

Court Allows Unsuccessful Bidder to Sue Architect for 'Malice' in Bid Selection Process

TYPICALLY, WE begin each January's column with a case that highlights a tried and true legal theory or contract maxim. This year, however, we kick off with a legal dispute that is anything but typical. In *Cedroni Associates, Inc. v. Tomblinson, Harburn Associates Architects & Planners, Inc.*, the low bidder on a project alleged that an architect retained to assist the owner with the bid selection process intentionally interfered with its bid, causing it to lose the award.

The case arose from the construction of two school sites in Michigan for the Davison Community Schools (DCS). DCS retained the architecture and engineering firm Tomblinson, Harburn Associates Architects & Planners, Inc. (THA), to review and evaluate bid applications, investigate competing contractors and their references, express opinions and views on contractor competence and workmanship, and make recommendations on the final award. Cedroni submitted its bid for the project. Although THA had previously worked with Cedroni, it conducted interviews with parties in Cedroni's references to obtain opinions on the quality and timeliness of Cedroni's work. THA gave DCS the generally positive responses from the references Cedroni had provided. However, THA also gave the owner negative feedback having to do with its own experiences with Cedroni. Cedroni was given the chance to rebut the negative reviews by THA. It presented an affidavit and a letter from its president to DCS describing in detail numerous projects it had completed in timely fashion with work of high quality and for which it had received excellent reviews. Cedroni claimed that the problems associated with the projects on which it had worked with THA were the fault of THA, a view that the owners of the projects in question would supposedly confirm.

Although Cedroni was the lowest

bidder, THA recommended that DCS award the contract to the second-lowest bidder. When DCS followed THA's recommendations, Cedroni filed suit against THA, claiming that the latter had intentionally interfered with its bid by wrongfully claiming that it was not qualified to perform the work on the project, that THA's wrongful interference prevented it from being awarded the contract, and that its business expectancy had been damaged as a result.

At the trial level, the court ruled in favor of THA at the summary phase and dismissed Cedroni's lawsuit, finding that it had no legal grounds for the suit because it lacked any "valid business expectancy." In other words, Cedroni had no right to assume it would have otherwise obtained the contract. On appeal, however, the Michigan Court of Appeals reversed the lower court's finding.

As there was no dispute that Cedroni was the lowest bidder, the validity of the plaintiff's business expectancy turned on whether it was the "lowest responsible bidder." Comparing THA's interview notes with Cedroni's affidavit and letter regarding its previous performance on projects, the court concluded that the documentary evidence indicated that Cedroni was sufficiently qualified to complete the project in a satisfactory manner. Having established the potential for a valid business expectancy by Cedroni, the court turned to address whether the contractor put forth a legally valid claim that THA's conduct was intentional and improper—a legal burden necessary to support a claim for tortious interference with that expectancy.

Under Michigan law, a claim for tortious interference with a contractual or business relationship must allege the intentional doing of a wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual or business relationship of another. With regard to Cedroni's actual workmanship and

capability of completing the project, the court again found that THA's interview notes conflicted with Cedroni's affidavit, letter, and other evi-

dence such that an issue of fact existed as to Cedroni's actual performance on prior projects. For the court, this raised the reasonable inference that THA was being "untruthful." The court found that Cedroni presented enough evidence to support its claim that THA had intentionally and improperly interfered with its bid by "inaccurately portraying" its past performance. Further, it found that THA did so out of spite arising from the previous projects.

The court held that while an architecture and engineering firm's exercise of professional business judgment in making recommendations to government agencies "must be afforded some level of protection and deference... we will not preclude litigation when there exists evidence suggesting that the ostensible exercise of professional business judgment is in reality a disguised or veiled attempt to intentionally and improperly interfere with the contractual or expectant business relationships of others."

As a general rule, contractors are not permitted to sue architecture and engineering firms in the absence of a contract between the parties because economic damages cannot be recovered in negligence claims. Here, however, the legal theory was unusual in that it was predicated upon the bidder's loss of expectancy damages. What is most surprising about this decision is that the court found that conflicting versions of events on past projects (not unusual in this business) somehow rose to the level of finding that THA might have been intentionally "untruthful." Architecture and engineering firms providing clients with bid selection services need to take heed to this atypical ruling. **CE**

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