Some Aspects of Public Bidding Law in New York

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation


This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
cations latent in these restrictive type zoning ordinances be overlooked. The people living in small communities need not concern themselves with the possibility of churches overrunning their village. The percentage of people of a particular denomination residing in that community, plus the cost of building a church, will keep their number at a minimum. Conversely, if this legislation were upheld, it would theoretically be possible to legislate this country into atheism. But rather than await a judicial determination by the Supreme Court, a more speedy and efficient remedy has been resorted to by the State of Massachusetts. This jurisdiction has enacted a state-wide statute which declares invalid any ordinance prohibiting the use of land for church purposes.62 Such a declaration of public policy should be promulgated in all the states, and this will prevent the enactment of this bigoted legislation.

---

SOME ASPECTS OF PUBLIC BIDDING LAW IN NEW YORK

Introduction

Public bidding contracts are those entered into after submitting advertisements to the public and executed between a successful bidder and the state, its political subdivisions or agencies. They are governed, in general, by the principles applicable to all contracts and, whenever such instruments come before the courts, the rights and obligations of the contracting parties will usually be adjusted on the same principles as if both were private persons.1 A statute requiring competitive bidding is based upon motives of public economy and of the mistrust of the officers to whom the duty of making contracts for the public service was committed. Such a statute or charter is designed to preclude favoritism and jobbing,2 and to protect the constituent body from corruption and improvidence.3 While public contracts are, in general, governed by the same rules as private contracts, they differ greatly in many respects. Thus, where the defense of ultra vires will not be sustained in an action on an executed contract

---

62 "No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid." Mass. Ann. Stat. c. 325, § 1 (1950).


by a private corporation, that defense, when applied in the strict sense, will absolutely preclude recovery from a municipal corporation. Similarly, while private contracts rarely fall within the ambit of statutory control, public contracts are, in the main, subject to such control as to their subject matter, formation and execution. Certain public contracts, which are prohibited by law, would raise no question of legality if executed by private persons. Thus, a contract for patented articles is prohibited unless entered into under such circumstances as would allow fair and reasonable opportunity for competition.

In general, any public contract may be required to be let by public bidding. There are, however, certain services or supplies which, by their nature, could not be the subject of competitive bidding. Contracts calling for the professional services of stenographers, architects, engineers, and surveyors; for patented articles where no statutory prohibition is applicable; for public utilities; and for the leasing or purchase of land or easements in land, are not within the provisions of such statutes.

With these distinctions as a basis, a synopsis of the major New York statutory and decisional law on this subject will be attempted with a view toward assisting contractors and their advocates in the successful prosecution of public bidding contract actions in this state. The following analysis will be limited to a consideration of state contracts, and will omit treatment of such instruments executed by the Federal Government or its agencies.

---

4 Bath Gas Light Co. v. Claffy, 151 N. Y. 24, 45 N. E. 390 (1896); Whitney Arms Co. v. Barlow, 63 N. Y. 62 (1875).
6 N. Y. CITY CHARTER § 348; N. Y. CANAL LAW § 31; Barber Asphalt Paving Co. v. Willcox, 90 App. Div. 245, 86 N. Y. Supp. 69 (1st Dep't 1904); see Warren Brothers Co. v. City of New York, 190 N. Y. 297, 83 N. E. 59 (1907) passim.
10 See People ex rel. Smith v. Flagg, 17 N. Y. 584, 587 (1858).
NOTES

Statutory Control

As indicated above, the degree of statutory control over public bidding contracts is an important element in distinguishing them from private contracts. This control may be the result of state constitutional provisions, state legislation, municipal charter provisions, and municipal ordinances, or a combination of any or several of them. Certain statutory provisions have an overall controlling effect. For example, Section 15 of the Public Works Law requires all contracts for public works involving an expenditure of over $2,500 to be let by public bidding. Section 2513 of the Education Law requires competitive bidding before any contract for school construction or repair exceeding $1,000 is executed by a city of less than 125,000 population. But while there are no provisions in any law applying to the construction of schools in villages or towns, Section 15 of the Public Works Law would control where such contract exceeds $2,500, inasmuch as its provisions apply not only to state work, but to that of each of its political subdivisions. However, where a specific statute provides for a figure higher than a minimum of $2,500, that particular law governs. This is in accordance with the rule of statutory construction that, where a particular and a general law apply to the same subject, the former takes precedence over the latter.

Much of the litigation arising out of public contracts results from the fact that they are often executed in ignorance of other statutory requirements which must be read in pari materia with the particular statute which the parties think is controlling. An additional complication arises due to the fact that certain statutes or ordinances conflict with pertinent constitutional provisions and are thereby invalid. In New York, for example, there exist two constitutional provisions controlling public bidding contracts. Section 3 of Article 15 requires all contracts for the construction or repair of canals to be let, after due advertisement, to the lowest bidder. The second,

---

16 N. Y. PUBLIC AUTHORITIES LAW §§ 1138, 1714. All statutes hereafter cited will be those of New York State.
19 "All contracts for work or materials on any canal shall be made with the persons who shall offer to do or provide the same at the lowest price..."
20 Where the statute requires the contract to be let to the "lowest bidder," the courts generally construe this term to mean the "lowest responsible bidder." "That term [lowest responsible bidder] does not mean one who is only pecuniarily responsible but one who also possesses moral worth. It implies skill, judgment and integrity as well as sufficient financial resources." Picone v. City of New York, 176 Misc. 997, 969, 29 N. Y. S. 2d 339, 541 (Sup. Ct. 1941).
and more important provision, is Section 10 of Article 9 which prohibits the award of extra compensation to contractors. The courts have construed this provision as outlawing remedial bills to relieve a contractor from the consequences of a bad contract, or to compensate a contractor for extra material or labor supplied as a result of an error in his estimate, or where increased costs have rendered the contract an unprofitable or a losing proposition. Likewise, it has been construed as invalidating contracts wherein the public agents agreed to increase the compensation or to indemnify a contractor for damages occasioned by increased costs. Inasmuch as there is no general constitutional mandate to let contracts to the lowest bidder (with the exception of canal construction), the validity of public contracts can be determined by looking at the applicable statute.

Necessity for Letting

Public bidding contracts fall into two categories: those which, by statute, must be submitted to competitive bidding, and those which are submitted pursuant to permissive statutes. The first category may be further subdivided into three groups. The first of these has an absolute requirement to let the contract to the lowest, or lowest responsible, bidder and frequently provides that the contracting officer may, in his discretion, reject all bids and readvertise. Statutes in the second group are only relatively mandatory and are qualified by language permitting an alternative method of award. Those in

21 "The legislature shall not, nor shall the common council of any city, nor any board of supervisors, grant any extra compensation to any public officer, servant, agent or contractor." (emphasis added).
27 CANAL LAW § 30; GENERAL MUNICIPAL LAW § 120-1; COUNTY LAW § 211; CONSERVATION LAW §§ 417, 452-g, 534, 657; EDUCATION LAW §§ 2513, 2556(10); PUBLIC AUTHORITIES LAW §§ 890, 1138, 1406; SECOND CLASS CITIES LAW § 120; STATE FINANCE LAW § 135; TOWN LAW §§ 174, 197, 222.
28 A. "... except that no contract shall be awarded to a bidder other than the lowest responsible bidder without the written approval of the comptroller." HIGHWAY LAW §§ 38(3), 126, 194(3); PUBLIC BUILDING LAW § 8(6) (with minor variations); STATE PRINTING LAW § 4(1); STATE FINANCE LAW § 174.
B. "Except in an emergency . . ." COUNTY LAW § 408(2).
C. "... unless the authority shall determine that it is for the public interest that a bid other than the lowest bid should be accepted." PUBLIC AUTHORITIES LAW §§ 233(2), 258(2), 283(2), 309, 1069, 1088, 1108, 1141.
the third group, however, while providing for public letting, have no requirement that the contract be let to the lowest bidder, but permit an award to be made in the discretion of the contracting officer.\textsuperscript{20} With the exception of the Conservation, Public Works and Village Laws, the sections in this third subdivision provide that the contracts be let in accordance with the law of the individual county, city, or municipality in or near which the work is to be done.

In all three subdivisions, however, the sections are inapplicable where the work to be done, or the supplies to be purchased, involve an expense less than the specified minimum sum. Where such a minimum is set, the provision requiring public letting cannot be evaded by dividing the work into parts, and contracting separately for each, thereby bringing them individually under the minimum. Where it has been attempted, such contracts have been held illegal.\textsuperscript{20}

**Extra Work**

A difficulty arises where the contract is for the performance of work as distinguished from the purchase of supplies or materials. In the former, the contractor is often faced with the possibility of having to do extra work either as a result of some error or default on the part of the public body, or in compliance with an unjustified demand by a public agent charged with directing the project. Where the extra work is necessitated by the error or default of the public body, the contractor may recover damages.\textsuperscript{31} However, if it is done in compliance with a demand by a public officer, no recovery may be had if the work is performed voluntarily.\textsuperscript{32} On the other hand, if the contractor duly objects and performs the work under protest, it was held that he could recover, not on the theory of extra compensation under the contract, but rather on the theory of damages.

D. "... but failure to comply with this section shall not invalidate such contracts." Id., §§ 506, 559, 633.

E. "... provided, that by majority vote of the members of the authority the requirements of this section may be dispensed with upon a finding that compliance with its provisions would be detrimental to the best interests of the authority or that competitive bidding is not practical." Id., § 1714.

F. Or a combination of (A) and (D). Id., §§ 530, 1381.

\textsuperscript{20} Conservation Law § 458; Education Law § 2556(6); Public Authorities Law §§ 659, 1451, 1469, 1488, 1508, 1526, 1572, 1606; Public Works Law § 15; Village Law § 266.

\textsuperscript{31} Walton v. Mayor of New York, 26 App. Div. 76, 49 N. Y. Supp. 615 (1st Dep't 1898).

for a breach of contract.  In this case the measure of damages was the amount recoverable in *quantum meruit* for the extra work done. This liberal doctrine, however, was modified in *Borough Construction Co. v. City of New York* so as to allow recovery only where the dispute was a reasonably debatable one. It was held that, since the contractor knew the extra work was not required by the contract, no recovery could be had, as he should have refused to perform and sued immediately for breach of contract, recovering *quantum reruit* for work already done plus prospective profits. However, it is submitted that to compel the contractor to resort to the latter remedy is inequitable since it puts him in the position of having to make the judicial determination of what the contract requires. If he refuses to continue, he runs the risk of being in default, should the court determine that the work was within the contract. If he continues under protest, he runs the risk of being unable to recover if the court finds it was clearly outside the contract, notwithstanding the contractor's bona fides to the contrary. The better rule would be that of the *Borough Construction Co.* case, modified to the extent that the contractor may recover if he bona fide entertains a doubt, and not, as it has been construed, if a reasonable man would so doubt. The implementation of such a subjective standard—"the doctrine of white heart and empty head" as it has been called—would place the job of contract construction where it belongs, in the courts.

Where the specifications call for certain work and the contract is awarded to a bidder on that basis, a supplemental instrument executed for the performance of substantially different extra work without letting is illegal. Similarly, contracts were held to be illegal as to the parts not submitted to competitive bidding where the specifications called for bids on part of the work, but set unit prices for other parts. Some modern bidding statutes have obviated these difficulties by authorizing the insertion of "contingencies and extra work" clauses which, without the necessity of reletting, permit the

---


35 *Borough Construction Co. v. City of New York*, supra note 34.


37 CHAFFEE, SIMPSON AND MALONEY, CASES ON EQUITY 388 (3d ed. 1951).


contracting officer to execute supplemental contracts for extra work in an unlimited amount or up to a specified percentage of the authorized contract price.

Illegal Contracts

The question of recovery under illegal contracts is daily litigated in the courts. The term "illegal" is often used synonymously with "ultra vires" and "unauthorized." Ultra vires in the broad sense includes both illegal and unauthorized contracts. Illegal contracts are those either expressly prohibited by law, or prohibited unless executed sub modo et forma of the law. In addition, illegal contracts include those outside the scope of corporate authority (strictly ultra vires), and those against public policy. An illegal contract is utterly void and no recovery may be had either on the contract itself or on an implied contract, since a public body cannot ratify its illegality, nor be estopped from denying its validity. Thus, even where the contract is executed and the benefits have been received by the public, no recovery can be had, even in quantum meruit, since the law will leave the parties where it finds them. However, where the subject matter of the void contract is materials or chattels, the contractor may recover them in specie if they retain their original identity. The law does not favor forfeitures, and where there has been a bona fide performance of the contract of which the public has had the benefit, there is a strong equity in favor of the contractor seeking his compensation. The courts, therefore, will sometimes try to find an enforceable contract. Thus, where a town had contracted for the purchase of a steamroller in violation of law, the contract was held illegal and unenforceable. Nevertheless, the contractor was allowed to recover quantum meruit on the theory of an

40 Highway Law §§ 38(9), 126, 194; Canal Law § 30(9); Public Authorities Law §§ 530, 1381.
41 Public Authorities Law §§ 233(2), 258(2), 283(2), 309, 1069, 1088, 1108, 1138, 1141.
43 Donnelly, Law of Public Contracts § 51 (1922).
44 Ibid.
47 See Smith v. Newburgh, 77 N. Y. 130, 137 (1879); La France Engine Co. v. Syracuse, 33 Misc. 516, 519, 68 N. Y. Supp. 894, 897 (Sup. Ct. 1900).
48 See Moore v. Mayor of New York, 73 N. Y. 238, 248 (1878).
implied contract to lease the machine. Similarly, where a statute prohibited the erection of a school house without the prior approval of the Commissioner, the builder was allowed to recover, since, as the court stated, the law did not prohibit making the contract, nor the payment thereunder, but only the erection of the building which, having already been built, could not be restrained.\(^5\)

The great majority of illegal contracts are those which are prohibited unless executed \textit{sub modo et forma} of law. Thus, where the statute requires the contract to be awarded to the lowest bidder,\(^5\) or to be executed in writing,\(^5\) no enforceable legal obligation arises for work performed or materials provided under an oral contract, or one awarded without bidding, or to one other than the lowest bidder. “The state has chosen to enact something similar to the Statute of Frauds for its own protection. . . . If there is no contract, there is no liability.”\(^5\) The provisions of a statute prescribing the manner of contracting are mandatory, and a contract made in violation thereof is illegal and void.\(^5\) Although it has been stated that the defense of illegality need not be pleaded and that, if the facts develop it, the court will not enforce the contract but will, on its own motion, take notice of its illegality,\(^5\) the rule in New York is to the contrary.\(^5\)

\textbf{Unauthorized Contracts}

An unauthorized contract is one whose subject matter is within the scope of corporate power, but is invalid because of a defect or want of power in the contracting officer, or because the power is defectively or irregularly exercised.\(^5\) Such contracts are void and unenforceable; but where there is no positive prohibition of law, they are the subject of ratification or estoppel giving rise to an implied contract to pay for services rendered or materials supplied.\(^5\) The theory of such an implied contract is that, inasmuch as it was within the scope of corporate authority and could originally have been executed by the public body, its adoption binds the municipality to pay a reasonable price for the benefits thus received.\(^5\) If the subject

\(^{50}\) Benedict v. Van Dusen, 221 App. Div. 304, 223 N. Y. Supp. 152 (3d Dep't 1927).

\(^{51}\) Dickinson v. City of Poughkeepsie, 75 N. Y. 65 (1878).


\(^{53}\) Ibid.

\(^{54}\) Parr v. Village of Greenbush, 72 N. Y. 463 (1878); McDonald v. Mayor of New York, 68 N. Y. 23 (1876).

\(^{55}\) DONNELLY, LAW OF PUBLIC CONTRACTS §102 (1922).


\(^{57}\) DONNELLY, op. cit. supra note 55, § 51.


\(^{59}\) Peterson v. Mayor of New York, 17 N. Y. 449 (1858).
matter is within the scope of authority, yet no recovery is allowed on an implied contract, the reason is not that a public body cannot be subjected to an implied contract, but rather that it was illegal or against public policy, or that the parties had failed to comply with the manner of execution specifically provided for by law. The distinction between failure to execute a contract sub modo et forma of law and a mere irregular exercise of powers concededly possessed, is often disregarded when the contract has been bona fide performed and the requirement omitted was unsubstantial or technical. Thus, where the municipal charter required the common council to publish in all the papers an ordinance adopting a resolution to pave certain streets, and the council omitted to publish in one paper and subsequently awarded the contract to the plaintiff, it was held that such an omission was merely an irregular exercise of its powers and, as between an innocent contractor and the city, the latter could not set up its misgovernment as a defense.\textsuperscript{60} Similarly, where the statute required the city agency to make an appropriation before contracting and the agency neglected to do so, it was held that the omission was not a question of lack of power, but rather an irregular exercise of such power.\textsuperscript{61} However, the caveat must be made that in the overwhelming majority of cases, strict compliance is demanded, and even mere technical deviations from the statute will bar recovery. In New York, remedial legislation has been passed enabling persons who contract with a city to press equitable claims against it arising out of illegal, but executed, contracts, or for extra work not recoverable at law under a valid contract.\textsuperscript{62}

\textbf{Remedies of the Bidder}

\textbf{A. Equitable Rescission and Damages for Refusal to Contract}

Where a statute or the specifications require a bond or other security to be given to insure the proper execution of the contract after acceptance of a bid, the contractor cannot withdraw his bid without forfeiting his deposit.\textsuperscript{63} The purpose of such deposit is to indemnify

\textsuperscript{60} Moore v. Mayor of New York, 73 N. Y. 238 (1878).
\textsuperscript{62} \textsc{General City Law} \textsection{20}(5); Matter of Shaddock v. Schwartz, 246 N. Y. 288, 158 N. E. 872 (1927).
the public body against the expense of reletting and the damages it might sustain by being compelled to relet the work at an increased price through the default of a bidder to execute his contract. A bid is an offer, but contrary to the law of private contracts, cannot be revoked except on the grounds of mistake, or by permission of the offeree. Moreover, there can be no reformation of the bid in the absence of mutual mistake. However, where the acceptance is not absolute but contingent upon some fact not within the scope of the advertisement, or where the awarded contract is illegal, the contractor may withdraw his bid and recover his deposit. Whether a rescission of the bid and a recovery of the deposit on the ground of mistake will be allowed, is an equitable question, and, in general, the courts almost uniformly allow rescission except where there has been culpable negligence, laches, or where the municipality has been put to great expense by having to readvertise. Notwithstanding a statutory provision denying the right to withdraw a bid, it was held that the plaintiff could recover his deposit where the city had refused rescission and readvertised, for an award could have been made to the next bidder without the necessity of readvertising. Where the contract has been awarded and the petitioner seeks a return of the deposit, the contract may be rescinded for an error on his part, and the award made to the next bidder since, in contemplation of law, the bid was only an apparent offer and, hence, there is no necessity for readvertisement. However, where a contractor delayed before


64 See Erving v. Mayor of New York, 131 N. Y. 133, 137, 29 N. E. 1101, 1102 (1892).
66 While rescission may be allowed for a mistake of fact, no relief will be granted where the error is one of law. Matter of Foley Contracting Corp. v. Greene, 108 Misc. 520, 177 N. Y. Supp. 779 (Sup. Ct. 1919).
71 See Note, 80 A. L. R. 586 (1932).
72 Second Class Cities Law § 121 (the prohibition of the statute was evaded by the court in stating that the plaintiff had never submitted his real bid).
making known the error so as to prevent a restoration of the status quo, recovery was denied on the ground of laches.75

Where the advertisement stipulates that the deposit shall serve as liquidated damages in the event of a refusal to execute the contract after award, such refusal is presumptive evidence of injury and damages need not be proven.76 In such a case, the deposit is the limit of the contractor's liability,77 but, where the contractor can rebut the presumption of damages, the deposit may be recovered inasmuch as it would then clearly be a mere forfeiture.78 Conversely, where no provision for liquidated damages is made, the contractor will be liable for actual damages even in excess of his deposit.

By the same token, a bidder to whom an award has been made may recover damages for a subsequent refusal by the public agency to execute the contract,79 unless he received no authorized notice of acceptance,80 or where the award was ultra vires.81 An unsuccessful bidder, however, stands in a much different position; he may not recover damages against the city for merely refusing to award the contract to him,82 as no contractual relation arises until the bid has been accepted.

B. Damages for Breach

Prior to the adoption, in 1874, of Section 10 of Article 9 of the New York Constitution,83 the legislature was competent to, and frequently did,84 enact bills relieving a contractor from damages sus-

78 See Davin v. Syracuse, supra note 76 at 293-294, 126 N. Y. Supp. at 1008; see 5 Corbin, Contracts § 1074 (1951).
83 See note 21 supra.
84 See, e.g., People v. Canal Board, 1 Thomp. & C. 309 (Sup. Ct. 1873), aff'd, 55 N. Y. 390 (1874).
tained in the performance of public contracts. The typical situation calling for such relief was that in which state-prepared specifications included plans estimating the required work under the contract. It frequently occurred that such representations were erroneous and the contractor was forced to complete the undertaking at an expense greatly in excess of that contemplated by the parties. It was early held that the contractor could not recover on a theory of breach of contract inasmuch as the statements were not warranties, but mere representations, which he was under a duty to verify by independent investigation. The contractor was therefore relegated to petitioning the legislature to reimburse him for an equitable claim against the state which ought, in good conscience, to be paid. Subsequent to 1874, such bills were prohibited and the claimant could seek recovery neither on the contract, nor by relief legislation. Where, however, the public body was guilty of fraud by deliberate concealment or active misrepresentation in the plans, damages could be recovered notwithstanding a provision wherein the contractor waived all claims against the state. As stated by the court, "A contract to take a thing with all faults does not mean that it is to be taken with all frauds." But even in the absence of fraud, where independent investigation would have proved unavailing, or where the time for investigation was inadequate, the statements were deemed to be warranties, the breach of which gave claimants an action for damages. Where the contractor's work was interfered with, or where he was prevented from completing the work, an action for damages for breach of contract was held to lie.

C. Injunction

Section 51 of the General Municipal Law, the "taxpayer's statute," authorizes a taxpayer to bring an action to prevent waste or injury to city property, or to enjoin an illegal act of a public officer. This remedy is available to any taxpayer regardless of

---

84 See, e.g., People v. Densmore, 1 Thomp. & C. 280 (N. Y. Sup. Ct. 1873).
88 Id. at 120, 205 N. Y. Supp. at 662.
89 Faber v. City of New York, 222 N. Y. 255, 118 N. E. 609 (1918).
92 Dean v. Mayor of New York, 167 N. Y. 13, 60 N. E. 236 (1901).
93 General Municipal Law § 51, "All officers, agents, commissioners and other persons acting . . . for and on behalf of any county, town, village or municipal corporation . . . may be prosecuted, and an action may be maintained against them to prevent any illegal official act . . . or to prevent waste or injury . . . ."
motive,\textsuperscript{94} and even in the absence of special injury.\textsuperscript{95} Thus, such a suit may be entertained by an unsuccessful bidder,\textsuperscript{96} or by a competitor of the successful bidder.\textsuperscript{97} Where the contract is illegal, an injunction will issue to restrain its award,\textsuperscript{98} execution,\textsuperscript{99} performance,\textsuperscript{100} or payment thereunder after completion.\textsuperscript{101} When the lowest responsible bidder has been determined, a suit for an injunction will not lie at the suit of a disappointed bidder, for it is presumed, in the absence of a contrary showing, that the discretion involved in such a determination was honestly exercised,\textsuperscript{102} especially where the claimant's bid itself was informal.\textsuperscript{103} However, if it appears that the acts of the official are without power or that collusion, fraud, or bad faith amounting to fraud was present, relief will be granted.\textsuperscript{104} But if the bid contains certain irregularities which are waived by the public body and which are not prejudicial to its interests, an injunction will not issue to restrain the letting of the contract,\textsuperscript{105} inasmuch as such protective statutes were enacted for the benefit of the public and not to give a disappointed bidder a remedy.\textsuperscript{106} Where the spirit of competitive bidding is prevented, or where the lowest bidder cannot be determined due to the vagueness of the specifications, an injunction will lie to restrain the award.\textsuperscript{107}

\textsuperscript{95} See Morse v. Ereth, 80 N. Y. S. 2d 321, 322 (Sup. Ct. 1947), aff'd mem., 273 App. Div. 938, 78 N. Y. S. 2d 377 (4th Dep't 1948) (the action was disallowed as the claimant was not a taxpayer).
\textsuperscript{97} Grace v. Forbes, 64 Misc. 130, 118 N. Y. Supp. 1062 (Sup. Ct. 1909).
\textsuperscript{100} Grace v. Forbes, 64 Misc. 130, 118 N. Y. Supp. 1062 (Sup. Ct. 1909).
\textsuperscript{101} Daly v. O'Brien, 60 Misc. 423, 112 N. Y. Supp. 304 (Sup. Ct. 1908).
\textsuperscript{102} See Picone v. City of New York, 176 Misc. 967, 970, 29 N. Y. S. 2d 539, 541-542 (Sup. Ct. 1941).
\textsuperscript{103} Adams v. Ives, 1 Hun 457 (N. Y. 1874), aff'd mem., 63 N. Y. 650 (1875).
\textsuperscript{104} "... [B]efore a plaintiff in a taxpayer's action can be given relief by way of an injunction against the acts of an official it must appear that the acts complained of are without power or that collusion, fraud or bad faith amounting to fraud exists." Schieffelin v. City of New York, 65 Misc. 609, 617, 122 N. Y. Supp. 502, 508 (Sup. Ct. 1910).
\textsuperscript{105} McCord v. Lauterbach, 91 App. Div. 315, 86 N. Y. Supp. 503 (1st Dep't 1904).
\textsuperscript{106} See Martin Epstein Co. v. City of New York, 100 N. Y. S. 2d 326, 330 (Sup. Ct. 1950).
D. Mandamus

Under a statute requiring the contract to be let to the lowest bidder, the writ of mandamus will issue to compel a public agency to permit the relator to bid for the contract, inasmuch as the "prequalification" of bidders is violative of the required competition. Conversely, where no such statutory requirement exists, the courts will not compel the contract to be awarded to the lowest bidder. Once the contractor has bid, he may, by mandamus, compel consideration of his bid as a "subsisting" or "valid" offer although no relief will be granted if the bid fails to conform to the specifications, i.e., is not a "formal" bid. Where the alleged defect, if corrected, would have been against public policy, or where there was no compliance with an unconstitutional statute, mandamus issued respectively to compel the acceptance of a bond after award of a contract, and to compel payment under the contract. Mandamus will not lie to compel acceptance if all the bids are rejected or if only one bid is received.

If the complainant is a rejected bidder, the courts will not compel the award of the contract to him, as he has no "clear legal

---

108 J. Weinstein Building Corp. v. Scoville, 141 Misc. 902, 254 N. Y. Supp. 384 (Sup. Ct. 1931); accord, Burland Printing Co. v. La Guardia, 9 N. Y. S. 2d 616 (Sup. Ct. 1938) ("shutting out" a bidder was enjoined as the basis for disqualification was deemed insufficient).


113 People ex rel. John Single Paper Co. v. Edgcomb, 112 App. Div. 604, 98 N. Y. Supp. 965 (4th Dep't 1906) (The specifications required the use of a particular union label, and the court held that, since such a requirement tended to create a monopoly by restricting competition to a particular class of printers, it was against public policy.).

114 People ex rel. Rodgers v. Coler, 166 N. Y. 1, 59 N. E. 716 (1901) (The unconstitutional provision of the statute required the contractor to pay his laborers not less than a specified minimum.).


116 People ex rel. Carlin v. Board of Supervisors of Kings County, 42 Hun 456 (N. Y. 1886). It was held in an early New York case that mandamus would issue to compel consideration of the relator's bid as the public agency had no right to reject all bids. People ex rel. George E. Matthews & Co. v. Buffalo, 5 Misc. 36, 25 N. Y. Supp. 50 (Sup. Ct. 1893). Today this problem has become almost completely academic as most of the statutes dealing with public bidding expressly confer on the public officer the power to reject all bids.
right." In the same breath, the courts have, as a general rule, refused to compel the execution of a contract to a successful bidder to whom an award has been made, leaving him to his remedy at law for damages. This dilemma was recognized in an early New York case, and the court granted the writ to compel the execution of the contract to the successful bidder. Although this is contrary to the great weight of decisional law, it is submitted that the holding was a sound one, as it would effectuate the true purpose of competitive bidding. Today this problem has become more acute as most statutes require the execution of a formal contract, and in the absence thereof, a successful bidder has no standing at law or in equity. Though a contractor be the lowest bidder, he acquires no rights prior to the actual awarding of the contract and hence no standing to compel its execution. Despite this settled rule, the recent tendency of the courts has been to allow review at the suit of an unsuccessful bidder resulting in the rescission of the illegal contract and compelling its award according to the requirements of law. Thus, claimants who were denied relief for bona fide claims in the past now have some standing to compel review of an unjust or illegal award, but it still seems that the courts are loath to compel the award directly to the petitioner.  


118 People ex rel. Lunney v. Campbell, 72 N. Y. 496 (1878); People ex rel. Buffalo Paving Co. v. Mooney, 4 App. Div. 557, 38 N. Y. Supp. 495 (4th Dep't 1896).

119 See note 79 supra; see People ex rel. Ryan v. Aldridge, 83 Hun 279, 282 (N. Y. 1894).


121 See Molloy v. New Rochelle, 198 N. Y. 402, 412, 92 N. E. 94, 98 (1910) (concurring opinion).

122 "... [P]etitioner acquired no substantive rights prior to an actual award, nor any rights to an award by reason of being the lowest responsible bidder." Matter of Baitinger Electric Co. v. Forbes, 170 Misc. 589, 590, 10 N. Y. S. 2d 924, 925 (Sup. Ct. 1939).


124 Application of Cestone Bros., Inc., 91 N. Y. S. 2d 70 (Sup. Ct. 1949) (this case directed the award to the petitioner), rev'd, Matter of Cestone Bros., Inc., 276 App. Div. 970, 95 N. Y. S. 2d 172 (2d Dep't 1950). The case was reversed as the successful bidder had not been joined in the petitioner's action. The court intimates that, with both bidders as parties to the proceedings, an action will lie to direct the officials to proceed in accordance with the applicable statute, with no mention being made of an award directly to the petitioner. "The courts have been loath to grant mandamus or relief under Article 78,
Once the award has been made, it has been held that the successful bidder may obtain the writ to compel the execution of the contract pursuant to the terms of his bid as accepted. However, where the statute requires the contract to be in writing, it would appear that mandamus will not lie to compel its execution. It has been held that a bidder was entitled to the writ to compel a return of his deposit where the award was unauthorized. After the contract has been performed, mandamus will lie to compel payment unless it was illegally entered into, in which case payment will not be compelled.

Security and Bonds

A. Benefiting the Public

In addition to the statutory requirement that a deposit accompany the bid, the contractor is usually required to furnish security, in the manner prescribed by the public agency, conditioned on his faithful performance of the contract. Several statutes also provide that the bidder shall execute a bond with sufficient sureties protecting against any direct or indirect damages suffered on account of the performance of the contract, and to guarantee the commencement and completion of the work in the time prescribed by the contract. While the deposit must actually accompany the bid, the security or the bond is only required to be furnished after the award to the successful bidder, but is a condition precedent to the execution of the formal written instrument. Failure to furnish the security or execute the bond within the stipulated period is ground for forfeiture of the deposit as liquidated damages.

The bond and security are intended to save the public harmless from damages occasioned by the contractor's refusal to perform or complete the work undertaken. In such cases, the measure of damages recoverable from the surety is, respectively, the difference between the contract price and the price for which a new contract must


130 CONSERVATION LAW § 417; GENERAL MUNICIPAL LAW § 120-1; PUBLIC AUTHORITIES LAW §§ 233(2), 258(2), 283(2).

131 CANAL LAW § 30(7); HIGHWAY LAW §§ 38(7), 126, 194(3); PUBLIC AUTHORITIES LAW §§ 530, 1381.

132 See CHARTER OF THE CITY OF NEW YORK § 343(d).
be made, or the difference between the contract price and the amount already paid under the contract, plus that required to complete the work. Whether or not the new contract need be submitted to bidding depends upon the statute and, inasmuch as the public is protected from loss by an action against the original contractor, or his surety, most statutes allow the public officer to complete the work in any way he sees fit.

B. Benefiting Laborers, Materialsmen or Sub-contractors

There are no statutory provisions which, by their terms, require the execution of a bond in favor of laborers, materialsmen or sub-contractors, protecting them against the contractor's breach or default in payment. However, it is competent for the public agency to exact from the contractor a covenant that he will fully perform his contractual agreements with third parties. The purpose of such a covenant, in the absence of a clear intent to the contrary, is to protect the public against mechanics' liens and not for the protection of third parties. When such a covenant is inserted, the question arises as to the right of third parties to proceed against the contractor's sureties, on the theory of third party beneficiary. It was held by the Court of Appeals that the security thus exacted was solely for the benefit of the public, and to permit other persons to maintain an action would allow a depletion of the security, to the detriment of the public. It was subsequently decided, however, that the public agency might sue upon the covenant, and hold the proceeds in trust for the unpaid laborers. But while no statutory right is given laborers and other third parties to maintain an action on the bond, several statutes provide that payments shall not be made on the contract until the public officer shall be satisfied that the contractor has paid laborers for work done as of the time for payment. This provision allows the public agency to retain a percentage of the contract price so as to enable the laborer or other third parties to impose a mechanic's lien upon the fund. In this manner, the public agency may pay the lienors the amount due, thereby discharging the lien and incidentally benefiting the lienors who formerly were rele-

133 CANAL LAW § 32; CONSERVATION LAW § 417; HIGHWAY LAW § 40.
134 CANAL LAW § 32; HIGHWAY LAW § 40.
136 For statutory provisions pertaining to mechanic's liens on public improvements, see LIEN LAW §§ 5, 12, 42.
137 For development of third party beneficiary doctrine, see Lawrence v. Fox, 20 N. Y. 268 (1859); Vrooman v. Turner, 69 N. Y. 280 (1877); Seaver v. Ransom, 224 N. Y. 233, 120 N. E. 639 (1918).
140 CANAL LAW § 30(8).
141 LIEN LAW § 5.
gated to an action against the contractor or an action to foreclose the lien.\footnote{St. John's Law Review 27:142. Today, however, laborers are further protected by Section 220-a of the Labor Law which requires contractors and subcontractors to file a sworn statement certifying the amounts due and owing to laborers before payment can be made on the contract. Section 220-b of the same law requires the appropriate state or municipal official, upon seasonable objection by an unpaid laborer, to withhold from the contract payment the sum claimed by him in the verified statement, and to pay the laborer this amount in full discharge of the obligation.}

Conclusion

Inasmuch as the preceding analysis was intended to present a synopsis of the highlights of the public bidding law, a detailed criticism of this subject was not attempted. In conclusion, however, two facets of the law suggest themselves for brief individual treatment. While the public contract law is justifiably designed to protect the public interest, at times it unduly deprives a contractor of a remedy which, in all fairness, should be allowed, consistent with that aim. A valid criticism of this body of law, as it exists today, is the excessive discretionary power lodged in administrative agencies which tends to impede the operation and thwart the end of bidding statutes, by denying to contractors the opportunity of proving, before a court of law, their superior right over a less qualified bidder. If the purpose of the statutes is to obtain the most advantageous terms when contracting in the public behalf, something less than arbitrariness and fraud ought to justify judicial review of the administrative action. The interests of the public are no less prejudiced by an erroneous award honestly made than by a similar award through fraud and collusion. While recent years have seen increasing access to the courts by deserving bidders, a more liberal rule would appear to be the desired object.

Secondly, the defense of ultra vires as applied in municipal contracts is an outmoded and inequitable means to achieve the desired result. In this day of bureaucratic complexity, the fiction that third persons are charged with the knowledge of the limits of corporate authority should not be indulged in to the detriment of innocent contractors. The problem of proving fraud has never been an insurmountable hurdle to the administration of justice and there is no reason why a bona fide claimant, having performed his contract of which the public retains the benefits, should not be permitted to recover at least \textit{quantum meruit} upon a just claim.