

# Court Rules Architectural Firm's Recommendation Interferes with Lowest Bidder's 'Business Expectation'

March 14, 2011

*Sticks & Bricks March 2011 Edition*

The Michigan Court of Appeals recently ruled that architectural firms involved in selecting bidders for public projects may be liable, in tort, for interfering with the lowest reasonable bidder's business expectancy. This issue arises when the architectural firm recommends a higher bidder be awarded the project, without adequately justifying why the lower bidder was not qualified for the project.

In *Cedroni Associates, Inc. v Tomblinson, Harburn Associates Architects & Planners, Inc.*, the plaintiff contractor submitted the lowest bid on a public school project. Pursuant to its contract with the school district, the defendant architectural firm assisted the district with reviewing and evaluating bid applications investigating competing bidders and making recommendations about which contractor should be awarded the project.

The defendant contacted a number of references provided by the plaintiff. The reviews of the plaintiff's work on other projects were somewhat mixed. Based upon the information gleaned from the investigation, the defendant recommended the second lowest bidder rather than the plaintiff.

The plaintiff brought suit against the defendant seeking to recover lost profits and alleging a single count of tortious interference with a business expectation. The defendant architectural firm filed a motion for summary disposition on grounds that the school district had broad discretion in awarding the bid and that there was sufficient documentation to establish that the plaintiff was unqualified. The trial court agreed, granting the defendant's motion for summary disposition. The plaintiff appealed.

The Michigan Court of Appeals reversed and remanded the trial court's order, holding that the defendant architectural firm could be held liable for damages under a theory of tortious interference with a valid business expectation. In doing so, the appellate court looked outside of the bid documents to determine whether the school district, and the defendant, by proxy, had broad discretion in awarding bids.

Specifically, the court examined the language of the school district's fiscal management manual, which stated that "[b]ids shall be awarded in compliance with applicable bidding obligations imposed by law to the lowest responsible bidder."

COURT RULES ARCHITECTURAL FIRM'S RECOMMENDATION INTERFERES WITH LOWEST BIDDER'S  
'BUSINESS EXPECTATION' Cont.

The fiscal management manual also defined the term "lowest responsible bidder" as follows:

[t]he Responsible Contractor that has submitted a fully complete and responsive bid that provides the lowest net dollar cost for all labor and materials required for the complete performance of the work of the construction project let for bid. Such bid must satisfy the requirements of all applicable local, state, and federal laws, this policy, any administrative rules associated with this policy developed by the superintendent at the Board's direction, and bid documents used to solicit bids, and any other guidelines and specifications required for the construction project. Because a bidder with the net lowest dollar cost bid may not be a responsible contractor, the lowest dollar cost bidder may not always receive award of the bid.

This provision, in conjunction with the directive that bids "shall" be awarded to the lowest bidder, was sufficient to create a valid business expectation in the plaintiff.

The appellate court held that, as a matter of law, the bid documents and provisions therein reserving the right to reject any bid were subject to the fiscal management manual provisions stating that the bid shall be granted to the lowest responsible bidder. Therefore, the plaintiff had a valid business expectation.

In issuing its ruling, the appellate court reasoned that the multiple provisions reserving the right to reject bids are subject to the provision requiring an award to be made to the lowest responsible bidder; otherwise the "lowest responsible bidder" provision is rendered meaningless and nugatory.

The appellate court emphasized that the submission of the lowest bid, in and of itself, was inadequate to sustain the plaintiff's suit; rejecting any per se rule that allows litigation to proceed based simply on proof of the lowest bid.

The appellate court further concluded that the plaintiff had presented sufficient evidence to create a question of fact about whether it was qualified for the project. Specifically, the plaintiff offered affidavits from various individuals, who had worked with the plaintiff on prior construction projects, and believed that the plaintiff was competent and qualified. The court concluded this was sufficient to rebut the evidence presented by the defendant and created a question of fact.

*The Sticks & Bricks Newsletter is distributed by the firm of Plunkett Cooney. Any questions or comments concerning the matters reported may be addressed to Scott H. Sirich or any other members of the practice group. The brevity of this newsletter prevents comprehensive treatment of all legal issues, and the information contained herein should not be taken as legal advice. Advice for specific matters should be sought directly from legal counsel. Copyright© 2011. All rights reserved PLUNKETT COONEY, P.C.*

COURT RULES ARCHITECTURAL FIRM'S RECOMMENDATION INTERFERES WITH LOWEST BIDDER'S  
'BUSINESS EXPECTATION' Cont.