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Bidding Error Ruling Could Impact Public Contracting Procedures

Wisconsin municipalities confronted with the submission of mistaken bids in the public contracting process have a legal obligation to act in a quasi-judicial manner in determining whether to permit withdrawal of a bid. At the same time, bidders have a statutorily prescribed cause of action to recover forfeiture of a bid bond when a public works contract is awarded but not performed. Such is the dual holding of a recent Wisconsin Supreme Court decision intended to review and clarify section 66.0901(5), Wis. Stats., which governs the correction of errors in public works contract bids. Because the holding appears to modify precedent with respect to the correctability of bidder errors and sets out a potentially cumbersome process of reviewing bidder requests for withdrawal and bid bond release, the decision should prompt municipal officials to revisit and possibly revise their own public bidding practices and procedures.

The case, *James Cape & Sons v. Mulcahy*, 2005 WI 128 (July 15, 2005), involved a bid to the Wisconsin Department of Transportation (DOT) for construction work on the Milwaukee Zoo Interchange. After bids on the project were opened, Cape realized that it had failed to incorporate a last-minute change from one of its subcontractors into the bid. The change would have resulted in a \$450,000 increase in the submitted bid. Upon discovering the error on the same day of the bid selection, Cape sent a hand-delivered letter to the DOT project

engineer explaining what had happened. The letter requested an opportunity to correct the bid, or in the alternative, that the bid be returned without forfeiture of Cape's \$100,000 bid bond. DOT rejected the request, indicating first that section 66.0901 did not permit such a correction after opening of the bids and second, that DOT would permit withdrawal only upon condition of forfeiture, which forfeiture Cape would not be allowed to recover unless it proved that the error had been made "free from carelessness, negligence or inexcusable neglect," pursuant to 66.0901(5). After DOT proceeded to award the contract to Cape as the lowest bidder, Cape refused to perform because of the error. DOT rescinded the contract and declared a forfeiture of the \$100,000 proposal guaranty, prompting the original lawsuit by Cape seeking either the ability to correct its bid or recovery of its bid bond.

Affirming both the Circuit Court and the Court of Appeals, the Supreme Court held that DOT had been correct in preventing Cape from changing the bid, notwithstanding the fact that previous Wisconsin Supreme Court decisions had suggested that bid amendment is an acceptable remedy under some circumstances. Otherwise, the Court reasoned, the integrity of the public bidding process would be compromised and bidders would have an incentive to delay notification of error until after the opening of a bid, since section 66.0901(5) precludes correction of bids prior to bid opening. The

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SPEAKERS FORUM

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holding in *Cape* thus makes it unequivocally clear that section 66.0901(5) “does not permit amendment of a bid as relief for mistakes, errors, or omissions under any set of circumstances. It only authorizes a municipality to allow withdrawal” (emphasis added). (¶49)

Where DOT went astray, according to the Court’s decision, was in improperly conditioning withdrawal upon forfeiture. According to the Court, the proper adjudicatory role of a municipality receiving notice of a bidder’s error after bid opening is to apply a three-part test to determine whether a bidder should be permitted to withdraw a mistaken bid. In accordance with this test, derived from the third sentence of section 66.0901(5), withdrawal can be permitted only if the bidder (i) demonstrates good faith through prompt notification of the error; (ii) pinpoints the exact nature of the mistake and its material impact on the bidder; and (iii) presents clear and satisfactory evidence that the error was not due to negligence in either examining the plans or specifications of the bid request or conforming to the requirements of the statute itself. This last component of the test is designed to ascertain whether the bidder made an honest error while acting conscientiously, or acted as part of a consistent pattern of neglect and carelessness.

In authorizing the municipality to undertake such a quasi-judicial role, the statute, according to the *Cape* ruling, recognizes that a municipality must weigh the bidder’s interest in withdrawal against the municipality’s own interest in awarding the contract and retaining the bid bond upon non-performance. The *Cape* decision thus expressly recognizes that prejudice to the municipality is a factor entitling a municipality to go forward and award a bid submitted in error.

However, the decision makes it clear that the process of evaluating a bidder’s request for withdrawal is separate from, though related to, the process for determining whether forfeiture of a bond bid is permissible. As the Court states, section 66.0901(5) explicitly “subjects the municipality’s conduct to scrutiny when the municipality awards a contract knowing of the bidder’s error and then seeks forfeiture of a bidder’s guaranty bond” (¶63). Specifically, the statute contemplates a de novo court proceeding to determine whether a bid bond has been inappropriately retained by a municipality. Thus, if a bidder meets the withdrawal standards contemplated by section 66.0901(5) but a municipality denies withdrawal on the grounds that it would be prejudiced by such withdrawal, the bidder still has an opportunity to demonstrate as part of a fact-finding judicial procedure that it was “free from carelessness, negligence, or inexcusable neglect” in making the error, in which case the municipality will be required to return the bid bond.

Based on this analysis, the error made by DOT in *Cape*

Proposed Great Lakes Agreements Could Significantly Impact All Wisconsin Community Water Systems

On June 30, 2005, the Council of Great Lakes Governors released its second draft of the “Great Lakes Basin Sustainable Water Resources Agreement” and the “Great Lakes Basin Resources Compact”. A copy of these drafts can be obtained from the Council of Great Lakes Governors website, www.cglg.org.

While most of the discussion in Wisconsin about these documents focused on whether the City of Waukesha would be allowed to obtain Lake Michigan water, these agreements—if approved and implemented—could have a significant impact on all Wisconsin communities.

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was in failing to recognize the possibility that *Cape* could be permitted to withdraw without forfeiture. Because *Cape* was able to establish in the evidentiary hearing before the Circuit Court judge that it had made an honest mistake akin to a mere clerical or mathematical error as opposed to an error in judgment or multiple miscalculations, forfeiture was ruled to be inappropriate, a decision which the Supreme Court could find no basis to reverse.

Cape thus makes it clear that, while municipalities have the authority to reject a bidder’s withdrawal request upon discovery of an error after bid opening, they must do so with the awareness that their own actions in rejecting such a request will be subject to non-deferential judicial scrutiny. The decision recognizes that, if a bidder fails to meet the three-part test for determining whether withdrawal may be permitted, it will not be able to make the required showing for recovering a forfeited bid bond. However, in the event that a bidder does meet the three-part withdrawal test but undergoes a forfeiture on the grounds that withdrawal would prejudice the municipality, the statute affords the bidder a procedural remedy.

In light of this ruling, municipalities would be well-advised to review their public bidding procedures. Under no circumstances should a bidder be allowed to amend a mistaken bid, whether before or after bids are opened. In the event that the municipality becomes aware of a bidder error after bids are opened, assuming that it is promptly notified and the bidder can make a good faith case that the mistake was an honest error, the municipality is likely better off permitting withdrawal or, if the material consequences of permitting withdrawal are sufficiently great, rebidding the project outright. In any event, the municipality must be careful to ensure that it affords the mistaken bidder due process before rejecting a withdrawal request and that it does not condition withdrawal on forfeiture of the bid bond.

— Richard A. Heinemann

The proposed agreements create standards applicable to “withdrawals” from the Great Lakes themselves or from surface water or *groundwater* located within the Great Lakes Basin. And, in states such as Wisconsin, where part of the state is within the basin and part outside the basin, there is a good likelihood that the standards applied within the basin would also be applied to withdrawals outside the basin.

The agreements would require the State of Wisconsin to review all applications for withdrawals over 100,000 gallons per day average over a 90-day period in accordance with the standards established by the agreements. Under the agreements, Wisconsin could not approve a new or increased withdrawal unless the applicant showed all the following criteria were met:

- The need for all or part of the proposed withdrawal cannot be reasonably avoided through efficient use or conservation of existing supplies;
- The withdrawal would be limited to quantities considered reasonable for the purposes proposed;
- All water withdrawn must be returned to the source watershed;
- The withdrawal will result in no significant individual or cumulative adverse impacts to the quantity or quality of the water and water-dependent natural resources of the basin with consideration given to the potential cumulative impacts of any precedent-setting consequences associated with the proposal; and
- The withdrawal must be implemented so as to incorporate conservation measures.

Under the proposed agreements, these new standards would eventually replace Wisconsin’s current standards for approving withdrawals—including groundwater withdrawals.

This raises significant concerns because the State just passed groundwater quantity legislation in 2004. This legislation was developed through a consensus process involving many different stakeholders, and much give-and-take. One of the major issues under discussion was applying a “no significant adverse environmental impact” factor to all high capacity well withdrawals. Certain groups supported such a standard, others strongly opposed it, and ultimately it was agreed that this standard would be applied to limited defined areas where potential impacts were of greatest concern.

Parties to the negotiated legislation worked hard to reach this compromise. However the regional agreements would essentially require Wisconsin to replace this recently negotiated legislation for withdrawals, and adopt the new standards included in the agreements, including the no significant adverse impact standard. Many parties involved in the development of Wisconsin’s groundwater legislation would likely react unfavorably to this.

Opposition to the “no significant adverse environmental impact” factor in Wisconsin focused on con-

cerns that the standard was undefined and subject to a wide range of interpretations. Information needed to meet this standard could be extensive and expensive to obtain. And, stringent application of this factor could make water supply projects unreasonably expensive or impossible. These same concerns exist with the proposed agreements.

Wisconsin’s groundwater quantity legislation also included a certain limited priority for public water supply wells which provide water for public health and safety. Under current Wisconsin law, such a public water supply well may still be allowed even if it causes a substantial environmental impact if (i) the Wisconsin DNR determines that there is no other reasonable alternative location for the well, and (ii) it includes permit conditions which ensure that the environmental impact of the well is balanced by the public benefit of the well related to public health and safety. The standards in the proposed regional agreements include no such recognition of the importance of public health and safety—even in the face of an adverse environmental impact.

The agreements are expected to be finalized by the Council of Great Lakes Governors yet this year. However, final implementation only occurs when each State incorporates the provisions of the agreements in its State’s laws.

—*Lawrie Kobza*

Retroactive Effects of the Ziervogel Variance Case Further Explained

The Wisconsin Supreme Court’s decision in *Lamar Central Outdoor, Inc. v. Board of Zoning Appeals*, 2005 WI 117, 700 N.W.2d 87, described in the September issue of this newsletter (“Wisconsin Supreme Court Provides Guidance to Zoning Boards of Appeals”), established that any pending case in which the local zoning board had applied the restrictive *State v. Kenosha County* “no reasonable use” test to an area variance application will be remanded to the zoning board for a new decision applying the *Ziervogel v. Washington County Bd. of Adjustment* standard for area variances.

That remand rule is confirmed in a new case from Eau Claire County, with an added twist: the new hearing can consider additional testimony and evidence. It is a full *de novo* review. And the board can consider and base its decision on evidence that may not have even existed at the time the board first made its decision, prior to the appeal.

The new case is *Malcolm, Inc. v. Eau Claire County Board of Land Use Appeals*, Appeal No. 2005AP920-FT, decided August 23, 2005. The Court of Appeals’ decision will not be published.

—*Richard A. Lehmann*

MUNICIPAL LAW NEWSLETTER

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