowest bidder,” as does the fact that the law “does not exist to benefit bidders,” but rather the public).
11 Charlie’s Towing & Recovery, Inc. v. Jefferson Cty., 183 F.3d 524, 527 (6th Cir. 1999) (Because the County reserved the right “to select the lowest and best bid, also to reject any or all bids or any part thereof,” there was “no entitlement to an award of the bid under state law, there is no constitutionally protected property interest.”).
12 United of Omaha Life Ins. Co. v. Solomon, 960 F.2d 31, 34–35 (6th Cir. 1992) (holding that because Michigan statutory and case law does not require that the lowest bidder be awarded a state contract, and because the state retained authority to reject any and all bids and to “accept” a bid only by signing a contract or a purchase, the low bidder plaintiff did not have a property interest in the award of the contract).
13 See Nelson v. City of Horn Lake ex rel. Bd. of Aldermen, 968 So. 2d 938 (2007) (holding that “because [the low bidder] had no constitutionally protected right in the [public construction] contract, we find that procedural due process is not invoked.”).
14 Carroll F. Look Constr. Co. v. Town of Beals, 802 A.2d 994, 999 (Maine 2002) (“[D]isappointed bidders do not have a property interest unless the applicable law or regulation mandated that the contracting body accept the bid and gave it no discretion whatsoever to reject the bid.”).
15 ROK Bros. v. Baltimore Cty., Md., No. CIVAWMN-09-3423, 2010 WL 1529263, at *4 (D. Md. Apr. 15, 2010) (holding that under Maryland law, municipalities are awarded “wide discretion” in “determining who is the lowest responsible bidder,” and that such “degree of discretion in the award of contracts [is] antithetical to the recognition of a property right”).
16 See Higgins Élec., Inc. v. O’Fallon Fire Protection Dist., 813 F.3d 1124 (8th Cir. 2016) (quoting Demien Construction Co. v. O’Fallon Fire Protection Dist., 812 F.3d 654, 656–57 (8th Cir. 2016) (applying Missouri law)) (“an unsuccessful bidder obtains no [due process] property right in the award of a construction contract,” even if the bidder is the low bidder, where the government body “reserve[d] [the] right to select a Bidder other than the lowest,” and “reserve[d] the right to reject any and all proposals.”).
17 ISC Distributors, Inc. v. Trevor, 903 P.2d 170, 175 (Mont. 1995) (holding that a state law that required the award of a public contract “to the responsible offeror whose proposal is determined in writing to be the most advantageous to the state” precluded the low bidder plaintiff from maintaining a property interest in the award of the contract).
18 See Fisher Sand & Gravel Co. v. Clark County, 2010 WL 09218 (D. Nev. Jan. 6, 2010) (implicitly finding the low bidder was entitled to due process and, after several deliberate attempts by the Clark County Board of Commissions to scheme around providing due process to the low bidder on subsequent rebids, entering a writ awarding the low bidder the contract and an order for Clark County to show cause as to why they should be held in contempt of court).
19 See Fisher Sand & Gravel, Co. v. Giron, 465 F. App’x 774, 776 (10th Cir. 2012) (holding that the low bidder did not have a due process property interest because there was no enforceable implied contract, despite that the public entity initially recommended awarding the contract to the low bidder).
20 See Lunati Paving & Const. of NY, Inc. v. Suffolk Cty. Water Auth., 65 N.Y.S.3d 663, 666 (N.Y. Sup. Ct. 2017) (holding that no due process property interest exists because “[n]either the low bidder nor any other bidder has a vested property interest in a public works contract).
21 See City-Wide Asphalt Paving, Inc. v. Alamance Cty., 966 F. Supp. 395, 402 (M.D.N.C. 1997) (holding that the low-bidding plaintiff does not have a property interest, and stating that “the federal courts do not, nor does the Fourteenth Amendment's Due Process Clause, function as a general overseer of arbitrariness in state and local land-use decisions.”). See also City-Wide Asphalt Paving, Inc. v. Alamance County, 132 N.C. App. 533 (1999) (same).
Pennsylvania, 23 South Carolina, 24 South Dakota, 25 Utah, 26 Vermont, 27 and Washington 28 all explicitly reject that being a low bidder—in and of itself—creates an enforceable due process property interest in being awarded that contract.

Conversely, Arkansas, 29 California, 30 Florida, 31 Georgia, 32 Idaho, 33 Louisiana, 34

22 See Buckley Const., Inc. v. Shawnee Civic & Cultural Dev. Auth., 933 F.2d 853 (10th Cir. 1991) (citing Oklahoma law) (holding that the low bidder did not have a property interest in being awarded contract.


24 Sowell’s Meats & Servs., Inc. v. McSwain, 788 F.2d 226, 228 (4th Cir. 1986) (“South Carolina law does not confer a property interest on unsuccessful bidders for public contracts” for § 1983 claims).


26 PickMeUp Med. Transp., LLC v. Utah Dep’t of Health, No. 13-CV-846, 2013 WL 6185042, at *7 (D. Utah Nov. 26, 2013) (holding that the low-bidder in a medical contract case with the State of Utah could not “meet its burden to prove a substantial likelihood of success on the merits of its claims because Plaintiff has not alleged a property interest sufficient to warrant due process protection”).

27 Skaikiw v. Vermont Agency of Agric., 198 Vt. 187 (2014) (holding that the low bidder on state contract to run subsidized program to sterilize pets for low income citizens did not have protectible property interest in contract; rather, low bidder had nothing more than unilateral hope or expectation of securing contract).


29 L & H Sanitation, Inc. v. Lake City Sanitation, Inc., 585 F. Supp. 120, 126 (E.D. Ark. 1984), aff’d, 769 F.2d 517 (8th Cir. 1985) (“In sum, this Court holds that, under Arkansas law governing competitive bidding on public contracts, the lowest responsible bidder in compliance with the bidding specifications and procedures has a legitimate expectation in being awarded the contract once the governmental body makes a decision to award the contract on which bids were solicited.”).

30 Fu-Gen, Inc. v. Los Angeles Cnty. Coll. Dist., 2012 WL 13013040, at *6 (C.D. Cal. Aug. 10, 2012) (holding that, depending on the “extent to which the decision-maker’s discretion is restrained by ‘substantive guidelines’ or ‘objective standards,’” a disappointed low bidder may have a property interest).

31 Grace & Naeem Uddin, Inc. v. N. Broward Hosp. Dist., No. 13-60815-CIV, 2013 WL 3313443, at *5 (S.D. Fla. July 1, 2013) (holding that a low bidder may have a property interest in being awarded a bid even where the municipality “retained substantial discretion,” because a municipality does “not have the authority to act arbitrarily or capriciously, or contrary to the requirements of the statute”.

32 Pataula Elec. Membership Corp. v. Whitworth, 951 F.2d 1238, 1242-43 (11th Cir. 1992) (holding that, where the definition of “lowest responsible bidder” is sufficiently defined, statute requiring award of public contract to “lowest responsible bidder” does not involve discretion by awarding body, creating a property interest for low bidder in award of public contract).

33 Scott v. Buhl Joint Sch. Dist. No. 412, 852 P.2d 1376, 1382 (Idaho 1993) (“[I]t is clear that in Idaho, and under a competitive bidding statute providing for the award of the contract to the lowest responsible bidder, the lowest bidder has a property interest in the award of the contract.”).

34 See Triad Res. & Sys. Holdings, Inc. v. Par. of Lafayette, 577 So. 2d 86, 89 (La. Ct. App. 1990), writ den., 578 So. 2d 914 (La. 1991) (holding that the “lowest responsible bidder who had bid according to the contract, plans, and specifications as advertised” had a protected constitutional property interest in being awarded a contract,” and that “[w]hile the low bidder could still be denied the contract, it could not be denied on an arbitrary or capricious basis.”
Minnesota, New Jersey, and Ohio have all found that a low bidder does (or may) have an enforceable due process property interest in being awarded a contract.

Many states have not explicitly made any determination as to whether low bidders have property interests, including Connecticut, Delaware, Massachusetts, Nebraska, New Hampshire, North Dakota, Oregon, Rhode Island, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming.

B. Can Contractors Maintain a Procedural Due Process Claim Based on Claimed Deprivations of their Liberty Interests?

The concept of “liberty” within the meaning of the due process clause of the United States Constitution
denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Roth, 408 U.S. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). In contrast to procedural due process claims based on the deprivation of a property interest, few courts have

35 Schwandt Sanitation of Paynesville v. City of Paynesville, 423 N.W.2d 59, 66 (Minn. Ct. App. 1988) (“the lowest responsible bidder in compliance with the bidding specifications and procedures has a legitimate expectation in being awarded the contract once the governmental body makes a decision to award the contract”).
36 Trap Rock Indus., Inc. v. Kohl, 59 N.J. 471, 479 (1971) (holding that low bidders who claim to be entitled to an award have property interests sufficient to challenge not receiving an award).
37 Cleveland Const., Inc. v. Ohio Dep't of Adm. Serv., 121 Ohio App. 3d 372, 394–95, 700 N.E.2d 54, 69 (1997) (“[A] disappointed bidder to a government contract may establish a legitimate claim of entitlement protected by due process by showing either that it was actually awarded the contract at any procedural stage or that local rules limited the discretion of state officials as to whom the contract should be awarded.”).
38 However, because an awarding authority is vested with broad discretion to determine the lowest responsible and qualified bidder, see Austin v. Housing Authority of the City of Hartford, 122 A.2d 399, 404 (1956) (upholding awarding authority's exercise of judgment in determining the lowest responsible bidder); Vellaco v. City of Derby, 232 A.2d 335, 336 (1966) (holding that municipality properly exercised its discretion in awarding a contract to the second-lowest bidder). Connecticut would likely find that no property interest exists, similar to New York, which is also within the Second Circuit.
39 Virginia courts have decided several cases involving due process liberty interests that also recognize that a property interest is not being claimed in that case.
reached a conclusion as to whether disappointed bidders may maintain liberty interest deprivation claims. As a result, this Section will highlight what some jurisdictions have and have not found to be sufficient to allege liberty interest claims.

1. **Disappointed Bidders May Have a Liberty Interest in their Good Name and Reputation**

An entity may have a liberty interest in its good name, and if its reputation is besmirched by governmental action, it may be entitled to a name-clearing hearing. *See Wisconsin v. Constantineau*, 400 U.S. 433, 437–39 (1971) (“[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential”). However, defamation alone does not raise a due process claim. *See Paul v. Davis*, 424 U.S. 693, 701–02, 710–13 (1976). However, such a liberty interest is implicated only when a defendant’s action forecloses virtually all other contracting opportunities or the reason for a defendant’s termination of a plaintiff’s contract or refusal to grant a plaintiff a contract is such as to suggest that the plaintiff is dishonest, immoral, mentally incompetent, disloyal, or some other reason which would “seriously damage [plaintiff’s] standing and associations in his community.” *Roth*, 408 U.S. at 572.40

One who has been dealing with the government on an ongoing basis may

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40 *See also Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 898–99 (1961) (holding that procedural due process rights were not violated by discharge of an employee for reasons which did not “bestow a badge of disloyalty or infamy” on the employee); *Shands v. City of Kennett*, 993 F.2d 1337, 1347 (8th Cir. 1993) (employee's liberty interest not implicated by discharge unless reason for discharge is extremely stigmatizing, such as accusations of dishonesty, immorality, criminality, or racism); *Smith & Wesson v. United States*, 782 F.2d 1074, 1081 (1st Cir. 1986) (liberty interest not implicated in refusal to award contract to gun manufacturer because reason for not awarding contract was not based on allegations of manufacturer’s fraud or dishonesty); *Old Dominion Dairy Prods., Inc. v. Secretary of Defense*, 631 F.2d 953, 955–56 (D.C. Cir. 1980) (liberty interests of government contractor implicated by government's refusal to award contract because government action virtually barred contractor from all further government contracts and because government's reason for refusing to award contract was based on allegations of dishonesty and lack of integrity); *Nathanson v. United States*, 630 F.2d 1260, 1265 n.3 (8th Cir. 1980) (liberty interests are implicated in discharge of employee only when the reason for discharge are stigmatizing, such as drug usage or grave character defects, as opposed to poor performance); *Myers & Myers, Inc. v. United States Postal Serv.*, 527 F.2d 1252, 1258 (2d Cir. 1975) (no deprivation of liberty interest where governmental action does not foreclose other employment opportunities and does not stigmatize).
not be blacklisted, whether by suspension or debarment, without being afforded procedural safeguards including notice of the charges, an opportunity to rebut those charges, and, under most circumstances, a hearing. Gonzales v. Freeman, 334 F.2d 570 (D.C. Cir. 1964); Horne Brothers [v. Laird, 463 F.2d 1268 (D.C. Cir. 1972)]; Old Dominion Dairy Products, Inc., 631 F.2d 953 (D.C. Cir. 1980). While the deprivation of the right to bid on government contracts is not a property interest (procurement statutes are for the benefit of the government, not bidders, Keco Industries v. [United States], 428 F.2d 1233 (Ct. Cl. 1970)), the bidder's liberty interest is affected when that denial is based on charges of fraud and dishonesty. Old Dominion Dairy Products, Inc. supra. The minimum requirements of due process are notice and an opportunity for hearing appropriate to the nature of the case. Boddie v. Connecticut, 401 U.S. 371 (1971).

Transco Sec., Inc. of Ohio v. Freeman, 639 F.2d 318, 321 (6th Cir. 1981).

2. Disappointed Bidders May Have a Liberty Interest in Being Denied Employment or Contracting Opportunities.

The Fourteenth Amendment also protects a person’s or entity’s freedom “to engage in any of the common occupations of life.” Roth, 408 U.S. at 572. This right to be free of deprivation of one’s liberty is not so broad as to protect an individual's right to a particular job, however. Instead, “[i]t is the liberty to pursue a particular calling or occupation, and not the right to a specific job, that is secured by the Fourteenth Amendment.” Piecknick v. Pennsylvania, 36 F.3d 1250, 1259–1260 (3d Cir. 1994) (internal citation and quotation marks omitted); Ulichny v. Merton Cnty. Sch. Dist., 249 F.3d 686, 704 (7th Cir. 2001) (“The due process clause of the Fourteenth Amendment secures the liberty to pursue a calling or occupation, and not the right to a specific job.”). As the Supreme Court emphasized in Roth, “[i]t stretches the concept too far to suggest that a person is deprived of ‘liberty’ when he simply is not rehired in one job but remains as free as before to seek another.” Roth, 408 U.S. at 575.

IV. Federal False Claim Act/Qui Tam Claims

As a general premise, states, countries, cities and other municipalities promulgate the bid guidelines, including when a bid protest may be brought. However, since most of these
government bodies embed the right to reject or award a contract to whomever they believe is more appropriate, bid protestors tend to be handicapped. The terms “responsible” and “responsive” which appear in most bid documents are subject to interpretation by the government body.

Most bid protests maintain that the winning bidder was not responsive to the mandates set forth in the bid specifications. Generally the bid deviation must be of a material nature, not inconsequential. Again this decision remains subject to the discretion of the authority. How then can a disappointed bidder challenge a bid in circumvention of these discretionary rules?

The False Claims Act 41 imposes liability on persons and companies who defraud governmental programs while engaging in certain acts:

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment;42

(B) knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim;43

(C) conspires to commit a violation of any of the acts (A through G);

(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces who lawfully may not sell or pledge property; or

(G) knowingly takes, uses or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

41 FCA § 3729
42 Daewoo Engineering and Construction Co., Ltd v U.S., 73 Fed Cl. 585 (2009)
43 FCA § 3729 (A)(1)
The Federal False Claims Act is very broadly defined and therefore provides the Government with a tool to be applied in many applications, including construction projects which are federally funded in total or in part. Unlike common law fraud, under the Act there is no requirement that one have the intent to deceive or defraud to be liable. For example, if a subcontractor were to submit a false pay application to the general contractor who in turn submits the pay request to the Government, both the General Contractor and Subcontractor could be held accountable.

When a contractor submits a false bid, does this give rise to a violation under the Act? While the federal courts maintain that a bid, in and of itself, is not a claim, a bid is a request for the Government to provide property (the contract) to the bidder. Once the bid is accepted and the contractor engages in any action, such as submitting a request for payment, it falls under the Act. 44 Another potential violation occurs when the contractor overstates the required involvement of minority or disadvantaged owned businesses in its bid.45 In the City and County of San Francisco v Tutor-Saliba Corp., 2005 WL 645389 the government brought a claim against the winning bidder who had represented a certain percentage of the work scope would be assigned to Minority Contractors. In failing to fulfill this promise, a claim was brought by the government and ultimately settled for $19 million. In a qui tam action, a realtor (competing bidder), armed with information regarding the contractor’s failure to enter into sub-contracts with minorities, provides a possible mechanism to challenge the bid award.46

In the case of U.S. rel Marcus v Hess, 317 U.S. 537 (1943), a Pennsylvania PWA project which was partially funded by the federal government provided an opportunity for the

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44 U.S. ex rel Stierli v Shasta Services, Inc., 440 F. Supp. 2d 1108 (2006); City & County of San Francisco v Tutor-Saliba Corp 2005 WL 645389
45 FCA § 3729(A)(1)
government to prosecute a contractor for engaging in collusive activity with other contractors bidding on the project in order to increase the amount of the bid awarded. The court found the contractor had violated the Federal False Claims Act notwithstanding the fact that this was a municipal project.

Since the advent of the Fraud Enforcement and Recovery Act of 2009, the number of claims has increased due to the strength infused into the False Claims Act by FERA. Where contractors have engaged in collusive bidding where the bid was rigged, the government has asserted violations of the False Claims Act. In this scenario, winning bidders have guaranteed that the contractor, who would otherwise be a competitor in the bid, would be the subcontractor with a kickback bonus. This would serve to increase the amount of the contract awarded.

Government employees sharing sensitive information with a bidder to the exclusion of others formed the basis for a claim under the Act. In the case of U.S. v Farina, the federal government brought an action against a supplier asserting a violation of the False Claims Act. In this instance, a government official provided pre-bid information to the supplier disclosing a competing bidder’s numbers which were lower. It was alleged that the respondent, acting as a conspirator, acquired the contract under false pretenses using insider information. Although under the present view the courts may have found the supplier liable under the Act, this 1957 decision concluded that the government could not prove liability since there was a lack of damage (i.e. the government received a more favorable bid amount).

The Federal False Claims Act provides a device for claimants other than just the Federal Government to address violations by contractors in bid situations. This is referred to as a qui tam (Whistleblower) claim. A person or a corporation (the Relator) which becomes aware of a violation by another contractor of the False Claims Act can bring a claim by submission to the
Government which thereafter may take action against the contractor. The claimant may be in line for a percentage of whatever penalty is assessed against the violator. Moreover, if the claim is initiated on time, the competing bidder (whistleblower) can secure the project if the bid is set aside.

Disappointed bidders and subcontractors can pursue a claim under the Federal False Claims Act on Federal projects or under the applicable State False Recovery Acts in challenging a bid on State projects. The goal is to convince the Government to set aside or cancel the bid, then reissue the bid. Seeking protection under the False Claims Act may provide an opportunity in challenging the bid where the traditional Bid Protest approach fails, particularly in light of the discretion enjoyed by various municipalities and states in bidding projects under their bid solicitation guidelines, such as in the Cedroni Associates case\(^47\).

States have enacted their own forms of False Claims Acts, which tend to be patterned after the Federal Act (New York,\(^48\) California,\(^49\) Virginia,\(^50\) Massachusetts,\(^51\) District of Columbia,\(^52\) Nevada,\(^53\) Alaska,\(^54\) Connecticut,\(^55\) Kansas,\(^56\) Maryland,\(^57\) Missouri,\(^58\) Delaware,\(^59\) Georgia,\(^60\) Illinois,\(^61\) Indiana,\(^62\) Michigan,\(^63\) Minnesota,\(^64\) New Hampshire,\(^65\) New Mexico\(^66\) and

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\(^49\) California: Cal. Gov’t Code §§ 12650-12656
\(^50\) Virginia: Va. Code Ann. §§ 8.01-216.1 through 8.01-216.19
\(^52\) DC: D.C. Code § 2-381.02
\(^53\) Nevada: Nev. Rev. Stat. §§ 357.010-357.250
\(^54\) Alaska: AS 37.10.110-37.10.195
\(^60\) Georgia: O.C.G.A. § 23-3-120
\(^61\) Illinois: 740 ILCS 175/1, et. seq.
\(^62\) Indiana: Ind. Code §§ 5-11-5.5-1 to 5-11-5.5-18; §§ 5-11-5.7-1 to 5-11-5.7-18
\(^63\) Michigan: MCL §§ 400.601-400.615
There are States that have chosen to expand the reach of the False Claims Acts to provide greater flexibility in bringing claims against a contractor. Some of these States (e.g., Hawaii) in attempting to broaden their reach have been found by the Inspector General to be noncompliant. On State Government projects which are partially Federally funded, a potential disappointed bidder may have a choice to make with respect to which Act to consider.

V. Claims Against Competitors

A disappointed low bidder may also have legal recourse against competitors who contributed to the owner’s rejection of its bid by making defamatory statements about the bidder’s experience, quality of work, or reputation. In Chaves v. Johnson, 230 Va. 112 (S. Ct. 1985), the plaintiff architect won a contract for studying a city’s needs for municipal construction, reviewing existing properties, and providing complete architectural services for new construction. The contract was only terminable for cause. The plaintiff submitted a cost proposal for one building, which the city counsel believed to be too high. The defendant architect, who did not bid the contract, wrote the city a letter claiming the plaintiff was inexperienced and his costs were too high. The city decided to terminate the plaintiff’s contract and retained the defendant for the same contractual scope. The plaintiff sued for defamation and tortious interference with contract. The supreme court rejected the defamation claim because the defendant’s statements did not “impugn [plaintiff’s] character or professional standing,” and were statements of opinion. Id. at 118-19. The court overruled the lower court’s dismissal of the

64 Minnesota: Minn. Stat. §§ 15C.01, et seq.
67 Washington: R.C.W. § 74.66.005, et. seq; § 74.09.230; § 74.09.210; § 48.80.010; § 43.70.075; §49.60, et. seq, § 42.40, § 42.41
tortious interference claim, however, because it was wrongful for the defendant to induce termination of the plaintiff’s contract when it was only terminable for cause. *Id.* at 121. The defendant also testified that he wrote the letter after missing the contract bid date, but wanted to win future work from the city, which the court deemed an improper motive. *Id.* 123.

Another such was *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563 (Tx. Ct. App. 2007), arising from two waste management companies’ competition for public contracts. Before the contracts were finalized, but after the plaintiff company was informally chosen for the work, the defendant company hired a public relations agent to publish an “Action Alert” questioning the plaintiff’s reputation and environmental integrity. *Id.* at 570. The plaintiff ultimately executed the contracts, but was delayed by the effects of the “Action Alert.” The court of appeals affirmed the jury’s finding that the defendant acted with actual malice in publishing the “Action Alert,” and reversed trial court’s refusal to allow jury instructions about plaintiff’s defamation per se claim because there was a question of fact as to whether the recipients of the “Action Alert” would understand it in a way that injured the plaintiff’s business reputation.

Misrepresenting a bidder’s legal history can also support a defamation claim by a disappointed bidder. In *Fisher Sand & Gravel Co. v. FNF Const., Inc.*, 2013 WL 12121867 (D.N.M. March 14, 2013), the plaintiff was rejected as a responsible bidder after two competitors made statements to public entity project owners in New Mexico and Arizona regarding the deferred prosecution agreement (DPA) the plaintiff entered into several years before to resolve a tax fraud indictment. The plaintiff lost the contract and sued for defamation. The court held the defendants liable for defamation because they portrayed the DPA as a “conviction” when it did not have that legal impact, and transmitted bid protest documents used in Arizona to the New
Mexico owner that contained the misrepresentations regarding the plaintiff’s “conviction.”

Misrepresentations arising from labor-related disputes can also support defamation claims when they prevent a low bidder from winning a contract. *J&J Const. Co. v. Bricklayers & Allied Craftsmen*, 468 Mich. 722, 664 N.W.2d 728 (2003) involved defamation claims made by a disappointed low bidder against a union representative who learned that the plaintiff was a nonunion employer. The defendant made private presentations to the municipal owner of deceptive photographs of the plaintiff’s work, and suggested that the plaintiff could not perform the work in a timely manner. The owner then awarded the contract to the second-lowest bidder based on stated concerns from the defendant’s complaints. The trial court awarded the plaintiff defamation damages in the amount of plaintiff’s lost profits, along with attorney fees.