GOVERNMENT CONTRACTING

Government Contracting: Breach

Winston Park, Ltd. v. City of Coconut Creek,
872 So. 2d 415 ( Fla. 4th Dist. App. 2004)

Summary judgment is not proper when there is a dispute concerning a material fact, as demonstrated in this breach-of-contract case between a developer and a local government entity.

FACTS AND PROCEDURAL HISTORY

A 1983 agreement between the City of Coconut Creek and the predecessors in interest of Winston Park, Ltd., development company provided that Winston Park would build water and sewage pipelines for properties that it developed. The agreement provided that Winston Park would construct a minimum of 10,000 Equivalent Residential Connections (ERCs) of capacity for both Winston Park’s development and others. Those pipelines would then be connected to the City’s existing pipelines so that the City could provide water and sewer service to the residents.

The agreement made it mandatory for the developer to return any unused capacity to the City, which then had the option of refusing the excess capacity or selling it to a third party. If the City elected to accept the excess capacity, it could subsequently sell it to a third party but was required to reimburse eighty percent of the selling price to the original developer.

After completing a development in the mid-1990s, Winston Park determined that it had 296 excess ERCs. It attempted to return them to the City so that the ERCs could be reassigned to another developer, Engle Homes. Winston Park orally agreed to transfer the ERCs through the City to Engle Homes for $2,400 each. However, the City exercised its option “to decline to accept the unused ERCs.” Winston Park, 872 So. 2d at 417. The City later sold 296 ERCs directly to Engle Homes for $3,200 each. When Winston Park requested eighty percent of the selling price, the City refused to pay and claimed that the ERCs sold to Engle Homes had originated from the City’s water supplier, Broward County, and not from Winston Park’s excess capacity.
Winston Park brought suit against the City for breach of contract, claiming that the City sold Winston Park’s excess ERCs without reimbursement as the contract required. The City filed a motion for summary judgment on the grounds that the ERCs the City sold were from the capacity that had been built in excess of 10,000 ERCs, and further, that the agreement specifically allowed the City to refuse any excess capacity a developer offered. The trial court granted the motion for summary judgment. The Fourth District Court of Appeal, however, found that relevant material facts remained in dispute. Therefore, the court reversed the summary judgment ruling and remanded the case to the lower court for trial.

ANALYSIS

Summary judgment should not be granted if there is a material fact in dispute. The parties did not dispute that the contract permitted the City to decline excess ERCs. However, the parties disputed the capacity of Winston Park’s pipelines. If the capacity was only 10,000 ERCs, then the excess ERCs likely passed through Winston Park’s portion of the pipeline, and the City implicitly accepted and sold Winston Park’s ERCs. If the capacity was in excess of 10,000 ERCs, then the City likely sold ERCs to which it properly had access. The record did not clearly identify the capacity of Winston Park’s pipelines or whether the City could have obtained excess water from Broward County. Because a material factual issue was in dispute, summary judgment was not proper.

SIGNIFICANCE

This case applies the long-held rule relevant to summary judgment: summary judgment is not proper when the record indicates that a dispute may exist concerning a material fact or inference that may be drawn from that disputed fact.

RESEARCH REFERENCES


Sandy Phillips
Government Contracting: Franchise Fees

*Florida Power Corporation v. City of Winter Park*, 887 So. 2d 1237 (Fla. 2004)

A municipality may continue to collect a franchise fee from a franchisee after the expiration of the franchise agreement, and during a renegotiation period, as long as both parties continue to provide the bargained-for exchange.

**FACTS AND PROCEDURAL HISTORY**

The City of Winter Park (Winter Park) built an electrical system, which it sold to Florida Power Corporation’s (FPC) predecessor along with a franchise agreement to provide electrical power to Winter Park. The negotiated franchise agreement provided for a six-percent franchise fee and the right to buy back the electrical system at the expiration of the agreement. When the agreement expired, FPC continued to provide power to Winter Park and maintained possession of the Winter Park’s rights-of-way, but refused to pay the franchise fee. Winter Park sought an injunction requiring continued payment of the franchise fee throughout negotiations for a new fee or, alternatively, a buy-back of the electrical system. The trial court granted the injunction, and the Fifth District Court affirmed. The Fifth District Court certified conflict with the Second District Court’s decision in *Florida Power Corp. v. Town of Belleair*, 830 So. 2d 852 (Fla. 2d Dist. App. 2002).

**ANALYSIS**

In *Alachua County v. State*, the Florida Supreme Court held that a fee was an unconstitutional tax when a city unilaterally imposed the fee for the use of public property and the fee was unrelated to the cost of maintaining that property. 737 So. 2d 1065 (Fla. 1999). In *Florida Power*, the Florida Supreme Court recognized the Second and Fifth District Courts’ of Appeal conflicting application of *Alachua*.

The Conflicting Views

In *Belleair*, the Second District Court was faced with facts nearly identical to *Winter Park*. In *Belleair*, an electrical-service franchise agreement between the Town of Belleair (Belleair) and
FPC provided for a six-percent franchise fee and a buy-back agreement at expiration. After the franchise agreement expired, FPC refused to pay the franchise fee. Belleair sought an injunction to force FPC to continue paying the franchise fee until the issue was resolved. The trial court granted the injunction, but the Second District Court reversed. The court based its decision on Alachua, holding that the court had no authority to extend an agreement after it expired. In addition, the court determined that, because the agreement had expired, no negotiated agreement supported a six-percent franchise fee. Imposition of the fee would constitute an unconstitutional tax because the fee was not related to the cost of maintaining Belleair's rights-of-way. The court did note that Belleair could charge a fee related to the cost of maintaining the rights-of-way and FPC would be obligated to pay that fee.

The Fifth District Court distinguished its facts from Alachua. The court explained that, when a franchise fee is negotiated, it is not “unilaterally imposed,” but reasonably related to the use of public property. Winter Park, 887 So. 2d at 1240 (citing Florida Power Corp. v. City of Winter Park, 827 So. 2d 322, 324 (Fla. 5th Dist. App. 2002)). The Fifth District Court analogized the issue to a holdover tenant who would be required to continue paying the original rent until a new lease could be negotiated.

The Resolution of the Conflict

The Florida Supreme Court agreed with the Fifth District Court. The Court noted that the franchise fee was a bargained-for exchange and would not change to an unconstitutional tax “when the clock struck midnight on the final day of the franchise agreement.” Id. In addition, the Court affirmed the trial court’s finding that the six-percent fee was a fair market rate reasonably related to the City’s property maintenance costs.

The Court noted that, when both parties continue to perform the original agreed-upon bargain, it is reasonable for a court to imply the existence of a contract at law. Thus, the contract’s payment provision could be enforced. In addition, the Court noted that FPC was still collecting the fees from its customers but not passing the fees along to Winter Park, while Winter Park was continuing to bear the costs of maintaining the public property.
Therefore, if the Court did not imply a contract at law, FPC would be unjustly enriched. Accordingly, the Florida Supreme Court approved the Fifth District Court’s decision in Winter Park and disapproved the Second District Court’s decision in Belleair.

SIGNIFICANCE

When an existing agreement between a municipality and a utility company expires, and both parties continue to act as they did under the agreement, the status quo between the parties will be maintained until another agreement can be reached. If the municipality continues to maintain the public rights-of-way, and the utility continues to provide service, the utility must continue to pay the former franchise fee.

RESEARCH REFERENCES


Sandy Phillips

Government Contracting: Public Bidding

*Miami-Dade County School Board v. J. Ruiz School Bus Service, Inc.*, 
874 So. 2d 59 (Fla. 3d Dist. App. 2004)

Unsuccessful bidders for public contracts are not entitled to an award of damages based on lost profits. The “majority of jurisdictions” agree that such an award is against the sound public policy behind competitive bid statutes that allow public entities to receive goods and services at the lowest possible cost. *J. Ruiz*, 874 So. 2d at 63.

FACTS AND PROCEDURAL HISTORY

In the summer of 1999, several private bus companies submitted bids to the Miami-Dade County School Board to participate in the county bus route system. Twenty-one vendors submitted bids. *J. Ruiz School Bus Service, Inc.* and *A. Oliveros Trans-
portation, Inc. (Ruiz and Oliveros) each offered the lowest bid for two of the routes. The School Board rejected the bids, finding them “non-responsive” because Ruiz and Oliveros “failed to include the required Florida Division of Unemployment Compensation Employer’s Quarterly Report Form UCT-6,” which included a master list of their current employees and their wages. J. Ruiz, 874 So. 2d at 60. The School Board then entered into contracts with the next lowest bidders who submitted the forms.

Ruiz and Oliveros filed timely notices of protest with the State of Florida Division of Administrative Hearings (DOAH), whereupon an Administrative Law Judge (ALJ) found that most of the other bidders submitted incomplete UCT-6 forms. The ALJ found that “the School Board had waived deviations regarding these forms from the bid requirements.” Id. The ALJ also found that Ruiz’s and Oliveros’s failure to provide the UCT-6 forms did not affect the bid price, give Ruiz and Oliveros an unfair competitive advantage, or “give the School Board any reason to doubt” Ruiz’s and Oliveros’s business viability. Id. The ALJ then awarded Ruiz and Oliveros the two routes for which they were the lowest bidders, for the remaining twenty days in the school year. Because this was clearly not a meaningful remedy, Ruiz and Oliveros filed a complaint in the circuit court seeking damages for lost income and profits for “unlawful disqualification of [their] competitive bids.” Id. at 59–60. The School Board filed a motion to dismiss, arguing that Ruiz and Oliveros had “no cause of action against a public entity for the recovery of [lost] profits.” Id. at 60.

The trial court denied the motion on the basis that the School Board’s actions were arbitrary and capricious, and awarded damages to the plaintiffs including prejudgment interest and lost profits for the 160 days they were denied bus routes. The School Board appealed, and the Third District Court of Appeal found that lost profits were not recoverable by bidders that were wrongfully denied contracts, and that the bidders were entitled only to equitable relief including future comparable contracts or, in the alternative, bid preparation or protest costs. Thus, the Third District Court reversed the lost-profit awards and remanded the case back to the trial court for further proceedings.
ANALYSIS

The issue on appeal involved whether the Appellees were entitled to lost profits. In this case, the School Board did not challenge the lower court’s finding that its actions were arbitrary and capricious. Instead, it argued that the prior public policy prohibited a lost-profits remedy.

The Third District Court found that the “overwhelming weight of authority [was] against allowing an award of lost profits to unsuccessful bidders of public contracts” because it would provide then “an unfair windfall to unsuccessful bidders for work they did not perform and risks they did not incur.” Id. at 62. The court noted that Florida’s competitive bid statutes were created to “ensure that the public receives the lowest and best price for goods and services and that public contracts are not awarded in an arbitrary and capricious manner.” Id. at 61. Thus, the court found that an award of lost profits would go against the intent of the statute to prevent the taxpayers from being doubly burdened: “the first time, through the unjustified additional expenditure of funds on the awarded contract, and then, a second time through the necessity for paying a judgment for lost profits to the aggrieved low bidder.” Id. at 63 (citing Beaver Glass & Mirror Co. v. Bd. of Ed. of Rockford Sch. Dist., 376 N.E. 2d 377, 380 (Ill. App. 3d Dist. 1978)).

In an effort to leave Ruiz and Oliveros, the wronged bidders, with some form of redress, the court reversed and remanded the case to the lower court with instructions to allow them to recover actual costs, including bid or proposal preparation costs, as is customary in most jurisdictions.

SIGNIFICANCE

This case is significant because it is the first Florida case to address expressly whether a bidder who is wrongfully denied a public contract may recover lost profits. The court affirmed the rule in “the majority of jurisdictions on this issue” that public policy provides a strong argument against awarding lost profits to unsuccessful bidders who were wrongfully denied public contracts. This decision means that Florida bidders, not limited to those involved in bus route bids, are estopped from receiving lost profits, even when they were wronged, and even when equitable relief is unavailable.
RESEARCH REFERENCES

Rachel L. Soffin

Government Contracting: Public Bidding

*Sutron Corp. v. Lake County Water Authority,*
870 So. 2d 930 (Fla. 5th Dist. App. 2004)

Courts will overturn a local government entity's decision to reject or accept a bid for a public contract only if the government entity acted arbitrarily, capriciously, or unreasonably. Furthermore, to establish an estoppel claim against a government entity, the injured party must prove that rare and exceptional circumstances, such as a severe injury or a grossly unjust governmental action, surrounded the actions giving rise to the estoppel claim.

FACTS AND PROCEDURAL HISTORY

In April 2002, the Lake County Water Authority entered into a contract with an Orlando engineering firm to conduct studies concerning the Authority's proposed Hydrologic Monitoring Network Repair, Purchase, Installation and Maintenance project. The engineering firm then requested that Sutron Corporation act as a sub-consultant during the firm's studies, which, among other purposes, would be used to prepare a request for bids (RFB) on the Authority's project. Any entity that wished to compete for the Authority's public contract would need to respond to that RFB before bidding on the contract. Before assuming its role as sub-consultant, however, Sutron sought assurance from the Authority that its participation in the project studies would not preclude it from responding to the RFB or from bidding on the contract. The Authority's executives agreed that they would still allow Sutron to bid on the contract despite Sutron's involvement in the RFB preparation. In reliance on that decision, Sutron chose to participate in the preliminary project studies.
The final RFB stated that the Authority would award the contract to the bid that “best serves the interest of the Authority and the citizens of Lake County.” Sutron, 870 So. 2d at 933. The RFB further contained a reservation clause that allowed the Authority to accept or reject any bids based upon the bid’s prospective impact on the public’s best interests. Though Sutron was the lowest bidder on the initial RFB, the Authority invoked the RFB reservation clause and chose to reject all the bids, including Sutron’s, and elected to solicit further bids for the contract. Sutron, in response, sought an injunction requiring the Authority to award the contract to Sutron because it was the lowest bidder. The trial court granted summary judgment in favor of the Authority, and the Fifth District Court of Appeal affirmed the trial court’s ruling.

ANALYSIS
Arbitrary, Unreasonable, or Capricious Standard

Florida law concerning bidding on public contracts is intended to ensure that bidders are given fair and equal opportunities to compete for contracts and to prevent corruption and favoritism in the awarding of public contracts. The Fifth District Court noted that a court should not reverse a public contract award unless the public entity acted in an arbitrary, capricious, or unreasonable manner in accepting or rejecting a particular bid. The court further stated that, even if the public entity commits an error in the public contract award, a court should still not intervene, “absent a showing of dishonesty, illegality, fraud, oppression, or misconduct.” Id. at 932.

In making its decision to reject Sutron’s bid, the Authority partially relied upon Florida Statutes § 287.057(18) (2004), which precludes any person or firm that contributes to the preparation of or solicitation for bids on a public project from entering into a contract related to that project. Though the court recognized that the Authority was not bound by the statute because it applies to state rather than to county agencies, the court also suggested that the Authority’s reliance on the statute promoted the best interests of the public by preventing favoritism and encouraging open competition in public contract bidding. The court further reasoned that the RFB’s public-interest reservation clause should have signaled to Sutron that the Authority had the ability to reject a bid,
even the lowest responsive bid, if it determined that accepting the offer would be detrimental to the public’s interests in any way. The court then held that the Authority’s decision to reject all bids was not arbitrary, capricious, or unreasonable: Conversely, the court also stated that the Authority could have legally chosen to award the contract to Sutron. Because the Authority’s actions would not have been considered arbitrary, capricious, or unreasonable, the court stated that it would not have interfered with the public contract award, just as it declined to interfere with the Authority’s rejection of the contract bids.

Estoppel

Sutron further argued that the trial court should have granted an injunction because Sutron detrimentally relied on the Authority’s promise to consider its bid on the project contract. Aside from establishing the traditional elements of estoppel, a plaintiff asserting estoppel against a governmental entity must also prove that rare and exceptional circumstances surrounded the action giving rise to the estoppel claim. The Fifth District Court suggested that rare and exceptional circumstances would include a detrimental reliance that resulted in “potentially severe economic consequences to the person who relied on a government agent’s misstatement of fact” and callous, negligent, or intentional misstatements that caused a significant injury to an innocent party. Id. at 934. Sutron, however, did not allege, nor did it prove, that rare and exceptional circumstances gave rise to its estoppel claim.

First, the court noted that the Authority’s misstatement was an honest and reasonable error in forecasting the Authority’s future consideration of Sutron’s bid, rather than a callous, negligent, or intentional action. Second, Sutron failed to prove that its reliance on the Authority’s misstatement created exceptional financial loses for the corporation. Finally, the court noted that Sutron did not claim that the Authority failed to pay for the work that Sutron performed as a sub-consultant on the project. The court reasoned that the only economic losses that Sutron suffered as a result of its detrimental reliance were the costs it incurred in preparing its bid and potential lost profits resulting from the Authority’s rejection of its bid. The court then held that the former did not give rise to rare and exceptional circumstances in a estop-
pel claim against a local government entity, while the latter could not be recovered in a public-contract action.

SIGNIFICANCE

The Sutron standard places a very heavy burden upon any party that wishes to challenge a governmental entity's decision to reject or accept a particular bid, regardless of the reasoning. Even if the public entity makes an error in its bid decision or chooses to reject its lowest offer for an unstated reason, the party challenging the decision must prove that the decision was not just erroneous, but also likely to be fraudulent, dishonest, or in some other way grossly unreasonable.

Individuals and entities that wish to undertake preliminary work on a proposed governmental project must carefully consider their decision if they intend to later bid on a public contract related to that project. While state agencies are statutorily required to preclude any individuals or entities that perform preliminary work on public project from bidding on that project’s contract, county and municipal entities have the discretion to allow such individuals and entities to bid anyway. However, in an attempt to prevent a Sutron-like scenario, those local government entities may now be reluctant to allow preliminary project contractors to bid on the project contracts. Furthermore, local governmental entities may be well advised to include a public interest reservation clause in their RFBs and to make that reservation known to any potential bidders, so as to prevent a Sutron-like predicament.

Finally, Sutron demonstrates the heavy burden placed upon parties wishing to bring an estoppel claim against a governmental entity in a public bidding action. Under Sutron, the “rare and exceptional circumstances” element of an estoppel claim must result from government action that demonstrates either a flagrant injustice or a severe injury to the plaintiff. If the government's misstatement was so malevolent and detrimental as to give rise to a governmental estoppel claim, it would also likely give rise, without respect to immunity issues, to a tort claim, which may be easier for a plaintiff to litigate than the proposed estoppel action.

RESEARCH REFERENCES


J. Jervis Wise