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Public Contracts—Standing of Unsuccessful Bidders to Sue

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PUBLIC CONTRACTS—STANDING OF UNSUCCESSFUL BIDDERS TO SUE. *Walt Bennett Ford, Inc. v. Pulaski County Special School District*, 274 Ark. 208, 624 S.W.2d 426 (1981).

The Pulaski County Special School District advertised for bids on eighteen school buses. Jim Nabors, Inc. (Nabors) submitted the lowest bid. After the bids were opened but before the contract was awarded, Walt Bennett Ford, Inc. (Bennett) filed a written protest with the school district. Among other complaints,[1] Bennett claimed that it alone had submitted a claim for the five percent preference for Arkansas residents,[2] which would make Bennett the lowest responsible bidder. After the complaint was filed, the school district allowed Nabors to submit a letter claiming a five percent preference. The school district later awarded the contract to Nabors.[3]

Bennett filed suit in chancery court and sought to void the contract between the school district and Nabors. The successful bidder, however, was not made a party to the suit. Bennett also sought to hold individual school board members and purchasing agents liable for an alleged tortious interference with business relations.[4]

On the contract count, the chancellor held that Bennett lacked standing to sue and that the school board should prevail on the merits of the case. The chancellor also dismissed the tort count.[5]

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1. The other complaints were that Nabors was not a franchised dealer (and could not give a valid warranty of repairs for the vehicles) and that Nabors was not a licensed vehicle dealer as required by ARK. STAT. ANN. § 75-2305(1) (1979).

2. ARK. STAT. ANN. § 14-293 (b) (Cum. Supp. 1981) provides for a constructive reduction of five percent of the amount of the bid for consideration purposes. Residency is determined according to the payment of state taxes.

3. Additionally, Nabors was allowed to proceed as the agent of a licensed and franchised vehicle dealer, Moore Ford.

4. The doctrine that school board members could be liable in tort for interference with contractual relations was established in Mason v. Funderburk, 247 Ark. 521, 446 S.W.2d 543 (1969).

5. The chancellor found that the school board members had not acted in bad faith. This finding was affirmed by the Arkansas Supreme Court. Walt Bennett Ford, Inc. v. Pulaski County Special School Dist., 274 Ark. 208, 624 S.W.2d 426 (1981). In a supplemental opinion handed down with a denial of Bennett's petition for rehearing, the court clarified its affirmance of the chancellor's dismissal of the tort count. The court recognized that bad faith was not generally considered an element of the tort of interference with contractual relations. However, the court stressed that the instant case involved an alleged interference with business expectations, rather than contractual relations. The court cited W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 130 (4th ed., 1971), to support its holding that the defense of privilege to the action for interference with business expectations was wider than

On appeal, the Arkansas Supreme Court reversed the chancellor's holdings on the issue of standing and on the merits of the contract count. It affirmed the chancellor's finding that there was no bad faith shown in relation to the tort count. *Walt Bennett Ford, Inc. v. Pulaski County Special School District*, 274 Ark. 208, 624 S.W.2d 426 (1981).

In several early cases from other states, it was held that an unsuccessful bidder on a public contract had no standing to contest the award of the contract to a higher bidder.[6] This rule was based on the premise that competitive bidding was for the benefit of the public and not the bidders.[7] The bidders were held not to have gained a right to sue by entering into the bidding process. Since the right to reject any and all bids was generally reserved by the contracting authority the courts could justify upholding the choice of a bidder other than the low bidder.[8]

Early federal decisions also denied unsuccessful bidders standing to sue, either as bidders or in their capacity as citizens.[9] One rationale given for this policy was that competitive bidding was created for protection of the government against fraud by its officers, not for the benefit of the bidders.[10] In 1940 the United States Supreme Court handed down what became the controlling case on the standing issue, *Perkins v. Lukens Steel Co.*[11] In *Perkins* a group of steel companies sought to challenge a requirement made by the Secretary of Labor that the companies pay a set minimum wage before being allowed to enter a competitive bidding process. The Court denied the steel companies standing since the requirement violated no legal right of the companies. Mere participation in the bidding process did not bestow a right to contest the contract award

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for interference with contractual relations. The court then held the school board members had acted on behalf of the public interest, and thus could avail themselves of the privilege defense. 274 Ark. at 214 (A-B), 624 S.W.2d at 429-30.

6. *See, e.g.*, Detroit Free Press Co. v. Board of State Auditors, 47 Mich. 135, 10 N.W. 171 (1881); Commonwealth v. Mitchell, 82 Pa. 343 (1876); Free Press Ass'n v. Nichols, 45 Vt. 7 (1872).

7. *See, e.g.*, Detroit Free Press Co. v. Board of State Auditors, 47 Mich. 135, 10 N.W. 171 (1881); People *ex rel.* Carlin v. Board of Supervisors, 49 N.Y. Sup. Ct. 456 (N.Y. App. Div. 1886); Commonwealth v. Mitchell, 82 Pa. 343 (1876); Free Press Ass'n v. Nichols, 45 Vt. 7 (1872); State *ex rel.* Phelan v. Board of Educ., 24 Wis. 683 (1869).

8. *E.g.*, People *ex rel.* Carlin v. Board of Supervisors, 49 N.Y. Sup. Ct. 456 (N.Y. App. Div. 1886); Commonwealth v. Mitchell, 82 Pa. 343 (1876).

9. *E.g.*, O'Brien v. Carney, 6 F. Supp. 761 (D. Mass. 1934); Strong v. United States, 6 Ct. Cl. 135 (1870).

10. *E.g.*, United States v. New York and Porto Rico S.S. Co., 239 U.S. 88 (1915).

11. 310 U.S. 113 (1940).

requirements.[12]

The courts of many states have subsequently eroded or eliminated the traditional standing rule. Some courts have allowed the bidder standing to sue as a taxpayer, rather than as a bidder.[13] Others have expressly granted standing to an unsuccessful bidder, regardless of whether the bidder is a taxpayer.[14] Some courts, however, still deny an unsuccessful bidder standing to contest the award of a public contract.[15]

The federal courts have also come to recognize that unsuccessful bidders have standing to sue when a public contract is awarded to a higher bidder. In *Scripps-Howard Radio, Inc. v. FCC*[16] the threat of economic injury was held to be a factor in determining standing. In that case, the plaintiff was allowed to sue as a representative of the public interest to contest the award of a license to a rival radio station; the possibility of competition was regarded as a relevant consideration in determining the parties' rights.[17] The first federal decision granting an unsuccessful bidder standing, albeit in a limited form, was in 1956 in *Heyer Products Co. v. United States*.[18] The Court of Claims held that when the plaintiff could prove that his bid was not considered in good faith, he could sue for the cost of preparing the bids. However, the unsuccessful bidder was not allowed to challenge the award of the contract. *Heyer* represented an important intermediate step toward granting full standing to unsuccessful bidders.[19]

The District of Columbia Circuit was the first to grant the unsuccessful bidder full standing. In 1964 in *Gonzalez v. Freeman*,[20] the District of Columbia Circuit Court of Appeals granted standing

12. *Id.* at 127.

13. *E.g.*, Federal Elec. Corp. v. Fasi, 56 Haw. 57, 527 P.2d 1284 (1974); American Totalisator Co. v. Seligman, 489 Pa. 568, 414 A.2d 1037 (1980).

14. *See, e.g.*, Sternberg v. Board of Comm'rs, 159 La. 360, 105 So. 372 (1925); Paul Sardella Constr. Co. v. Braintree Hous. Auth., 329 N.E.2d 762 (Mass. App. Ct. 1975); Gulf Oil Corp. v. Clark County, 94 Nev. 116, 575 P.2d 1332 (1978).

15. *See, e.g.*, Owen of Ga., Inc. v. Shelby County, 442 F. Supp. 314 (W.D. Tenn. 1977); Townsend v. McCall, 262 Ala. 554, 80 So. 2d 262 (1955).

16. 316 U.S. 4 (1942). *Cf.* FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). Also, see Comment, *The Erosion of the Standing Impediment in Challenges by Disappointed Bidders of Federal Government Contract Awards*, 39 FORDHAM L. REV. 103 (1970); Note, *Judicial Review and Remedies for the Unsuccessful Bidder on Federal Government Contracts*, 47 N.Y.U. L. REV. 496 (1972).

17. 316 U.S. at 14. The threat of competition made the plaintiff an "aggrieved party," to whom standing was granted.

18. 140 F. Supp. 409 (Ct. Cl. 1956).

19. See Note, *supra* note 16.

20. 334 F.2d 570 (D.C. Cir. 1964).

to a contractor already doing business with the government when new administrative action barred that contractor from seeking future government contracts. The court held that the threat of interruption of an existing business relationship with the government gave the contractor standing, since such an interruption would cause grave economic injury. Further, the court held that such an interruption without the right to judicial review would deny the contractor constitutional due process.[21] While the *Gonzalez* decision stressed that this standing for bidders extended only to those already doing business with the government, the basis for the court's decision paved the way for full recognition of unsuccessful bidder standing. In 1970 this standing was finally granted in *Scanwell Laboratories, Inc. v. Shaffer*.[22]

In allowing the unsuccessful bidder to sue, the court in *Scanwell* stressed the familiarity of the wronged bidder with the award process and his interest in the matter. The District of Columbia Circuit Court of Appeals held that the *Perkins v. Lukens Steel Co.* approach to standing, which concentrated on whether the contractor's participation in the bidding process gave him a legal right to contest a contract award, was outmoded. Instead, the court cited *Scripps-Howard Radio, Inc. v. FCC* to support its holding that the threat of harm was also a factor in determining standing. By allowing the unsuccessful bidder standing to question a contract as a representative of the public interest, the court allowed the bidder standing to sue without construing this standing as a property right acquired through the unsuccessful bidder's participation in the bidding process. Thus, the right to sue that the unsuccessful bidder received was the right to "stand in" for the public in questioning public contract awards.[23]

Early Arkansas cases dealing with unsuccessful bidders followed the traditional rule by denying unsuccessful bidders standing to contest the award of a public contract. In an 1893 case, *Arkansas Democrat Co. v. Press Printing Co.*,[24] the Arkansas Supreme Court held that only the state could complain of a wrongful award of a contract to one other than the lowest bidder.[25] The court reasoned that since the low bidder had not entered into a contract with the state, he had no contractual rights as a result of his participation in

21. *Id.* at 579.
22. 424 F.2d 859 (D.C. Cir. 1970).
23. *Id.* at 864.
24. 57 Ark. 322, 21 S.W. 586 (1893).
25. *Id.* at 326, 21 S.W. at 586.

the bidding process. In *Bank of Eastern Arkansas v. Bank of Forrest City*[26] the Arkansas Supreme Court held that the lack of privity between the unsuccessful bidder and the government prevented the unsuccessful bidder from attaining a right or interest which could be affected when another bidder was chosen to perform the contract. The bidder could acquire no rights in the public contract in question until the contract was awarded to that bidder.[27]

The Arkansas courts have occasionally decided the merits of suits brought by unsuccessful bidders, even while espousing the no-standing rule.[28] In 1979 the Arkansas Supreme Court in *Worth James Construction Co. v. Jacksonville Water Commission*[29] recognized that the traditional rule could pose difficulties, both in terms of expediency (since later litigation would inevitably slow the contract award) and financial cost.[30]

The Arkansas Supreme Court finally disapproved the traditional denial-of-standing doctrine in *Walt Bennett Ford, Inc. v. Pulaski County Special School District*.[31] The court recognized that the chancellor had relied on the established case law in Arkansas, including cases such as *Arkansas Democrat Co. v. Press Printing Co.*[32] and *Bank of Eastern Arkansas v. Bank of Forrest City*.[33] It then specifically overruled those cases, stating that:

> We are satisfied that continuing to deny an unsuccessful bidder the standing to sue for an alleged wrong is to minimize protection of the public interest. On the other hand, the most practical way to protect the public interest is to allow unsuccessful bidders to seek judicial review of any alleged wrong in the contracting procedure.[34]

The Arkansas Supreme Court relied on the reasoning of *Scanwell Laboratories, Inc. v. Shaffer*[35] in arriving at its decision

26. 94 Ark. 311, 126 S.W. 837 (1910).
27. *Id.* at 317, 126 S.W. at 840.
28. *See, e.g.*, Worth James Constr. Co. v. Jacksonville Water Comm'n, 267 Ark. 214, 590 S.W.2d 256 (1979) (standing granted for ratepayer/bidder's challenge to award of construction contract by utility to one other than the low bidder); Fagan Elec. Co. v. Housing Auth., 216 Ark. 932, 228 S.W.2d 39 (1950) (standing granted to consider whether a contracting authority was required by statute to contract some of the construction work for a new building separately).
29. 267 Ark. 214, 590 S.W.2d 256 (1979).
30. *Id.* at 217, 590 S.W.2d at 258.
31. 274 Ark. 208, 624 S.W.2d 426 (1981).
32. 57 Ark. 322, 21 S.W. 586 (1893).
33. 94 Ark. 311, 126 S.W. 837 (1910).
34. 274 Ark. at 211, 624 S.W.2d at 428.
35. 424 F.2d 859 (D.C. Cir. 1970).

that Bennett should be given standing to sue in the public interest.[36] The Arkansas court quoted from *Scanwell*:

> If there is any arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits . . . .[37]

After determining that Bennett had standing to sue, the court reversed the chancellor's holding that the school district should prevail on the merits of the contract count[38] and remanded the case for further proceedings on that count.[39] Thus, Bennett was given standing to seek judicial review of the award of a public contract on which it had been an unsuccessful bidder.[40]

The concept of the wronged bidder having standing to sue as a representative of the public interest avoids many of the difficulties inherent in an approach whereby the bidder's rights must first be determined. A holding that the competitive bidder acquires a contractual right of standing to contest the award through its participation in the bidding process would not be appropriate. Logically, it cannot attach until the award of the contract, since it is inconceivable that the bidder should be considered to have entered into an express contractual relationship granting it standing to sue merely because it submitted a bid. Perhaps some quasi-contractual relationship (similar to the rationale regarding good faith consideration of bids in *Heyer Products Co. v. United States*[41]) between the bidder and the state could be found to give the bidder standing; however, the *Walt Bennett Ford* decision, with its emphasis on the bidder-as-representative-of-the-public-interest, obviates the need for finding such a relationship.

Walt Bennett Ford is an important step in liberalizing the rights of competitive bidders. The new policy allowing judicial review of contract awards at the instance of unsuccessful bidders will benefit

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36. 274 Ark. at 211, 624 S.W.2d at 428.

37. *Id.* at 212, 624 S.W.2d at 428 (*quoting* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 866-67 (D.C. Cir. 1970)).

38. It found invalid the school district's action in allowing Nabors to claim the preference after the bids were opened and to use Moore Ford to satisfy the dealer requirement. 274 Ark. at 212, 624 S.W.2d at 428.

39. The usual practice is for the Arkansas Supreme Court to retry equity cases de novo rather than to remand them. It was not clear in this case, though, whether the contract in question was executory or executed. *Id.* at 213, 624 S.W.2d at 428.

40. *Id.* at 211, 624 S.W.2d at 428.

41. 140 F. Supp. 409 (Ct. Cl. 1956).

both the public and the unsuccessful bidder. The public will be guarded against wrongful contract awards by the government; the bidders bringing suit will act as the watchdogs for these awards. Of course, the bidders themselves will benefit from the new rule, since they will be able to get redress when they are wrongfully denied contracts.

One shortcoming in the court's decision in *Walt Bennett Ford* is the lack of criteria given to analyze the competitive bidding process. Now that the unsuccessful bidder has standing to contest the contract, standards must be established to determine what would constitute a sufficient error in the competitive bidding process to justify the court's interfering with that process. The holding in *Walt Bennett Ford* does not offer any suggestions about what the requirements for successfully challenging a contract should be. The *Walt Bennett Ford* decision is a step forward, nonetheless. Unsuccessful bidders will no longer be denied their day in court because of the lack of a contractual right to sue.

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