

No. 301907-III

COURT OF APPEALS OF THE  
STATE OF WASHINGTON, DIVISION III



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Skyline Contractors, Inc.,

Appellant,

v.

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

Respondent.

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

Judge Kathleen M. O'Connor

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**APPELLANT SKYLINE CONTRACTORS, INC.'S BRIEF**

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## **I. INTRODUCTION**

In order to take advantage of federal funds, Spokane Housing Authority (“SHA”) found itself in the unfamiliar position of obtaining a general contractor through the Public Works competitive bidding process. SHA put out an Invitation for Bids seeking a general contractor to “*Furnish and Install Windows on Seventy-Five (75) Public Housing Homes And/or Duplexes*”. Skyline Contractors, Inc. (“Skyline”), a responsible bidder, timely provided the responsive low bid for the project. Following a bid dispute confirming Skyline had complied with the Invitation for Bid and was a responsible contractor, SHA provided Skyline with a written award as the successful bidder. CP 462.

Under both Washington law, and the express terms of the Invitation for Bids drafted by SHA, that written award resulted in “*a binding contract without further action by either party*”. CP 45. SHA breached the binding contract by attempting to change the general conditions of the written contract from those provided in the Invitation for Bids. When Skyline objected to the changes, SHA terminated Skyline. Despite the fact the Invitation for Bid

specifically provided that SHA's written award would constitute an acceptance of the bid and public works law confirming that a written award constitutes acceptance of a bid, the Trial Court wrongfully granted SHA's motion for Summary Judgment and dismissed the case. As explained below, the Trial Court's ruling was incorrect as a matter of law and fact. Therefore, it should be reversed and this matter remanded for trial.

## **II. ASSIGNMENTS OF ERROR**

1. Did the Trial Court Err by Granting Defendant's Motion for Summary Judgment?
2. Did the Trial Court Err By Finding As A Matter of Law That SHA'S Written Award of The Public Works Contract To Skyline Did Not Constitute An "Acceptance" of the Bid?
3. Did the Trial Court Err By Finding That Genuine Issues Of Material Fact Did Not Exist With Regard To Whether SHA Accepted Skyline's Bid?
4. Did The Trial Court Err By Awarding SHA Attorney Fees And Costs?

## **III. STATEMENT OF THE CASE**

In February 2010, SHA issued a public Invitation for Bids to Furnish and Install Windows on Seventy-Five (75) Public Housing Homes and/or Duplexes, Contract No. 2010-01 (the "*Project*"). The

Invitation for Bids set forth the obligations for both parties and in pertinent part provided:

- The Invitation for Bids specifically identified the Contract Form that would be executed based on standard form documents. CP 38.
- The bid was to be awarded to “*the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the PHA/IHA considering only price and any price-related factors specified in the solicitation.*” CP 44.
- “***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.

On March 14, 2010, Skyline timely submitted a low responsive bid for the Project. Nonetheless, on March 22, 2010, SHA indicated it intended to wrongfully award the bid to the second lowest bidder. Its reasoning was based on its incorrect position that Skyline as a company had to be in business for more than 5 years, despite no such requirement in the bid documents. However, based on the Invitation for Bids, Skyline met the requirement which was to consider a bidder’s “*previous experience in performing comparable work, business and technical organization, and financial resources.*”

Despite the company only being in existence for three (3) years, Skyline documented that it had over 20 years of experience in construction through its management and the Project Manager who would be handling the project (Steve Spady). It also provided documentation establishing that it had successfully completed current and past projects. CP 325-326.

Based on the fact it should have been awarded the contract, Skyline submitted a bid protest before SHA provided the written award to the second lowest bidder. In its protest, Skyline highlighted its extensive experience and qualifications to perform the work. CP 366-459. SHA reviewed the information provided and made the decision to award the contract to Skyline. On March 29, 2010, Defendant formally awarded Skyline the contract for the Project in writing. CP 462.

The express terms of SHA's Invitation for Bids provided that the written award resulted in a valid and binding contract between the parties:

*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.<sup>1</sup>*

***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....<sup>2</sup>***

CP 30-153. (Emphasis added).

A pre-construction meeting was scheduled for April 12, 2010. Pursuant to administrative requirements, the parties were to execute an Owner-Contractor Agreement at the beginning of that meeting. The standard form of the contract to be signed was identified in the Invitation for Bids. Yet, on April 5, 2010, SHA wrongfully attempted to change the general conditions of the Owner-Contractor Agreement, without notice to Skyline or Skyline's prior agreement. On April 12, 2010, Skyline signed the Owner-Contractor Agreement described in the Invitation for Bids. However, Defendant refused to execute the Owner-Contractor Agreement. In an attempt to resolve

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<sup>1</sup> CP 45 - Instructions for PHA/IHA Programs, Contract Award, Section 8(g).

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

the dispute over the added contract language, Skyline requested clarification from SHA regarding the intended meaning of newly proposed contract provisions. CP 328-329; CP 546-550.

Following the April 12, 2010 meeting, Skyline received meeting minutes transcribed by SHA which included inaccurate statements allegedly made by Skyline concerning McVay. SHA inaccurately transcribed that Skyline stated it was not using McVay. CP 329; CP 546-550. The bid dispute and SHA's attempts to change the terms of the general conditions, also delayed progress of the construction timeline provided for the Project under the Invitation for Bids. Originally, Skyline hoped to complete the five months of construction work prior to winter. However, by May 5, 2010, SHA had continued to refuse to sign the agreement and refused to issue Skyline with the Notice to Proceed which would have allowed the materials to be ordered. In the meantime, Skyline had provided the required insurance certifications, and the payment and performance bonds. Skyline also had begun performing under the contract by providing submittals to SHA for the materials, spending two weeks on-site doing field measuring of the windows

on 75 separate homes<sup>3</sup>, producing an extensive CPM schedule and beginning other contract administration. CP 329.

Skyline received subsequent meeting minutes transcribed by SHA, which also included statements inaccurately transcribed by SHA and allegedly made by Skyline. The meeting minutes alleged Skyline stated it did not have a quote from McVay in formulating the bid it submitted to SHA on March 15, 2010. Skyline objected to this statement. In fact, Skyline obtained a bid from McVay for installation work on March 9, 2010, which was incorporated within Skyline's bid submission. However, Defendant refused to make corrections to the meeting minutes. Ultimately, Defendant transcribed inaccurate statements allegedly made by Skyline at the meetings to serve as the purported basis to wrongfully terminate its contract with Skyline. Following the May 5, 2010 meeting, SHA informed Skyline it was, unilaterally, after-the-fact, and post-award, finding Skyline's bid non-responsive. CP 329-330; CP 546-550; CP 551-554. Based on SHA breaches of contract, Skyline filed the action at issue. The Trial Court wrongfully dismissed the action by

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<sup>3</sup> This was done with SHA representatives.

finding that SHA's written award did not constitute acceptance of Skyline's bid.

#### IV. ARGUMENT

##### A. Standard Of Review.

A trial court's order granting summary judgment is reviewed de novo. Trimble v. Washington State Univ., 140 Wn. 2d 88, 92 (2000). A party moving for summary judgment has the burden of demonstrating that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. CR 56(c). *"The burden is on the moving party to demonstrate that there is no issue as to a material fact, and the moving party is held to a strict standard."* Scott v. Pac. W. Mountain Resort, 119 Wn.2d 484, 502-03 (1992). 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). In ruling on a motion for summary judgment, the Court's function is to determine whether a genuine issue of fact exists to avoid a useless trial, not to resolve any factual issues on their merits. Balise v. Underwood, 62 Wn.2d 195, 199 (1965). The summary judgment procedure may not be used to try an issue of fact; issues of fact must be determined at trial. Bates v. Bowles White & Co., 56 Wn.2d 374 (1960).

**B. SHA Accepted Skyline's Bid By Issuing A Written Award Of The Public Works Contract.**

The Trial Court granted the motion for summary judgment because it incorrectly found that SHA's written award of the contract did not operate as an acceptance of Skyline's bid (offer). RP 5. However, this decision ignored the express terms of the Invitation for Bids and well established Public Works law. As explained below, SHA's written award of the public works contract to Skyline

was an acceptance of the bid. As a result, a binding contract was formed when SHA provided the written award. CP 45. Consequently, the Trial Court erred by dismissing Skyline's action.

*"In contract law, construction bidding is treated as a unique category."* Arango Construction Co. v. Success Roofing, 46 Wn. App. 314, 321 (1986). The Trial court recognized an unfamiliarity with the issue at bar as it related to public works bidding. See e.g. RP 2. *"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.; See also Allen M. Campbell Company v. United States, 199 Ct. Cl. 515, 467 F.2d 931 (Ct. Cl. 1972); Appeal of Kilgore Sales Co., ASBCA 2778 (1955); J.J. Welcome & Sons Constr. Co. v. State of Washington, 6 Wash. App. 985, 988-89 (1972).

In public bidding, acceptance of a bid occurs through a written award of the contract. 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 Land Constr. Co. v. Snohomish County, 40 Wn App. 480, 483 (1985)(“*it is the acceptance, not the tender, of a bid for public work which constitutes a contract*”); 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 ruled that on this public works project no contract was formed because post-award SHA refused to execute the contract forms set forth in the Invitation for Bids. RP 6.

The Trial Court also ignored the express provision of the Invitation for Bids that defined SHA would accept the offer (bid) by a written award. The provision also made it clear to bidders and SHA that a written award would “*result in a binding contract without further action by either party*”. CP 45. SHA does not deny it provided Skyline a written award. CP 462. By the terms of the Invitation for Bids, the written award resulted in a valid and binding

contract between Skyline and SHA. Because the written award constituted an acceptance, the Trial Court erred in ruling that SHA did not accept the bid.

The fact is, SHA was required to award and did award Skyline the project. 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 and the parties' rights were dictated by the contract. As a result, Skyline was entitled to seek recovery for any breaches by SHA and the Trial Court erred as a matter of law by dismissing the Action. Allen M. Campbell Co. at 467.

C. **Genuine Issues of Material Fact Existed With Regard To Whether SHA Accepted The Bid.**

The Trial Court also erred because at the very least, the Invitation for Bids created an issue of fact with regard to whether the written award constituted an acceptance. SHA's Invitation for Bids specifically provided:

*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). In ruling that SHA did not accept the bid, the Trial Court ignored this fact and failed to provide Skyline with all reasonable inferences flowing from this provision. Namely, that SHA accepted the offer and entered into a binding agreement by providing the written award. As a result, at the very least, genuine issues of material fact exist with regard to the formation of a contract and the Motion for Summary Judgment should have been denied.

**D. The Trial Court Erred By Awarding Attorney Fees and Costs.**

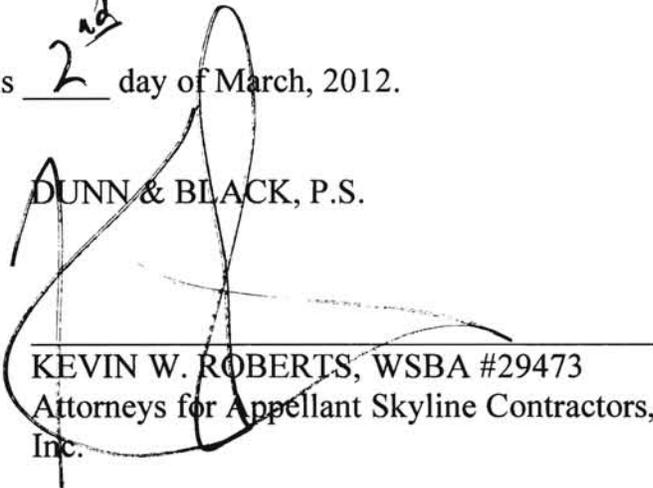
Based on the summary dismissal of Skyline's complaint, the Trial Court awarded SHA attorney fees and costs. As explained above, the Trial Court erred by granting summary judgment. As a result, the matter should be remanded and the award of attorney fees and costs also reversed.

**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.

DATED this 2<sup>nd</sup> day of March, 2012.

DUNN & BLACK, P.S.

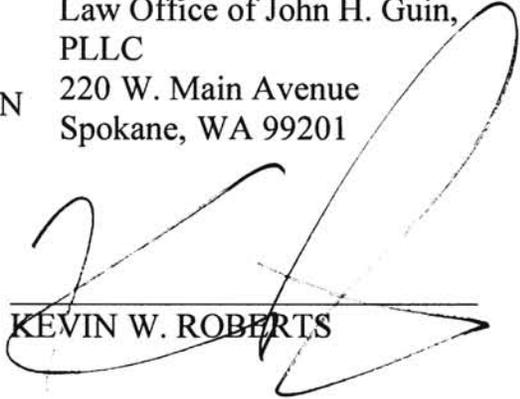


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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2<sup>nd</sup> day of March, 2012, I caused to be served a true and correct copy of the foregoing document to the following:

- |                                     |                  |                             |
|-------------------------------------|------------------|-----------------------------|
| <input checked="" type="checkbox"/> | HAND DELIVERY    | John H. Guin                |
| <input 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 type="checkbox"/>            | EMAIL            | Spokane, WA 99201           |

  
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