

## **RECOVERING COSTS ASSOCIATED WITH FAILED BIDS ON PUBLIC PROJECTS**

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Engineering firms which provide services on large state and municipal construction projects are familiar with the competitive bid process. Competitive bidding is required on large public projects to protect taxpayers by obtaining services at the lowest possible cost from qualified contractors. Occasionally, through no fault of their own, potential bidders submit bids based on outdated or incomplete bidding information, thereby resulting in rejection of their apparent low bids.

Under those circumstances, Wisconsin courts have permitted apparent low bidders to seek an injunction to prevent the contract at issue from being awarded to another contractor. Timing is everything in those circumstances, because an injunction will not be issued if the governmental body has already executed a contract with another bidder. Although a public bidding authority cannot be compelled to award a contract to any bidder and a disappointed bidder cannot recover lost profits, a party successfully obtaining an injunction prohibiting the contract from being awarded to another party is entitled to recover its reasonable and necessary expenses associated with preparing its bid, plus the costs of obtaining bonds required by the specifications. Aqua Tech, Inc. v. Como Lake Protection & Rehabilitation District, 71 Wis. 2d 541, 239 N.W.2d 25 (1976).

But what happens in cases where a contract is already executed before the disappointed bidder has been notified of the contract award and has not had an opportunity to seek injunctive relief in court? The Wisconsin Court of Appeals recently ruled that a disappointed bidder under those circumstances may be entitled to recover their bid preparation expenses even in the absence of obtaining an injunction.

In North Twin Builders, LLC. v. Town of Phelps, 2009 AP 3036 (May 3, 2011), the Town of Phelps solicited bids for a town hall repair project. The Town repeatedly changed the scope of the project, which prevented one of the bidders, North Twin Builders, from incorporating a necessary cost estimate into its final bid. The Town ultimately rejected North Twin Builders' bid as incomplete and awarded the project to the only remaining bidder. The Town signed a contract the same day with the other bidder and commenced construction. Under these facts, the Court of Appeals concluded that North Twin Builders moved quickly to protect its interests even though it was unable to obtain an injunction before the contract was signed. As the Court noted, "the public interest is not served by allowing municipalities to circumvent the competitive bidding statute by rapidly signing a contract and directing the startup performance." Id., ¶ 20. Disappointed bidders should make every effort to immediately seek injunctive relief from a circuit court if they feel they are the victim of an erroneous bidding decision by a governmental body. However, the North Twin Builders case keeps the door open for a disappointed bidder who is not able to obtain an injunction due to circumstances beyond their control to still recover their bid expenses.