LOCAL GOVERNMENT LAW

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DISAPPOINTED BIDDER CLAIMS AGAINST NORTH CAROLINA LOCAL GOVERNMENTS

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A person who participates in a public bidding process expends time and money in reviewing specifications and in preparing and submitting a bid. Generally these expenditures are accepted as part of the cost of doing business, and unsuccessful bidders accept the decision of the governing body. In some cases, however, a disappointed bidder may feel that the process was legally flawed.

A typical scenario might be as follows: A contractor submits the low bid on a county jail project. The board of county commissioners awards the contract to the second lowest bidder after concluding that the low bidder is not the lowest *responsible* bidder, as permitted under the competitive bidding law.[1] The contractor contends that the board has exceeded its authority in awarding the contract to the second lowest bidder.

The following discussion will touch on some of the avenues the contractor and other disappointed bidders have for challenging decisions about bids. It discusses the legal bases for claims that may be brought by a disappointed bidder, as well as some defenses to those claims that may be asserted by a local government. It is intended as a survey of the most common claims in this area and does not purport to be an exhaustive list of possible claims, nor an exhaustive exploration of each claim discussed.

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1. N.C. Gen. Stat. § 143-129 (hereinafter G.S.). *See* Frayda S. Bluestein, *A Legal Guide to Purchasing and Contracting for North Carolina Local Governments* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina, 1998), 61.

Overview

North Carolina law does not establish an administrative protest procedure for challenging a local government's award of a contract under the competitive bidding laws.[2] In contrast, bidding procedures for the state of North Carolina,[3] the federal government,[4] and for local governments in other states[5] include administrative protest procedures that may be a prerequisite to or concurrent with the option of suing in court. A contractor who objects to a bidding process conducted by a North Carolina local government typically raises his or her protest informally, first, with the local government employee or consultant handling the bid, and ultimately, with the governing board that made the decision.[6]

If the bidder is not satisfied with these informal options, the only other legal recourse is to bring a lawsuit challenging the board's action in court. The small number of reported court cases in North Carolina involving local government bids suggests that most contractor complaints are resolved informally. An alternative interpretation is that contractors are not willing to incur the expense of litigation or to jeopardize future contracting opportunities by suing contracting entities.

2. In some other states, bidding procedures do include administrative protest procedures. *See* note 14.

3. Bid protests involving state procurements must be brought under the contested case procedures of the North Carolina Administrative Procedures Act, Chapter 150B, Article 3. *See also* North Carolina Administrative Code 5B.1519 (March 2, 1999) (requiring bid protests to be filed within thirty days from the date of contract award).

4. Federal Acquisition Regulations, 48 C.F.R. § 33.103(e) (2000) (requiring that protests to a federal agency be filed no later than ten days after the basis of the protest is known or should have been known, whichever is earlier, or in the case of improprieties in a solicitation, protests must be filed prior to the bid opening or closing date for receipt of proposals).

5. *See* Lewis J. Baker, *Procurement Disputes at the State and Local Level*, 25 Public Contract L.J., 265 (1996).

6. Local governments probably have authority to establish mandatory local procedures for pursuing protests, although it is unclear whether failure to comply with these procedures could be a basis for barring a lawsuit.

Claims and Remedies

A disappointed bidder who does decide to challenge the board's decision could base a claim on allegations that include (1) use of unjustifiably narrow specifications; (2) erroneous acceptance of a bid that contains material deviations from specifications[7] or of a bid that does not comply with statutory requirements; (3) failure to comply with statutory bidding procedures, including failure to award the contract to the lowest responsible bidder; or (4) award of a contract for a discriminatory or other impermissible reason.

The bidder then has two categories of potential claims to consider: those arising under state law and those arising under federal law. Both are discussed below and three remedies that a disappointed bidder might seek for each type of claim are analyzed: (1) declaratory or injunctive relief, (2) mandamus (or mandatory injunction), and (3) monetary damages. The legal analysis for the first two (nonmonetary) remedies does not vary significantly for each cause of action discussed and will therefore not be repeated under each section.

Federal law claims discussed are those alleging a violation of federal constitutional rights. State constitutional claims are subsumed within that discussion, since the North Carolina courts have generally held the relevant state constitutional rights, especially due process, to be coextensive with parallel federal constitutional rights.[8] Claims could also arise under federal statutes, for example, where a local government is responsible for awarding contracts as part of its administration of a federal program, but these claims would be very specific to the particular federal program at issue and are generally beyond the scope of this discussion.[9]

Many of the issues involved in disappointed bidder claims have not been addressed by the North Carolina appellate courts. Much of the following discussion is based on cases from other jurisdictions but the analysis takes into consideration the effect of differences in statutory bidding procedures on the courts' decisions with a view toward predicting how North

7. *See* Professional Food Services Management, Inc. v. Dep't of Admin., 109 N.C. App. 265, 426 S.E.2d 447 (1993).

8. Horton v. Gulledge, 277 N.C. 353, 359, 177 S.E.2d 885, 889 (1970), *rev'd on other grounds*, State v. Jones, 305 N.C. 520, 290 S.E.2d 675 (1982).

9. This bulletin does address potential claims against local governments for violations of equal protection in the administration of race-based programs, some of which may be implemented under federal statutory requirements.

Carolina courts would rule on cases analyzing North Carolina's bidding statute.

Some Observations

A review of cases in this area prompts three observations. First, courts are often influenced in reaching their holdings by the theory that bidding procedures exist primarily for the benefit of taxpayers and the public at large, and not for the bidders. This theory has been the basis for denying standing to disappointed bidders[10] and for holding that there is no right of action for damages for violation of the bidding requirements.[11]

The second observation is that the outcome of a disappointed bidder claim often hinges on the extent to which the bidding law or procedure in question affords discretion to the governmental agency in awarding the contract. In states where contracts must be awarded to the lowest bidder, without consideration of discretionary factors, a court is in a better position to assess and rule on whether a disappointed bidder should have been awarded a contract. When the award standard incorporates subjective factors, such as responsibility, quality, performance—all terms that are contained in North Carolina's award standard—a court will generally use a more deferential standard in reviewing award decisions, typically displacing the decision only in cases where the claimant can demonstrate an abuse of discretion. Discretion in the award of contracts makes it difficult for the bidder to prove that he or she would have received the contract but for the local government's failure to comply with the law, and has been the basis for denying a claim under procedural due process[12] and for denying recovery of lost profits.[13]

Finally the timing and nature of relief sought can be significant factors in the success of a disappointed bidder claim. If the relief sought includes a court order to rebid or reaward a contract, the remedy may be foreclosed if the contract has already been performed by the time the litigation is completed. Administrative bid protest procedures, where available, often involve short time frames for appeal and decision to provide a practical remedy without delaying the award and completion of the contract at issue.[14] Without such procedures for North Carolina local government contracts, and in the absence of any statutorily imposed stay of contracting activities during the pendency of a claim, the passage of time could limit a bidder's remedy. In addition, courts have been reluctant to award damages for lost profits when the contract has already been performed on the theory that this would impose a redundant burden on taxpayers.[15] Claimants who do not seek injunctive relief at the initial stage of a claim may face the argument that the claim is moot or barred by laches.

State Law Claims

Direct Claim Under Bidding Statutes

The most obvious and straightforward claim a disappointed bidder is likely to make is one alleging a failure to comply with the applicable bidding statute. Statutes that might form the basis of such a claim include:

- G.S. 143-129—sealed bid requirement for purchase of apparatus, supplies, materials, or equipment, and for construction or repair contracts.
- G.S. 143-131—informal bidding requirement for purchase of apparatus, supplies, materials, or equipment, and for construction or repair contracts.
- G.S. 143-128—separate prime bidding, minority participation, and other requirements for building construction projects.
- G.S. 143-129.2—construction, operation, and maintenance of complex solid waste projects.
- G.S. 143-64.17–64.17E—guaranteed energy savings contracts.
- G.S. 143-64.31—selection of architects, engineers, and surveyors.

10. *See* Ardmare Construction Co. v. Freedman, 467 A.2d 674 (1983); Sowell's Meat and Services, Inc. v. McSwain, 788 F.2d 226 (1986).

11. *See* Grand Canyon Pipelines, Inc. v. City of Tempe, 816 P.2d 247, 250 (Arizona Ct. App. 1991).

12. *See* Kim Construction v. Mundelein, 14 F.3d 1243 (7th Cir. 1994).

13. *See* Swinerton & Walberg Co. v. City of Ingelwood–Los Angeles County Civic Center Authority, 114 Cal. Rptr. 834 (Cal. Ct. App. 1974).

14. *See* Ohio Rev. Code Ann. § 9.312 (Baldwin 2000) (protest of award to other than the apparent low bidder must be received within five days of notification of award); Va. Code. Ann. § 11-66 (Mathew Bender & Co. 1999–2000) (protest must be filed no later than ten days after public notice or announcement of award, whichever is earlier).

15. *See* Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority, 1 P.3d 63 (Cal. 2000).

Alleged violations of these statutes could include failure to comply with specific statutory bidding procedures (improper or lack of advertisement, insufficient number of bids), failure to properly prepare or interpret specifications, acceptance of bids not meeting specifications, or invalid use of an exception to the bidding requirements.

Declaratory and Injunctive Relief

A disappointed bidder might file a lawsuit asking a court to determine whether the bidding requirements have been violated, and if so, to prevent the defendant local government from proceeding to award or perform under an invalid contract. State law authorizes claims for *declaratory judgments* "to declare rights, status, and other legal relations."[16] Under this authority, a disappointed bidder could ask a court to determine whether the local government has complied with applicable bidding procedures. A plaintiff can combine this claim with one for *injunctive relief*, seeking a court order prohibiting the award, execution, or performance of a contract that is declared to be invalid due to the failure to comply with bidding procedures.[17] (A plaintiff might also seek a mandatory injunction ordering the performance of a particular duty, but this is similar to the mandamus action discussed below.[18])

There are three types of injunctive relief that a disappointed bidder might seek. First, and probably most effective, would be a *temporary restraining order (TRO)*. A TRO may be granted in order to prevent "immediate and irreparable injury, loss, or damage" that would result from the action to be restrained.[19] For example, a disappointed bidder might seek a TRO to prevent a local government from awarding or performing a contract alleged to be in violation of a statutory bidding procedure. The immediate and irreparable injury would arise from the fact that, once a contract is awarded, the plaintiff's claim might be moot or subject to a challenge under the doctrine of laches (discussed below).[20]

A bidder might also seek a *preliminary injunction*, which is issued to prevent a party to litigation from taking action that would injure the plaintiff or eliminate the plaintiff's remedy in a lawsuit.[21] The purpose of the TRO and preliminary injunction is to preserve the status quo while the rights of the parties are being litigated. As in the case of a TRO, the disappointed bidder would argue that a preliminary injunction is necessary to prevent the local government from taking action to award a contract or spend tax dollars under the contract pending the outcome of the litigation that seeks to invalidate the contract or bidding procedure.

A *permanent injunction* may be issued after a complete trial on the merits of the claim if the plaintiff is successful in establishing that the unit has violated the bidding requirements.[22] A permanent injunction might be issued, for example, to prevent the local government from spending money on or otherwise proceeding with a contract determined to be void for failure to comply with the bidding requirements.[23]

In order to maintain an action for either a TRO or preliminary injunction, the plaintiff must demonstrate a likelihood of succeeding on the merits of the claim. In the case of a challenge under the bidding statute, the plaintiff must demonstrate that he or she is likely to prevail in arguing that the local government has failed to comply with the applicable statutory requirements. A disappointed bidder must also demonstrate that he or she would be injured by the alleged violation. The low bidder in the example provided at the beginning of this article can easily show that the board's failure to award him or her the contract is injurious. In another example, a bidder who was second lowest after bids are opened could probably demonstrate that he or she is injured by the board's illegal acceptance of a low bid that allegedly failed to meet specifications. On the other hand, a bidder who is third or fourth low after bids are received may not have a sufficient basis for

16. G.S. 1-253.

17. G.S. 1-485.

18. The North Carolina courts have noted that there is little difference between a mandatory injunction and a mandamus action. Clinton-Dunn Tel. Co. v. Carolina Tel. & Tel. Co., 159 N.C. 9, 74 S.E. 636 (1912).

19. G.S. 1A-1, Rule 65.

20. *See Kajima/Ray Wilson*, 1 P.3d 63, 67 n.1 (Cal. 2000) (injunctive relief is the most effective but may not be available once contract is performed); Sutter Brothers Construction Co., Inc. v. City of Leavenworth, 708 P.2d 190 (Kansas 1985).

21. G.S.1-485. *See* Kinsey Contracting Co. v. City of Fayetteville, 106 N.C. 383, 416 S.E.2d 607, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 149 (1992) (disappointed bidder sought a temporary restraining order and then a preliminary injunction to prevent the city from going forward with an unlawful contract).

22. *See* Roberts v. Madison County Realtors Assoc., Inc., 344 N.C. 394, 400, 474 S.E.2d 783, 787 (1996).

23. *See* Raynor v. Commissioners of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941) (failure to comply with bidding requirements renders contract void).

claiming injury in a claim about whether the award to either the lowest bidder or the second lowest bidder was proper. If, however, the claim is based on a procedural irregularity or on a claim that specifications were improperly written, it could be argued that the defect affects all actual or potential bidders equally, and that each of them has an injury sufficient to support a claim. A showing of sufficient injury or interest in the litigation is also necessary to establish standing to maintain the action (see discussion below).

Mandamus

A disappointed bidder might be particularly interested in obtaining a court order requiring a local government to award a contract or to conduct a new bidding process. A lawsuit for *mandamus* ordering the award of a contract or requiring a bidding process is unlikely to succeed. Mandamus is an appropriate remedy for compelling action as to which the agency or individual has no discretion—that is, where the right to the relief is clear.[24]

The North Carolina courts have characterized the letting of contracts as discretionary acts,[25] and have held that the governing board has discretion in evaluating factors included in the "lowest responsible bidder" standard for awarding contracts.[26] In addition, the main competitive bidding statute[27] reserves to the governing board "the right to reject any or all" bids and limits the board's discretion in this regard only by providing that bids "shall not be rejected for the purpose of evading the [statutory bidding requirements]."[28] This provision suggests that despite having solicited bids, the governing body of the local government may decide to forgo entering into a contract, and may exercise its discretion to do so at any time before accepting bids and awarding the contract. Given the governing board's discretion in both the award of contracts and the rejection of bids, it seems unlikely that a North Carolina court would view mandamus as an appropriate remedy. The North Carolina Supreme Court has acknowledged the limitation on the use of mandamus in the bidding context. In *General Electric Co. v. Turner*,[29] which involved a challenge to a bid process conducted by the state, the court noted that, "[n]either mandamus nor mandatory injunction may be issued to control the manner of exercising a discretionary duty."

While recognizing that separation of powers limits the courts' ability to supervise or displace the discretion of public officials, courts have asserted jurisdiction to "compel action in good faith in accord with the law."[30] If a plaintiff can demonstrate that public officials have acted in bad faith, or that their actions were arbitrary or constitute an abuse of power, an action in mandamus may be appropriate. If it is successful, however, such an action may not supply the remedy a disappointed bidder plaintiff is likely to seek, namely, the award of the contract. As the supreme court has noted, "In matters involving the exercise of discretion, mandamus will lie only to compel public officials to take action; ordinarily it will not require them to act in any particular way."[31] Appropriate relief in a case involving an abuse of discretion might include an order directing the local unit to conduct a bid process in accordance with the law, but it would seem inappropriate for the court to substitute its judgment, for example, in evaluating the lowest responsible bidder for a contract. Since the bidding statute allows the governing board to reject all bids, that is, to decide not to award a contract at all, a court order mandating the award of a particular contract would seem inappropriate.

Monetary Damages

In order to recover monetary damages, a disappointed bidder must demonstrate that this remedy is available under some theory based in either common law or statute. Several North Carolina cases have addressed claims arising under state bidding laws, but the courts have never directly addressed the question of whether these laws allow a direct cause of action for damages. In *City-Wide Asphalt Paving, Inc. v. Alamance County*,[32] the North Carolina Court of Appeals considered the question of whether a direct right

24. Matter of Alamance County Court Facilities, 329 N.C. 84, 405 S.E.2d 125 (1991); Burton v. Reidsville, 243 N.C. 405, 90 S.E.2d 700 (1956).

25. Mullen v. Town of Louisburg, 225 N.C. 53, 60, 33 S.E.2d 484, 488; *Kinsey*, 106 N.C. 383, 416 S.E.2d 607, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 149 (1992).

26. *Kinsey*, 106 N.C. at 384–5, 416 S.E.2d at 608–9.

27. G.S. 143-129.

28. G.S. 143-129(b).

29. 168 S.E.2d 385, 388, 275 N.C. 493, 497–8 (1969).

30. *Burton*, 243 N.C. at 407, 90 S.E.2d at 702.

31. Matter of Alamance County Court Facilities, 329 N.C. at 105, 405 S.E.2d at 136 [*citing* Hospital v. Joint Committee, 234 N.C. 673, 680, 68 S.E.2d 862, 868 (1952)].

32. 132 N.C. App. 533, 513 S.E.2d 335 (N.C. App. 1999), *disc. rev. denied*, 350 N.C. 826 (1999).

of action exists under G.S. 143-129.2.[33] The court noted that an earlier case, *Kinsey Contracting Company v. City of Fayetteville*,[34] allowed a claim by a disappointed bidder, but that decision did not indicate whether the plaintiff sought damages.[35] In *City-Wide*, the court did not resolve the issue because it held that even if a claim existed it would be barred by sovereign immunity.[36] Thus the question of whether a cause of action for damages will be allowed under a bidding statute remains open in North Carolina.

In North Carolina cases arising in other contexts, the courts have held that no private right of action for damages under a statute exists unless the statute expressly provides for it.[37] None of the North Carolina bidding statutes contains an express remedy provision. The question of whether a statute implicitly provides a private remedy has been addressed in cases analyzing various federal statutes.[38] The focus in these cases is on determining the intent of the legislature, and in particular, on whether the statute in question was intended to benefit the plaintiff as part of a special class of citizens as opposed to the public at large.

In cases from other states analyzing whether competitive bidding statutes give rise to a direct cause of action by a disappointed bidder, courts have considered the underlying purpose of the bidding laws.[39] Disappointed bidder claims have been denied where the court finds that the bidding laws exist for the benefit of the public not the bidders.[40] In some cases, this rationale leads a court to deny a disappointed bidder standing, without reaching the issue of whether there is a substantive cause of action.[41] Some courts have also noted the potential imposition on the public purse if damages are awarded to a disappointed bidder after the contract is already completed, essentially requiring the taxpayers to pay twice for the same contract.[42]

It is not clear how the North Carolina courts would rule on the question of whether a disappointed bidder is entitled to damages for a violation of the bidding statutes. The North Carolina Supreme Court has held the purpose of the competitive bidding law is to prevent favoritism, corruption, and fraud in the award of public contracts by giving notice to prospective bidders, thus assuring competition, which in turn guarantees fair play and reasonable prices in the expenditure of public money.[43] Based on this statement, the primary benefit from the statutory bidding requirements would appear to be for the public at large, although the requirements of fairness and notice are most pertinent to those participating in the bidding process itself. Furthermore, as courts in other states have noted, the purpose of the bidding laws may be promoted by recognizing a cause of action by disappointed bidders, since they have the greatest incentive to incur the cost of litigation to enforce the laws and because the possibility of damages for failure to comply with the statutes may deter violations of bidding requirements.[44]

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33. This statute is actually an exception to the formal bidding statute, G.S. 143-129, and applies only to a specific type of solid waste project.

34. 106 N.C. App. 383, 416 S.E.2d 607, *disc. rev. denied*, 332 N.C. 345, 421 S.E.2d 149 (1992).

35. The reported decision indicates that the plaintiff sought a temporary restraining order and then a preliminary injunction to prevent the city from going forward with an unlawful contract. *Kinsey*, 106 N.C. at 384, 416 S.E.2d at 608.

36. 132 N.C. App. at 538, 513 S.E.2d at 339. The plaintiffs in *City-Wide* did not allege a waiver of sovereign immunity.

37. *See* Vanasek v. Duke Power Company, 511 S.E.2d 41, 44, 132 N.C. App. 335, 338 n.2 (1999), *cert. denied* 350 N.C. 851 (1999) [*citing*, Clinton v. Wake County Board of Education, 108 N.C.App. 616, 424 S.E.2d 691, *review denied*, 333 N.C. 574, 429 S.E.2d 570 (1993)].

38. *See* Cannon v. University of Chicago, 99 S. Ct. 1946, 1948 (1979) [Four factors in determining whether Congress intended a private right of action under a federal statute are (1) whether the statute was enacted for the benefit of a special class of which the plaintiff is a member, (2) whether there is evidence of legislative intent to create a private remedy, (3) whether implication of a private remedy is consistent with the underlying purpose of the legislative scheme, and (4) whether implying a federal remedy is inappropriate because the subject matter involves an area of interest to the states.].

39. *See* City of Scottsdale v. Deem, 556 P.2d 328, 329 (Ariz. 1976).

40. James L. Isham, J.D., *Public Contracts: Low Bidder's Monetary Relief Against State or Local Agency for Nonaward of Contract*, 65 A.L.R.4th 93, section 2(a) (1988). Durant v. Laws Construction Co., Inc., 721 So. 2d 598, 608 (Miss. 1998) (listing cases denying recovery under this theory).

41. Sowell's Meats and Services, Inc. v. McSwain, 788 F.2d 226 (1986); Brunoli v. Town of Branford, 722 A.2d 271, 274 (Conn. 1999).

42. *Brunoli*, 722 A.2d at 274.

43. Mullen v. Town of Louisburg, 225 N.C. 53, 58–59, 33 S.E.2d 484, 487 (1945).

44. *Brunoli*, 722 A.2d at 276 (Berdon, J. dissenting); Marbucco Corp. v. City of Manchester, 632 A.2d 522 (N.H. 1993).

Other North Carolina cases involving the application of the bidding laws have involved efforts to enforce a contract that was subject to competitive bidding and as such, do not address the question of whether a disappointed bidder (as opposed to a successful contractor) has the ability to enforce the bidding laws by individual right of action.[45] North Carolina courts have consistently held that a contract that is subject to the competitive bidding requirements is void if those requirements are not met.[46] For example, in *Hawkins v. Town of Dallas*,[47] a contractor sought payment for work performed under a contract that, although subject to the bidding requirements, was not bid. The court held that the contractor was entitled to recovery under a *quantum meruit* theory, even though the contract itself was void due to the town's failure to comply with the bidding requirements.[48] In this type of case, the cause of action arose under the contract, or as a claim in quasi-contract, and not under the bidding statute itself.

The North Carolina courts have also ruled on cases involving taxpayer claims alleging failure to comply with bidding procedures. These cases arise under the bidding statute, but they typically involve claims for declaratory or injunctive relief. For example, in *Mullen v. Town of Louisburg*,[49] plaintiff Mullen was a taxpayer suing on behalf of himself and all other citizens and taxpayers of the town to enjoin, among other things, the town's purchase of electricity from a private utility without complying with bidding procedures.

The only North Carolina case recognizing monetary recovery for violation of bidding procedures involved allegations of fraud and collusion by the local government employees and board members. In *Moore v. Lambeth*,[50] an action brought by taxpayers on behalf of the city, the court held city officials personally liable for repayment of moneys spent under an unlawfully awarded contract. This was not a private right of action, but instead, an action in the nature of a taxpayers derivative suit brought for the benefit of the local government.

45. *See* Nello L. Teer Co. v. North Carolina State Hwy. Comm'n, 265 N.C. 1, 143 S.E.2d 247 (1965).

46. Raynor v. Commissioners of Louisburg, 220 N.C. 348, 17 S.E.2d 495 (1941).

47. 229 N.C. 561, 50 S.E.2d 561 (1948).

48. This basis for recovery may be barred by sovereign immunity under the subsequent decision in Whitfield v. Gilchrist, 348 N.C. 39, 497 S.E.2d 412 (1998).

49. 33 S.E.2d 484, 225 N.C. 53 (1945).

50. 207 N.C. 23, 175 S.E. 714 (1934).

State Common Law Claims

Common law theories upon which a claim might be based include *negligence*, *implied contract*, and *estoppel*. The following discussion focuses on the claim itself rather than on particular remedies that might be obtained, since the discussion of remedies under the previous section would apply to these claims as well.

Negligence

No North Carolina case has addressed the question of whether a local government could be liable for negligence in conducting a bidding procedure. A majority of cases in other states have refused to recognize a negligence claim in the bidding context. Repeating a now familiar theme in this area, these cases generally rely on the rationale that the bidding laws are designed to protect the public at large, not individual bidders, and, therefore, any duty owed is to the public rather than to a particular disappointed bidder.[51] If a cause of action were recognized under a negligence theory, the local government might assert the defense of governmental immunity (see discussion below). Although many local governments waive their immunity by purchasing insurance,[52] liability for negligence in awarding contracts is not typically covered by such insurance. In these situations, the immunity defense would remain viable.

Implied Contract and Estoppel

Various theories of recovery allowed in other states recognize that, although no contractual relationship exists during the bidding process, bidders are in a position of reliance, potentially to their detriment, upon the fair and lawful application of state laws governing

51. *See* Wadsworth Construction Co., Inc. v. Salt Lake City, 818 P.2d 600 (Utah App. 1991), *rev. denied* 832 P.2d 476 (1992); Sutter Brothers Construction Co., Inc. v. City of Leavenworth, 708 P.2d 190 (Kansas 1985); *see* 65 A.L.R.4th 93, section 5 (1988). *But see* Stafford Construction Co., Inc. v. Terrebonne Parish School Board, 612 So. 2d 847 (La. App. 1992), *rev. denied*, 614 So. 2d 82 (1993).

52. *See* G.S. 153A-435(a); G.S. 160A-485(a).

the contracting process.[53] No North Carolina case has addressed this type of claim to date.

A typical analysis under an implied contract theory can be found in *King v. Alaska State Housing Authority*.[54] In that case, the court held:

> In exchange for a bidder's investment of the time and resources involved in bid preparation, a government agency must be held to an implied promise to consider bids honestly and fairly. Breach of this implied contract on the part of an agency entitles a disappointed bidder to recover the costs incurred in preparation of the bid.[55]

The court in *King* established a deferential standard of review, placing upon the bidder the burden of demonstrating that the action was arbitrary and capricious and denying recovery in cases where the decision is "fairly debatable."

A similar basis for recovery is permitted in federal contracting claims. In *Keco Industries, Inc. v. United States*,[56] the court identifies four factors to be used in determining whether recovery is allowed: (1) subjective bad faith on the part of the procuring officials; (2) proof that there is no reasonable basis for the decision; (3) degree of proof necessary is related to the amount of discretion given to the awarding authority by applicable laws or regulations; and (4) proven violation of applicable laws or regulations can, but need not necessarily, be a basis for recovery.[57]

A claim under the related theory of estoppel is based on the bidder's reliance on the implicit promise of the public agency when it advertises to receive bids that the contract will be awarded to the lowest responsible bidder.[58] Under this theory, the bidder's reliance on the announced or statutorily mandated bidding process prevents the board from defending the legality of a contract awarded in violation of that process. A particularly strong case for estoppel may be made when a specific but incorrect representation is made to a bidder during the bidding process. For example, a Florida appellate court recognized a disappointed bidder's claim for bid preparation costs where the bidder was erroneously told by an agent of the unit that no license was required for the project.[59]

The North Carolina Courts have limited the use of estoppel against governmental entities. An estoppel claim is allowed against a governmental entity acting in its governmental capacity only if it is necessary to prevent loss to another and will not impair the entity's exercise of governmental powers.[60]

The degree of discretion involved in the contract award standard may determine the extent of damages allowed in cases based on implied contract or estoppel. In most cases, any implied promise or express representation is of a fair opportunity to compete for a contract, not of a guaranteed award of a contract. Thus in *Swinerton & Walberg Co. v. City of Inglewood–Los Angeles County Civic Center Authority*, the court awarded bid preparation costs but not lost profits on the basis that the representations of the unit may have induced the bidder to submit a bid, but since there was discretion in awarding a contract, there was no promise to support a claim of lost profits.[61]

The North Carolina court of appeals has noted that the standard for awarding contracts under the bidding statute does involve discretion,[62] so it is likely that a limitation on recovery of lost profits would apply in a case arising in this state. In addition, a claim under an implied contract theory would likely be barred by sovereign immunity in North Carolina (see discussion below). A local government may also assert sovereign immunity as a bar to a claim under an estoppel theory.[63]

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53. *See generally* Planning & Design Solutions v. City of Santa Fe, 885 P.2d 628 (N.M. 1994) (summarizing cases allowing recovery).

54. 633 P.2d 256 (Alaska 1981).

55. *King*, 633 P.2d at 263.

56. 492 F.2d 1200 (Ct. Cl. 1974).

57. *Keco Industries, Inc.*, 492 F.2d at 1203.

58. *See* Swinerton & Walberg Co. v. City of Inglewood–Los Angeles County Civic Center Authority, 114 Cal. Rptr. 834 (Cal. App. 1974).

59. City of Cape Coral v. Water Services of America, Inc., 567 So. 2d 510 (Fla. App. 1990), *rev. denied* 577 So. 2d 1330 (1991).

60. Holland Group, Inc. v. N.C. Dept. of Adm., 130 N.C. App. 721, 726, 504 S.E.2d 300, 304 (1998) (state construction office estopped to deny application of period for issuing its decision of a claim). *But see* Washington v. McLawhorn, 237 N.C. 449, 75 S.E.2d at 402 (1953) (county not estopped to collect taxes) *and* City of Raleigh v. Fisher, 232 N.C. 629, 634, 61 S.E.2d 897, 902 (1950) (city not estopped to enforce zoning ordinance).

61. 114 Cal. Rptr. at 838.

62. Kinsey Contracting Co. v. City of Fayetteville, 106 N.C. at 384–5, 416 S.E.2d at 608–9.

63. See Data General Corp. v. County of Durham, No. COA00-202, (N.C. Ct. App. April 17, 2001).

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Federal Law Claims

The most likely form of action for a disappointed bidder claim alleging a violation of federal constitutional rights is a lawsuit seeking damages under 42 U.S.C. § 1983, as well as attorneys' fees under 42 U.S.C. § 1988. Declaratory and injunctive relief might also be available for federal claims under the analysis set forth in the first section of this bulletin. The federal civil rights statutes, however, which provide an explicit basis for monetary relief, make the inclusion of a federal claim an attractive option for a disappointed bidder. The most likely substantive rights that could form the basis for these claims are *due process*, *equal protection*, and *First Amendment* (free speech).

Due Process

The United States Constitution provides that a person shall not be deprived of life, liberty, or property without due process.[64] The same protection is also provided under Article I, Section 19 of the North Carolina Constitution, which has been held to be equivalent to the federal due process clause.[65] The due process protection has two distinct components: procedural and substantive. A challenge alleging a denial of substantive due process is unlikely to succeed except in extreme circumstances. Under substantive due process, a claimant must demonstrate that the challenged action bears no rational relationship to a valid state purpose, and that the action was arbitrary and unreasonable.[66] This standard places a heavy burden on the plaintiff that will be met only in rare circumstances. In a recent case the North Carolina Court of Appeals recognized that the county's "concern about whether plaintiff was competent, qualified and financially able to [perform the contract] was reasonable in relation to the government's objective to protect the health and safety of its citizens, and its decision to reject plaintiff's bid was not arbitrary or capricious."[67]

In order to succeed under a procedural due process theory, a plaintiff must first demonstrate an entitlement to an underlying life, liberty, or property interest, the denial of which gives rise to the claim. The courts have made clear that there is no absolute right to particular procedural protections, only a right to life, liberty, or property that cannot be denied without due process, such as notice, the right to be heard, the right to a neutral decision maker, and the right to appeal.[68] Stated another way, a disappointed bidder plaintiff "must already enjoy a constitutionally protected benefit in order to assert procedural due process rights in the denial of that benefit."[69] A claim of entitlement may arise from state and local statutes and regulations.[70]

The two interests most likely to be at stake in a contract bidding situation are (1) a property interest in the contract, or in bid preparation costs, and (2) a liberty interest in pursuing one's chosen trade or profession. These are discussed in turn below.

Property Interest

Cases analyzing disappointed bidder claims under procedural due process have usually focused on the extent to which the claimant can demonstrate an entitlement to a recognized property interest. Misapplication of state law, by itself, does not give rise to a due process claim.[71] In the bidding context, the existence of this interest depends directly upon the extent to which the governing board has discretion in carrying out the procedures at issue in the complaint.

There is no North Carolina case analyzing the principal bidding statute, G.S. 143-129 under a due process challenge. Were a case to arise, however, there is ample suggestion in the case law that the claim would be unsuccessful. In *Kinsey Contracting Co. v. City of Fayetteville*,[72] the North Carolina Court of Appeals held that "officers of a municipal corporation, in the letting of municipal contracts, perform not merely ministerial duties but duties of a judicial and discretionary nature, and that courts, in the absence of fraud or a palpable abuse of discretion, have no power to control their action."[73] North Carolina courts have also held that neither mandamus nor mandatory injunction is available as a remedy to compel the award

64. U.S. CONST., amend. V.

65. A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444 (1979).

66. *City-Wide Asphalt Paving, Inc. v. Alamance County*, 132 N.C. App. at 539–40, 513 S.E.2d at 339–40.

67. *City-Wide*.

68. Board of Regents v. Roth, 408 U.S. 564 (1972).

69. *See* Anita Brown-Graham, *A Practical Guide to the Liability of North Carolina Cities and Counties* (Chapel Hill, N.C.: Institute of Government, The University of North Carolina, 1999) 7-4.

70. Board of Pardons v. Allen, 482 U.S. 369 (1987).

71. City-Wide Asphalt Paving, Inc. v. Alamance County, 966 F. Supp. 395, 401 (M.D.N.C. 1997).

72. 106 N.C. App. 383, 416 S.E.2d 607, *disc. rev. denied*, 332 N.C. 345, 421 S.E.2d 149 (1992).

73. 106 N.C. at 384, 416 S.E.2d at 608.

of a contract to the lowest responsible bidder because the action involves a discretionary duty.[74]

In *City-Wide Asphalt Paving, Inc. v. Alamance County*,[75] a federal district court in North Carolina denied a due process claim asserted under G.S. 143-129.2, a bidding procedure that applies to specialized solid waste facilities. The court found that the required bidding procedure "does not mandate award of a contract based on objective, particularized criteria," and noted that the county had the right to reject proposals.[76] Similarly, in *Sowell's Meats & Services v. McSwain*,[77] (a case from the Fourth Circuit, but involving a federal contract) the court rejected a disappointed bidder's claim for violation of due process because the governmental agency had wide discretion in awarding the contract. Similar results have been reached in cases from other jurisdictions in which the statutory standard for awarding the contract afforded discretion, or allowed rejection of all bids in the discretion of the awarding authority.[78]

Although there are cases that have allowed due process claims asserted by disappointed bidders, these seem to be in the minority.[79] Furthermore, in at least one case where the court recognized the existence of a protected property interest, the claim was ultimately remanded for a determination of whether the right to challenge the denial of the contract in federal court satisfied the plaintiff's due process rights under the constitution.[80]

74. General Electric Co. v. Turner, 168 S.E.2d 385, 275 N.C. 493 (1969) (interpreting bidding requirements that apply to state agencies).

75. 966 F. Supp. 395 (M.D.N.C. 1997).

76. *City-Wide*, 966 F. Supp at 401. (This opinion discusses the property interest issue in analyzing a substantive due process claim.)

77. 788 F.2d 266 (4th Cir. 1986).

78. *See* Kim Construction v. Mundelein, 14 F.3d 1243 (7th Cir. 1994); Grand Canyon Pipelines, Inc. v. City of Tempe, 816 P.2d 247 (Ariz. Ct. App. 1991); Cleveland Construction, Inc. v. Ohio Dept. of Admin. Services, 700 N.E.2d 54, 69 (Ohio Ct. App. 1997).

79. *See* Three Rivers Cable Visions, Inc. v. City of Pittsburgh, 502 F. Supp. 1118 (W.D. Pa. 1980); L&H Sanitation, Inc. v. Lake City Sanitation, Inc., 769 F.2d 517 (8th Cir. 1985); Pataula Electric Membership Corp. v. Whitworth, 951 F.2d 1238 (11th Cir 1992), *cert. denied*, 115 S. Ct. 302.

80. Flint Electric Membership Corp. v. Whitworth, 68 F.3d 1309 (11th Cir. 1995), *modified*, 77 F.3d 1321. *See also* Anderson-Myers, Inc. v. Roach, 1988 WL 311025 (D. Kansas 1988).

Liberty Interest

Another potential claim under the federal procedural due process clause is that the denial of a contracting or bidding opportunity denies the disappointed bidder his or her right to pursue a chosen trade, thus affecting a liberty interest. Although competitive bidding statutes themselves generally do not create a liberty interest, their application to a particular bid may implicate that aspect of due process that "forbids arbitrary deprivation of liberty where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him."[81] Mere failure to obtain the contract does not necessarily implicate this interest. "The Constitution only protects this liberty from state actions that threaten to deprive persons of the right to pursue their chosen occupation. State actions that exclude a person from one particular job are not actionable in suits . . . brought directly under the due process clause. It is the liberty to pursue a calling or occupation, not a right to a specific job, that is secured by the Fourteenth Amendment."[82]

In order to state a claim for deprivation of a liberty interest, a disappointed bidder must demonstrate that the denial of a contract has a broad effect upon his or her ability to pursue his or her chosen trade. This could arise if the local government takes action to disqualify a contractor or makes a broad determination that the contractor is not "responsible." Accordingly, if a local government denies a contract to a particular contractor, it should be careful to make clear in the record that the determination of qualification is based narrowly on the contract at issue. In cases where the unit does wish to disqualify a contractor for future contracts, it should provide due process, including notice, competent evidence, and an opportunity for the contractor to present evidence on his or her own behalf.[83]

81. Omaha Life v. Solomon, 960 F.2d 31, 33 (6th Cir. 1992) (citations omitted).

82. Piecknick v. Commonwealth of Pennsylvania, 36 F.2d 1250, 1259 (3rd Cir. 1994) (citations omitted); *see also* Fleury v. Clayton, 847 F.2d 1229, 1231 (7th Cir. 1988).

83. *See* LaCorte Electrical Construction and Maintenance, Inc. v. County of Rensselaer, 604 N.E.2d 88 (N.Y. 1992), *and* Nathaniel Causey, *Past Performance Information, De facto Debarments, and Due Process: Debunking the Myth of Pandora's Box*, 29 Public Contract L.J. 637, 668. There is no specific statutory authority for North Carolina local governments to disqualify or "debar" contractors, although some could be eliminated for particular contracts under prequalification procedures authorized under G.S. 143-135.8.

Equal Protection

An equal protection challenge involving the award of a local government contract is most likely to arise from the application of a minority- or women-owned business enterprise program.[84] The law is clearly established that if a local government awards a contract based on race, the decision will be subject to the highest level of scrutiny.[85] This means that a race-based program must be justified by a compelling state interest and must be narrowly tailored to meet that interest.[86] A challenge based only on the women-owned business aspect of a program would be subject to intermediate scrutiny. Under this level of scrutiny, the local government program must be justified by an important purpose and be substantially related to that purpose.[87]

North Carolina local governments do not have authority to establish preferences or quotas in contracting, but are required to establish a "good faith efforts" program as set forth in G.S. 143-128(f) for major building construction projects.[88] This statute is designed to promote the use of minority-owned businesses (defined to include women-owned businesses) but explicitly prohibits the award of a contract based on race or sex. A separate law authorizes local governments to agree to and comply with minimum minority business enterprise participation requirements established by the federal government as a condition of receiving federal grants or funds.[89] In addition, some local governments may have local acts authorizing separate types of minority or "disadvantaged" business enterprise programs.[90] The same level of scrutiny applies to the local government's implementation of a program under an equal protection challenge, whether the source of authority for the program is federal, state, or local.

No reported case to date has ruled on whether the North Carolina program mandated under G.S. 143-128(f) is race-based and whether the requirements of strict scrutiny apply. Although the program is clearly designed to increase participation by minority contractors, that fact alone may not be sufficient to invoke the equal protection analysis. It is certainly possible to have race-neutral programs that promote a diverse contractor base. Indeed, the United States Supreme Court has promoted the use of race-neutral programs and has noted with approval the goal of preventing the infusion of tax dollars into a discriminatory industry.[91] More recently, however, courts have been quick to apply strict scrutiny to a variety of programs designed to promote minority contracting without distinguishing among subtle differences in approach.[92] A key factor in the outcome of an equal protection challenge might be whether the court finds that the program as administered creates an unequal playing field as between majority and minority bidders.[93]

Under North Carolina's program, the statute requires that contracts be awarded to the lowest responsible bidder without consideration of race. Each contractor is required to make a good faith effort to meet a goal established by the awarding authority for participation by minority contractors, but the award of the contract is not based on the percentage of

84. These programs may also be called "disadvantaged business enterprise" or "historically underutilized business" programs.

85. Richmond v. J.A. Croson Company, 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

86. *Richmond*, 488 U.S. at 498, 507.

87. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982); Engineering Contractors Ass'n. v. Metro Dade County, 122 F.3d 895, 907–908 (11th Cir. 1997), *cert denied*, 523 U.S. 1004 (1998).

88. For more discussion on the North Carolina requirements, see Frayda S. Bluestein, "Local Government Minority- and Women-Owned Business Programs: Questions and Answers," in *Popular Government* 59 (Spring 1994): 19–26.

89. G.S. 160A-17.1(3a).

90. *See, e.g.*, 1987 N.C. Sess. Laws 418 (Durham County); 1985 N.C. Sess. Laws 632 (City of Winston-Salem); 1983 N.C. Sess. Laws 474 (City of Durham).

91. *Richmond*, 488 U.S. at 491 ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.").

92. *See* Monterey Mechanical Co. v. Wilson, 125 F.3d 702, *en banc review denied*, 138 F.3d 1270 (9th Cir. 1997), holding that a "good faith effort" program is subject to strict scrutiny; *and* Concrete Works of Colorado, Inc. v. City and County of Denver, 86 F. Supp. 2d 1042 (D. Colo. 2000).

93. *See* Associated General Contractors v. City of Jacksonville, 508 U.S. 656, 665–66 (1993) (holding that contractors association has standing to challenge city's minority contracting program based on the finding that the program "erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group").

participation offered. Since the requirement applies to all contractors, it can be argued that it does not create a preference. On the other hand, if a minority contractor is permitted to consider his or her own status toward the good faith effort requirement (an application of the statute that would seem consistent with its purpose) it could be argued that the program creates a race-based inequality among bidders.

A number of local governments in North Carolina and in other states have conducted "disparity studies" to establish the factual and historical basis to support the need for a race-based program as required under the strict scrutiny analysis. These studies help local government identify the pool of available minority contractors as well as the historical contracting patterns and can be useful in structuring a narrowly tailored and supportable program. Although there has been significant litigation about these studies, there is no definitive case law to date upholding a particular methodology or study in the context of a strict scrutiny analysis.[94]

An equal protection challenge might also arise from a contracting decision based on something other than race, such as a local preference. If the distinction is one that does not involve a suspect classification, it will be evaluated under a more deferential standard, which requires that the program be rationally related to a legitimate public purpose.[95] It should be recognized, however, that the bidding statutes require local governments to award contracts to the "lowest responsible bidder," taking into consideration quality, performance, and time. Any additional basis for awarding contracts would have to fall within the scope of that authority. A local preference, for example, would be invalid because it exceeds the authority granted under the statute. Requirements related to performance of the contract, however, such as experience on projects of a specified size or type, which might be used to prequalify bidders, are within the scope of the unit's authority to award contracts and, if reasonably drawn, would likely withstand scrutiny under an equal protection challenge.

94. A recent decision arising out of Fulton County, Georgia, went into great detail in analyzing, but ultimately rejected, the disparity study and its defense by expert witnesses. Webster v. Fulton County, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), *aff'd* 218 F.3d 1267 (11th Cir. 2000). *See also* Concrete Works of Colorado, Inc. v. City and County of Denver, 86 F. Supp. 2d 1042 (D. Colo. 2000) (minority contracting program violates equal protection notwithstanding disparity study).

95. *City-Wide Asphalt Paving, Inc. v. Alamance County*, 132 N.C. App. at 540, 513 S.E.2d at 340.

First Amendment (Freedom of Speech)

Several United States Supreme Court cases have extended to independent contractors the standards governing employee free speech protection.[96] This restricts the ability of a local government to base the decision to award a contract upon statements or views of a contractor that are recognized as expression protected by the First Amendment. Subsequent decisions have limited the application of this rule to cases in which there is a preexisting commercial relationship.[97] Although this type of claim may be more likely to arise in service contracts, most of which are not subject to competitive bidding in North Carolina,[98] it would clearly apply in a case where it could be shown that a contractor was rejected because of critical statements he or she made about the local government or its representatives, or because he or she supported political opponents of members of the governing board.[99]

Defenses

Standing

No North Carolina case to date has directly addressed the question of whether a disappointed bidder who is not also a taxpayer has *standing* to challenge a contract award decision. There are reported cases that were brought by disappointed bidders, but the issue of standing was not addressed.[100] Cases from other jurisdictions are divided on this issue. Some deny standing on the theory that the bidding laws exist for

96. O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996); Board of County Comm'rs, Wabaunsee County v. Umbehr, 518 U.S. 668 (1996).

97. *See* McClintock v. Eichelberger, 169 F.3d 812 (3d Cir. 1999), *cert. denied*, 528 U.S. 876, 120 S. Ct. 182 (1999) (denying First Amendment claim where bidder did not establish prior ongoing commercial relationship).

98. *See* Bluestein, *A Legal Guide to Purchasing and Contracting*, at p. 21.

99. *See, e.g.*, North Mississippi Comm., Inc. v. Jones, 792 F.2d 1330 (5th Cir. 1986), *and* El Dia, Inc. v. Rossello, 165 F.3d 106 (1st Cir. 1999) (violation of First Amendment when newspaper contract was cancelled in retaliation for critical reporting).

100. *City-Wide*, 132 N.C. App. 533, 513 S.E.2d 335 (N.C. App. 1999), *disc. rev. denied*, 350 N.C. 826 (1999); Kinsey Contracting Co. v. City of Fayetteville, 106 N.C. 383, 416 S.E.2d 607, *disc. review denied*, 332 N.C. 345, 421 S.E.2d 149 (1992).

the benefit of the taxpayers and not the bidders.[101] Others allow claims by disappointed bidders, recognizing that they are the parties most likely to enforce the laws, and that the interest in fair and open competition that underlies most bidding procedures is in part for the benefit of the bidders.[102] The modern trend appears to be in favor of recognizing disappointed bidder standing.

The bidder's position and the nature of the claim may also affect the bidder's standing to bring a claim.[103] If the claim relates to the application of the award standard, a bidder who was third or fourth from the lowest may not have a sufficient interest to have standing to bring the claim. If the claim is based on a failure to comply with statutory procedures, or unlawful preparation or interpretation of specifications, all bidders may be equally affected and standing may not depend on their position after bids are opened.

The standard for awarding contracts has also been a factor in determining whether bidders have standing to bring a claim, especially in cases involving a claim under a procedural due process theory. Courts have denied standing on the theory that, where the board has discretion in awarding the contract, the bidder has too remote an interest in the contract to constitute a sufficient injury to support standing.[104] This may represent a blurring of the substantive law on the merits of the claim and the issue of standing, but the theory is relevant in both contexts.

Mootness and Laches

Depending upon the relief a disappointed bidder seeks, the status of the contract at the time the action is filed may give rise to a defense of *mootness*. Where the plaintiff seeks injunctive relief, an action filed after a contract is awarded or after work is begun or completed may be moot.[105]

The North Carolina courts have recognized that a case should be dismissed on mootness grounds when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy."[106] Whether a claim is moot depends upon the specific remedy sought. If the plaintiff seeks to prevent the award or performance of a contract alleged to be unlawful for failure to comply with statutory bidding requirements, the court can offer no remedy if the contract has already been awarded or performed when the claim is heard.[107] If, however, the plaintiff seeks damages or some other remedy that can be provided after the award or completion of the contract, the claim may not be moot. (As noted above, a claim for damages is unlikely to succeed unless it is based on a constitutional violation.)

The courts have recognized exceptions to the mootness doctrine, several of which could be applicable to a disappointed bidder claim. First, a bidder might argue that the claim should be allowed under the exception for cases that are "capable of repetition yet evading review." The claimant might argue that, even if it is too late to enjoin the award of a contract, the defendant will award contracts again in the future, perhaps using the same allegedly defective process.[108] This

101. *See* James L. Isham, J.D., *Public Contracts: Low Bidder's Monetary Relief Against State or Local Agency for Nonaward of Contract*, 65 A.L.R.4th 93, section 2(a) (1988).

102. *See* Brunoli v. Town of Branford, 722 A.2d 271 (Conn. 1999) (allowing disappointed bidder standing for injunctive relief only); AEP v. LIPA, 686 N.Y.S. 664 (N.Y. 1999), State *ex rel.* EDS Federal Corp. v. Ginsberg, 259 S.E.2d 618 (W.Va. 1979). *See also* Jennifer Gartner, *The Meaning of "Interested Party" under 28 U.S.C. § 1491*, 29 *Public Contract Law Journal*, 739 (2000) (summarizing federal case law and legislation affording disappointed bidders standing to challenge federal contracting decisions).

103. Hinesburg Sand & Gravel Co., Inc. v. State of Vermont, 693 A.2d 1045 (Vermont 1997) (denying standing for potential subcontractor). See also Gartner, *The Meaning of "Interested Party*," at 740, concluding that the interested party standard for standing to challenge federal contracting decisions refers to the second-lowest offeror, a subcontractor of that offeror, or a contractor who was illegally precluded from bidding and who can show an intent to bid and a substantial chance at award.

104. Browning-Ferris, Inc. v. Manchester Borough, 936 F. Supp. 241 (M.D. Pa. 1996); Sowell's Meats and Services, Inc. v. McSwain, 788 F.2d 226 (1986).

105. *See* Masonry Arts, Inc. v. Mobile County Commission, 628 So. 2d 334 (Ala. 1993); C.N. Robinson Lighting Supply Co. v. Howard County Board of Education, 602 A.2d 195, *rev. denied*, 607 A.2d 7 (Md. App. 1992); Ash, Inc. v. Mesa Unified School District, 673 P.2d 934 (Ariz. App. 1983); DeFonce Construction Corp. v. Community Resources Recovery Authority, 418 A.2d (Conn. 1979).

106. Roberts v. Madison County Realtors Ass'n, Inc., 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996).

107. *See* Fulton v. City of Morganton, 260 N.C. 345, 132 S.E.2d 687 (1963) (court could not restrain an election that had already been held).

108. *See* Hemphill Construction Co., Inc. v. City of Laurel, 760 So. 2d 720 (Miss. 2000).

argument is weakened, however, by the fact that a plaintiff has the ability to enjoin the award of a contract, thus the claim does not actually evade review.[109]

Since the mootness doctrine is one of judicial restraint, the courts may decide not to exercise that restraint where the question at issue involves a matter of public interest.[110] Courts in other states have allowed disappointed bidder claims notwithstanding the mootness defense because of the importance to the public of questions involving interpretation of the public bidding laws.[111]

A local government might also assert the affirmative defense of *laches* against a claim for equitable relief, such as an injunction.[112] A claim is barred by laches where "lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim."[113] A bidder's claim could be subject to a laches defense on the ground that the bidder's failure to seek an injunction allowed the unit to go forward with the contract. If the bidder's claim were to be successful, the taxpayers would be injured by having to pay for the contract as well as the bidder's damages.[114]

Immunity

The state and its political subdivisions are protected from certain claims for damages by *immunity* doctrines recognized by the courts. Governments may waive this immunity, most commonly, through the purchase of insurance.[115] The North Carolina Supreme Court has held that the state waives its sovereign immunity when it enters into a contract and implicitly consents to be sued for damages if it breaches the contract.[116] This reasoning was extended to municipalities in a case decided by the North Carolina Court of Appeals.[117] A claim by a disappointed bidder, however, is not a claim under a contract, but instead, a claim that arises before a contract has been awarded. As noted earlier, some courts have recognized these claims under implied contract or estoppel theories. A North Carolina Supreme Court decision would appear to bar any such action in this jurisdiction.

In *Whitfield v. Gilchrist*,[118] the court refused to recognize an implicit waiver of sovereign immunity by the state for claims arising under a theory of implied contract, regardless of whether the contract was alleged to be implied in fact or implied in law.[119] Instead, the court held, immunity can only be waived when the governmental entity enters into a *valid* contract. Applying this rule in the bidding context, any claim arising before the execution of a valid contract would be barred by sovereign immunity. In addition, the North Carolina Court of Appeals has recognized sovereign immunity as a bar to an estoppel claim.[120]

Contracts Not Subject to Competitive Bidding Requirements

The bidding requirements for North Carolina local governments apply to contracts for the purchase of tangible personal property, and for construction or repair work.[121] Contracts for most types of services are

109. *See* Shell Island Homeowners Ass'n, Inc. v. Tomlinson, 517 S.E.2d 401, 134 N.C. App. 286 (1999) (plaintiff had ample opportunity to seek review of permit denials through administrative appeal process).

110. Matthews v. Dep't of Transportation, 35 N.C. App. 768, 242 S.E.2d 653 (1996); Leak v. High Point City Council, 25 N.C. App. 394, 397, 213 S.E.2d 386, 388 (1975).

111. *See* National Electrical Contractors Assoc. Puget Chapter v. Seattle School Dist., 400 P.2d 778 (Wash. 1965); Anderson v. Kennedy, 264 N.W.2d 714 (S.D. 1978); Petricca Construction Co. v. Commonwealth, 640 N.E.2d 780, 783 (Mass. Ct. App. 1994).

112. Laches is not available as a defense to an action at law. City-Wide Asphalt Paving, Inc. v. Alamance County, 513 S.E.2d 335, 338, 132 N.C. App. 533, 537 (1999).

113. Taylor v. City of Raleigh, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976).

114. *See* Urban Electrical Services, Inc. v. Brownwood Ind. School Dist., 852 S.W.2d 676 (Texas App. 1993).

115. G.S. 160A-485(a); G.S. 153A-435(a).

116. State v. Smith, 289 N.C. 303, 222 S.E.2d 412 (1976).

117. *See* Houpe v. City of Statesville, 128 N.C. App. 334, 343, 497 S.E.2d 82, 89, *disc. rev. denied*, 348 N.C. 72, 505 S.E.2d 871 (1998) (holding that the rule in *Smith v. State* applies to municipalities).

118. 348 N.C. 39, 497 S.E.2d 412 (1998).

119. The Court of Appeals had distinguished between a contract implied in fact (a contract in which there is agreement but the contract is not valid) and a contract implied in law, where there is no agreement but a remedy is provided to prevent unjust enrichment. *See* Whitfield v. Gilchrist, 126 N.C. App. 241, 485 S.E.2d 61 (1997).

120. Data General Corp. v. County of Durham, No. COA00-202, (N.C. Ct. App. April 17, 2001).

121. G.S. 143-129, 131. *See* Bluestein, *A Legal Guide to Purchasing and Contracting*, at p. 21.

not covered by these statutory requirements. Local governments often solicit competitive bids for contracts even when not required to do so by law. A court might recognize compliance with locally adopted bidding procedures as essential to the validity of a contract. If so, a disappointed bidder could seek injunctive relief to prevent the award or performance of an illegal contract. For several reasons, however, a claim by a disappointed bidder arising under an optional bidding procedure will be much more difficult to maintain than one arising under the bidding statutes.

First, if a challenge to the bidding process is raised before a contract is awarded, the local government has the option of terminating the bidding process and simply negotiating a contract in its discretion. The only type of claim that would survive such a decision would be one based on discrimination, violation of free speech, due process rights, or some other constitutional right. The fact that the unit is not required to conduct a bidding procedure would make it difficult for a contractor to demonstrate a property interest in a fair bidding procedure, and there would, of course, be no statutory basis for a cause of action. There is no North Carolina case addressing the issue of whether a disappointed bidder has a cause of action for failure to comply with optional bidding procedures.

Courts in other jurisdictions, however, have recognized claims asserted by participants in bidding procedures that were not required by law.[122] A ruling in such a case must be based on a general requirement of fairness and equal treatment. A failure to abide by self-imposed bidding requirements could be viewed as arbitrary, but a plaintiff must still identify a legal basis for making a claim. The most likely claim would be a violation of substantive due process, but as noted earlier, the plaintiff would have to demonstrate that the actions of the local government have no rational basis—a fairly difficult standard to meet. Furthermore, as noted above, the local government in the face of such a claim can simply terminate the procedure it has begun and either revise it or award the contract in its discretion.

This is not to suggest that local governments can or should freely ignore the optional procedures they develop for contracts that are not subject to the competitive bidding statutes. These procedures should be carefully considered and should be followed in order to avoid a claim of arbitrariness. If there is a legitimate reason for departing from the procedures, they should be revised or the process should be terminated and reinitiated in accordance with the desires of the unit. A court may hold that even when a local government voluntarily uses a competitive process the interests of fairness are still implicated. If there is no rational explanation for the unit's failure to adhere to optional procedures, or if there is evidence of favoritism or unreasonable action by the unit, a court might be more inclined to allow a challenge.

Conclusion

A disappointed bidder has a limited window of opportunity to assert legal claims against a North Carolina local government. Furthermore, the remedies available may be limited. It is preferable for both the bidders and the local governments to resolve claims arising out of the bidding process informally. Bidders can provide valuable information to contracting agents about the appropriateness of particular procedures or specifications and how they affect the competitive environment. Local government officials should review and respond promptly to claims or protests asserted by bidders during the bidding process. The public interests the bidding statutes are designed to serve will be best served by the fair and expeditious implementation of bidding and contracting procedures.

122. McQuillin Mun. Corp. § 29.31, 3d Ed., 1999 [*citing* Irwin Marine, Inc. v. Blizzard, Inc., 490 A.2d 786 (N.H. 1985) (city was required to treat all bidders fairly under optional bidding procedure for sale of property)].

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