

**THE NEED FOR INJUNCTIVE RELIEF WHEN CONTESTING AN
AWARD OF CONSTRUCTION CONTRACT AND THE
RIGHT TO RECOVER BIDDING COSTS**

In a Court of Appeals decision of June 18, 2008, the Wisconsin Court Appeals rejected the contest of award of construction contract to an unsuccessful bidder. In PRN Associates, LLC and PGN Associates, LLC v. Wisconsin Department of Administration, the Court of Appeals dismissed the action brought by the unsuccessful bidder because the unsuccessful bidder had failed to seek an injunction preventing DOA from awarding the contract to anyone else. Instead, the bidder sued for damages following the award of a state university construction contract to another bidder.

PRN and PGN (collectively referred to as Prism) submitted a proposal to renovate the Kenilworth Building located on a University of Wisconsin, Milwaukee campus. However, the State Building Commission refused to approve an award of contract to Prism and ordered a second request for proposal on the project. Prism submitted a bid but WEAS Development submitted the low bid. The University of Wisconsin system and the State Building Commission approved the WEAS bid. Subsequently, DOA sent a letter to Prism advising that the contract was going to be awarded to WEAS, and it was. Instead of immediately commencing an action seeking injunctive relief, preventing the State from awarding the contract to WEAS, Prism appealed the matter through the administrative offices of DOA. When DOA denied the appeal, Prism commenced an action in the circuit court for Ozaukee County seeking damages. The Wisconsin attorney general filed a motion to dismiss, arguing that Prism had failed to obtain an injunction preventing the award of contract to WEAS and therefore the case was moot. The circuit court agreed and dismissed Prism's action. Prism appealed to the Wisconsin Court of Appeals.

The Court of Appeals stated:

Here, the contract has been awarded and no injunction was filed to prevent this. The circuit court relied on the reasoning of four cases and holding the matter to be moot under these circumstances... Our review of the case law supports our agreement with the circuit court in holding that once the contract is awarded, the matter is moot in terms of challenging the award or challenging the process...

In addition, even if Prism had timely sought and obtained injunctive relief, which it did not, the court cannot order the contract to be awarded to Prism or to any other bidder for that matter... The court can enjoin the award of a contract (an available option if the contract has not already been awarded), in which case the procuring body can either let the contract to the bidder who successfully challenged the initial award decision, or it can call for new bids on the procurement.

The Court of Appeals went on to note that when an injunction is sought and granted, the complaining bidder, if it is not awarded the contract, may recover as damages its reasonable and necessary expenditures in preparing its bid, plus the cost of obtaining the bonds required by the specifications, but it may not recover its loss of profit. The Court additionally noted that the competitive bidding statutes are designed primarily for the benefit and protection of the public, not individual bidders. The Court said:

By not seeking an injunction, Prism has allowed the disputed project to go forward with another contractor and sought to recover its purported losses with a lawsuit seeking damages. ... If Prism were successful in that scenario, the state and its taxpayers would pay Prism's lost profits in addition to the contract price paid to the contractor who performed the work. ... This result fails to benefit or protect the public. ... Only if Prism had successfully obtained an injunction, would it be entitled to limited damages, not including lost profits.

This decision is a reminder to design professionals that if a contractor intends to dispute an award of a governmental construction contract that the aggrieved contractor must immediately commence an action seeking an injunction preventing the governmental agency from awarding a contract to someone else during the pendency of a lawsuit contesting the award. It will be helpful to the owner if the professional engineer advises the owner that if a contract is awarded before any action is commenced by an aggrieved contractor, that aggrieved contractor will no

longer have a viable case for the courts to consider. It will be considered moot.

However, if an injunction action is timely commenced by an aggrieved contractor who successfully challenges the initial award decision, the contractor will be awarded its reasonable and necessary costs in preparing its bid plus the cost of obtaining its bonds, if it is not awarded the contract. However, it may not recover any lost profits.