

DOES A REJECTED LOW BIDDER HAVE ANY LEGAL REMEDIES?

I have often been asked what remedies are available to contractors when they are the low bidder but do not receive the contract. Such rejections of the low bidder occur when the owner concludes that the low bidder is not the lowest “responsible” bidder. Invariably, the owner reserves in the bid documents the right to determine who is the lowest “responsible” bidder. Recently, the Court of Appeals has decided what power the public owner has in determining who is the lowest “responsible” bidder.

In DMK, Inc. v. Town of Pittsfield, DMK was the low bidder on four projects but the town of Pittsfield refused to award road construction contracts to DMK because of the town’s concern that DMK would not perform adequately. The town had previously awarded contracts for road construction to DMK and had been dissatisfied with DMK’s work.

Prior to deciding what to do with DMK’s bids, the town of Pittsfield met and reviewed the bids. The town’s attorney expressed concerns about DMK’s problems on earlier projects. A town supervisor expressed the belief that the town did not have confidence in DMK and would be spending more money by taking it as the lowest bidder. The town chairman expressed the belief that although the town lacked confidence in DMK, she thought that DMK may be capable of performing one or two contracts. DMK warned the town that if the town did not award DMK all the contracts where DMK was low bidder, it would sue the town. Given that ultimatum, the town passed a motion to award two contracts to DMK conditioned upon DMK signing a waiver. DMK’s lawyer responded that it would accept three contracts with a waiver, but not two contracts. The town then rescinded its motion to award the two contracts to DMK with a waiver and awarded all four contracts to other bidders.

DMK then brought a lawsuit against the town. The town as a governmental unit was

provided with certain immunities by the legislature for its exercise of legislative quasi-legislative judicial or quasi-judicial function. The Court of Appeals in its decision held that the terms “legislative, quasi-legislative, judicial or quasi-judicial are synonymous with the term discretionary. The Court held that a court will only interfere with the bidding authority’s discretionary act if it is arbitrary or unreasonable. It stated that an arbitrary act is one that is either so unreasonable as to be without rational basis or as the result of an unconsidered, wilful or irrational choice of conduct. The Court of Appeals, agreeing with the circuit court, held that the town’s expressed concern regarding DMK, based upon DMK’s prior work, evidenced a valid exercise of discretion when the town decided to award the work to other contractors.

The court once again reviewed the appropriate remedies that could be sought by an aggrieved contractor who is the low bidder but who is not awarded the work. The court observed that the Wisconsin Supreme Court has already held that an aggrieved low bidder who is not awarded a contract is entitled to maintain a suit for damages, provided that it immediately seeks an injunction before work begins. This admonition is often forgotten by lawyers who represent contractors. The appropriate action for a disappointed low bidder is to immediately commence a lawsuit seeking injunctive relief against the owner, preventing the owner from awarding the contract to anyone else, or seeking an injunction preventing the contractor who is awarded the work from commencing performance. If and when successful, the disappointed low bidder can force the owner to award it the contract, or alternatively, re-let it. When the disappointed low bidder is granted such injunctive relief, the court may also award damages representing the contractor’s cost of preparing the first bid and obtaining the required bond. However, the contractor will not be entitled to recover lost profits, because if it is entitled to receive the contract and perform the work as low bidder, it will realize its profits when it performs the work.

The DMK case involved a public agency, but the law is somewhat the same involving private owners. Contractors whose low bids are not accepted by public or private owners must immediately commence an action to obtain injunctive relief, preventing the owner from awarding the contract to anyone else and preventing anyone else from commencing the work which is the subject of the dispute. However, private owners are not required by law to let bids to the lowest responsible bidder and often reserve the right to reject any and all bids.