

Does the lowest bidder have a business expectancy?

This column highlights a recent judicial decision or Michigan Municipal League Legal Defense Fund case that impacts municipalities. The information in this column should not be considered a legal opinion or to constitute legal advice.

FACTS:

Davison Community Schools, a public school district, contracted with an architectural firm for services on a construction project. As part of the contract, the firm agreed to assist the school district with the bid selection process by evaluating the bids submitted by contractors and recommending to the school district which contractor should be awarded the project. Based on the firm's recommendation, the school district awarded the project to US Construction and Design Services, the contractor that had submitted the second-lowest bid. Cedroni Associates, Inc., the contractor that submitted the lowest bid, sued the firm for tortious interference with a business expectancy.

The architectural firm said that it recommended US Construction rather than Cedroni based on negative feedback from references provided by Cedroni and that US Construction had performed adequate work on projects designed by the firm. Cedroni, conversely, claimed that the recommendation was based on the firm's desire to "punish" Cedroni because of circumstances on another project during which the firm had been replaced by another architect.

Both the advertisement for bids and the instructions for bidders in the project manual stated that the school district "reserves the right to accept or reject any or all offers." In addition, the school district's fiscal management policy stated multiple times that the school district has the "right to reject any or all bids" and that "the lowest dollar cost bidder may not always receive award of the bid." The policy also stated, however, that "[b]ids shall be awarded in compliance with applicable bidding obligations imposed by law to the 'lowest responsible bidder.'" In this case, the school district retained the right to choose the "lowest responsible bidder." The policy provided a list of factors for the school district to consider, including its architect's input.

In addition to the documents, longstanding case law provides that a disappointed low bidder on a public contract has no standing to sue in order to challenge the award of a contract to another bidder. Also, MCL 380.1267(6) provides that a bidder on a school construction project should know that its submission of the lowest bid does not create a reasonable probability that it will be awarded the contract.

QUESTION 1:

Does a disappointed lowest bidder on a public contract have a valid business expectancy for the purpose of sustaining a claim of tortious interference with a business expectancy?

Answer According to the Trial Court:

No.

Answer According to the Court of Appeals:

Possibly. The court of appeals determined that there was a genuine issue of material fact that 1) Cedroni, as a disappointed low bidder on a public contract, had a valid business expectancy and 2) the architectural firm's communications with the school district amounted to intentional and improper conduct sufficient to sustain a claim of tortious interference with a business expectancy. By virtue of its ruling, the case was to be remanded to the trial court for determination of the issues by the court or by a jury.

Answer According to the Michigan Supreme Court:

No. The Court held that Cedroni, as the lowest bidder on a public contract, did not have a valid business expectancy. The Court stated that "[t]he expectancy must be a reasonable likelihood or probability, not mere wishful thinking." The Court cited case law, statutory authority, and the documents submitted in this case in arriving at its decision. In particular, the Court cited *Talbot Paving Co v Detroit* in which the Court reached a similar result even though the Detroit charter stated that "it was the duty of the city to let the contract to the lowest responsible bidder."

Significantly, with respect to public contracts, the Court held that the school's retention of the broad discretionary right to reject the lowest bidder precluded the court, absent any evidence of fraud, injustice or violation of trust, from substituting its judgment for the judgment of the school district. "The school district determined that [Cedroni] was not a 'responsible contractor' in this specific circumstance, and it is not our job to second-guess this determination."

Cedroni Associates, Inc. v Tomblinson, Harburn Associates, Architects & Planners, Inc., No. 142339 (July 27, 2012).

Sue Jeffers is a legal consultant to the League. You may reach her at sjeffers@mml.org.