

IN THE SUPREME COURT OF
FLORIDA

CASE NO. 71,081

STATE OF FLORIDA, DEPARTMENT
OF TRANSPORTATION,

Petitioner,

vs.

GROVE-WATKINS CONSTRUCTORS,

Respondent.

**BRIEF OF AMICUS CURIAE
DADE COUNTY**

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TABLE OF CONTENTS

	<u>PAGES</u>
Table of Authorities	i.
Statement of the Case and Facts	1
Summary of the Argument	2
Argument:	3-6
IT IS AN ABUSE OF JUDICIAL DISCRETION TO DIRECT A CONTRACT AWARD TO A SUCCESSFUL CHALLENGER OF A PUBLICLY BID CONTRACT.	
Conclusion	7
Certificate of Service	8

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<u>William A. Berbusse, Jr., Inc. v. North Broward Hospital District,</u> 117 So.2d 550 (Fla. 2d DCA 1960)	3, 4
<u>Berry v. Okaloosa County,</u> 334 So.2d 349 (Fla. 1st DCA 1976)	4
<u>Culpepper v. Moore,</u> 40 So.2d 366 (Fla. 1949)	5
<u>Dedmond v. Escambia County,</u> 244 So.2d 758 (Fla. 1st DCA 1971)	4
<u>Marriott Corporation v. Dade County,</u> 383 So.2d 662 (Fla. 3d DCA 1980)	5
<u>Mayes Printing Company v. J.A. Flowers,</u> 154 So.2d 859 (Fla. 1963)	5
<u>Milander v. Department of Water & Sewers of City of Hialeah,</u> 456 So.2d 588 (Fla. 3d DCA 1984)	3, 4
<u>Harry Pepper & Associates, Inc. v. City of Cape Coral,</u> 352 So.2d 1190 (Fla. 2d DCA 1977)	5
<u>Robinson Electric Company, Inc. v. Dade County,</u> 417 So.2d 1032 (Fla. 3d DCA 1982)	5
<u>Schloesser v. Dill,</u> 383 So.2d 1129 (Fla. 3d DCA 1980)	4
<u>Wood-Hopkins Contracting Company v. Roger J. Au and Son, Inc.,</u> 354 So.2d 446 (Fla. 1st DCA 1978)	4, 5

STATEMENT OF THE CASE AND OF THE FACTS

The District Court directed an award of a partially performed contract to one of the bidders on the full original project specifications.

SUMMARY OF THE ARGUMENT

When a bid awarded by a public body is judicially invalidated, the Court should not direct an award to any other bidder. The bids submitted are only offers. The public body must retain discretion either to accept a bid or to reject all bids if it needs to abandon or modify the project. The Court should not take those choices away from the public entity. Moreover, when the invalidated award already has been partially or fully performed, the full work identified in the original specifications no longer remains to be accomplished, so a court-ordered award on the original specifications is especially inappropriate.

ARGUMENT

IT IS AN ABUSE OF JUDICIAL DISCRETION TO DIRECT A CONTRACT AWARD TO A SUCCESSFUL CHALLENGER OF A PUBLICLY BID CONTRACT.

When a court determines that a contract awarded by a public body is void, the proper remedy is to invalidate the contract. When a court goes further to direct the public body to contract with another party, the court has exceeded its authority and has abused its discretion.

The public body always retains the right to reject all bids, to abandon the project or to modify the project without incurring liability to bidders or taxpayers. Milander v. Department of Water & Sewers of City of Hialeah, 456 So.2d 588 (Fla. 3d DCA 1984).

The low bidder responding to an invitation to bid has merely submitted an offer. There is no right to compel the public body to accept that offer, and there is no action for breach of contract should the public body decline to accept the offer. William A. Berbusse, Jr., Inc. v. North Broward Hospital District, 117 So.2d 550 (Fla. 2d DCA 1960).

In Milander v. Department of Water & Sewers of City of Hialeah, supra, the city offered land for sale, but rejected all bids and kept the land. The court found that the high bidder had no grounds to compel a sale.

In entering judgment on the pleadings, the trial court correctly held that, since the bids constituted no more than offers to the city, none of which, although it had requested their submission, it was under a legal obligation to accept, Meekins-Bamman Prestress, Inc. v. Better Construction, Inc., 408 So.2d 1071 (Fla. 3d DCA 1982); City of Homestead v. Raney Construction, Inc., 357 So.2d 749 (Fla.

3d DCA 1978); see, Schloesser v. Dill, 383 So.2d 1129 (Fla. 3d DCA 1980), Milander had acquired no enforceable rights.

Milander v. Department of Water & Sewers of City of Hialeah, supra, at 589.

In William A. Berbusse, Jr., Inc. v. North Broward Hospital District, supra, the public body awarded a contract to the second low bidder. The low bidder sued for lost profits and its bid preparation costs, claiming that violations of the bid process created a cause of action for breach of contract. The Second District Court upheld the dismissal of the complaint.

The invitation to bid did not constitute an offer of a contract but only the solicitation or inducement to make offers, and it imposed of itself no liability.

William A. Berbusse, Jr., Inc. v. North Broward Hospital District, supra at 552.

Until notified of acceptance by the public body, the bidder is free to withdraw his offer. Berry v. Okaloosa County, 334 So.2d 349 (Fla. 1st DCA 1976). No binding contract arises until the bidder is notified of the acceptance of his offer. Dedmond v. Escambia County, 244 So.2d 758 (Fla. 1st DCA 1971); Wood-Hopkins Contracting Company v. Roger J. Au and Son, Inc., 354 So.2d 446 (Fla. 1st DCA 1978); Schloesser v. Dill, 383 So.2d 1129 (Fla. 3d DCA 1980).

If a flawless bid procedure confers no contractual rights upon bidders, surely a flawed one can offer no more. When a court directs a contract award it abrogates a public body's right to consider the alternatives of modifying or abandoning the project.

In Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So.2d 1190 (Fla. 2d DCA 1977), the second low bidder successfully sued to enjoin an award to the low bidder.

The District Court noted:

Faced with Gulf's substantially non-conforming bid, the City had but two proper alternatives; to award the contract to the next lowest bidder who met the specifications, or to reject all bids and re-advertise for new ones.

Harry Pepper & Associates, Inc. v. City of Cape Coral, supra at 1193.

A Court's subsequent re-award of the contract is particularly inappropriate when the contract has been already partially or fully performed. The re-award puts the public body in instant breach. It denies the public body its option to reject all bids if it needs to modify or abandon the project. It puts the successful challenger in a better position than he was in at the time of bid opening, for at bid opening no bidder had any assurance of a contract award. Culpepper v. Moore, 40 So.2d 366 (Fla. 1949); Mayes Printing Company v. J.A. Flowers, 154 So.2d 859 (Fla. 1963); Harry Pepper & Associates, Inc. v. City of Cape Coral, supra; Wood-Hopkins Contracting Company v. Roger J. Au and Son, Inc., supra.

This Court should not approve such a practice as proper merely because it has occurred, without appeal, in the past. See, Robinson Electric Company, Inc. v. Dade County, 417 So.2d 1032 (Fla. 3d DCA 1982); Marriott Corporation v. Dade County, 383 So.2d 662 (Fla. 3d DCA 1980).

A bidder has the right to expect a public body to conduct a proper and legal bid procedure; it has no right to expect a contract award. A successful challenger has suffered only the misfortune of participating in a flawed procedure. The proper remedy for a successful challenger of a bid award voided for procedural improprieties would be no more than the cost to prepare the bid.

CONCLUSION

This Court should reverse the lower court decision to the extent that it directed an award of the contract to a particular bidder.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was served by mail upon David S. Dee, Esquire, Post Office Drawer 190, 410 First Florida Bank Building, Tallahassee, Florida 32302 and Bob Scanlon, Esquire, Department of Transportation, Haydon Burns Building, 605 Suwannee Street, Tallahassee, Florida 32301, this 9 day of February, 1988.


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