SECTION 3

BIDDER MISTAKES AND REMEDIES

A. BID MISTAKES

1. Bid Irregularities

A public contract cannot be awarded on terms that vary from those contained in the invitation for bids.[1] A bid must conform in all material respects to the invitation for bids; a bidder cannot be allowed after bid opening to supply an essential element that was missing from its bid.[2] However, not every irregularity in a bid requires rejection of the bid. In order for rejection to be required, a variation from the bid specifications or instructions must be of a type that essentially destroys the competitive nature of bidding. The variation must be substantial, and in order to be substantial, it must affect the amount of the bid and give the bidder an advantage or benefit not allowed other bidders.[3] In order to be waived by the contracting agency, a deviation from the specifications or instructions must be inconsequential; in other words, it must not provide that bidder with an advantage over other bidders, and must not otherwise defeat the goals of public contracting in insuring proper use of public funds and avoidance of corruption.[4] Generally, the test applied is to determine whether waiver of the irregularity would deprive the agency of its assurance that the contract will be entered into, performed, and guaranteed according to the specifications, and whether the irregularity is such that it undermines competitive bidding by giving one bidder an advantage over others.[5]

a. Major vs. Minor Irregularities

A material defect in the bid is one that would allow the bidder to avoid the binding nature of its bid without forfeiting its bid bond, and it cannot be waived.[6] The distinction between waivable and nonwaivable bidding requirements sometimes may be spelled out in the language of applicable statutes. For example, Louisiana's Public Bid Law specifically states that the requirements of the statute, requirements in the advertisement for bids, and substantive requirements stated on the bid form may not be considered informalities and may not be waived by the agency.[7] Nonwaivable statutory requirements may be as detailed as inclusion of the bidder's certificate of responsibility number on the outside of its bid envelope.[8] But frequently, the distinction between waivable and nonwaivable deviations must be discerned through a careful evaluation of the actual impact of the irregularity.[9]

b. Incomplete, Non-Responsive, or Irregular Bids

Frequently bids are prepared under circumstances that increase the chance of innocent error. It is common for bidders to wait as long as possible before the filing deadline to complete their bids, for by so doing they may be able to take advantage of late price changes for materials.[10] In other instances, this longer time also may be used beneficially to analyze the project specifications and verify the technical data upon which the contracting agency has based its estimates. Preparation and submission of bids under pressure increases the danger of many types of error. Typical of the irregularities that may have to be evaluated by contracting agencies are the following:

- Bid is not signed or is not dated.[11]
- Bid does not include corporate resolution authorizing representative to sign bid.[12]
- Bid does not disclose bidder's stockholders where

[1] Portions of this section are derived from *Competitive Bidding and Award of Highway Construction Contracts* by Dr. Ross D. Netherton, published by the Transportation Research Board in 1976 and included in the first edition of SELECTED STUDIES IN HIGHWAY LAW.

[2] Sevell's Auto Body Co. v. N.J. Highway Auth., 306 N.J. Super. 357, 703 A.2d 948, 951 (A.D. 1997); L. Pucillo & Sons, Inc. v. Township of Belleville, 249 N.J. Super. 536, 592 A.2d 1218, 1224, *certification denied*, 127 N.J. 551, 606 A.2d 364 (1991) (citing Palomar Constr., Inc. v. Township of Pennsauken, 196 N.J. Super. 241, 482 A.2d 174 (A.D. 1983)).

[3] Wilson Bennett, Inc. v. Greater Cleveland Regional Transit Auth., 925, 67 Ohio App. 3d 812, 588 N.E.2d 920, *jurisdictional motion allowed*, 53 Ohio St. 3d 717, 560 N.E.2d 778, *cause dismissed*, 57 Ohio St. 3d 721, 568 N.E.2d 1231 (1990).

[4] Ghilotti Constr. Co. v. City of Richmond, 53 Cal. Rptr. 2d 389, 390, 45 C.A. 4th 897, *review denied* (1996); *see also* AMERICAN BAR ASSOCIATION, MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOVERNMENTS § 3-202(6) (2000).

[5] United States v. Joint Meeting of Essex & Union Counties, 997 F. Supp. 593, 600 (D. N.J. 1998); Matter of Protest of Award of On-Line Games Production and Operation Services Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 653 A.2d 1145, 1160 (1995) (both citing Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 650 A.2d 748 (1994)).

[6] Spawglass Constr. Corp. v. City of Houston, 974 S.W.2d 876, 885 (Tex. App. 1998).

[7] Boh Bros. Constr. Co., L.L.C. v. Department of Transp. and Dev., 698 So. 2d 675, 678 (La. App. 1 Cir. 1997); La. R.S. § 38:2212 subd. A(1)(b). However, the agency may still waive deviations that are not substantive in nature. *Id*.

[8] City of Durant v. Laws Constr. Co., 721 So. 2d 598, 602 (Miss. 1998).

[9] A.A.B. Elec., Inc. v. Stevenson Public School Dist., 5 Wash. App. 887, 491 P.2d 684, 686–87 (1971).

[10] *See* City of Atlanta v. J.A. Jones Constr. Co., 370, 260 Ga. 658, 398 S.E.2d 369, 370, *on remand*, 198 Ga. App. 345, 402 S.E.2d 554, *cert. denied*, 111 S. Ct. 2042 (1990).

[11] *See, e.g.,* A.A.B. Elec., Inc. v. Stevenson Public School Dist., 5 Wash. App. 887, 491 P.2d 684, 686 (1971) (bid was rejected because it was unsigned, bidder could have accepted or rejected the award in retrospect, which gave that bidder an advantage over other bidders).

[12] George W. Kennedy Constr. Co. v. City of Chicago, 135 Ill. App. 3d, 306, 481 N.E.2d 913, 916 (1985) (corporation secretary's signature was not sufficient to bind bidder where the bid did not include a certified copy of the corporate by-laws or other authorization for secretary to bind corporation).

required by statute.[13]

• Bid papers do not acknowledge the bidder's receipt of changes in plans, additions to specifications, or other addenda.[14]

• Bidder does not include lists of current equipment, a description of previous experience, or an updated financial statement.[15]

• Bidder fails to list subcontractors as required by statute or the invitation for bids.[16]

• Arithmetical errors occur in estimating materials or extending unit prices to derive total prices.[17]

• Bid papers are not submitted on the right forms or in the required number of copies.[18]

• Prices submitted are for an alternate item in lieu of an item specified.[19]

• Prices are not given for an alternative called for in the invitation for bids.[20]

• Bidder does not include its plan of operation with the bid, including completion date.[21]

• Bidder has failed to attend the pre-bid meeting.[22]

• Cost item is omitted.[23]

• Bidder fails to include affirmative action plan.[24]

In addition, the AASHTO Guide Specifications contract provisions[25] also consider the proposal irregular or non-responsive if:

• The proposal is incomplete, indefinite or ambiguous because it contains unauthorized additional, conditional or alternate bids or other irregularities.

• The proposal fails to furnish a properly executed guaranty (bid bond or equivalent).

• The proposal includes added provisions that reserve the bidder's right to accept or reject a contract award.

• There is evidence of collusion among bidders.

• The proposal is materially unbalanced.

• The bidder firm and an affiliated corporation submit more than one bid or proposal for the same contract.

Consistent with the rule that there must be strict adherence to formal specifications and procedures in the submission, opening, and acceptance of bids, courts have upheld the rejection of bids that are irregular when submitted.[26] On the other hand, where an irregu-

[13] George Harms Constr. v. Borough of Lincoln Park, 161 N.J. Super. 367, 391 A.2d 960, 965–66 (1978).

[14] George & Benjamin General Contractors v. Virgin Island Dep't of Property and Procurement, 921 F. Supp. 304, 309 (D. V.I. 1996) (failure to acknowledge receipt of addendum may be waived as minor informality if the bid clearly indicates that the bidder received the amendment, such as when the addendum adds an item of work and the bidder has included a bid for that item).

[15] J.H. Parker Constr. Co. v. Board of Aldermen, City of Natchez, 721 So. 2d 671, 677 (Miss. App. 1998) (city had discretion to waive prequalification statement where bidder from response); TEC Electric, Inc. v. Franklin Lakes Board of Educ., 284 NJ. Super. 480, 665 A.2d 803, 806 (1995) (omitted prequalification statement was waivable as an immaterial defect and it was an abuse of discretion to deny the waiver; statement that was omitted would have duplicated what had already been submitted with respect to assurances regarding financial responsibility, plant, and equipment, and there was no evidence of advantage to the bidder); Gunderson v. University of Alaska, Fairbanks, 922 P.2d 229, 235 (Alaska 1996) (permitting use of different hauling equipment from that specified in request for proposals was harmless); Peninsula Correctional Health Care v. Department of Corrections, 924 P.2d 425, 428 (Alaska (1996)) (submission of resumes of employees as representative sample of who would be working on project, and not as commitment that those employees would be assigned to project, did not render bid nonresponsive); Arakaki v. State of Haw., 87 Haw. 147, 952 P.2d 1210, 1214 (1998) (it was error for agency to reject all bids and determine that low bidder was nonresponsive on the grounds that the low bidder had requested permission to supplement its bid with its qualification and experience list). *But see* City of Durant v. Laws Constr. Co., 721 So. 2d 598, 602 (Miss. 1998) (bidder's failure to include statutorily required certificate of responsibility number on outside of bid envelope is nonwaivable deviation).

[16] Ray Bell Constr. Co. v. School District of Greenville County, 331 S.C. 19, 501 S.E.2d 725, 729–30 (1998) (bid was nonresponsive as listing alternative subcontractors was contrary to subcontractor listing law requirements; alternatives gave bidder opportunity to choose among listed subcontractors, which was an advantage not enjoyed by other bidders).

[17] *See, e.g.,* Department of Transp. v. Ronlee, Inc., 518 So. 2d 1326, 1328 *review denied*, 528 So. 2d 1183 (Fla. App. 3 Dist. 1987).

[18] George & Benjamin General Contractors v. Virgin Islands Dep't of Property and Procurement, 921 F. Supp. 304, 309 (D. V.I. 1996); *see also* Sedor v. West Mifflin Area School District, 713 A.2d 1222, 1225 (Pa. Commw. 1998) (laches may apply to action to enjoin an award to a bidder who used wrong bid form).

[19] Bodies by Lembo v. Middlesex County, 286, N.J. Super 298, 669 A.2d 254, 256 (A.D. 1996); *see also* Southern Foods Group, L.P. v. State, Dep't of Educ., 974 P.2d 1033, 1042, 89 Haw. 443 (1999) (alternate bids submitted where they were not called for, in violation of bidding regulations, was properly rejected as nonresponsive).

[20] Hall Constr. Co. v. N.J. Sports Auth., 295 N.J. Super. 629, 685 A.2d 983, 988 (A.D. 1996) (failure to submit bid on alternate renders bid nonconforming).

[21] Kokosing Constr. Co. v. Dixon, 72 Ohio App. 3d 320, 594 N.E.2d 675, 680 (1991).

[22] Scharff Bros. Contractors, Inc. v. Jefferson Parish Sch. Bd., 641 So. 2d 642, 644, *reconsideration denied*, 644 So. 2d 398 (La. App. 5 Cir. 1994).

[23] Matter of Protest of Award of On-Line Games Production and Operation Services Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 653 A.2d 1145, 1163–64 (1995).

[24] Kokosing Constr. Co. v. Dixon, 72 Ohio App. 3d 320, 594 N.E.2d 675, 680 (1991). However, the bidder's failure to include a signature on the affirmative action plan was not a material deviation. *Id.* 594 N.E.2d at 680.

[25] AASHTO Guide Specification, Division 100, Section 102.07, at pp. 12-13; see also Section 1 *supra*.

[26] Ardmare Constr. Co. v. Freedman, 191 Conn. 497, 467 A.2d 674, 676 (1983) (use of rubber stamp rather than hand-

larity is determined to be minor and has no adverse effect on the competition among bidders, contracting agencies have been upheld in their waiver of the defect.[27]

The Ohio Revised Code can provide useful guidance. It provides that a contract will be considered responsive if the proposal responds to the bid specifications in all material respects and contains no irregularities or deviations that would affect the amount of the bid or otherwise give the bidder a competitive advantage.[28]

Materiality of a particular specification is a question of law.[29] Whether irregularities in bidding and acceptance may be waived by the contracting agency generally has been determined by consideration of their practical effect on the basic purpose of the competitive bidding system. Thus, the question of waiving a bidder's failure to file certain forms with the bid is evaluated in terms of the risk that an unfair advantage may be granted by allowing this oversight to be corrected after bid opening.[30] Under an Ohio decision, a letter clarifying the bid that was received after the bid opening was found to be a deviation from the bid specifications, destroying the competitive nature of the bidding process.[31] By contrast, the bidder's omission of a two-page specification sheet was found to be insubstantial and did not affect the bid process or give the bidder a competitive advantage over the other bidders.[32] Similarly, waiver of oversights in the formalities of opening bids requires consideration of whether the action will result in giving any bidder an advantage that the others do not have,[33] or provide the bidder a competitive advantage as set forth in the Ohio Revised Code.

Determination of when a bid is accepted must be made by reference to the contracting agency's rules of procedure. Where bids for a construction contract were the subject of several motions at the same meeting of the agency's governing body, it was held that the last action in the continuous session of the commission's meeting was controlling, and earlier motions to accept a particular bid did not give rise to a bidding contract at that time and by that act.[34] Also, where a contracting agency's rules of procedure require that acceptance is not completed until the bidder is formally notified, the time of notification is controlling, even though the successful bidder was represented at the county commission meeting at which the contract was awarded.[35]

Among the consequences of acceptance of a bid is the general rule that the bidder may not thereafter make changes in the list of subcontractors that it has submitted without the approval of the contracting agency.[36] Some states have specific legislation to discourage bid shopping or bid peddling in connection with construction contract awards.[37] This promotes the dual purposes of maintaining fairness in dealings between prime and subcontractors as well as protecting public works projects from excessive costs.[38] However, where a bid statute does not require listing of subcontractors and the invitation for bids does not have such a requirement,

written signature on bid); Colombo Constr. Co. v. Panama Union Sch. Dist., 136 Cal. App. 3d 868, 186 Cal. Rptr. 463, 466 (1982) (bidder who made a mistake in original bid is prohibited from further bidding on same project); E.M. Watkins & Co. v. Board of Regents, 414 So. 2d 583, 587 (Fla. App. 1982) (failure to list subcontractors in bid); Gibbs Constr. Co. v. Board of Supervisors, La. State Univ., 447 So. 2d 90, 92 (La. App. 1984) (failure of bidder to attend pre-bid conference); Williams v. Board of Supervisors, La. State Univ. and Agricultural and Mechanical College, 388 So. 2d 438, 441 (La. App. 1980) (failure to describe equipment according to instructions); Grace Constr. Co. v. St. Charles Parish, 467 So. 2d 1371 (Fla. App. 1985); George W. Kennedy Constr. Co. v. City of Chicago, 135 Ill. App. 3d 306, 481 N.E.2d 913, 916 (1985) (omission of bidder's president's signature on corporate signature and acceptance pages); Matter of Bayonne Park, Lincoln Park and James J. Braddock-North Hudson Park Bikeway System, Hudson County, 168 N.J. Super. 33, 401 A.2d 705, 709 (1979) (successful low bidder delayed return of executed contract beyond period permitted in bid instructions).

[27] *See, e.g.*, Lovisa Constr. Co. v. N.Y. State Dep't of Transp., 435 N.Y.S.2d 123 (1980) (low bidder did not list mobilization costs separately for particular facilities, but inserted one gross figure for all mobilization costs).

[28] OHIO REV. CODE 9.212.

[29] George Harms Constr. v. Borough of Lincoln Park, 161 N.J. Super. 367, 391 A.2d 960, 965 (1978).

[30] Excavation Constr., Inc. v. Ritchie, 230 S.E.2d 822, 825 (W. Va. 1976) (refusal to waive failure to file a "free competition affidavit" with original bid papers was not abuse of discretion).

[31] Rein Constr. Co. v. Trumbull County Bd. of Commr's, 138 Ohio App. 3d 622, 741 N.E.2d 979 (2000).

[32] Lewis & Michael, Inc. v. Ohio Dep't of Admin. Servs., 103 Ohio Misc. 2d 29, 724 N.E.2d 885 (1999).

[33] Butler v. Federal Way School Dist. No. 210, 17 Wash. App. 288, 562 P.2d 271, 276 (1977) (contracting agency mislaid bid and did not open it until 15 minutes after others were opened in the presence of other bidders, irregularity could be waived); Farmer Constr., Ltd. v. State Dep't of Gen. Admin., 98 Wash. 2d 600, 656 P.2d 1086 (1983) (omission of signature on bid form was not material where bid bond was signed and bid bond and proposal referred to each other and were connected by internal reference; bidder would be bound by bid and lack of signature on cover page was not an advantage).

[34] Berry v. Okaloosa County, 334 So. 2d 349, 350 (Fla. App. 1976).

[35] *Id*. at 351.

[36] *But see* McCandlish Elec., Inc. v. Will Constr. Co., 107 Wash. App. 85, 25 P.3d 1057 (2001) (subcontractor listing statute did not provide listed subcontractor with cause of action when prime contractor substituted another subcontractor; subcontractor's remedy was to try to enjoin award and execution of contract).

[37] CAL. PUB. CONT. CODE § 4101 *et seq*. (1999).

[38] *See* Bay Cities Paving & Grading, Inc. v. Hensel Phelps Constr. Co., 128 Cal. Rptr. 632, 634, 56 C.A. 3d 361 (1976) ("Bid shopping is the use of the lowest bid already received by the general or prime contractor to pressure other subcontractors into submitting even lower bids; bid shopping is prohibited by the statute after the award of the prime contract.").

then a bidder's failure to do so may be waived.[39] This is particularly so where the court has determined that the subcontractor listing would not have prevented bidders from bid shopping.[40] However, where a statute requires listing of subcontractors, the bidder's failure to do so is a nonwaivable deviation, even if the invitation for bids is silent on that requirement.[41]

An agency may require subcontractor listing in its invitation for bids where it is not necessarily required by statute, or may set out more detailed requirements than are required by statute. In such a case, the bidder's failure to comply with the more stringent requirements may be grounds for determining that the bid is nonresponsive. A California court in *MCM Construction v. City and County of San Francisco* held that the City acted within its discretion when it rejected the low bid as nonresponsive for not complying with its requirement that it provide the subcontract price of all of its listed subcontractors, even though this requirement went beyond the requirements of California's subcontractor listing statute.[42]

In addition to not being able to change the individual subcontractors or prices listed, a bidder also cannot change the subcontractor percentages in its bid after bid opening. Where the specifications permitted only 50 percent of the work to be subcontracted and the bidder proposed to subcontract over 80 percent, the higher amount could not be waived, nor could the bidder alter the percentages.[43] Many of these irregularities cannot adversely affect the competitive bidding process. Others, such as failure to submit a plan of operation or an updated financial statement, might affect a contract award.

In practice, the character and consequences of a bid's variance influence the disposition of the bid. Where the variances are minor, and the bid conforms substantially to the specifications, courts have held that acceptance of the bid as originally submitted does not destroy the competitive character of the bidding. Rejection appears to be required only where the bid variance would create a substantial difference between the terms of the bid and the announced specifications of the project, and would give that bidder an advantage not enjoyed by other bidders.

Difficulties arise in practical application of the rule to individual cases, since variances may result from a wide range of fact situations. The reported cases have concerned all major types of specifications—quantity, quality, and condition of materials; schedules for work and deliveries; geometric and structural design; organization of work; and numerous special provisions.[44] They have also disclosed a wide variety of language used in both bids and specifications. The courts have approached these cases with a pragmatic objective of preventing situations in which any bidder is allowed to bid in a way that gives its proposal an advantage that is not also enjoyed by the other bidders. The impact on bid prices is, therefore, the pivotal point in distinguishing allowable and prohibited variances. Those that have a minimal effect or no effect on price may be permitted to remain in the competition for the contract award. It is not important to the rule that the variant bid might provide an additional benefit to the contracting agency. If it contemplates a material change, and thus departs from the basis on which the other bids are evaluated, the variance must be rejected.

c. Unsigned Bids

Normally, the lack of a signature is a material defect that cannot be waived. In the absence of a signature of a person that can bind the bidder to its bid, the bidder is free to refuse to execute the contract without forfeiting its bid bond should it decide that it is in its interest to do so.[45] This is an advantage not enjoyed by other bidders, and so constitutes a material and substantial deviation. However, where the cover page was not signed but the addendum was signed, the court held that the lack of a signature on the cover page was not a material and substantial deviation, as the signature on the addendum was sufficient to bind the bidder.[46]

Likewise, where there was a signature in three other places in the bid, including the bid bond, the lack of a signature on the cover page was waivable; the bid and bid bond could be treated as one signed instrument.[47] However, whether a signature on the bid bond is enough to bind the bidder to its bid must be determined with reference to the documents. Where the bid bond and the bid are internally connected and make references to one another, they may be held to be one document. In such a case, the signature on the bid bond will

[39] Williams Bros. Constr. v. Public Bldg Comm'n of Kane County, 243 Ill. App. 3d 949, 612 N.E.2d 890, 895, *appeal denied*, 152 Ill. 2d 582, 622 N.E.2d 1229 (1993).

[40] *Id*. at 897.

[41] Gaglioti Contracting, Inc. v. City of Hoboken, 307, N.J. Super. 421, 704 A.2d 1301 (1997).

[42] 78 Cal. Rptr. 2d 44, 51, 66 Cal. App. 4th 359 (Cal. App. 1998).

[43] Valley Crest Landscape, Inc. v. City Council of City of Davis, 49 Cal. Rptr. 2d 184, 190, 41 C.A. 4th 1432 (1996) (the agency cannot permit changes in subcontractor percentages after bid opening; specifications permitted only 50 percent of the work to be subcontracted, and a higher percentage could not be waived).

[44] Annotation, 65 A.L.R. 835 (1930); Annotation, 69 A.L.R. 697 (1930); Annotation, 114 A.L.R. 1437 (1938).

[45] A.A.B. Elec., Inc. v. Stevenson Pub. Sch. Dist., 5 Wash. App. 887, 491 P.2d 684, 686 (1971) (bid was rejected because it was unsigned, bidder could have accepted or rejected the award in retrospect, which gave that bidder an advantage over other bidders).

[46] Leaseway Distribution Centers, Inc. v. Department of Admin. Services, 49 Ohio App. 3d 99, 550 N.E.2d 955, 960–61 (1988) (addendum is part of bid package to which bidder is bound).

[47] Spawglass Constr. Corp. v. City of Houston, 974 S.W.2d 876, 885 (Tex. App. 1998) (bid was signed in three other places including bid bond; bid and bond were connected by internal references and could be treated as one signed instrument).

bind the bidder, even if the signature on the cover page of the bid is lacking.[48] However, if they are not so connected as to make the bid bond part of the bid and thus part of the offer itself, then the signature on the bid bond alone may be insufficient.[49]

Another material defect occurs when the bid does not include a corporate resolution authorizing a representative to sign the bid.[50] As in the case of a missing signature, the bidder would have the opportunity to refuse to execute the contract by claiming that the signer did not have authority to bind the corporation. This is considered a material and substantial deviation that cannot be waived by the contracting agency.

d. Late Bids

Whether an agency must reject a late bid or may waive the lateness as an informality depends on the degree of discretion given the agency in its bidding statutes.[51] Most states require that a late-submitted bid must be rejected.

The Virginia Supreme Court in *Holly's, Inc. v. County of Greensville* held that the second lowest bidder was entitled to reversal of the award of the contract to a lower bidder whose bid had not been timely submitted.[52] The court stated that the requirement in the invitation for bids fixing the time for submission of bids was one that had to be strictly complied with, and noncompliance was not a minor defect or informality that may be waived. Rather, it was a material and formal requirement to be complied with. The court in *City of Atlanta v. J.A. Jones* discussed the reason for adhering strictly to the time set for submission of bids, noting that a contractor may adjust its prices up until the last minute that the bid is submitted. Therefore, even a 3-minute delay in submission of a bid was considered to be an unfair advantage not enjoyed by other bidders.[53]

However, not all states take such a strict position regarding timeliness of bids. For example, the Wisconsin Court of Appeals held that a city had discretion to accept a late bid, where the statute under which it advertised for bids did not preclude the opening of a late-submitted bid.[54]

A bid officer's declaration of the time at bid opening is presumed to be correct unless the protester shows clearly that the time was inaccurate.[55] In *Washington Mechanical Contractors v. Department of the Navy*, a federal district court found that where the agency itself had shown that its bid clock was fast, it was not error to accept a late bid as timely when it was timely when the adjustment was made for the fast clock. The protester who would have been the low bidder otherwise could not show that the Navy was wrong in determining that its clock was fast.[56]

A more unusual situation is the one in which the bidder delivers the bid to the right place at the right time, but through some oversight of the agency staff it is not "received" on time. Two courts reached different results in this situation. In *Statewide Roofing v. Eastern Suffolk Board of Cooperative Educational Services,* [57] the parcel delivery service had delivered the bidder's bid prior to the deadline for submission, but had placed it on the administrator's desk rather than delivering it to the room in which bid opening would occur, and the package was not discovered until after all other bids had been opened and announced. The agency subsequently opened the bid in the presence of others; the agency had confirmed that it had arrived prior to the deadline, which precluded any inference of dishonesty, favoritism, or fraud. The New York court held that it was not error for the agency to award the contract to that bidder, who was the lowest responsible bidder.[58] There had been no benefit to the bidder, and it remained on the same footing as the other bidders. However, in another case in which the bid was delivered to the correct place but was not "received" by the contracting officer in time for bid opening, the court held that the bid was properly rejected as untimely.[59]

e. Balanced and Unbalanced Bids

Where project advertisements specify that bids must be expressed in unit prices, contracting agencies must be prepared to deal with unbalanced bids. The distinction between balanced and unbalanced bids lies in the extent to which the unit price assigned to each bid item realistically reflects the item's share of the total cost or work. A balanced bid for a particular cost item carries its full and correct share of the total price. An unbalanced bid does not, so that some items are overpriced and others are low or only nominally priced.[60] Thus,

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[48] Farmer Constr., Ltd. v. State Dep't of Gen. Admin., 98 Wash. 2d 600, 656 P.2d 1086 (1983) (omission of signature on bid form was not material where bid bond was signed and bid bond and proposal referred to each other and were connected by internal reference; bidder would be bound by bid and lack of signature on cover page was not an advantage).

[49] A.A.B. Elec., Inc. v. Stevenson Public School Dist., 5 Wash. App. 887, 491 P.2d 684, 686–87 (1971) (bid bond was not part of bid, but rather was condition precedent to acceptance of offer).

[50] George W. Kennedy Constr. Co. v. City of Chicago, 135 Ill. App. 3d 306, 481 N.E.2d 913, 916 (1985).

[51] *See* B. Waagner and E. Evans, *Agency Discretion in Bid Timeliness Protests: The Case for Consistency*, 29 PUB. CONT. L.J. 713, 724–37 (2000).

[52] 250 Va. 12, 458 S.E.2d 454, 458 (1995).

[53] *See, e.g.,* City of Atlanta v. J.A. Jones Constr. Co., 260 Ga. 658, 398 S.E.2d 369, 370 *on remand*, 198 Ga. App. 345, 402 S.E.2d 554, *cert. denied*, 111 S. Ct. 2042, 500 U.S. 928 (1990).

[54] Power Systems Analysis v. City of Bloomer, 197 Wis. 2d 817, 541 N.W.2d 214, 216 (Wis. App. 1995).

[55] Washington Mechanical Contractors, Inc. v. United States Dep't of the Navy, 612 F. Supp. 1243 (S.D. Cal. 1984).

[56] *Id*.

[57] 661 N.Y.S.2d 922, 173 Misc. 2d 511 (N.Y. Supp. 1997).

[58] *See also* Butler, *supra* note33.

[59] Holly's, Inc. v. County of Greensville, 250 Va. 12, 458 S.E.2d 454, 457 (1995).

[60] Turner Constr. Co. v. N.J. Transit Corp., 296 N.J. Super. 530, 687 A.2d 323, 327 (1997).

without changing the total price, a contractor may arrange the unit prices for the specifications of a project so as to achieve unusually favorable, and sometimes unintended, results.

The attractiveness of unbalanced bidding in certain situations is easy to understand. A contractor who needs to build up or recoup working capital as soon as possible may unbalance a bid by setting high prices on items of work performed early in the project. In this way the contractor can ease the financial strain incurred in mobilizing the construction plant and equipment, purchasing materials, and the general costs of starting up the project. These are all expenses that the contractor otherwise could not expect to liquidate until the work progressed over a substantial period of time. There is, however, a risk to the public if this practice is abused. An unscrupulous or unqualified bidder may unbalance a bid in a way that results in excessively high payments early in the work, only to default and leave the surety or the contracting agency to finish the project and pay for those items that were underestimated in the bid.

Federal regulations and ASSHTO Guide specifications divide unbalanced bidding into two categories: materially unbalanced and mathematically unbalanced. They define a materially unbalanced bid as a bid which generates reasonable doubt that the award will result in the lowest ultimate cost to the government. They further define a mathematically unbalanced bid as one containing lump sum or unit bid items which do not reflect the reasonable actual costs plus a reasonable share of the bidder's anticipated profit, overhead and other indirect costs.[61]

Federal regulations also require an examination of all unit prices to determine conformance with the engineers' estimate.[62] Part of this bid analysis may include a review of unbalanced bid items. In order to detect a mathematically unbalanced bid, an analysis of the item and the engineers' estimate and other bid prices should be conducted. Although the bid is mathematically unbalanced, it still may be acceptable depending on the degree of and reasons for the unbalancing. The determination of a materially unbalanced bid is generally done on a case-by-case basis, and the procedures for making such determinations vary amongst the states.

Many state DOTs use the BAMS.DSS "Tms*port" software program, which helps to identify unbalanced bid items as well as to analyze bids for any indicia of potential bid-rigging. Careful attention should be paid to the bid for mobilization, which can mask unbalancing, and token bid items that show large variations from the engineers' estimate. In addition, the reason for the unbalancing should be examined, because it may be caused by inaccurate bid quantity estimates, plan errors, or changes in design, which require further evaluation to determine whether the initial apparent low bidder is in fact the actual low bidder. If the agency examination determines that there is reasonable doubt that the award would result in the lowest ultimate cost, then the bid is materially unbalanced and should be rejected.[63]

As one example of a state DOT provision addressing unbalanced bidding, Ohio Standard Contract Provision 102.08 is patterned after the federal definitions. It provides for the rejection of a materially unbalanced bid when the Department determines that it will not result in the lowest ultimate cost to the Department.

A mathematically unbalanced bid is not necessarily nonresponsive. A reasonably unbalanced bid may be perfectly proper.[64] However, a bid may be considered nonresponsive when it is mathematically and materially unbalanced.[65] When the bid is so grossly unbalanced that it results in an advance payment, it is materially unbalanced and must be rejected. In *McKnight Const. Co. v. Department of Defense*, [66] the agency concluded that items with exceptionally high prices would be done early in the project, while the later work was priced "ridiculously low." Thus it was not an abuse of discretion to reject the bid.

Unbalanced bidding may also be used where a bidder believes that the contracting agency's estimates for quantities of certain items are low, and that these quantities will have to be increased as the work progresses. In those circumstances the contractor can increase profits by unbalancing the bid in favor of these items without increasing the total price of the proposal. In other instances, inaccurate estimates may work to the disadvantage of a contractor, because any substantial increase or reduction in the quantity of materials or work after construction operations have commenced may distort the factors that determine a contractor's actual cost, so that the unit price submitted in the bid is thrown out of balance, with resulting loss of profits.

Because of these possibilities for unanticipated profits or losses, and the susceptibility to fraud and collusion, unbalanced bids are not favored. Bidding specifications sometimes provide for permissive rejection of unbalanced bids.[67] In this way, unbalanced bidding may be scrutinized case-by-case, and its effect on the cost to the contracting agency can be analyzed. This approach is to be preferred to outright prohibition of unbalanced bidding. Unbalanced bids are not per se fraudulent, nor

[61] 23 C.F. R. 635.102.

[62] 23 C.F.R. 635.114(c).

[63] FHWA, CONTRACT ADMINISTRATION CORE CURRICULUM PARTICIPANT MANUAL AND REFERENCE GUIDE, § III, State Procedures, at 26–27 (2006); http://www.fhwa.dot.gov/programadmin/contracts/cacc.pdf.

[64] 687 A.2d at 327.

[65] SMS Data Products Group, Inc. v. United States, 900 F.2d 1553, 1557 (Fed. Cir. 1990).

[66] 85 F.3d 565, 570–71 (11th Cir. 1996).

[67] *See, e.g.*, Washington State Department of Transportation, 2000 Standard Specifications for Road, Bridge, and Municipal Construction § 1-02.13(2)(b) (bid may be considered irregular and may be rejected if "[a]ny of the unit prices are excessively unbalanced (either above or below the amount of a reasonable bid) to the potential detriment of the Contracting Agency.").

are they always evidence of substantial error. The rule appears to still be:

An unbalanced bid that does not materially enhance the aggregate cost of the work cannot be complained of. If there is no deception or mistake as to the quantities, and if the ordinances have fairly been complied with, and the quantity and quality of the work has been estimated as nearly as practical, there is no ground for alleging substantial error merely because of an unbalanced bid under which the contract was let, and if the cost of the work has not thereby been enhanced, there is no ground for alleging fraud.[68]

Cooperation between the contractor and the contracting agency should eliminate the risk of unfair practice and minimize the area in which inaccuracies exist. Such a policy is sometimes set forth in the transportation agency's own standard specifications.

The distinction between genuine and apparently unbalanced bids was made in *Department of Labor and Industries v. Boston Water and Sewer Commission*, [69] in which the complainant protested a bid for construction of underground sewer lines. The Commission's specification for the work called for the contractor to install temporary sheeting, for which the apparent low bidder listed a unit price of a penny per square foot. Although it determined that this bid was not unbalanced, "front-end loaded," or otherwise inflated; was made in good faith; and did not violate any of the State's public contract laws; the Department of Labor and Industries instructed the defendant Commission to reject the bid as unresponsive and contrary to the Department's policy.[70] The trial court explained that the Department of Labor and Industries had taken the position that penny bidding of certain items of the contract is unlawful even where the bid is not facially unbalanced. This position was taken as a result of the department's interpretation of the law and a longstanding and publicly known policy against any form of penny bidding. The basis of this policy was a conclusion that "because of the potential bid manipulation and the possible resulting harm to the awarding authority and the general public…unrealistic bids must be rejected as unresponsive to the bid requirements."[71] On appeal, however, the Massachusetts Appellate Court reversed this ruling. It held that the Department lacked authority to promulgate rules or regulations that controlled the bidding process, and its announced policy could not be permitted to have the practical effect of law.[72] The court also distinguished the practice of "penny bidding" from the case where the "equal footing" of bidders was destroyed by artificially low bids that conferred special advantages on one of the bidders.[73]

In another case, *Turner Construction Company v. New Jersey Transit Corporation*, [74] the bidder had submitted a bid of zero for one item. Rather than construe this as a failure to submit a unit price on an individual bid item, which would be a material defect, the court construed it as an unbalanced bid, which is not defective merely because it is unbalanced. In this case, a bid of zero was comparable to a nominal or penny bid. The court stated: "Every contractor may apply his own business judgment in the preparation of a public bid, and his willingness to perform one of the items for a nominal amount is but his judgmental decision in an effort to underbid his competitors."[75]

The court thus found that the zero bid for one bid item was a waivable defect.

f. Qualified Bids

Serious difficulties may arise when bids do not conform fully or precisely to the plans, terms, or specifications in the project announcement. When bids are at variance with these aspects of the project announcement, it is unlikely that the contracting agency will receive the end product it desires. It is also not possible to fairly compare all bidders on a common set of work standards. Bids may be inconsistent with advertised plans, terms, and specifications, but still offer an acceptable end product. However, such bids should be treated as counterproposals, which are not responsive. This was the result in *Bodies by Lembo v. Middlesex County*, [76] a New Jersey case in which the second low bidder's alternative for an "equivalent" product that was less than the price of the low bidder was declared invalid. The court ordered that the low bidder be awarded the contract as it was advertised and did not allow the county to readvertise.[77]

A bidder's conditional response to a request for proposals also will generally be considered nonresponsive. A responsive bid is considered an offer to contract with the agency; a bid that proposes something other than that requested in the invitation for bids or that conditions its response will be considered a counter-offer, and a nonresponsive bid. For example, a bidder's conditional response to one item of a request for proposals for the supply of reflective sheeting materials and supporting services for reflective license plates was considered a nonwaivable material deviation from the request for

[68] In re Anderson, 109 N.Y. 554, 17 N.E. 209 (1888).

[69] 18 Mass. App. 621, 469 N.E.2d 64 (1984).

[70] *Id*. at 66.

[71] *Id.*

[72] *Id*. at 67.

[73] *Id*. at 68. The court noted that in the instant case, at least five other contractors had listed bids of one penny per square foot for temporary sheeting. 469 N.E.2d at 66.

[74] 296 N.J. Super. 530, 687 A.2d 323, 327 (1997).

[75] 687 A.2d at 327 (quoting Riverland Constr. Co. v. Lombardo Contracting Co., 380 A.2d 1161, *aff'd*, 388 A.2d 626 (1978)).

[76] 286 N.J. Super. 298, 669 A.2d 254, 256 (A.D. 1996). In addition to including an alternative product, the bid also contained deficiencies that the bidder had been permitted to correct after bids were opened.

[77] *Id.* 669 A.2d at 260.

proposals.[78] This was found to create a situation in which the agency could not be assured that the contract would be performed, and gave the bidder a competitive advantage.

g. Improper Bid Bonds

An example of a material deviation that could not be waived is found in a case in which the bid was submitted with a letter from the surety stating that it did not anticipate any difficulty in providing bonds, rather than guaranteeing that the bonds would be provided.[79] The court found this defect to be a substantial deviation from a material condition because there was no guaranty that the surety would issue the bonds on the date that bids were due.[80]

h. Failure to Acknowledge Addenda

In *George & Benjamin General Contractors v. Virgin Island Department of Property and Procurement*, the court noted that the applicable regulations allowed that failure to acknowledge receipt of addendum may be waived as a minor informality if the bid clearly indicated that the bidder received the amendment, such as when the addendum added an item of work and the bidder included a bid for that item.[81] Adherence to this requirement insures that bidders are all submitting bids on the basis of the same information.

i. Other Material Deviations.–Where the invitation for bids specifically required the prospective bidders to attend a pre-bid meeting at the construction site, the court held that the bidder's failure to attend was adequate grounds for the agency's rejection of its bid.[82] The agency's reason for requiring attendance was to ensure that all bidders had adequate notice of the site conditions and could take those conditions into account in their bids. Although the bidder who had not attended the pre-bid meeting submitted a lower bid than the bidders who did attend the meeting, the agency was justified in concluding that the second low bid was the more realistic one, more likely taking into account the actual site conditions. The court did not, however, determine whether the agency was required to reject the bid because of the bidder's failure to attend the meeting, only that it was not arbitrary to have done so. If the bidder's failure to attend gave it more of an opportunity to claim that it was entitled to additional compensation due to changed conditions, then it could be considered a deviation that gave it an advantage over other bidders, requiring rejection. However, under most changed condition clauses, the bidder would probably be held to knowledge of the information provided in the pre-bid conference whether it had a representative at the meeting or not. In addition, requiring that the bidder inspect the site does not protect the agency from changed condition claims.[83] Failure to attend the pre-bid conference is most likely a nonmaterial deviation that the agency could choose to waive in an appropriate case, as it is not a factor that likely affects the price of the bid or that gives the non-attending bidder an advantage over other bidders.[84] However, where the agency was concerned about the bidders being informed about the specific site conditions, for the purpose of avoiding claims of changed conditions, it was not arbitrary for the agency to enforce that requirement in the invitation for bids and reject the nonconforming bidder. The agency has discretion to determine whether a deviation is material or nonmaterial, and its decision generally will be upheld if supported by a rational basis.[85]

Another case in which the bidder was rejected for failure to attend the pre-bid conference went even further in supporting the agency's rejection, holding that the contractor did not even qualify as a "bidder" due to its failure to attend.[86] The advertisement and contract documents had set the time, date, and place for the pre-bid meeting, and had provided that "no bid shall be accepted from any contractor who does not have a responsible representative attend this meeting." Only one contractor attended, and it was awarded the contract. The court again did not determine whether the agency had the power to waive this requirement, only that it was proper to have rejected the bid on that basis.

ii. Nonmaterial Deviations.–Where the agency finds that the bidder's deviation from the instructions or specifications will not affect its price and will not give that bidder an advantage over other bidders, the deviation may be waived. A common example is an mathematical error, such as in extending unit prices to derive total prices. A patent error in the statement of a unit price as $400 rather than $4 was found to be a waivable, nonmaterial error where the bidder's intent was obvious from the computed total for the quantity of that item.[87]

In *Colonnelli Bros., Inc. v. Village of Ridgefield,*[88]

[78] Matter of Request for Proposals No. 98-X-29314 Reflective Sheeting License Plates, 315 N.J. Super. 266, 717 A.2d 998, 1001 (A.D. 1998).

[79] DeSapio Constr., Inc. v. Township of Clinton, 276 N.J. Super. 216, 647 A.2d 878 (1994).

[80] *Id*. at 880–81.

[81] 921 F. Supp. 304, 309 (D. V.I. 1996)

[82] Scharff Bros. Contractors v. Jefferson Parish Sch. Bd., 641 So. 2d 642, 644, *reconsideration denied*, 644 So. 2d 398 (La. App. 5 Cir. 1994).

[83] R.J. Wildner Contracting v. Ohio Turnpike Comm'n, 913 F. Supp. 1031 (N.D. Ohio 1996).

[84] *See* Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 341 A.2d 327, 332 (1975) (failure to attend federally-required pre-award conference was for bidder's benefit, and was waivable).

[85] Varsity Transit, Inc. v. Board of Educ. of City of N.Y., 515 N.Y.S.2d 520, 521, 130 A.D. 2d 581, *appeal denied*, 519 N.Y.S.2d 1029, 70 N.Y.2d 605, 513 N.E.2d 1309 (1987).

[86] Gibbs Constr. Co. v. Board of Supervisors, La. State Univ., 447 So. 2d 90, 92 (La. App. 1984).

[87] Spina Asphalt Paving Excavating Contractors v. Borough of Fairview, 304 N.J. Super. 425, 701 A.2d 441, 443 (A.D. 1997).

[88] 665 A.2d 1136, 284 N.J. Super. 538 (1995).

however, the bid specifications stated that unit prices would prevail over extended totals. The bidder had written the numerical amount of $10,000 for "maintenance of traffic during construction," but had written out "one hundred dollars no cents." The bidder then added $10,000 into the total price. The agency engineer had estimated that item at $5,000, and the bids had ranged from $2,000 to $15,000. When the bid was recalculated using the unit prices, it was found that that bid was in fact the lowest bid. However, the agency rejected the bid as nonresponsive. The trial court held that the fact that the totals were in error was a waivable defect. The appellate court reversed, holding that the trial court had improperly interfered with the agency's discretion, and upheld the rejection.[89] The court distinguished this case from cases in which the error is obvious and the bidder's intent is easily discerned from the bid document. In this case, the error was not obvious, and allowed the bidder to choose which number to use after bid opening.[90]

A similar situation arises when figures are transposed. This was considered a minor error that could be corrected by the agency, because the error was so obvious it was easily determined what the bidder's intent was.[91] Also, an error in the estimation of the amount of waste material to be generated was considered waivable where the quantity was intended to be an estimate and the possibility of error was contemplated by the parties.[92]

Another error deemed waivable was a bidder's deviation in submitting the name of one subcontractor in the wrong envelope.[93] Also, the bidder's failure to file a biennial corporate report or pay nominal corporate taxes was not a material defect requiring rejection, as it did not give that bidder an advantage over others.[94]

A number of cases address whether a bidder's failure to include prequalification information with its bid is a material defect requiring rejection. In most of these cases, the bidder already has filed its prequalification materials and has been prequalified in order to submit a bid in the first place. Therefore, courts have found these defects to be waivable in that they do not give that bidder an advantage over others and do not affect the bidder's price.[95] However, the requirement of prequalification itself is not considered a mere formality. Where a bidder had no prequalification statement on file, the fact that it did not include the prequalification information with its bid could not be waived.[96] In some states, a bidder is not even entitled to receive the bid package and submit a bid unless it has first been prequalified, so this would not be an issue.[97]

2. Bidder Remedies

When errors occur in cost calculations, or the terms of the project advertisement or bid are not correctly construed, the resulting confusion may seriously delay or jeopardize the contract award. In the case of contracts for large and complex highway construction projects, this risk is increased by the sheer size of the task of checking the plans, specifications, and estimates to detect mistakes. It may also be complicated by the fact that state codes and administrative regulations rarely provide comprehensive procedures for correcting mistakes. Thus, where controversies cannot be settled administratively by the contracting agency, the parties must adjudicate their claims in court.

a. Bid Protests

i. Letting Agency Review vs. External Control Agency Review.–The U.S. Government and a number of states have adopted either regulations establishing bid protest procedures or administrative procedures relating to the exercise of statutory discretion for review and approval of contract awards. One significant distinction to be drawn in assessing such procedures is whether they are administered by the letting agency or by an external control agency. A letting agency is the agency that advertises for and opens competitive bids, awards contracts, and administers contracts. An external control agency is a federal or state agency with independent statutory authority to review and approve or disapprove the award of contracts, including the authority to override contract award decisions by letting agencies.

In the former situation, the letting agency, while considering any bid protests, retains control over the award of its own contracts. In the latter situation, while the letting agency may still have authority to let its own contracts and nominal authority to make contract award decisions, the review of bid protests and ultimate control over the authority to award contracts rests with the external control agency, rather than the letting agency.

Examples of bid protest processes administered by letting agencies are provided by the States of Maryland and Virginia.

In Maryland, bid protests are governed by state procurement regulations, which provide for protests to be filed with "the appropriate procurement officer."[98]

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[89] 665 A.2d at 1138–39.

[90] *Id*.

[91] George & Benjamin General Contractors v. Virgin Island Dep't of Property and Procurement, 921 F. Supp. 304, 309 (D. V.I. 1996).

[92] R.J. Wildner Contracting v. Ohio Turnpike Comm'n, 913 F. Supp. 1031, 1041–42 (N.D. Ohio 1996).

[93] MCM Constr., Inc. v. City & County of S.F., 78 Cal. Rptr. 2d 44, 54–55, 66 C.A. 4th 359, *review denied* (1998).

[94] Lower Kuskokwim School Dist. v. Foundation Services, 909 P.2d 1383, 1387–88 (Alaska 1996). Note that the filing requirement here was one that is considered to be a revenue mechanism as opposed to a licensing requirement specific to contractors, or a prequalification requirement.

[95] *See supra* note 15.

[96] Modern Continental Constr. Co. v. City of Lowell, 391 Mass. 829, 465 N.E.2d 1173, 1180 (1984).

[97] *See* WASH. REV. CODE § 47.28.070 (2001).

[98] Consolidated Maryland Regulations (COMAR) § 21.10.02.02.

While the procurement officer is required to notify and consult with the Office of the Attorney General, the procurement officer makes the determination on the bid protest.[99] The decision by the procurement officer is subject to review by a reviewing authority and also subject to an appeals procedure, but reviews and appeals occur only after the procurement officer has made a determination.[100]

In Virginia, bid protests are governed by the Virginia Public Procurement Act. Under the provisions of this Act, bid protests are submitted in writing to "the public body, or an official designated by the public body," which let the contract and the public body or designated official make the determination on the bid protest.[101] Public bodies may establish an administrative procedure for a disinterested person or panel to hear appeals from protests of decisions to award contracts, or awards of contracts, and the decisions of such disinterested persons or panels shall be final and conclusive and shall not be set aside, absent a judicial determination that such a decision was fraudulent, arbitrary, capricious, or grossly erroneous.[102]

The U.S. Government and New York State provide typical examples of bid protest processes administered by external control agencies.

The bid protest process for U.S. Government contracts is governed by the regulations of the U.S. Government Accountability Office (GAO), formerly known as the General Accounting Office. The GAO bid protest regulations, 4 C.F.R. Part 21, have been in effect for a number of years. GAO's regulations include provisions governing filing,[103] time for filing,[104] notice of protest, submission of agency report, and time for filing comments in report,[105] protective orders,[106] exclusion of certain specified issues from protests,[107] withholding of award and suspension of contract performance,[108] hearings,[109] remedies,[110] time for decision by GAO,[111] express options and flexible alternative procedures,[112] the effect of judicial proceedings,[113] distribution of decisions,[114] non-statutory protests,[115] and requests for reconsideration.[116] These provisions are sufficiently lengthy and detailed to appear more the province of specialized practitioners than accessible to the uninitiated.

The GAO regulations afford sufficient opportunities for long procedural delays to the point that Congress included a requirement in the National Defense Authorization Act for federal fiscal year (FFY) 1996 that GAO issue bid protest decisions within 100 days after the protest were filed, and GAO had to amend its regulations accordingly.[117]

In New York State, statutory authority for the letting and award of contracts nominally rests with contracting agencies.[118] All state contract awards are, however, subject to the review and approval of the Office of the State Comptroller (OSC), and a state contract is not considered to be final and legally in effect unless and until it has been approved by OSC.[119] New York State has not enacted any statute making express provision for bid protests, but OSC decided to implement bid protest procedures through the issuance of an administrative bulletin to state agencies in 2008.[120]

While nominally guidelines, the OSC bid protest procedures rival GAO's regulations for complexity. Although acknowledging that a letting agency might establish its own bid protest procedures and requiring protesters to resort to such procedures first if the letting agency has provided notice of such procedures in its solicitation documents, the OSC guidelines offer protesters the opportunity to file protests directly with OSC where agencies have failed to establish or provide notice of such procedures, or where facts giving rise to a protest are not known until the expiration of any filing deadlines established by agency procedures. The OSC guidelines also offer protesters the opportunity to appeal to OSC from agency determinations on bid protests.

Whether in the case of an initial protest filed with OSC or an appeal to OSC from an agency determination, the OSC guidelines grant broad discretion to OSC's Bureau of Contracts to determine whether a hearing is necessary and what level of formality a hearing may require, to waive any deadline or other requirements in the guidelines, to require the contracting agency or any other interested party to address any additional issues raised by OSC, and to obtain information relevant to the procurement from

[99] COMAR §§ 21.10.02.05 and 21.10.02.09(A).

[100] COMAR §§ 21.10.02.09(B), 21.10.02.10, 21.10.03.02, and 21.10.07.02.

[101] Virginia Public Procurement Act § 2.2-4360(A).

[102] Virginia Public Procurement Act § 2.2-4365(A).

[103] 4 C.F.R. § 21.1.

[104] 4 C.F.R. § 21.2.

[105] 4 C.F.R. § 21.3.

[106] 4 C.F.R. § 21.4.

[107] 4 C.F.R. § 21.5.

[108] 4 C.F.R. § 21.6.

[109] 4 C.F.R. § 21.7.

[110] 4 C.F.R. § 21.8.

[111] 4 C.F.R. § 21.9

[112] 4 C.F.R. § 21.10.

[113] 4 C.F.R. § 21.11.

[114] 4 C.F.R. § 21.12.

[115] 4 C.F.R. § 21.13.

[116] 4 C.F.R. § 21.14.

[117] *See* GAO's Notice of Final Rule, 61 Fed. Reg. 39039, July 26, 1996.

[118] *See, e.g.*, N.Y. HIGH. LAW § 38.

[119] N.Y. FINANCE LAW § 112.

[120] New York State Office of the State Comptroller, Procurement and Disbursement Guidelines Bulletin No. G-232, issued July 10, 2008, and updated Aug. 6, 2008; available online at http://www.osc.state.ny.us/agencies/gbull/g_232.htm, last accessed on Nov. 21, 2011.

outside sources.[121]

Although presented as guidelines, in the case of an initial protest, they authorize OSC's Bureau of Contracts to issue written determinations that "shall make findings of fact and conclusions of law on any issues in dispute." In the case of an appeal, the OSC guidelines authorize OSC's Bureau of Contracts to "evaluate the merits of the protest, the contracting agency's determination and any response submitted by an interested party," and to issue a written determination "addressing the issues raised by the appeal." [122]

The OSC guidelines are still sufficiently new, and at the time of the 2012 update to this volume, it is not yet clear whether any benefits they may convey—by providing checks and balances on unfettered letting agency discretion in making contract awards, and by providing initially unsuccessful bidders a second chance to win contracts by challenging an award to the lowest bidder—will outweigh the costs they impose by increasing the uncertainties of the contract award process, and by reducing the timeliness of final determinations on contract awards.

ii. Protests Prior to Bid Opening.—A bid protest filed prior to bid opening is the appropriate means for a bidder to challenge the legality of the bid instructions or specifications included in the invitation for bids. Such a challenge allows the agency to save expense to bidders, assure fair competition among them, and correct or clarify plans and specifications prior to bid opening.[123] The challenge must be directed at specifications that are so vague that bidders cannot formulate an accurate bid based on them, or that are unreasonable in that they are impossible to comply with or too expensive to comply with and remain competitive in the bidding process.[124]

A challenge to the bid specifications must be brought in a timely manner or may be deemed waived. A bidder cannot wait until after bid opening and then challenge a specification if the bidder is unsuccessful. A timely challenge will give the agency the opportunity to correct a flawed specification, either by addendum or by rejecting all bids and readvertising. It will also allow other bidders to modify their bids if necessary to conform to the corrected or clarified specification.[125]

Although this type of protest is generally used to challenge special provisions in the contract specifications, a bidder in an Alabama case attempted to prevent the Department of Transportation from applying its standard specifications in a contract. In *Alabama Department of Transportation v. Blue Ridge Sand and Gravel*, the court balanced the potential public harm of premature road failures against the bidder's potential loss of profits, and upheld the use of the department's standard specification requiring that gravel for use in hot mix asphalt have a specific bulk gravity.[126]

iii. Standing to Protest Award.—States vary in whether they allow a disappointed bidder to challenge an award where that bidder is not also a state taxpayer.[127] For example, Pennsylvania, Colorado, and Washington courts have required that one must be a taxpayer in order to enforce the requirements of public bidding laws, such as that public contracts be awarded to the lowest responsible bidder.[128] In Washington, the court has held that in order to prove taxpayer status, the bidder must show that it pays the type of taxes that are funding the project, and that it asked for the Attorney General's Office to take action before filing suit.[129]

However, many states do allow the bidder to protest the award where it contends that the contract was awarded to a higher bidder because the bidding procedure did not permit the bidders to compete on equal terms.[130] For example, Florida's courts have held that a person who has at least some potential stake in the contract to be awarded will have standing to challenge the bidding process.[131] In New York, an Ohio contractor was found to have standing to challenge the contract award on the basis that it alleged noncompliance by the agency with its procedures, and the contractor had suffered injury in fact that was different from that suffered by the public at large.[132]

One federal court has held that a disappointed bidder may challenge the contract award only if it is "within the zone of active consideration" for the award of the contract.[133] Because the federal Administrative

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[121] *Id*.

[122] *Id*.

[123] Capeletti Bros. v. Department of Transp., 499 So. 2d 855, 857 (Fla. App. 1 Dist. 1986).

[124] Advocacy Center for Persons with Disabilities, Inc. v. State, Dep't of Children and Family Services, 721 So. 2d 753, 756 (Fla. App. 1998) (challenge must be to specifications themselves, and not to policy decisions to privatize services).

[125] *See* Optiplan, Inc. v. School Board of Broward County, 710 So. 2d 569, 572 (Fla. App. 4th Dist. 1998) (unsuccessful bidder waived its right to challenge race-based selection criteria by submitting bid based on specifications that it later sought to challenge).

[126] 718 So. 2d 27, 32 (Ala. 1998).

[127] For a discussion of whether aggrieved bidders should have standing to protest awards regardless of taxpayer status, *see* David Sullivan, *Disappointed Bidder Standing To Challenge A Government Procurement Contract Award: A Proposal For Change In Kentucky*, 88 KY. L. J. 161–82 (1999).

[128] Ray Angelini, Inc. v. City of Phila., 984 F. Supp. 873, 884 (E.D. Pa. 1997).

[129] Dick Enterprises, Inc. v. Metro/King County, 83 Wa. App. 566, 922 P.2d 184, 187 (1996).

[130] Metropolitan Express Services, Inc. v. City of Kansas City, Mo., 23 F.3d 1367, 1370–71 (8th Cir. 1994), *rehearing denied, appeal after remand*, 71 F.3d 273 (1995).

[131] Advocacy Center of Persons With Disabilities, Inc. v. State, Dep't of Children and Family Services, 721 So. 2d 753, 755, *rehearing denied* (Fla. App. 1 Dist. 1998).

[132] AEP Resources Service Co. v. Long Island Power Auth., 686 N.Y.S.2d 664, 669, 179 Misc. 639 (1999).

[133] Ellsworth Assocs. v. United States, 926 F. Supp. 207, 211 (D.D.C. 1996); Ralvin Pacific Properties, Inc. v. United States, 871 F. Supp. 468, 472 (D.D.C. 1994); *see also* Transactive Corp.

Procedure Act (APA) is written in somewhat broader terms than many state APAs, federal courts are more likely to allow a bidder who is not also a taxpayer to challenge an award.[134] The United States Supreme Court's general test for standing is generally relied upon to determine whether a bidder has standing: "The essence of the standing question, in its constitutional dimension, is 'whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'"[135]

Whether other bidders who responded to the invitation for bids are entitled to notice of the protest, and may participate in the proceeding, is another question. Generally, the bidder who has been awarded the contract should be considered to have standing, and to have an interest sufficient to support intervention in a court proceeding or recognition of its interests by the agency in an administrative proceeding. However, a proposed rule in Florida that would have required the agency to forward copies of a bid protest and notice of hearing to all other bidders was held to be arbitrary and an invalid exercise of its rule-making authority.[136]

A Georgia court has held that taxpayers lacked standing to challenge the award of a contract and to enjoin payment to a contractor who had been awarded an on-call contract for paving. In *Faulk v. Twiggs County*,[137] the contractor had obtained a competitively bid unit price contract, but the contract was indefinite as to quantity; the county intended to designate areas for paving as funds became available. In a similar case, the court ruled that unsuccessful bidders did not have standing to challenge an award as taxpayers because the injury that they suffered was private and not shared by the public at large.[138]

Generally, a bidder must at a minimum be one who is within the zone of active consideration for the award in order to have standing. However, in *L. Pucillo & Sons v. Belleville Township*, [139] a New Jersey case, a potential bidder was found to have standing to protest where it alleged that it was deterred from submitting a bid by the size of the performance bond required, and the amount of the bond specified was subsequently waived for another bidder.

iv. Standard and Scope of Review.—Generally, contracting agencies have broad discretion in evaluating bids and awarding contracts. Therefore, a disappointed bidder must show that the contract award had no rational basis, or that it involved a clear and prejudicial violation of an applicable statute or regulation.[140] A disappointed bidder bears a heavy burden to show that the award decision had no rational basis.[141] One court has described the review for abuse of discretion in these terms: "The awarding agency has the right to be wrong in the exercise of its discretion, but not the right to be 'unfairly, arbitrarily wrong.'"[142]

Other courts have stated the standard of review as being whether the agency's decision on who is the lowest responsible bidder was arbitrary, unreasonable, or capricious.[143] The agency's compliance with its own bidding regulations will be reviewed for whether the agency's decision is correct as a matter of law.[144] The agency and its officials and employees are presumed to have acted in good faith, and any party challenging the agency's action must present strong evidence of bad faith in order to overcome this presumption.[145] The agency's findings of fact will generally not be reversed unless a reviewing court concludes that a finding is clearly erroneous in view of the entire record.[146]

The court's standard of review will have to take the statutory language into account. For example, where the statute allows the agency to select the lowest *and best* responsive bid, the agency may be held to have a higher degree of discretion than one that is obligated by its statute to select the lowest responsive bid. One court has held that where the statute allowed the agency to award the contract to the bidder submitting the lowest and best bid, the bid selection is solely within the sound discretion of the agency, and its decision will be re-

v. N.Y. State Dep't of Social Services, 665 N.Y.S.2d 701, 704, 236 A.D. 2d 48 (N.Y. App. 1997) (contractor who merely filed intention to bid lacked standing to challenge award, without a showing that it met the qualifications set out in the request for proposals) and Brem-Air Disposal v. Cohen, 156 F.3d 1002, 1003 (9th Cir. 1998) (contractor lacked standing to challenge award after end of bid proposal period as it could no longer qualify as a prospective bidder).

[134] *See* 5 U.S.C. § 702 ("person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action").

[135] Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 260–61 (1977) (quoting Warth v. Seldin, 422 U.S. 490, 498–99 (1975) (emphasis in original)).

[136] Division of Admin. Hearings v. Department of Transp., 534 So. 2d 1219, 1220 (Fla. App. 1 Dist. 1988).

[137] 504 S.E.2d 668, 670 (Ga. 1998).

[138] Mid-Missouri Limestone v. County of Callaway, 962 S.W.2d 438, 441 (Mo. App. 1998).

[139] 592 A.2d 1218, 1222 (N.J. Super. A.D. 1991).

[140] Latecoere Intern. Inc. v. United States Dep't of the Navy, 19 F.3d 1342, 1356 (11th Cir. 1995); Robert E. Derektor of Rhode Island, Inc. v. United States, 762 F. Supp. 1019, 1022 (D.R.I. 1991).

[141] Saratoga Dev. Corp. v. United States, 21 F.3d 445, 456, 204 U.S. App. D.C. 351 (D.C. Cir. 1994).

[142] Williams v. Board of Supervisors, La. State Univ. and Agricultural and Mechanical College, 388 So. 2d 438, 441 (La. App. 1980).

[143] Matter of Protest of Award of On-Line Games Prod. and Operation Services Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 653 A.2d 1145, 1158 (1995).

[144] State Contracting and Eng'g Corp. v. Department of Transp., 709 So. 2d 607, 610 (Fla. App. 1 Dist. 1998).

[145] China Trade Center, L.L.C. v. Washington Metro. Area Transit Auth., 34 F. Supp. 2d 67, 70–71 (D.D.C. 1999).

[146] Southern Foods Group, L.P. v. State, Dept. of Educ., 89 Haw. 443, 974 P.2d 1033, 1042 (1999).

viewed only for fraud or abuse of discretion.[147]

Although no formal contract exists prior to the acceptance of a bid by the agency, the agency may be considered to have an implied-in-fact contract with bidders to consider all bids fairly. Its failure to do so may result in the awarded being voided. In considering whether an agency has breached this duty, a court will look at (1) whether there is evidence of subjective bad faith on the part of the agency, (2) whether there is a reasonable basis for the agency's decision, (3) the amount of discretion afforded by the statutes and regulations, and (4) whether there is proof that the statutes or regulations have been violated.[148]

Ordinarily, the scope of a court's review will be limited to the record in existence before the agency.[149]

v. Procedures and Evidence.—When a disappointed bidder invokes a statutory review process, the agency must follow the statute's procedural steps.[150] In addition to protecting the due process rights of the disappointed bidder, these statutory requirements may be held to be necessary to further public policy goals such as ensuring public confidence in the public bidding system, and ensuring that all who participate in the public procurement process are treated fairly and equitably.[151] This is also consistent with the requirements that the agency follow its own procedures prior to the submission of bids and in the consideration of bids.

Likewise, the aggrieved bidder is held to compliance with any statutory filing requirements for challenging the award of a contract. In a Virginia case, these requirements were held to be a limitation imposed on a substantive right rather than mere procedural requirements, and the unsuccessful bidder's failure to comply with the filing requirements warranted dismissal of its case with prejudice.[152] Requirements may include filing an administrative claim prior to filing in court. Failure to do so may be considered a failure to exhaust administrative remedies, and will bar pursuit of the protest in court.[153]

Where the rules pertaining to protests require that it be filed within a certain time period, the bidder's failure to comply with the timeliness requirement will bar its challenge.[154] The disappointed bidder must plead that it has timely complied with the filing requirements; its failure to include in its protest the facts needed to determine the timeliness of its filing required dismissal of its protest.[155] A Mississippi court has held that where award is subject to approval by FHWA, the time for appeal runs from the time that the contract is executed, and not from the time of award.[156]

Even where another bidder had filed a timely protest, the California court held that a bidder's failure to comply with mandatory procedures regarding the timing and manner of its own protest that were set forth in the bid instructions required dismissal of its protest.[157] In other words, the fact that the agency was not prejudiced by the late filing, due to the fact that there was already a protest pending, did not relieve the bidder from compliance with the filing requirements.

In a bid protest proceeding, an unsuccessful bidder could not bring in evidence of issues that were not included in its notice of protest, even if the other parties stipulated to admission of the evidence.[158]

vi. Injunctive Relief.—Injunctive relief may be available to the protesting bidder, providing that it can meet the standard requirements for such relief, namely that it will suffer irreparable harm and that it has a likelihood of success on the merits.[159] However, in order to pursue injunctive relief, a contractor must act in a timely manner. A bidder that does not pursue injunctive relief in a timely manner, even though it has readily ascertainable facts sufficient for such a request for relief, may be barred by laches. Further, a bidder may waive its rights to pursue any relief if it does not first ask the court to enjoin the award and execution of the contract to the higher bidder.[160] The rationale for this is that the agency should be allowed to correct any errors, or if necessary, rebid the project.[161] A Louisiana court held that an aggrieved bidder may seek to have the contract declared null and void without first obtaining an

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[147] Wilson Bennett, Inc. v. Greater Cleveland Regional Transit Auth., 67 Ohio App. 3d 812, 588 N.E.2d 920, 925, *jurisdictional motion allowed*, 42 Ohio St. 3d 717, 560 N.E.2d 778, *cause dismissed*, 57 Ohio St. 2d 721, 568 N.E.2d 1231 (1990).

[148] Southfork Systems, Inc. v. United States, 141 F.3d 1124, 1132 (Fed. Cir. 1998).

[149] China Trade Center, L.L.C., *supra* note 145, at 70.

[150] Alexander & Alexander, Inc. v. State, 596 So. 2d 822, 828 (La. App. 1 Cir. 1991), *rehearing denied* (1992).

[151] *Id*. at 828.

[152] Sabre Constr. Corp. v. County of Fairfax, 501 S.E.2d 144, 146–47 (Va. 1998).

[153] *See* Mosseri v. FDIC, 924 F. Supp. 605, 608 (S.D. N.Y. 1996).

[154] Sabre Constr. Corp., *supra* note 152, at 146–47.

[155] Widnall v. B3H Corp., 75 F.3d 1577, 1585 (Fed. Cir. 1996).

[156] J.H. Parker Constr. Co. v. Board of Aldermen, City of Natchez, 721 So. 2d 671, 674 (Miss. App. 1998).

[157] MCM Constr., Inc. v. City and County of S.F., 78 Cal. Rptr. 2d 44, 55-57, 66 C.A. 4th 359 (Cal. App. 1998), *review denied*.

[158] Pacificorp Capital, Inc. v. State Through Division of Admin., Office of State Purchasing, 612 So. 2d 138, 139 (La. App. 1 Cir. 1992).

[159] San Diego Beverage & Kup v. United States, 997 F. Supp. 1343, 1345 (S.D. Cal. 1998); Tri-State Asphalt Corp. v. Com. Dep't of Transp., 135 Pa. Commw. 410, 582 A.2d 55, 60, appeal denied, 527 Pa. 659, 593 A.2d 4429 (1990).

[160] South Lafourche Metal Bldgs., Inc. v. Grand Isle Fire Dep't Through Jefferson Parish Fire Dist. No. 10, 582 So. 2d 970 (La. App. 5 Cir. 1991); Hartman Enters. v. Ascension--St. James Airport and Transp. Auth., 582 So. 2d 198, 200-01, *writ denied*, 582 So. 2d 195, *reconsideration denied*, 584 So. 2d 669 (La. App. 1 Cir. 1991); Webb Constr., Inc. v. City of Shreveport, 665 So. 2d 653, 656 (La. App. 2 Cir. 1995).

[161] Hard Rock Constr., Inc. v. Parish of Jefferson, 688 So. 2d 134, 137 (La. App. 5 Cir. 1997).

injunction, but may not seek damages unless it has either timely filed for an injunction or shown that timely suit for an injunction was impossible.[162]

Washington's courts have held that unless an injunction is issued prior to execution, a disappointed bidder does not have standing to enjoin performance of the executed contract.[163] Once the contract is signed, the bidder lacks standing to enjoin performance.

Another question is whether the bidder is entitled to a mandatory injunction, ordering the agency to award it the contract. In *Clark Construction Company v. Pena*, [164] the federal district court held that the contractor was entitled to such a mandatory injunction, compelling the Alabama Department of Transportation to award the contract to the protesting bidder. In that case, the FHWA had refused to concur in the award to the lowest responsible bidder, on the grounds that a traffic control note had been omitted from the approved plans and specifications. The court found that this was an immaterial omission, and was not grounds for rejecting all bids and readvertising.[165]

Because the granting of a mandatory injunction ordering the award of the contract is an extraordinary measure, the contractor must prove its entitlement to such relief, and such a remedy will ordinarily be granted only if the disappointed bidder can show that it is clear that it would have been awarded the contract "absent the flawed nature of the bidding process." [166] One federal court refused to order that remedy, choosing instead to defer to the agency's expertise and discretion and noting somewhat curtly, "This Court does not desire to become a GSA contracting officer."[167] In such a case, the proper remedy was rejection of all bids and readvertisement of the project.[168] In a California case, the court held that because the state has a statutory right to reject all bids, the lowest bidder does not have a right to compel award by writ of mandate.[169] However, the Louisiana Supreme Court has held that while a wronged bidder does not have a cause of action for damages due to the fact that there is no contract between it and the awarding agency, it may be entitled to injunctive relief, including an action to compel award of the contract to that bidder.[170]

Courts are more likely to order award of a contract in a case where the court has found that there have been violations of statute or bidding rules by the agency. The District of Columbia Circuit has held that the court may order the contract awarded to a particular bidder when it is clear that but for the illegal behavior of the agency, the contract would have been awarded to that bidder.[171] In another case, the First Circuit ordered that the agency award the contract to the next low bidder rather than readvertise the project.[172] The court held that the agency's violations of federal regulations required invalidation of the award. But for those violations, one of the other bidders would have obtained the award.[173] The court explained why it was ordering award to the next low bidder rather than re-solicitation: "To have a set of bids discarded after they are opened and each bidder has learned his competitor's price is a serious matter, and it should not be permitted except for cogent reasons."[174]

Where a statute authorizes injunctive relief, it may not necessarily entitle the unsuccessful bidder to any further relief beyond enjoining the execution of the contract. For example, an Alabama statute that allows an aggrieved bidder to bring an action to enjoin execution does not also entitle the bidder to damages.[175]

In addition to seeking injunctive relief, the bidder may also ask for declaratory relief or may bring a mandamus action against the agency. In a declaratory judgment action, the court would be asked to rule that the award to a bidder other than the low bidder was invalid, with essentially the same result—and the same standards applicable—as in an action for injunctive relief. However, in a mandamus action, the bidder may seek only an order directing the agency to carry out a ministerial function. Because the selection of the lowest responsible bidder involves the exercise of discretion, a mandamus action will ordinarily not lie.

Some courts have held that a low bidder has a property interest in the award of the contract, and is entitled to due process. This may be established by showing that it was actually awarded the contract and then subsequently deprived of the contract, or that the agency had limited discretion and that the bidder should have been awarded the contract.[176] Establishment of such an entitlement may further entitle the wronged bidder to a mandatory injunction.

vii. Requests to Invalidate Executed Contracts.—

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[162] B.F. Carvin Constr. Co. v. Jefferson Parish Council, 707 So. 2d 1326, 1327–28 (La. App. 5 Cir. 1998).

[163] Dick Enters. v. Metro/King County, 83 Wash. App. 566, 922 P.2d 184, 185–87 (1996).

[164] 930 F. Supp. 1470 (M.D. Ala. 1996).

[165] *Id*. at 1492.

[166] Ralvin Pacific Properties, Inc. v. United States, 871 F. Supp. 468, 475 (D.D.C. 1994).

[167] *Id*.

[168] *Id*.

[169] Rubino v. Lolli, 89 Cal. Rptr. 320, 321, 10 Cal. App. 3d 1059 (1970) (citing CAL. GOV'T. CODE § 14335, which provides that if acceptance of lowest responsible bid is not in best interest of state, agency may reject all bids and re-advertise).

[170] Webb Constr., Inc. v. City of Shreveport, 714 So. 2d 119, 122 (La. App. 2 Cir. 1998).

[171] Delta Data Systems Corp. v. Webster, 744 F.2d 197, 204 (D.C. Cir. 1984).

[172] Ulstein Maritime, Ltd. v. United States, 833 F.2d 1052 (1st Cir. 1987).

[173] *Id*. at 1058.

[174] *Id*. at 1058–59 (quoting International Graphics v. United States, 4. Cl. Ct. 515, 518 (1984)).

[175] Jenkins, Weber and Assocs. v. Hewitt, 565 So. 2d 616, 618 (Ala. 1990) (citing ALA. CODE §§ 41-16-1, 41-16-31, state procurement statutes).

[176] Cleveland Constr., Inc. v. Ohio Dep't of Admin. Services, 121 Ohio App. 3d 372, 700 N.E.2d 54, 69 (Ohio App. 1997).

Most courts have held that unless contract execution is enjoined, the disappointed bidder has no remedy; it must act to enjoin execution in order to preserve its opportunity to challenge the award to another bidder. However, some courts have held that the executed contract may be challenged by an unsuccessful bidder so long as that bidder does not delay its action. Otherwise, its action may be barred by laches. In *Western Sun Contractors Co. v. Superior Court*, the Arizona Court of Appeals held that a bidder's challenge was not barred by laches where it was not filed until the day after the contract was executed, but the bidder had sought reconsideration 2 days earlier.[177]

b. Withdrawal of Bids Before Bid Opening

Mistakes discovered prior to the opening of bids are easily handled. Standard specifications published by state highway and transportation agencies typically provide for withdrawal and revision of proposals, or filing of new ones, prior to the time and date scheduled for opening the bids. In some instances the right to correct the mistake and file a revised bid or new proposal is denied in order to avoid any appearance of collusion. In others, the contracting agency requires that if a bidder is granted the privilege of withdrawing its bid because of an alleged mistake, it may not file a revised bid or substitute a new bid in any subsequent round of bidding on that same contract.

Essentially, all procedures established for handling bid mistakes discovered before bid opening are designed to facilitate the withdrawal of erroneous bids, and thereafter, depending on the contracting agency's policy, to facilitate correction of the mistake or substitution of a new bid. In this process the main concern of the law is to maintain the integrity of the competitive bidding process and avoid the appearance of collusion or unfair advantage in any form.

c. Withdrawal of Bid After Bid Opening

While bidders in a competitive bidding process would appear to have a strong economic incentive to ensure that their bids are prepared carefully and submitted accurately, most state and municipal DOTs have experienced a bid mistake, that is, a request by a low bidder, subsequent to the opening of competitive bids but prior to the award of a contract, to be allowed to withdraw the bid without penalty because the bidder made a significant but purportedly unintentional error in preparing and submitting the bid and would incur significant financial hardship if compelled to enter into a contract based on the bid as submitted.

To err is human, and genuine errors do occur from time to time. Contractors' estimators may have multiple responsibilities with the firm, materials prices may be changing as the deadline for bid submissions approaches, and so forth. Forcing a contractor with a long track record of good perfomance to incur a major financial penalty due to a human error, a penalty which might affect the firm's viability in a highly competitive and difficult economy, is not necessarily in the public interest.

While public owners need to take such matters into consideration and grant relief where it can be shown to be genuinely jusitified, public owners need to exercise caution. In particular, when multiple bid error requests are received from the same firm or firms within a few months of each other, and when a review of agency bidding records reveals that the bidders involved compete against each other in the same geographic market, closer inquiry is warranted.

This is particularly the case when a certain pattern emerges. Such firms may accept contracts at very low prices whenever any firms from outside the area attempt to compete in the local market. When such firms are only bidding against each other, however, without any outside bidders participating, they may engage in a rotating pattern of bid errors in which members of the group repeatedly withdraw unusually low bids in favor of much higher second bids from other members of the group. The withdrawing firms may then turn up as subcontractors or material suppliers on each other's contracts. Under such circumstances, public owners have reasonable grounds for suspecting that the supposed bid errors may in fact be intentional and being made as part of a bid-rigging arrangement.

Public owners may have particular grounds for suspicion when some of the other bids submitted for a contract on which a request for bid withdrawal based upon a bid mistake is submitted appear to be unusually high, contain more rounded numbers than usual, or appear to have been prepared or signed in the same handwriting. Such indicators give public owners reasonable grounds for closer scrutiny into the possibility that losing firms have agreed to submit accommodation bids as part of a bid-rigging scheme. Submission of a very low bid with an intentional error allows the members of the group to be assured of having a sufficiently low price to claim the contract if outside competitors attempt to break into the local market, but otherwise to claim bid error, withdraw the lowest bid in favor of a higher bid by a member of the local group, and reward the withdrawing bidder by giving that firm a subcontract or material supply arrangement on the contract.

State or municipal DOTs or other public owners encountering such circumstances may wish to consult with the USDOT OIG or other appropriate investigative authorities about how to determine whether an apparent pattern is merely coincidental or an indicator of bid-rigging.

Assuming that no pattern of recurrent bid error claims has been identified and that circumstances instead indicate the likelihood that the claim of bidding error is genuine and advanced in good faith, the public owner must then examine the situation from a different perspective.

When a mistake is not discovered until bids have been opened, or where for other reasons a bid contain-

[177] 159 Ariz. 223, 766 P.2d 96, 100 (1988).

ing an error is not withdrawn prior to opening, the consequences are more serious. When bids are opened they are considered to be formally tendered offers, and each bidder is obligated to accept and perform a contract if it should be selected as the lowest responsible bidder. Moreover, the bid forms used by most public highway agencies contain specific statements by the bidder that it will accept a contract and execute it within a specified time if one is offered. Both by law and by contract, therefore, the bidder is obligated to stand by the offer it has made in its bid. Where relief is available to prevent excessive hardship from forcing a bidder to perform a contract based on a mistake, it comes through the courts' application of equitable principles and remedies to the claims of the parties involved.

In a few instances, special legislative procedures facilitate this recourse to equity. One illustration is provided by Wisconsin legislation relating to municipal public works contracting. Under this legislation, if a mistake is discovered and the contracting officer is notified prior to the bid opening, the erroneous bid is returned unopened to the bidder, with the restriction that it is not entitled to bid again on that contract unless it is readvertised. If, on the other hand, the mistake is discovered after bids are opened, the bidder who desires to withdraw must give notice of this fact without delay, and must produce evidence that its mistake was not caused by carelessness or lack of care in examining the project plans and specifications. In the event its bid bond or security deposit is forfeited, the statute provides that it may be recovered by proving to a court of competent jurisdiction that the mistake was not due to "carelessness, negligence, or inexcusable neglect."[178]

An Ohio Revised Code provision indicates that the agency may permit a bidder to withdraw a bid if it provides a written request together with a sworn statement of the grounds within 48 hours after bid opening. The bid must have been submitted in good faith, and the reason that the bid was substantially lower was a clerical mistake evident in the face of the bid, as opposed to a judgment mistake, and was actually due to arithmetic error or unintentional omission of a substantial quantity of work labor or material or material made in the compilation of the bid.[179] If the agency determines that the conditions for bid withdrawal have not been met, its director may award to the bidder, and if such bidder fails to enter into the contract and furnish a bond, he may declare the deposit check bid bond forfeit as liquidated damages and award the contract to the next lowest bidder.

California legislation for the relief of bid mistakes is similar to Wisconsin's law in its essential features and design. It denies the bidder any direct relief for an erroneous bid, and prohibits the bidder from any further bidding on the project on which the erroneous bid was made. But it authorizes court action for the recovery of forfeited security deposits upon proof that (1) a mistake was in fact made; (2) the contracting agency was notified in writing within 5 days after the opening of bids, with a detailed description of how the mistake occurred; (3) the mistake makes the bid materially different than was intended by the bidder; and (4) the mistake was made in preparing the bid form, and was not due to poor judgment, or carelessness in inspecting the work site or in reading the plans and specifications.[180]

d. Equitable Relief for Bid Mistakes

In litigation involving bid mistakes, the bidder's remedy generally is rescission of the bid, or the contract, if it has been awarded, or recovery of a forfeited bid security. Where action is brought by the contracting authority, it generally is for recovery on a surety bond posted as bid security. In these cases, the rights of the public agencies and private contractors are determined by the same principles of equity that apply to analogous situations involving private parties.

i. Reformation.—It is a general rule that the remedy of reformation of a bid or contract, frequently given to relieve against the consequences of a mutual mistake, will not be given to relieve against a unilateral mistake. The distinction between the two situations is said to be in the danger that in the latter case one of the parties would be forced into an agreement that was foreign to its intention. Rather, reformation is appropriate where the contract fails to express the intent of the parties as the result of a mutual mistake, or in the event of a unilateral mistake coupled with the inequitable conduct of the other party.[181]

In *Iversen Const. Corp. v. Palmyra-Macedon Central School District*, the court relied on Federal Court of Claims cases where the remedy of reformation had been extended beyond cases of mutual mistake to cases in which the agency knew or should have known of the error.[182] In that case, the bidder had made a clerical error of nearly $800,000 on a $5.5 million bid. Architects who were present at the bid opening had expressed surprise at the low bid, and had discussed the possibility of error. Later that day, the bidder discovered the error—one sheet of subbids had not been included in the total bid. The bidder immediately notified the architects and the school district of the error, submitted documentation of how the error occurred, and sought to withdraw its bid.[183]

The district did not respond, but rather several days later awarded the bid to Iversen, who again tried to withdraw its bid. The bidder then sought rescission. The court concluded that it was unconscionable to require the bidder to perform at the mistaken bid price.[184] The district responded asking for reformation of the contract. The court found that all prerequisites for equi-

[178] WIS. STAT. § 66.29(5) (1999).

[179] OHIO REV. CODE C 5525.01.

[180] CAL. PUB. CONT. CODE § 5103 (1999).

[181] Department of Transp. v. Ronlee, Inc., 518 So. 2d 1326, 1328 *review denied*, 528 So. 2d 1183 (Fla. App. 3 Dist. 1987).

[182] 539 N.Y.S.2d 858, 861, 143 Misc. 2d 36 (1989).

[183] 539 N.Y.S.2d at 859.

[184] *Id*. at 860.

table relief were met: (1) the mistake was of such consequence that enforcement of the contract would be unconscionable, (2) the mistake was material, (3) the mistake occurred despite the use of ordinary care, and (4) the other parties could be placed in the status quo.[185] In deciding between ordering rescission or reformation, the court found that reformation would place all parties in the status quo, because even the reformed bid was still the lowest bid. In addition to relying on federal cases, the court noted the rule that an agency cannot take advantage of an inaccurate bid if the agency is notified promptly of the mistake. Also the court noted that reformation gave the greatest benefit to the taxpayers, as it would allow the work to be done at the lowest cost.[186]

The prohibition against negotiating with bidders generally precludes reformation of the bid after bid opening, which would run contrary to the federal prohibition against negotiation on federal-aid contracts. Thus, it leaves the agency with the choice to permit the contractor to withdraw its bid and then proceed to the next bidder. In making the decision on whether to allow withdrawal of the bid without penalty, the agency will need to consider the magnitude of the error, its materiality to the construction project, and whether it was made in good faith. In unusual circumstances, a bidder may be allowed to correct its mistake after bid opening, or to reform its bid. However, a high standard of proof may be required by the agency in order for it to allow reformation, provided that it has the statutory ability to do so.[187] For example, if a bidder has made a mistake and the agency's conduct is determined to be inequitable, then the bidder may be entitled to reform the contract. However, in *Department of Transportation v. Ronlee, Inc.* the court described the standard that the bidder must meet in order to show that the agency's conduct was inequitable.[188] In that case, which involved bids for an interchange construction project, the second low bid exceeded the low bid by about 5 percent. Five days after bid opening, the low bidder advised the Department that it had made an error of about $300,000, or around 2 percent of its total bid price, due to an erroneous transcription of a unit price. The Department responded to the bidder that it was aware of the unbalanced price, but that it was unable to make a price adjustment. The bidder made no effort to withdraw its bid on the grounds of having made an error in its bid, but rather executed the contract and performed for 21 months.

In seeking additional compensation, the contractor then asserted that it was entitled to reform the contract to correct the erroneous unit price in its bid, on the grounds that the Department's conduct had been inequitable in that it had failed to inform the contractor of the error. However, the court held that the contractor waived any right that it had to either reformation or rescission when it had knowledge of its error 10 days prior to the start of construction, but chose to perform the contract rather than attempt to withdraw its bid.[189] Further, the court held that the Department's conduct was not inequitable when it failed to call the bidder's attention to its error, because the bidder discovered its own error at about the same time that the Department discovered it.[190]

ii. Rescission.—Rescission may be the appropriate remedy in the event of a bid mistake that is "so material and fundamental that it precluded a meeting of the minds necessary for the creation of a contract."[191] A significant number of cases in which relief has been granted for a unilateral mistake in bidding have evolved a general rule regarding the criteria for successful recourse to equity in such cases. The Maryland court in *City of Baltimore v. De Luca-Davis Construction Company* discussed this matter as follows:

The general rule as to the conditions precedent to rescission for unilateral mistakes may be summarized thus: 1, the mistake must be of such grave consequences that to enforce the contract as made or offered would be unconscionable; 2, the mistake must relate to a material feature of the contract; 3, the mistake must not have come about because of the violation of a positive legal duty or from culpable negligence; 4, the other party must be put in status quo to the extent that he suffers no serious prejudice except the loss of his bargain.[192]

In *De Luca-Davis*, the erroneous cost estimate resulted from copying unit prices incorrectly on the bidder's worksheets, and the contracting agency was notified of the mistake as soon as it was discovered at the bid opening. In addition, 5 days after the bid opening, a complete written explanation of the mistake was presented to the proper agencies of the city in support of a request for rescission of the bid and return of the bid deposit. Such prompt action by the bidder strengthened its claim for relief by forestalling action on the part of the contracting agency that would have been irreparable, and similar instances of early notification have been noted in other cases where rescission has been allowed.

In a leading California case, a majority of the court took the position that clerical errors in bid preparation did not come within the scope of the equitable rule denying relief. [193] The court said:

> There is a difference between mere mechanical or clerical errors made in tabulating or transcribing figures and er-

[185] *Id.*

[186] *Id.* at 861.

[187] McKnight Constr., Inc. v. Department of Defense, 85 F.3d, 565, 570 (11th Cir. 1996).

[188] 518 So. 2d at 1328.

[189] *Id.*

[190] *Id.*

[191] Naugatuck Valley Dev. Corp. v. Acmat Corp., 10 Conn. App. 414, 523 A.2d 924, 927 (1987) (citing Geremia v. Boyarski, 107 Conn. 387, 140 A. 749 (1928)).

[192] 210 Md. 518, 527, 124 A.2d 557, 562 (1956).

[193] M. F. Kemper Constr. Co. v. City of L.A., 37 Cal. 2d 696, 235 P.2d 7 (1951).

> rors of judgment, as, for example, understanding the cost of labor or materials. The distinction between the two types of error is recognized in the cases allowing rescission and in the procedures provided by the state and federal governments for relieving contractors from mistakes in bids on public work…Generally relief is refused for error in judgment and allowed only for clerical or mathematical mistakes…Where a person is denied relief because of an error in judgment, the agreement which is enforced is the one he intended to make, whereas if he is denied relief from a clerical error, he is forced to perform an agreement he had no intention of making.194

A dissenting opinion in this case presented the opposing view of the effects of mistakes in this way:

> When it is necessary for a person to make calculations or estimates, in order to determine the sum which he will bid for an offered contract, or to determine the cost to him of a proposed contract, or whether or not it will be advantageous to him to enter into it, he must assume the risk of any error or oversight in his computations, and cannot have relief in equity on the ground of mistake, if he reaches a wrong conclusion through inadvertence, misunderstanding of that which is plain on its face, or mathematical error.195

Among the other criteria for granting equitable relief from the penalties of a unilateral bid mistake, the courts have frequently stressed the requirement that the error must relate to a material feature of the contract, and must be of such magnitude or character as to make enforcement of the offer or contract unconscionable.[196] This requirement generally is found in conjunction with the corollary rule that equity will not allow withdrawal of an erroneous bid or return of a forfeited security deposit unless it appears that reasonable diligence and care were used in preparing the bid, and that the contracting agency will suffer no serious injury, except the loss of its original contract.

These propositions reflect the concern of equity for the essential qualities of fairness and realism in judging the bidder's claim for relief. Diligence and care in preparing bids are essential to success in claiming equitable relief, but they are requirements that must be applied in the light of each bidder's circumstances. For example, errors in calculating the expenses of excavation were considered in the light of evidence that when the bidder's representatives visited the construction site, they were misled by old right-of-way stakes and flags, which suggested the highway was to be built through loose dirt rather than through a rocky area that was the correct route.[197] Clerical errors, such as omitting digits or decimal points, are recognized as likely to occur in spite of diligent efforts to prevent such errors, and so are not automatically equated with negligence. If the circumstances include factors that reasonable persons would expect to make the bidding process more difficult or increase the chance of error, the standard of care to which bidders must conform reflects this fact.[198]

"Negligence" or its equivalent lack of care in bid preparation, as this concept is applied to claims for equitable relief for bid mistakes, means carelessness that exceeds the tolerance that the business and governmental community typically allow themselves in carrying on their own affairs. Reasonably understandable failure to calculate or present bid information correctly and completely will not bar equitable relief unless obvious carelessness or lack of good faith are present. When claims of mistake suggest that either carelessness or lack of good faith are present, the bidder is considered as having violated its duty to compete in good faith, and its claim to equitable relief generally is fatally weakened.

In *Puget Sound Painters v. State*, [199] the bidder underestimated the area of bridge towers to be painted by about half. The court held that it would be entitled to equitable relief if it acted in good faith and without gross negligence; was reasonably prompt in giving notice to the agency of the error in its bid; would suffer substantial detriment by forfeiture of its bid bond; and if the agency's status was not greatly changed.[200]

In a much more recent Colorado case, *Powder Horn Constructors v. City of Florence*, the court also imposed a good faith standard in limiting the requirement that the bidder prove that its error was not negligent.[201] In that case, Powder Horn Constructors was the low bidder on a water treatment facility. The day after bid opening, the City's project engineer noticed that one bid item was substantially lower than the same item in the other bids, and notified Powder Horn, suggesting that it review that item. The following day, Powder Horn informed the project engineer that it had mistakenly omitted the cost of one major item in that bid item, at a cost of $66,000, or about 10 percent of its bid. Powder Horn also submitted a letter to the engineer, stating that a subtotal from one worksheet had been inadvertently omitted from the final bid amount, and advised the engineer that the bid and bid security were being withdrawn.[202]

However, the city council voted to award the contract to Powder Horn anyway, which then refused to accept the award. The City then awarded to the second low bidder. The City sued Powder Horn and its surety, asserting that they were entitled to the amount of the bid bond as liquidated damages, to partially compensate the City for the difference between Powder Horn's bid and the second low bid.[203]

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[194] *Id.* 235 P.2d at 11–12.

[195] *Id.* at 14, citing BLACK, ON RESCISSION & CANCELLATION, § 142.

[196] *See* Department of Transp. v. American Ins. Co., 491 S.E.2d 328, 331 *reconsideration denied* (Ga. 1997).

[197] State By and Through its Road Comm'n v. Union Constr. Co., 9 Utah 2d 107, 339 P.2d 421 (1959).

[198] M. F. Kemper Constr. Co. v. City of L.A., 37 Cal. 2d 696, 235 P.2d 7, 11 (1951).

[199] 45 Wash. 2d 819, 278 P.2d 302, 304 (1954).

[200] *Id*.

[201] 754 P.2d 356 (Colo. 1988).

[202] *Id*. at 358.

[203] *Id*.

The trial court had found that Powder Horn did not exercise reasonable care in preparing its bid, and that it was liable to the City in the amount of its bid bond. However, the court also found that there had been a unilateral material mistake, that requiring Powder Horn to perform the contract would be unconscionable, and that the City was not prejudiced by the withdrawal of the bid. However, the court found that Powder Horn's negligence prevented rescission of its bid. The Court of Appeals affirmed.[204]

The Colorado Supreme Court reversed, disagreeing with the lower courts that the right of rescission could be conditioned on the exercise of reasonable care by the bidder in these circumstances.[205] The court noted the distinction between mathematical or clerical errors and errors of judgment, pointing out that it was undisputed that the error in this case was clerical and not an error of judgment. The court noted the policies underlying the requirement to prove an absence of negligence, including protection of the integrity of the bidding process, fostering consistency in bid preparation, and discouraging fraud and collusion. But the court distinguished the case in which the mistake is discovered prior to award:

> However, requiring a bidder to demonstrate freedom from negligent conduct when the bid has not been accepted and the bid contains a mechanical error, as distinguished from an error of judgment, will significantly restrict the availability of this equitable remedy in circumstances wherein recognition of the remedy would not undermine those policies.[206]

The court pointed out that the term "mistake" necessarily implies some degree of negligence, and that it would be extremely difficult to prove that the mistake was both material and that it was non-negligent. Rather, the court chose to impose a standard of whether the bidder made an honest or good faith mistake, and to consider "gross or extreme negligence" as evidence of the bidder's lack of good faith.[207] Therefore, the court allowed rescission, without forfeiture of the bid bond, where the bidder's mistake was made in good faith and the public agency did not rely to its detriment on the mistaken bid.[208]

In considering a choice between a standard of simple negligence or gross negligence, the Connecticut court chose to adopt neither. Rather, the court held only that the degree of negligence involved was an equitable factor to be considered by the agency, and ultimately by the court, in determining whether the bidder could withdraw without forfeiting its bond. In that case, *Naugatuck Valley Devel. Corp. v. Acmat Corp.*,[209] the agency had been awarded liquidated damages in the amount of the bid bond because of the bidder's failure to execute the contract. The bidder had become aware of a mistake in its bid 14 days after bid opening, but had notified the agency at that time. The bidder wanted to negotiate with the agency, but the agency was precluded from doing so. In trying the issue of liquidated damages, the trial court required the bidder to prove that its mistake was free from negligence in order to avoid the damages. The appellate court reversed, holding that whether the bidder was entitled to relief for its mistake was based on equitable principles, and that the bidder's degree of negligence was one equitable factor to be considered.[210]

The duty to deal in good faith is, of course, as binding on the contracting agency as on the bidder. Where a bid clearly discloses that in all probability it contains a mistake, the contracting agency is charged with that knowledge. Later, if it is shown that a mistake in fact has occurred, the agency may not take advantage of the bidder by acting in reliance on a bid when there is evidence or suspicion of error.[211] "An offeree 'will not be permitted to snap up an offer that is too good to be true; no agreement based on such an offer can…be enforced by the acceptor.'"[212]

Warning that a mistake has been made may be given by any evidence that under the circumstances is recognizable by the bidder or contracting agency as an error. In particular, it may be shown by an unusually great disparity of one bid in comparison with others.[213] For example, in a Minnesota case, the contracting officer noted a discrepancy in bids for a moving contract in that the other bids were three to four times the amount of the low bid. The officer contracted the bidder to inquire whether it intended the bid that it submitted, and the bidder confirmed its confidence in its bid.[214] The court refused to allow equitable relief for the bid mistake, stating that where the bidder is a professional in its field, it is reasonable for the agency to rely on the bid, particularly after the agency has called the bidder's attention to a possible error and has been reassured that that was the bid intended.[215]

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[204] City of Florence v. Powder Horn Constructors, Inc., 716 P.2d 143 (Colo. App. 1985).

[205] Powder Horn Constructors, Inc. v. City of Florence, 754 P.2d 356 (Colo. 1988).

[206] *Id*. at 361.

[207] *Id*. at 362.

[208] Although the agency had awarded the contract to Powder Horn, it did so with full knowledge of the mistaken bid and could not be said to have relied to its detriment on the mistake. *Id*. at 361.

[209] 10 Conn. App. 414, 523 A.2d 924 (1987).

[210] *Id.* 523 A.2d at 927.

[211] *But see* Department of Transp. v. Ronlee, Inc., 518 So. 2d 1326, 1329, *review denied*, 528 So. 2d 1183 (Fla. App. 3 Dist. 1987) (agency's failure to call to bidder's attention a 2 percent error in calculations, where bidder learned of error shortly after agency did, was not fraud or inequitable conduct that would entitle bidder to reformation).

[212] A.A. Metcalf Moving & Storage Co. v. North St. Paul Sch. Dist., 587 N.W.2d 311, 318 (Minn. App. 1998) (quoting Speckel by Speckel v. Perkins, 364 N.W.2d 890, 893 (Minn. App. (1985)).

[213] *See* Powder Horn Constructors, 754 P.2d at 358.

[214] A.A. Metcalf, 387 N.W.2d at 314.

[215] *Id*. at 318.

e. Bid Security Forfeiture and Exoneration

Bidding instructions that purport to prohibit or restrict withdrawal of bids have been construed as inapplicable to situations involving an honest unilateral mistake. In the same manner, courts have given similar construction to statements providing for forfeiture of deposits or surety bonds serving as security to assure execution of contracts. Because state laws and regulations require bid security in terms of a percentage of the total amount of the bid, the security deposit may represent a substantial amount of money, which a bidder cannot afford to lose. Much of the litigation over bid mistakes, therefore, is concerned with imposition of forfeiture of defaulted deposits, or attempted return of a security deposit following bid withdrawal.

Where a bid mistake is remediable by withdrawal of the bid, and the contracting agency is promptly notified of the error, equity will order return of the security deposit or cancellation of the bid bond. These results are based partly on the policy that once the contracting agency is aware of a bid error, it is unjust to take advantage of this situation and impose a forfeiture, and partly because after the bid is withdrawn the reason for the security ceases to exist.

Where there is a mistake in a bid such that the bidder will be permitted to withdraw its bid, it must be a mistake that either directly affects the price or that makes the bid materially different from that which was intended by the bidder. In a typical case where the reasoning supports equitable recovery or cancellation of bid security, notice of the mistake is received by the contracting agency before it accepts the erroneous bid. Frequently the discovery is made and notice given before the bid opening. Failure to give notice to the contracting agency before acceptance of an erroneous bid weakens the case for return of bid security, but forfeiture of security is not always the result in these situations. If a bidder notifies the agency after the agency's acceptance of its offer, but before a contract has been signed, and before there is any change in position in reliance on the erroneous bid, it may be successful in obtaining return of its deposit or cancellation of its bid bond.

In a unique case from New York, NYSDOT rejected the contractor's claim for "honest error," and when the contractor refused to execute the contract, NYSDOT contemplated an action to recover the amount of the bid bond. The contractor's error was not deemed to be of such a magnitude to cause irreparable financial harm. NYSDOT's decision was later reversed for failing to file its procedures pursuant to the State Administrative Procedures Act.[216]

State statute, however, may prohibit the court from granting equitable relief in the case of a bid mistake. Oklahoma's statute provides that the bid bond "shall" be forfeited if the apparent low bidder does not execute the contract. Even where the contractor brought the mistake to the agency's attention prior to contract award, the court held that the trial court lacked the equitable power to prevent forfeiture of the bid bond in light of the mandatory statutory language.[217]

Often a decisive factor in determining recovery of bid security is whether the contracting party has acted in reliance on the bidder's mistake. In the great majority of cases where equitable relief was requested, bid security was not recovered if the mistake was not discovered or reported until after the agency had made a contract award. Yet, occasionally there are circumstances in which bid mistakes are not discovered and reported until after contract award, and because no culpable negligence is chargeable to it, the bidder is permitted to recover its bid security. An older Kentucky case, *Board of Regents of Murray State Normal School v. Cole*, illustrates the required combination of circumstances.[218] In that case, the agency had inquired about a possible mistake at the time of bid opening, and the bidder verified its bid as correct. Relying on this assurance, the agency awarded that bidder the contract, only to have the bidder discover its mistake shortly thereafter. The court granted relief to the bidder. However, it did not apply the doctrine that an executory contract can be canceled when it is entered into with a unilateral mistake on a material point and without culpable negligence. Rather, the court chose to treat the matter as a rescission of the contract. The parties were restored to their original positions as nearly as possible by the return of the bidder's deposit, and payment by the bidder of the contracting agency's actual expenses of readvertising the project for new bids.

If the bidder chooses not to exercise its option to rescind its bid and re-attain its bid bond, it will not be entitled to reform the contract once it is executed.[219] Absent mutual mistake, the court will not reform the contract.[220]

f. Damages for Erroneous Rejection of Bid

Some states' courts have held that a disappointed bidder has no cause of action for damages against the awarding agency, even if the contract was wrongly awarded.[221] These courts have based their conclusions on the fact that the fundamental policy underlying pub-

[216] Matter of J.D. Posillico, Inc. v. Dep't of Transp. of the State of New York, 160 A.D. 2d 1113; 553 N.Y.S.2d 903 (1990).

[217] J.D. Graham Constr., Inc. v. Pryor Public Sch. Indep. Sch. Dist. No. 1, Mayes County, 854 P.2d 917, 920, *cert. denied* (Ok. App. 1993) (statute stated that bid bond "shall" be forfeited if bidder does not execute contract); 61 OKLA. STAT. ANN. § 107(B).

[218] 209 Ky. 761, 273 S.W. 508 (1925).

[219] Midway Excavators, Inc. v. Chandler, 128 N.H. 654, 522 A.2d 982, 984 (1986).

[220] *Id*.

[221] C.N. Robinson Lighting Supply Co. v. Board of Educ. of Howard County, 90 Md. App. 515, 602 A.2d 195, 200, *cert. denied*, 326 Md. 662, 607 A.2d 7 (1992); BBG Group, L.L.C. v. City of Monroe, 96 Wash. App. 517, 521, 982 P.2d 1176 (1999); Debcon, Inc. v. City of Glasgo, 28 P.3d 478, 485 (Mont. 2001) (citing cases from numerous jurisdictions that hold that aggrieved bidder cannot recover lost profits or other expectancy damages under negligence theory).

lic bidding laws is protection of the public interest, and not protection of contractors. At the same time, other courts have recognized that a bidder may be entitled to its bid preparation costs in the event that it is unfairly denied award of the contract. A smaller number have allowed additional damages for the aggrieved low bidder.

Generally, whether the court will consider the award of either bid preparation costs or lost profits depends on the bidder's diligence in seeking to enjoin the contract award or execution. A Maryland court held that it was not inequitable to find that the bidder has no cause of action for damages where it did not seek an injunction.

A timely challenge is compatible with the public interest since it serves to force compliance with the purpose of the bidding procedure. After the project is completed, however, it is difficult to perceive how the public interest is served by investing the low bidder with a cause of action for damages. The public has already paid for the difference between the lowest bid and the bid which was accepted. The taxpayer should not be further penalized.[222]

i. Bid preparation costs.—Recovery of bid preparation costs may be an appropriate remedy when a frustrated bidder proves that it should have been awarded the contract.[223] The Georgia Supreme Court has held that where a governmental entity has frustrated the bid process and awarded the contract to an unqualified bidder, the bidder whose bid was unfairly rejected is entitled to its reasonable bid preparation costs.[224] The court found that lost profits would unduly penalize the taxpayers, while compensating the bidder for effort that it did not make and risks that it did not take.[225] Awarding bid preparations costs was also found to be the appropriate remedy in *Bolander & Sons Co. v City of Minneapolis*, in which the work under the contract had already begun by the time the unsuccessful bidder prevailed in its challenge to the award of the contract to another bidder.[226] The bidder in that case was also awarded its attorney fees incurred in bringing the bid protest.[227] However, the bidder must show that the rejection of its bid was improper and that the agency's conduct was arbitrary and capricious or in bad faith.[228] Federal courts have held that in order to be awarded bid preparation costs, the bidder must show that the agency violated its "implied contract to have the involved bids fairly and honestly considered."[229] The court further quoted:

Proposal preparation expenses are a cost of doing business that normally are "lost" when the effort to obtain the contract does not bear fruit. In an appropriate case, however, a losing competitor may recover the costs of preparing its unsuccessful proposal if it can establish that the Government's consideration of the proposals submitted was arbitrary or capricious. The standards that permit a disappointed competitor to recover proposal preparation expenses are high and the burden of proof is heavy.[230]

The court went on to further explain what criteria might be used to determine if the government has acted arbitrarily or capriciously in evaluating bids:

One is that subjective bad faith on the part of the procuring officials, depriving a bidder of the fair and honest consideration of his proposal, normally warrants recovery of bid preparation costs. A second is that proof that there was "no reasonable basis" for the administration decision will also suffice, at least in many situations. The third is that the degree of proof of error necessary for recovery is ordinarily related to the amount of discretion entrusted to the procurement officials by applicable statutes and regulations. The fourth is that proven violation of pertinent statutes or regulations can, but need not necessarily be a ground for recovery.[231]

Alabama's public works statutes specifically authorize the award of bid preparation costs when an aggrieved bidder successfully challenges the award of a contract as being contrary to public bidding laws and obtains an injunction, so long as the action is brought within 45 days of award.[232]

ii. Lost Profits.—Ordinarily, even if a disappointed bidder's challenge to the agency's award is successful, it may not recover money damages.[233] The Washington Supreme Court has held that awarding damages to a disappointed low bidder inherently conflicts with the primary purpose of competitive bidding, which is pro-

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[222] Robinson, *supra* note 221, at 200 (quoting Gulf Oil Corp. v. Clark Co., 94 Nev. 116, 575 P.2d 1332, 1334 (1978).

[223] Credle v. East Bay Holding Co., 263 Ga. 907, 440 S.E.2d 20, 21 (1994).

[224] City of Atlanta v. J.A. Jones Constr. Co., 260 Ga. 658, 398 S.E.2d 369, 371, *on remand*, 198 Ga. App. 345, 402 S.E.2d 554 (1990), *cert. denied*, 111 S. Ct. 2042 (of two possible remedies, lost profits or bid preparation costs, the award of bid preparation costs is the better alternative).

[225] *Id*.

[226] 438 N.W.2d 735, 738, *review granted, affirmed*, 451 N.W.2d 204 (1989).

[227] *Id.* 438 N.W.2d at 738. The Federal Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, may also provide a basis for attorney fees. Taylor Group, Inc. v. Johnson, 915 F. Supp. 295, 297–98 (M.D. Ala. 1995) (contractor was "prevailing party" for purposes of EAJA where it obtained relief on the merits of its claims both in the issuance of a temporary restraining order that prohibited award to the bidder's rival and in obtaining a subsequent settlement with the agency).

[228] E.W. Bliss Co. v. United States, 77 F.3d 445 (Fed. Cir. 1996).

[229] *Id*. at 447 (citation omitted).

[230] *Id*. (Quoting Lincoln Servs., Ltd. v. United States, 678 F.2d 157, 158, 230 Ct. Cl. 416 (1982)).

[231] *Id*. (Quoting Keco Industries v. United States, 492 F.2d 1200, 1204 (1974) (citations omitted)).

[232] ALA. CODE 39-5-4 (2002).

[233] Delta Chemical Corp. v. Ocean County Utilities Auth., 250 N.J. Super. 395, 594 A.2d 1343, 1346 (1991); Ralph L. Wadsworth Constr. Co. v. Salt Lake County, 818 P.2d 600, 602, *cert. denied*, 832 P.2d 476 (1991).

tecting public funds.[234] The court also held that the rejected low bidder's opportunity to obtain an injunction allows the bidder some recourse while still being within the bounds of protecting both the bidder's and the public's mutual interests in the competitive bidding process.[235] In addition, in the Peerless Food Case the Washington court held that because there is no contract between the aggrieved bidder and the agency, the bidder is not entitled to damages.[236] Similarly, Arkansas's courts have held that a bidder's remedy is limited to enjoining award of the contract or termination of a wrongfully awarded contract.[237]

However, the New Hampshire Supreme Court has held that where a disappointed low bidder has complied with all of the requirements of the invitation for bids, but was denied award of the contract through conduct of the awarding agency that amounts to bad faith, then it may be entitled to recover its lost profits.[238] Similarly, Mississippi's Supreme Court has held that compensatory damages under the law of contracts are the proper measure of damages for an aggrieved bidder that was entitled to the contract award.[239] Montana has also recognized that in the event of bad faith or negligence on the part of the agency, a wronged bidder may be entitled to relief beyond invalidation of the contract.[240] However, in a later case, the Montana court held that an aggrieved bidder may not recover lost profits or other expectancy damages under a negligence theory.[241]

Where courts have awarded lost profits as the measure of damages for wrongful bid rejection, they have done so after a finding of bad faith on the part of the contracting agency. In *Peabody Construction Company v. City of Boston*, the court found that the bidder had complied with all of the requirements in the invitation for bids, and that its bid was rejected through agency conduct that amounted to bad faith.[242] The appropriate measure of damages was held to be the profit that the bidder would have earned on that job.

iii. Section 1983 Damages.—Failing to recover anticipated profits when their bids are wrongfully rejected, some contractors have attempted to recover damages under the Civil Rights Act, 42 U.S.C. § 1983. Where a state statute requires that a bid be awarded to the lowest responsible bidder, some courts have found that the lowest responsible bidder has a constitutionally protected interest in obtaining an award of the contract.[243] Based on this, the aggrieved bidder may seek damages against the contracting agency for the violation of its constitutional right to obtain the award. However, federal courts have set a similar standard for obtaining damages in the public contract setting as for other types of violations. In order to be eligible to pursue damages under Section 1983, a contractor must show not only a deprivation of rights, but also an inability to obtain a remedy in state court. Where state law provides for some review of the state agency's action, a bidder is unlikely to be successful in pursuing damages under § 1983.[244]

In order to establish a claim under § 1983, the bidder must show that the agency acted under color of state law to deprive the bidder of a right protected by the United States Constitution.[245] In public contracting, the bidder must establish that it had a legitimate claim of entitlement to the award of the contract by showing that it was actually awarded the contract at any procedural stage, or that the applicable rules limit the discretion of the agency officials as to whom the contract should be awarded.[246] The right to reject any and all bids usually confers enough discretion on the agency that this standard is difficult to meet. However, even the power to reject all bids does not allow the agency to act arbitrarily.[247]

In a Sixth Circuit case that illustrates the effect of agency discretion, the bidder was notified that it was the lowest responsible bidder, but that it would be expected to sign the project labor agreement required for the project that it had not yet signed.[248] The bidder re-

[234] Peerless Food Products, Inc. v. State, 119 Wash. 2d 584, 835 P.2d 1012 (1992) (bid is offer rather than acceptance of contract; therefore there is no cause of action for damages); Dick Enterprises v. Metro/King County, 83 Wa. App. 566, 922 P.2d 184 (1996).

[235] Dick Enterprises, *supra* note 234, at 185.

[236] Peerless, *supra* note 234, 835 P.2d at 1016.

[237] Milligan v. Burrow, 52 Ark. App. 20, 914 S.W.2d 763, 765 (1996) (based on state's sovereign immunity).

[238] Marbucco Corp. v. City of Manchester, 137 N.H. 629, 632 A.2d 522, 525 (1993).

[239] City of Durant v. Laws Constr. Co., 721 So. 2d 598, 606 (Miss. 1998).

[240] ICS Distributors, Inc. v. Trevor, 903 P.2d 170 (Mont. 1995).

[241] Debcon, Inc. v. City of Glasgow, 28 P.3d 478, 485 (Mont. 2001).

[242] 28 Mass. App. Ct. 100, 546 N.E.2d 898, 902 (1989).

[243] *See* Cleveland Constr., Inc. v. Ohio Dep't of Admin. Services, 121 Ohio App. 3d 372, 700 N.E.2d 54, 69 (1997). Pataula Elec. Membership Corp. v. Whitworth, 951 F.2d 1238, 1241 (11th Cir. 1992), *rehearing denied*, Georgia Power Co. v. Pataula Elec. Membership Corp., 506 U.S. 907, *appeal after remand*, Flint Elec. Membership Corp. v. Whitworth, 68 F.3d 1309, *opinion modified*, 77 F.3d 1321 (11th Cir. 1996) (Georgia law requires award to lowest responsible bidder).

[244] State ex rel. Educ. Assessments Systems, Inc. v. Cooperative Educ. Services of N.M., Inc., 115 N.M 196, 848 P.2d 1123, 1130 (1993) (although procurement code does not provide for damages it does provide adequate legal remedy by providing for protest and for appealable determination of protest); Church & Tower, Inc. v. Miami-Dade County, Florida, 11 F. Supp. 2d 1376, 1379 (S.D. Fla. 1998) (neither debarment nor city's refusal to consider bidder's bid pending investigation violated due process where there was an adequate procedure for disappointed bidders to challenge debarment procedure and each bid refusal by appeal to state court).

[245] Enertech Elec., Inc. v. Mahoning County Comm'rs, 85 F.3d 257, 259, 260 (6th Cir. 1996).

[246] Cleveland Constr., Inc., *supra* note 243, at 69.

[247] Pataula, *supra* note 243, at 1243.

[248] Enertech Elec., Inc., *supra* note 245, at 259.

fused to sign the project labor agreement, and its bid was then rejected. The court held that where the county had the ability to award to the "lowest and best bidder," and the county required a project labor agreement that the bidder refused to sign, the county had acted within its discretion and had not violated the bidder's constitutional rights.

In addition to alleging a property interest in the award of the contract, a bidder may allege a property interest in its prequalification to bid. In *Systems Contractors Corp. v. Orleans Parish School Board*, the bidder sought Section 1983 damages for its disqualification from bidding on a particular project and its debarment from bidding on future projects.[249] The bidder had been given written notice of its disqualification and debarment, but not prior to bid opening. The bidder was then given an opportunity to present its case directly to the agency. It then had the option of appealing the agency decision to an arbitrator. The court held that the bidder was not entitled to written notice of the disqualification and debarment prior to bid opening, and that the opportunity to appeal to the agency and to an arbitrator provided an adequate post-deprivation remedy sufficient to defeat a claim for § 1983 damages.[250]

In other cases, the contractor's claim under § 1983 has involved the contractor's contention that its right to free speech was violated by the contracting agency. In *Progressive Transportation Services v. County of Essex*, the court held that there was no First Amendment violation where the speech at issue was based on the contractor's own personal interest and did not involve issues of public concern.[251] Thus the contractor was not entitled to damages under § 1983 for its retaliation claim. However, the United States Supreme Court has held that the free speech rights held by individuals under the First Amendment also apply to government contractors. In *O'Hare Truck Service v. Northlake*, the contractor alleged that it was removed from the City's rotating list of towing contractors for political reasons because it had refused to contribute to the mayor's reelection campaign, and that it was being denied the opportunity to bid on city contracts.[252] The Court held that the contractor's allegations stated a cause of action under § 1983.[253]

Please note also the further discussion of §1983 issues in section 3(A)(8), below.

iv. Other Remedies.—In Louisiana, a frustrated bidder sued the successful bidder, alleging that the successful bidder had assisted in or encouraged a wrongful act in violation of a state statute that created liability for such actions.[254] The court upheld the validity of the award, and held that the same statute would apply to the consulting engineer retained by the agency, who allegedly conspired with the agency and the successful bidder who wrongfully obtained the contract.[255] The Federal False Claim Act may provide a similar remedy where the unsuccessful bidder alleges that the successful bidder has obtained the contract through false statements in its bid.[256]

The Eighth Circuit ruled that a contractor could be entitled to damages from its subcontractor for the subcontractor's bid errors that were used by the prime contractor in preparing its bid, based on a state law theory of implied warranty.[257]

Even where the bidder was awarded a contract under specifications later determined in a bid protest to have been illegal, it was not entitled to damages in a New Jersey case.[258] The court ordered that because of the illegal specifications, the contract had to be readvertised. The bidder submitted another bid, but was not the low bidder in the second round of bids. However, this was not a basis for damages. Similarly, in *Percy J. Matherne Contractor v. Grinnell Fire Protection Systems Company*, the prime contractor was allowed to recover from the subcontractor for the increased cost of substituting another subcontractor, where it relied to its detriment on the subcontractor's bid in submitting its bid.[259]

g. Innovations in Bid Challenges and Protests: Section 1983 Litigation

Several state transportation agencies have been subject to new legal challenges involving contractors who have initiated civil rights litigation under 42 U.S.C. § 1983.

There are reasons why contractors' attorneys might elect to file civil rights litigation under § 1983 rather than raising bid challenge or protest issues through other forms of litigation, such as state-court proceedings to challenge state agency decisions as arbitrary, capricious, an abuse of discretion, or in excess of statutory authority. The statute of limitations on § 1983 actions may be longer that the statutes of limitation for such state proceedings. Attorneys' fees and costs may also be available to counsel for winning plaintiffs in § 1983 actions, but not in such state court proceedings.

[249] 148 F.3d 571 (5th Cir. 1998).

[250] *Id*. at 575. Although state law provided for additional procedural steps such as written notification prior to award and retention of records of the disqualification hearing, these were not required by the United States Constitution. *Id*.

[251] 999 F. Supp. 701 (N.D. N.Y. 1998).

[252] 518 U.S. 712, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996).

[253] *Id.* 518 U.S. at 720. The Court also pointed out that had the mayor solicited contributions as a *quid pro quo* for not terminating the contractor or for keeping the contractor on the City's list, the mayor may have violated state bribery statutes. *Id*. at 721.

[254] Enerland Recovery Services, Inc. v. Parish of Lafourche, 619 So. 2d 129, 134 (La. App. 1 Cir. 1993).

[255] *Id*. at 134.

[256] United States ex rel. Alexander v. Dyncorp, Inc., 924 F. Supp. 292, 298 (D.D.C. 1996).

[257] C.L. Maddox, Inc. v. Benham Group, Inc., 88 F.3d 592, 600 (8th Cir. 1996).

[258] Morie Energy Management, Inc. v. Badame, 575 A.2d 885, 888, 241 N.J. Super. 572 (N.J. Super. A.D. 1990).

[259] 915 F. Supp. 818, 825–26 (E.D. La. 1995).

Noteworthy is the case of *Glover v. Mabrey*[260] involving Glover Construction Co. Inc. and six officials of ODOT. The complaint alleged violations of the contractor's First and Fourteenth Amendment rights. Glover had been in a dispute concerning the construction of Oklahoma Highway 64 where he encountered major problems. ODOT blamed Glover's poor workmanship and use of improper materials, while Glover blamed ODOT's design. ODOT allegedly revoked Glover's prequalification status while an injunction was in place. Glover asserted retaliation for the exercise of his First Amendment right to free speech and Fourteenth Amendment right to due process and equal protection.

The U.S. Court of Appeals of the Tenth Circuit affirmed a lower court decision that denied defendants' motion to dismiss and their claim of qualified immunity, on the grounds that Glover's complaint sufficiently alleged that ODOT employees wrote or adopted a recommendation that Glover be denied its prequalified bidder status in retaliation for its public criticism of the Highway 61 design, in violation of the First Amendment. The court dismissed the remaining allegations because the complaint failed to state claims for which relief might be granted. [261] Subsequently, Glover filed a third amended complaint under 42 U.S.C.§ 1983, alleging further retaliation against Glover for his efforts to adjudicate his claims and numerous other issues. Subsequently, the contractor elected not to pursue the action.

Similarly, NYSDOT has also been subjected to 42 U.S.C. § 1983 litigation in *Marinaccio, Sr., Accadia Contracting, Inc v. Joseph Boardman, et al. as employees of New York State DOT*.[262] In this case, the contractor commenced litigation under 42 U.S.C. § 1983 claiming violations of a contractor's First Amendment rights to free speech and association and for tortious interference with business relationships. The contractor, Mr. Marinaccio, asserted that the defendant state employees violated his rights to free speech and association under the First Amendment when they conditioned the award of a contract on barring Mr. Marinaccio from communication with DOT employees and consultants. The jury found for plaintiff that the state employee violated his First Amendment rights, but also found that the state employees were entitled to qualified immunity. In addition, the jury returned a verdict in favor of defendants on the tortious interference claim. The contractor appealed from the jury verdict, and the court denied plaintiff's motion for judgment as a matter of law and motions for a new trial.

These cases provide illustrative examples of how lengthy and time-consuming § 1983 litigation can be.

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[260] Glover v. Mabrey, 384 Fed. Appx. 763 (10th Cir. 2010).

[261] *Id.*

[262] Paul Marinaccio, Sr., et al. v. Joseph H. Boardman et Joseph H. Boardman et al., 2007 U.S. Dist. LEXIS 16088 (N.D.N.Y. 2007).