

BID ERRORS ON PUBLIC PROJECTS

In October, 2003 the Wisconsin Court of Appeals rendered a decision in *James Cape & Sons, Company v. Mulcahy* (Secretary of Wisconsin Department of Transportation), that held that a bidder on a state project had exercised the diligence required by the public bidding statutes in Wisconsin in searching for its bid errors and in giving notice of an error arising from carrying over the wrong unit price of a subcontractor into the bid tabulation. The Court of Appeals held that any carelessness, negligence or neglect on the part of the bidder was excusable within the meaning of the statute governing the correcting of errors in public contract bids.

On July 15, 2005, the Wisconsin Supreme Court affirmed the Court of Appeals. Professional engineers active in the design, construction and development of real estate improvements, as well as professional engineers involved in the development of state infrastructure, should be very interested in the Wisconsin Supreme Court's application of the statutes and its decisional rationale.

In 2002, WDOT let bids for the construction work on the Milwaukee Zoo interchange. Cape, a Wisconsin corporation engaged in highway construction, compiled its bid shortly before the deadline for bidding. Cape had solicited subcontractor bids for certain components of the project, including concrete masonry work. Shortly before the bids were due, one of Cape's subcontractors, whose price Cape had used in calculating Cape's bid, advised Cape that it was raising its per unit cost for a portion of the concrete masonry work. Shortly thereafter, Cape submitted its bid without incorporating the last minute change of the concrete masonry subcontractor. Had the increase in the per unit cost for the concrete masonry work been included in Cape's bid, Cape's bid would have been \$450,450.00 more than the bid it submitted.

Cape had tendered a \$100,000.00 bid guaranty to WDOT. When WDOT opened the bids, Cape's bid was low, and Cape suspected that there had been an error due to the substantial difference between the amount of its bid and the next lowest bidder. Cape immediately reviewed its bid and discovered that it did not include the subcontractor's price change. Later that same day, Cape notified WDOT of the error and explained that the revised unit price of the subcontractor did not get translated into Cape's final bid tabulation. Cape requested that its bid be corrected by the addition of \$450,450.00 to its original bid of \$16,332,873.75 and that if after such a correction it was no longer the low bidder, or for any other reason not permitting a bid correction, that it be relieved of its bid and bid bond.

WDOT responded that neither the statutes nor the project specifications allowed for a bid correction after the bids were opened and advised that it would not make a corrected change. It further advised that while WDOT could consider Cape's request to withdraw its bid, such action would cause a forfeiture of the \$100,000.00 unless Cape proved that the making of the bid error was free from carelessness, negligence or inexcusable neglect under § 66.29(5) of the Wisconsin Statutes. WDOT further advised Cape that if it did not wish to withdraw its bid and forfeit its bid guaranty, it must sign a bid in the amount of \$16,332,873.75.

WDOT eventually awarded Cape the contract and Cape refused to exercise the contract, reiterating its earlier request for relief. Cape then instituted a lawsuit seeking a declaratory judgment that it was entitled to correct its bid or in the alternative recover its \$100,000.00 bid guaranty. The Circuit Court for Dane County concluded that Cape met the statutory requirements to qualify for relief and therefore WDOT should have considered whether to grant such relief.

The Circuit Court also held that Cape had demonstrated that the mistake was free from carelessness, negligence and inexcusable neglect and ordered that the \$100,000.00 bid guaranty be returned to Cape.

WDOT appealed and the Court of Appeals affirmed. WDOT petitioned the Wisconsin Supreme Court for review and the petition was granted. In the meantime, § 66.29(5) of the Wisconsin Statutes was renumbered § 66.0901(5) because the chapter of the Wisconsin Statutes relating to municipal law had been renumbered and revised.

Section 66.0901(5), Wis. Stats., provides that when a bidder on public work claims a mistake, omission or error in preparing the bid, the bidder shall, before the bids are opened, make known the fact that the error,

omission or mistake has been made. The bid shall then be returned to the bidder unopened. If a bidder makes an error and discovers it after the bids are opened the bidder must immediately and without delay give written notice of the fact of the error and submit to the public body clear and satisfactory evidence that the error was not caused by any careless act or omission on the bidder's part in the exercise of ordinary care in examining the plans or specifications. The statute goes on to provide that if the discovery and notice of an error results in a forfeiture, the bidder may not recover the bid bond or deposit unless it proves to a court in an action brought for the recovery of the bid amount that in making the error the bidder was free from carelessness, negligence, or inexcusable neglect.

The Wisconsin Supreme Court held that the rules for competitive bidding on public works projects seek to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to ensure that the public receives the best work at the most reasonable price. It recognized that while bids are being compiled the last minute work effort is hectic and that errors will occur. However, the Court held that the necessities of competitive bidding do not grant bidders an absolute right of withdrawal after bid opening on the grounds that the bid contained an error.

In reviewing the meaning of § 66.0901(5), Wis. Stats., the Court acknowledged that the statutory procedures that allow bidders to receive relief from mistakes, errors and omissions, reflect concerns about the manipulation of the bidding process and that to prevent unscrupulous practices the system must balance the public's interest in obtaining the benefits of an advantageous price against the concern that municipalities not reap unjust windfalls from bidder errors. The Court held that in focusing on the statutory language and the purpose, scope and context of the statute, it clearly contemplated that bidders should be afforded relief for some but not all mistakes, errors or omissions. The Court noted that prior to 1933 there was no general statute governing bids on public works and that bidding was conducted under local ordinances in accordance with principles of decisional law. However, upon the enactment of a statute covering bid errors on state, city, village, town, school district, sewer district, drainage district, technical college or other public or quasi-public corporation, the statute controlled. The statute, the Wisconsin Supreme Court held, spoke directly to the bidders reporting obligation when the bidder discovers a mistake, error or omission after the bids are opened. Under the statute, the bidder must report the error and provide information about it, but the statute was ambiguous in the sense that it did not explain whether a bidder may ask to withdraw or correct its bid, and what the public entity should do if either relief is requested.

The Court reviewed its earlier decisions, interpreting what had been previously § 66.29(5) of the Wisconsin Statutes which granted relief if the bidder's error was immediately detected by the bidder and notice given to the public entity that the error was not the product of carelessness in examining the plans or specifications, such as simply making an adding machine error or in mistakenly transposing calculations to a bid sheet.

Since Cape was asking for the privilege to correct its bid and then increase it, the Wisconsin Supreme Court held that under § 66.0901(5), Wis. Stats., WDOT's refusal to permit this correction was proper, since the statute allowed a correction only if the error was discovered in the bid before the bids were opened. The Court further held that authorizing the amendment of bids after bid opening would destroy the certainty of the bidding process and that logically all bidders would be entitled to the same right of amendment as the low bidder. The Court concluded that the plain language of the statute did not contemplate a bid amendment and that public entities do not have authority to permit such an amendment of a bid. The Court concluded that the bidder had the statutory right to rescind, but not to amend its bid.

The Court then turned to the question of Cape's request that its bid be withdrawn. WDOT had refused the request and insisted upon a forfeiture of Cape's \$100,000.00 bid deposit. The Court noted that the statute first requires the bidder to provide prompt notice and that second the statute required the bidder to make known the fact of the error. The Court held that pinpointing the mistake would show whether the mistake is material to the contract and whether it would be unreasonable or unconscionable to attempt to enforce the bid. The Court said that the statute then also required the bidder to submit clear and satisfactory evidence that the mistake, omission or error was not caused by any careless act or omission in the exercise of ordinary care in examining the plans or specifications, or in conforming with the requirements of the

statute. The Court held that this requirement was designed to expose whether the bidder's error is an understandable honest mistake of the kind that could happen inadvertently to a conscientious bidder, or evidence of a pattern of sloppiness or lack of adequate preparation that need not be excused.

The Court noted that the statute provided for the institution of an action by the bidder to recover the monies or bid bond deposited based on the assertion that in making the mistake, error or omission in the bid, the bidder was free from carelessness, negligence or inexcusable neglect. The Court held that acceptance of the bid by the public entity is a precondition to forfeiture of a bidder's deposit and that the statute specifically contemplated a court proceeding to determine whether a proposal guaranty should be returned to the bidder when the bidder has accepted the bid. The Court held that its prior cases on the subject should be interpreted to hold that there is a single standard in the forfeiture recovery context by which all mistakes, errors and omissions are judged, i.e., did the bidder exercise ordinary care in computing its bid? The Court held that the conditions which formed the basis for forfeiting a bid bond must be examined in a particular factual setting and that because bid withdrawal and bid bond forfeiture are usually linked, the court should first review whether a bidder should be permitted to withdraw its bid before award of the contract, and that will depend upon whether the bidder timely discovered it and immediately gave written notice of it and submits to the public entity clear and satisfactory evidence that the mistake, omission or error was not caused by any careless act or omission in the exercise of ordinary care in examining the plans and specifications. If the bidder is able to satisfy that requirement, the public entity may still be able to show that the bidder's withdrawal will prejudice the public entity, at which point the bidder will have to meet the higher standard of proof that it was "free from carelessness, negligence or inexcusable neglect" in order to avoid a forfeiture of its bid bond. The Court concluded that the law was clear that the bidder had no vested right to withdraw its bid, and certainly no right to withdraw without the adverse consequences of forfeiture.

However, in applying this law to Cape, the Court concluded that the WDOT was correct in deciding that an amendment to Cape's bid was not an option, but that in considering the possibility of withdrawal under the statute without forfeiture, WDOT operated under an incorrect theory of law. Cape established that it immediately notified WDOT of its error, it pinpointed its mistake and explained how it occurred, and WDOT did not dispute those assertions. The Court held that Cape demonstrated the kind of honest mistake that can happen to a conscientious bidder, a mistake akin to the mathematical mistakes in prior cases as opposed to the multiple miscalculations and misjudgments of sloppy bidders. The Court concluded that the circuit court had correctly found that Cape met the requirements of the statute to qualify for relief, that is, to withdraw its bid before the award of the contract because it exercised ordinary care in examining the plans and specifications. It also concluded that Cape's mistake was free from carelessness, negligence and inexcusable neglect, and therefore Cape's \$100,000.00 bid deposit should not be forfeited by WDOT.

The road map for dealing with bid errors in public projects has been clarified by the Wisconsin Supreme Court and its decision will benefit the public and the design professions.

*Published in the *Engineering Professional*, November/December, 2005. Written by Attorney Robert J. Kay.