Public Construction Projects: Not Always a Hollywood Ending

Legal Options for Disappointed Bidders on Public Projects

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The Scenario

• Public owner solicits bids, with stated intent to award to the “lowest bidder,” “lowest responsive bidder,” or “lowest responsible bidder.”

• Qualified contractor submits its bid and is read low.

• Owner awards project to another bidder even though low bidder is in fact qualified.

What are the disappointed bidder’s options?
The Cedroni Case

- School district Owner solicits construction bids.
- Owner’s Engineer contracted to review and evaluate the bidders.
- The Owner’s Engineer had been the owner’s designer on prior school project where Cedroni was general contractor.
  - Cedroni disputed Engineer’s design recommendations for ballast.
  - Owner replaced Engineer with another design firm.
- Cedroni and other contractors submit bids on new project.
- Cedroni is read low and so notified, Owner initiates evaluation process.
The Cedroni Case (cont.)

• Engineer recommends against the award to Cedroni even though references were positive.

• Cedroni protests to Owner and provides evidence to show that Engineer has misrepresented reference comments and the experience on the prior project with the Engineer.

• Owner awards to the next low bidder anyway, noting that the Engineer was consulted and stands by its award recommendation.
The *Cedroni* Case – Trial Court and Court of Appeals

- Cedroni sues the Engineer for defamation and tortious interference.
- Trial court finds no valid business expectancy and dismisses the case.
- Court of Appeals reverses, finding that the Owner’s commitment to award to the lowest “responsible” bidder creates a valid expectancy.
- Question of fact existed as to whether Cedroni was qualified.
- A dissent argued there was no valid expectancy.
The *Cedroni* Case – Supreme Court

• Majority reverses Court of Appeals and reaffirms trial court order dismissing Cedroni’s complaint.

• Disappointed bidder has no right of action against municipal owner for failure to award contract, so “it is difficult to fathom how Cedroni could have a valid business expectancy” to be interfered with.

• “lowest responsible bidder” term gives owner so much discretion that the court will not second-guess the owner’s judgment.
The *Cedroni* Case – Supreme Court (Dissent)

- Dissent argued that holding the Engineer responsible for wrongful interference with the bidding process was in the interest of the taxpayers and consistent with the intent of the bidding statutes.
- Chastised the majority for immunizing the Engineer.
- A low bidder has a reasonable expectation that it will be awarded the contract as long as it is qualified.
Cedroni Distinguished – 360 v. Atsalis

• 360 Construction is low bidder on state project, is sent signature copy of contract by owner and invitation to preconstruction meeting.

• Next low bidder tells owner that 360 is really the same entity as a defunct company with a questionable legal history and reputation.

• 360 learns of the communications and sues for tortious interference with business expectancy.

• Federal court in Michigan distinguishes Cedroni: state law required award to low bidder, not “lowest responsible bidder.” “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.”
What Are A Disappointed Bidder’s Options?

• Tortious interference with business expectancy (in a state that recognizes this claim for a disappointed bidder)
• Defamation claims
• Violation of Procedural Due Process
• False Claim Act/Qui Tam Claims
Tortious Interference with Business Expectancy

• Examples:
  • Contractor submits bid to owner and is read low
  • Rival bidder or owner’s engineer gives negative feedback about the bidder to the owner
  OR
  • Rival bidder makes a fraudulent bid that appears to be lower
  OR
  • Rival bidder uses improper means to find out about contractor’s bid and submits lower bid
  • Project is awarded to another contractor.
Tortious Interference with Business Expectancy

• Plaintiff can prevail if:
  • Defendant acted out of malice or fraud
  • State law recognizes that a low bidder can have a business expectancy in a project award
  • Plaintiff has good reason to think that it will be awarded the project (preliminary approval, prior relationship with owner)

• Defendant can prevail if:
  • Action defendant took was not legally wrongful or malicious
  • State law does not give a bidder an actionable business expectancy in project award
  • Award process has not progressed far enough to give the plaintiff anything besides “wishful thinking” of the project award.
Tortious Interference with Business Expectancy

States generally take one of three positions:

(1) No business expectancy presumed (AL, CA, FL, DE)

(2) Fact-specific inquiry into existence of business expectancy (AZ, IL, CT, IN, VA)

(3) Presumption of business expectancy (MO, NY)

Many states have not addressed viability of tortious interference claims by disappointed low bidders.
Defamation Claims Against Competitors

Example:
- Contractor submits low bid
- Competitor tells the owner negative information about the contractor
- Contractor either loses the project or has its start of the project delayed
Defamation Claims Against Competitors

• Plaintiff can prevail if:
  • Defendant’s statements were false
  • No privilege applies (e.g., qualified privilege)
  • Plaintiff can prove it was harmed by the defendant’s statements

• Defendant can prevail if:
  • Defendant’s statements were protected by a qualified privilege
  • Defendant’s statements were not false
  • Plaintiff did not suffer any damages from the defendant’s statements
Qualified Privilege

• “The determination of whether a privilege exists is one of law for the court. The elements of a qualified privilege are (1) good faith, (2) an interest to be upheld, (3) a statement limited in scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only.”
Defamation Claims Against Competitors

• Publishing false information about another bidder’s reputation and integrity.

• Misrepresenting another bidder’s criminal history.

• Union representatives can be liable for misrepresenting a bidder’s qualifications after learning the bidder is a nonunion employer.
Constitutional Due Process Claims

• Deprivation of a property or liberty interest without due process.
• Directed at Owner’s failure to provide disappointed bidder with opportunity to prove qualifications or disprove challenges.
Procedural Due Process

• 14th Amendment: no state “shall . . . deprive any person of life, liberty, or property, without due process of law.”

• To sustain a valid procedural due process claim, a plaintiff must show that the government deprived it of a protected property or liberty interest without following adequate procedural safeguards.
Procedural Due Process

• Examples:
  • Contractor submits low bid on project with specified guidelines for owner’s determination of project award.
  • Owner awards project to another bidder, despite contractor’s compliance with owner’s guidelines for project award.

OR

• Contractor is debarred from bidding on an owner’s projects based on owner’s negative opinion of the contractor, even though the contractor meets the owner’s criteria for a responsible bidder and has not had an opportunity to defend its reputation and capabilities.
Procedural Due Process – Property Interest

• Many states do not recognize a bidder’s property interest in being awarded a contract based on an expectancy analysis (*Cedroni*).

• A few states have recognized that a low bidder can have a property interest in a contract award (Georgia and Ohio).
Procedural Due Process – Liberty Interest

• “One who has been dealing with the government on an ongoing basis may 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 ...”

• “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 ...) the bidder's liberty interest is affected when that denial is based on charges of fraud and dishonesty.”

• Bidder is entitled to bid other projects without stigma.
Procedural Due Process

• Plaintiff can prevail if:
  • Owner’s award guidelines limit owner to regulatory/statutory criteria that restrict owner’s discretion.
  • State law recognizes a compliant low bidder’s property interest in a project award.

• Defendant can prevail if:
  • Owner has broad discretion to accept/reject bids.
  • State law does not recognize a bid as creating a property interest.
  • Owner’s decision is not arbitrary or capricious, and plaintiff had an opportunity to make its case to the owner.
False Claims Act/Qui Tam Claims

• Federal and State False Claims Statutes allow the government and whistleblowers to pursue claims where false statements are used to bill the government.

• This may apply where a bidder makes false statements in convincing the government to award a contract.
False Claims Act/Qui Tam Claims

• Federal False Claims Act imposes liability for (among other things): (i) presenting false claim for payment; (ii) knowingly using a false record material to a claim; (iii) conspiring to violate the Act.

• As *qui tam* relator, disappointed bidder may be able to win the project if the original winning bid is set aside for FCA violation.

• Many states have enacted their own versions of the federal FCA.

• Submitting a bid is not a claim, but a contractor’s actions after its bid is accepted can qualify as false claims:
  • Misrepresenting percent of work to be assigned to MBE/WBE contractors
  • Colluding with other contractors to inflate amount of winning bid
False Claims Act/Qui Tam Claims

• Example:
  • Contractor submits a bid on a government project but is not low.
  • Rival contractor submits a low bid, which includes misrepresentations (e.g., MBE/WBE, local business, unionized workforce).
  • Rival contractor is awarded the project and submits payment requisition to owner.
  • Contractor “blows the whistle” as a *qui tam* relator.
False Claims Act/Qui Tam Claims

• Plaintiff can prevail if:
  • Owner sets aside the winning bid and awards the project to the whistleblower.

• Defendant can prevail if:
  • Defendant did not submit any payment requisitions to the owner.
  • Claims made to the owner were not knowingly false.
Conclusion

• Being read low is often not enough to support a claim.
• The further the bid award process/preexisting business relationship has progressed, the better the disappointed bidder’s chances of maintaining a claim.
• A winning bidder’s wrongdoing can be used against it for both tort and False Claims Act causes of action.
• Due process claims may be available depending on state/municipal regulations.
• A competitor’s motives in providing negative information to the owner can support a disappointed bidder’s claim.