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No. 301907-III

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION III

Skyline Contractors, Inc.,

Appellant,

v.

Spokane Housing Authority, d/b/a Northeast Washington Housing
Solutions,

Respondent.

APPEALED FROM SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 10-201932-9

Judge Kathleen M. O'Connor

**REPLY BRIEF OF APPELLANT
SKYLINE CONTRACTORS, INC.**

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A written award shall be furnished to the successful bidder within the period for acceptance specified in the bid and shall result in a binding contract without further action by either party.¹

I. INTRODUCTION

SHA's Response Brief consists of 34 pages of disputed facts and illustrates precisely why this action should not have been summarily dismissed. SHA specifically identified what constituted its "acceptance" of an offer (bid) – "*A written award...*". CP 45. Despite the fact SHA admits it provided a written award accepting Skyline's offer (bid), SHA convinced the Trial Court to ignore the express intent of the Parties with regard to contract formation and to dismiss the case by finding that a written award can never constitute acceptance forming a binding contract. The Court also ignored public bidding and contract law directly on point, the Parties' express intent and their post-award conduct. Because the Invitation for Bid and the facts viewed in the light most favorable to Skyline create a genuine issue of material fact, the Trial Court's dismissal should be reversed.

¹ CP 45 (emphasis added).

II. RE-STATEMENT OF ISSUES ON APPEAL

1. Did SHA's instruction that a written award would result in a binding contract without further action confirm the Parties' intent that a written award would constitute acceptance?
2. Did the Parties' post-award conduct support the inference that a contract was formed?
3. Should SHA's disputed "facts" be decided by a finder of fact?

III. RE-STATEMENT OF THE CASE

A. Invitation For Bid And Acceptance.

SHA's published Invitation for Bid was unambiguous with regard to what would constitute acceptance of a bid and the basis of the contract formed:

- The Contract terms and conditions were provided pre-bid. CP 38.
- Notably, the pre-bid Contract Form did not contain the additions and changes to the terms that SHA attempted post-award. See CP 496 and 517.
- ***"A written award shall be furnished to the successful bidder within the period for acceptance specified in the bid and shall result in a binding contract without further action by either party."*** CP 45. (Emphasis added).

CP 30 – 153. SHA identified that the contract would be awarded to the *"reliable bidder submitting the lowest proposal complying with*

the conditions of the Contract Documents...” CP 38. With regard to the responsiveness of bids, Skyline’s bid provided all of the information and forms identified as necessary. See CP 71; CP 189.

When Skyline decided to bid the project, it gathered bids from various suppliers and subcontractors. One of these was McVay Brothers (“McVay”). CP 324. McVay provided a price both for supplying windows and doors as well as a price for labor to install windows and doors. On the day of the bid, Skyline confirmed that McVay would agree to perform only the labor to install windows for the price it had quoted to them. Id. Based on that, Skyline listed McVay as a subcontractor on the project. Despite SHA’s assertions otherwise, Skyline at all times intended to use McVay to perform the installation of the windows. CP 324-325. The bid Skyline obtained from McVay included a price for installation. CP 339; 360. Although Skyline decided pre-bid to use a different supplier for the windows and doors, Skyline confirmed with McVay on the day of bid that McVay could perform the labor for the installation of the windows. CP 324. Skyline’s intent to use McVay as a

Subcontractor remained true all the way through when Skyline was wrongfully terminated from the Project. CP 324-325.

It is undisputed that Skyline was the lowest bidder and was provided the written award. Defendant formally awarded Skyline the contract for the Project in writing on March 29, 2010. CP 462. As provided for by the express terms of SHA's Invitation for Bid, the written award resulted in a valid and binding contract. See CP 45. This was also defined as a condition of the ARRA funds SHA received to fund the project.

Contract, as defined in FAR 2.101, means a mutually binding relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes the types of commitments that obligate the Government to an expenditure of appropriated funds and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards....²

CP 30-153. (Emphasis added).

B. SHA's Post-Award Conduct.

SHA's claim that Skyline did not intend to use McVay is inaccurate and vigorously disputed by the evidence. See CP 484;

² CP 60-61 - Requirements Under ARRA Funds, Section 2(a)(1).

513; and 330-331. In reality, it appears this was an excuse SHA invented with the assistance of Counsel to justify selecting the Contractor it wanted to use instead of honoring the competitive bidding process. See CP 334; 510.

Following the written award, Skyline attended the mandatory pre-construction meeting and subsequent meetings. Skyline also began performing on the contract by beginning work on submittals, measuring the windows and door openings at all 75 houses in different locations throughout the City of Spokane Valley, City of Spokane, and Spokane County and performing significant scheduling of work and other contract administration. In addition, it obtained certificates of insurance for the work, and 100% performance and payment bonds all to protect SHA against any failure of Skyline to perform per the general conditions and specifications of the contract. CP 327.

SHA and Skyline were to execute the Owner-Contractor Agreement at the Pre-Construction meeting in the form provided by the Invitation for Bid and the contract specification book provided prior to bidding. CP 327; 464. The Invitation for Bid provided that

the standard HUD forms would be used. A copy of the Owner-Contractor Agreement was included in the contract specification book from SHA. CP 327.

On April 5, 2010, Skyline received an Owner-Contractor Agreement from SHA in which SHA had wrongfully attempted to change the General Conditions of the contract in violation of the Invitation for Bid. CP 328. On April 12, 2010, Skyline protested SHA's wrongful changes, signed the Owner-Contractor Agreement that was within the contract specification book and contemplated by the IFB, and provided the executed copy to SHA. CP 328; 465- 477. However, SHA refused to execute the Owner-Contractor Agreement provided with in the contract specification book. CP 328.

The dispute caused the time during which the project work would be performed to be substantially delayed. While Skyline was performing work under the contract and SHA was accepting submittals, SHA refused to issue Skyline a Notice to Proceed. This Notice to Proceed was needed to allow Skyline to order the materials, enter into Sub-contracts, and provide enough time to perform the construction work before winter. CP 329.

SHA and Skyline participated in a Pre-construction conference on April 12, 2010, and a meeting on May 5, 2010. Skyline objected to notes, including an assertion by SHA that Skyline had indicated it did not intend to use McVay as a subcontractor. CP 329. During the meetings, Skyline indicated to SHA that because of the delays, that Skyline was concerned the actual work would be pushed into later summer than originally planned when it and McVay bid the project. Skyline emphasized to SHA that it still intended to use McVay to install the windows. CP 330. However, Skyline wanted to pre-qualify other owner operators/subcontractors to complete any installations required to keep the proposed schedule from being pushed into winter and result in the potential liquidated damages SHA was proposing. CP 330. Skyline informed SHA of this to provide assurances that Skyline would comply with the contract and quality assurance specifications to get the work timely completed. Skyline did not tell SHA that it did not intend to use McVay to install the windows. Skyline was making a contingency plan to address any fallout from the delays. CP 330-331. At that point, Skyline fully intended and had every

reason to believe McVay would perform. That remained the case all the way until SHA wrongfully terminated the contract. Id.

While the May 5, 2010 meeting was intended to be a construction meeting, SHA had its attorney present and he participated without identifying himself or signing in on the attendee sheet. SHA's Counsel asked questions intended to justify terminating Skyline. CP 331.

At the April 12, 2010 meeting, Skyline requested SHA execute the Agreement already signed by Skyline. SHA refused. Following the meeting, Skyline received a copy of the April 12, 2010 meeting minutes that inaccurately claimed Skyline was proposing or intended to change to a new subcontractor. CP 331. Following SHA's refusal to sign an Agreement until Skyline provided SHA with a signed subcontract, Skyline informed SHA that it couldn't guarantee McVay would execute any contract with Skyline to perform work on the Project until SHA's Architect re-approved her qualified window supplier source Atrium. Until SHA decided which windows they were going to use, Skyline couldn't secure an exact labor cost and final contract with McVay because

different windows could cause different installation cost to go up or down depending on installation methods. CP 332; 484-487.

By April 26, 2010, Skyline had provided SHA with the required insurance certificates, a payment bond, a performance bond, and a signed contract from Skyline. CP 332. Yet, as of May 5, 2010, SHA still refused to execute the Agreement. SHA informed Skyline it would not sign until Skyline submitted a signed subcontract with McVay Brothers. CP 333. As of May 5, 2010, Skyline still intended to use McVay as a subcontractor. Without providing Skyline the opportunity to confirm a subcontract with McVay contingent on SHA signing its contract, or approving additional substitute subcontractors, SHA wrongfully terminated its contract with Skyline. Id.

IV. ARGUMENT

A. Reasonable Inferences From The Evidence Support the Conclusion that SHA's Written Award Was An Acceptance That Created An Enforceable Contract.

The Declarations and exhibits submitted in response to the Motion for Summary Judgment established that the self-serving claims being made by SHA to justify its breach of contract are

disputed issues of fact. CP 323- 553. Allegations in a pleading or affidavit submitted by the non-moving party must be taken as true. State ex. rel. Bond v. State, 62 Wn.2d 487, 491-92 (1963). Doubts regarding the existence of a genuine issue of material fact are resolved against the moving party. Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506 (1990). The facts submitted and all reasonable inferences from those facts are to be considered in the light most favorable to the non-moving party, and the motion should be granted only if from all the evidence reasonable persons could reach but one conclusion. Nationwide Mutual Fire Ins. Co. v. Watson, 120 Wn.2d 178, 186 (1992).

The Trial Court ignored the fact that SHA's express statement that the written award would result in a binding contract without further action by either party, at the very least, created a genuine issue of material fact with regard to whether or not SHA accepted the offer forming a contract and/or whether the Parties' intent was to form a contract based upon the written award. Infra. As a result, it was err to summarily dismiss the action.

B. This Is Not A Disappointed Bidder Case Because SHA Accepted Skyline's Offer.

1. SHA Specifically States The Written Award Would Bind The Parties.

This is not a disappointed bidder case and SHA did not “reject” Skyline’s bid. Instead, Skyline was provided a written award of the contract. CP 45 – “*A written award...shall result in a binding contract...*” As SHA points out, the project was subject to federal regulatory requirements. This included the HUD requirements for bidding the project, including making the written award an acceptance of the offer, creating a binding contract. CP 45. There was nothing “*generic*” about that requirement. SHA had to follow HUD’s requirements to get funding. SHA cannot avoid that intent or obligation by claiming there was not an “*assurance of completion*” that rendered Skyline ineligible for “*award*”. That provision simply does not apply where there was a written award!

After being awarded the contract, Skyline began performing its obligations under the contract and with SHA’s active participation. This included participating in Skyline starting the measuring process and SHA reviewing material submittals Skyline

had to compile and submit. See e.g. CP 516 – “*You two work together to determine who will be accompanying Skyline for measuring*”; CP 534 – “*I have scheduled Larry to start window verification on Monday*”; and CP 539-540 – SHA’s submittal review and response. Thus, SHA conducted itself consistent with the written award being an acceptance of the offer and a binding contract was formed as indicated in its Invitation for Bid. CP 45. Consequently, the reasonable inference from the conduct of the parties and SHA’s statement that a contract would be formed based upon a written award is that a binding agreement was created when SHA accepted Skyline’s offer by its written award.

2. Washington Law and Federal Regulations Provide The Written Award Created A Binding Contract.

“It is the general rule in public contract law that a bid is an offer to contract...”. Peerless Food Products, Inc. v. State, 119 Wn.2d 584, 592 (1992). The acceptance of the bid for public work constitutes the contract on a public works project. Id.; J.J. Welcome & Sons Constr. Co. v. State of Washington, 6 Wash. App. 985, 988-89 (1972). The J.J. Welcome & Sons Court explained the effect of a written award on a public works contract:

[M]utual contractual responsibilities commenced [at the time of the award], even though it was contemplated that contract forms would subsequently be executed.

J.J. Welcome & Sons Constr. Co., 6 Wash. App. at 988-89; see also Federal Acquisition Regulation (FAR) 52.214-10(d) and 52.215-(f)(1) (a binding contract is immediately formed when an award or acceptance is “mailed or otherwise furnished” to a bidder). Contrary to this basic principle, the Trial Court improperly ruled that no contract was formed as a matter of law because post-award SHA refused to execute the contract forms. RP 6.

The Trial Court also ignored the fact that after the written award, SHA violated public bidding laws and the terms of its own Invitation for Bid by refusing to sign a written contract containing the terms set forth in the Invitation. Instead, SHA attempted to add provisions and obligations that were not disclosed to bidders and to change the terms of the contract. See CP 525 – SHA was informed its additional requirements were “*not part of the General conditions*”; and CP 531 – “*I have attached a possible addition to the contract...*”. Notably, Skyline still signed the contract. CP 539. It appears one of the real reasons for the wrongful termination by

SHA was the fact Skyline pointed out the wrongfulness of SHA's actions. See CP 539 – “*We received the signed contract with lots of supporting documentation of how they feel we are acting inappropriately.*”

In any event, because SHA was required to award and did award Skyline the project, this is not a disappointed bidder situation. See Rowan Northwestern Decorators, Inc. v. Washington State Convention & Trade Ctr., 78 Wn. App. 322 (1995); see also 10 U.S.C. § 2305(b)(3). Once there was an award, SHA was bound to the contract as either a matter of law or the specific facts of this case.

3. The Cases Relied Upon By SHA Are Distinguishable.

The post-award cases cited by SHA are based on specific facts that were not decided on Summary Judgment or included an invitation that contained a provision providing the written award did not constitute an acceptance of the bid. See e.g. Planning Research Corp. v. U.S., 971 F.2d 736 (Fed. Cir. 1992)(the case was decided through an administrative hearing where a fact finder decided the factual issues.); Isatari Const. v. City of Muscatine, 330 N.W.2d 798, 800 (Iowa 1983)(the award at issue was “conditional, subject to

approval by HUD”; HUD did not approve the award so there was no binding contract.); Delta Democrat Pub. Co. v. Board of Pub. Contracts, 81 So.2d 715, 717 (Miss. 1955)(the award was made subject to the execution of a contract. In addition, the Mississippi Constitution and Statutes required any such contract to be approved. The court found there was no such approval.). As a result, the cases are inapplicable since here SHA stated unconditionally that the written award would result in a binding contract without any further action by either party. SHA made that written award.

C. SHA’s “Subcontractor” Arguments Establish A Question of Fact.

1. Whether Skyline Intended To Use McVay Is A Disputed Fact.

As explained in the fact section above, SHA’s claim that Skyline did not intend to use McVay is highly contested and disputed issues of fact on that issue abound. Indeed, the Court recognized that the he said/she said portion of SHA’s argument would not support summary dismissal.

There are all kinds of facts around these cases that would not support a granting of a motion for summary judgment because there are disagreements about what was said, etc. That is not really what this case is about,

at least at this level for me here. This is not about who said what to whom, and who was right and who was wrong. What it is about is the legal approach that we need to take from which you can do the analysis.

RP p. 2, ll. 8-16. *“The issue really comes down to whether or not an award of the contract to an entity creates the contract.”* RP p. 4, ll. 1-3. As explained above, in this case, whether the written award constituted the formation of a binding contract is at very least a question of fact based upon the SHA statement in the Invitation for Bid and the Parties’ conduct. Supra. While Skyline disagrees with SHA’s unsupported claim that it can unilaterally decide “*responsiveness*” after award and performance begins, the issues raised by SHA are disputed and should be decided by a trier of fact.

2. Skyline’s Bid Was Responsive.

The only evidence is that Skyline’s bid was responsive. This is confirmed by the award and the evidence that Skyline intended to use McVay. SHA’s position is further undermined by the fact that on public works projects subcontractors may be substituted. The fact a subcontractor is listed but then not used does not allow a public owner to breach an awarded contract. This is because Washington law provides for substitution of subcontractors. RCW

39.60.060(2)(a)-(e). Thus, if by the time of performance, McVay was unable to perform, Skyline had the right to substitute a qualified sub-contractor. “*Substitution of a listed subcontractor may be made by the prime contractor for ... (c) Inability of the listed subcontractor to perform the requirements of the proposed contract or project.*” RCW 39.60.060(2)(c). Whether a Bid is “*responsive*” is determined at the time of bid submission based upon whether the bid conforms to the material requirements of the solicitation. See Cornell Pump Co. v. City of Bellingham, 123 Wn. App. 226 (2004). Here, it did.

In addition, here there was no “*irregularity*” in Skyline’s listing of McVay, and there was no misrepresentation. At best, SHA’s claims create an issue of fact in that regard, making summary judgment improper since the facts alleged by SHA are disputed.

D. SHA’s Red-Herrings.

1. SHA Harmed The Public By Violating The Competitive Bid.

From a policy perspective, SHA’s wrongful termination and attempt to change the terms and condition post-award defeated the purpose of competitive bidding and resulted in the needless

expenditure of more public funds than necessary to complete the Project. *“Bidding Statutes are for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good.”* Star of the Sea Concrete Corp. v. Lucas Bros., Inc., 850 A.2d 559, 566 (2004). Skyline was the lowest bidder by more than \$30,000. As indicated by the evidence, Skyline fully intended to use McVay Brothers as stated in its bid. However, because of delays being caused by SHA, Skyline was being proactive in requesting that additional Subcontractors be approved so if there was a problem they could be used to keep the Project on schedule. Considering the fact this Project had a liquidated damages provision, there is nothing untoward about Skyline preparing a contingency plan to keep the Project on schedule. Indeed, the Contract and Washington law recognize that in the public bidding context substitution of subcontractors may occur. Thus, SHA damaged the public good by not using the lowest bid.

2. Post-Award SHA Could Not Rescind The Contract.

Because a contract had been formed by the written award, SHA’s claim that it could unilaterally rescind the Contract is

incorrect. Once the Contract was formed, SHA was obligated to operate under its terms and if SHA wanted to terminate the Contract should have followed the provisions of the Contract or be responsible for breach of Contract damages. The cases relied upon by SHA are not ones where the parties intended to form a binding contract through a written award.

3. Skyline Was Not In Default.

Although it did not make the argument at the Trial Court level, SHA now claims Skyline was "*in default*" by failing to sign a contract. See SHA Brief, p. 24. However, that argument fails. First, Skyline did sign the contract. Supra. It was SHA, not Skyline that refused to execute the agreement. Indeed, Skyline was begging for the contract and notice to proceed to be provided. See CP 523. Second, SHA did not provide the contract form that was set forth in the Invitation for Bid. Instead, after award it presented a contract that contained "*additions*" and changes to the Contract terms. Supra. The problem with this is readily apparent. On a competitive bid, in order for the public to get the best price, bidders have to

know the terms of the agreement on which they are bidding. There simply is no evidence supporting this new argument.

4. The Award Was Not Conditional.

SHA also takes the position that the written award was “*conditional*”. However, nowhere in the written award or the Invitation did it state the award was conditional. Indeed, to the contrary, the Invitation stated exactly the opposite and made it clear the written award would constitute a “*binding contract*” without any further action by either party. BBG Group, LLC v. City of Monroe, 96 Wn. App. at 519-21 does not change that fact. BBG Group stands for the unremarkable proposition that a disappointed bidder (a third-party) has standing to enjoin construction from going forward. Here, no third party attempted to enjoin Skyline’s contract.

5. A Bid Dispute Is Not At Issue In This Case.

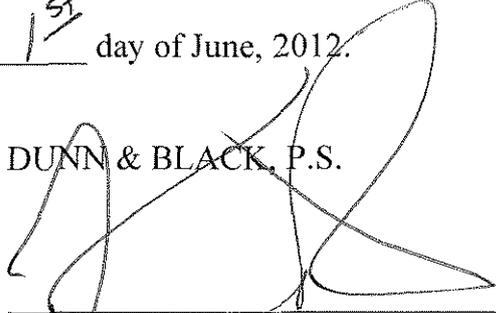
The fact that our jurisprudence provides other bidders standing to seek rescission of the contract post award and pre-signature does not change the character of the relationship vis-à-vis the Owner and the successful bidder. That is controlled by the intent of the parties. Here, there was no bid dispute or injunction by a

Third-party after the second award to Skyline. Therefore, the contractual analysis for this dispute is whether the intent of the parties was to be bound to one another based on the written award. The Instructions to Bidders make it clear that was the intent.

V. CONCLUSION

Pursuant to the foregoing, Skyline respectfully requests that the Trial Court's summary dismissal and award of attorney fees be reversed and the matter remanded for trial. The evidence and the inferences from the Parties' conduct confirms that the intent was for a binding contract to result from the written award.

DATED this 1st day of June, 2012.

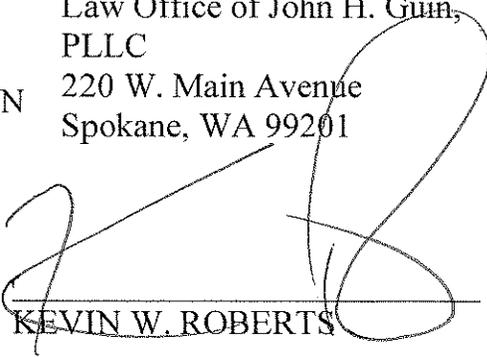

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of June, 2012, I caused to be served a true and correct copy of the foregoing document to the following:

- | | | |
|-------------------------------------|------------------|-----------------------------|
| <input type="checkbox"/> | HAND DELIVERY | John H. Guin |
| <input checked="" type="checkbox"/> | U.S. MAIL | Law Office of John H. Guin, |
| <input type="checkbox"/> | OVERNIGHT MAIL | PLLC |
| <input type="checkbox"/> | FAX TRANSMISSION | 220 W. Main Avenue |
| <input checked="" type="checkbox"/> | EMAIL | Spokane, WA 99201 |



Handwritten signature of Kevin W. Roberts in black ink, written over a horizontal line.

KEVIN W. ROBERTS