

No. 301907-III

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

SKYLINE CONTRACTORS, INC., Appellant,

v.

SPOKANE HOUSING AUTHORITY d/b/a NORTHEAST
WASHINGTON HOUSING SOLUTIONS, Respondent.

On Appeal from Spokane County Superior Court
Cause No. 10-201932-9

Judge Kathleen O'Connor

BRIEF OF RESPONDENT

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Authority d/b/a Northeast Washington
Housing Solutions*

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I. INTRODUCTION.

The Appellant, Skyline Contractors, Inc. (“Skyline”), employed a bait-and-switch tactic in an attempt to procure an award of a public works contract from the Spokane Housing Authority (“SHA”). When submitting its bid on the project, Skyline did not meet the qualifications necessary to bid on the window and door replacement project. To overcome this deficiency, Skyline listed a subcontractor in its bid that had the necessary qualifications to perform the work. In correspondence after the bid opening, Skyline again represented to SHA that the work would be performed by the qualified subcontractor. Based on these representations, SHA notified Skyline that SHA intended to award the contract to Skyline.

When it came time to produce a copy of the subcontract with the qualified subcontractor, Skyline could not do so. At that point, Skyline notified SHA that Skyline intended to use other subcontractors to perform the work, none of whom were listed in Skyline’s bid.

SHA discovered Skyline’s misrepresentations before the parties signed a contract. Therefore, SHA rescinded its notice of intent to award the contract to Skyline and rejected Skyline’s bid for two reasons: (a) the bid was non-responsive because it did not accurately list the subcontractors Skyline intended to use on the project; and (b) Skyline was not a responsible bidder because it did not meet the qualifications

specified in the bid documents and because Skyline's conduct indicated a lack of integrity and business ethics.

Skyline sued SHA for damages, alleging that it was wrongfully denied the contract. However, on a public works project, a disappointed bidder's sole remedy is to obtain injunctive relief to prevent the contract from being awarded to another bidder. Skyline initially pursued injunctive relief but then abandoned it shortly after commencing suit. Skyline instead argued to the trial court that SHA's notice of award constituted an enforceable contract, which could not be rescinded by SHA upon discovery of Skyline's misrepresentations in the bidding process.

On summary judgment, the trial court held that SHA's notice of award did not constitute an enforceable public works contract. (RP at 5-6) The trial court's decision is supported by the plain language of the bid documents, by the undisputed conduct of the parties, and by established Washington law for determining when public works contracts are deemed to be formed. Therefore, the trial court's decision should be affirmed.

II. ISSUES ON APPEAL.

A. Did the trial court properly hold, as a matter of law, that SHA's notice of award was insufficient to create an enforceable public works contract?

B. Did the trial court properly find no genuine issues of material fact in granting SHA's motion for summary judgment?

C. Did the trial court properly award SHA its costs and attorney's fees in obtaining dismissal of Skyline's claims for damages?

D. Should SHA be awarded its attorney's fees and costs on appeal?

III. STATEMENT OF THE CASE.

In February 2010, SHA issued an Invitation for Bids ("IFB") to Furnish and Install Windows on Seventy-Five (75) Public Housing Homes and/or Duplexes, Contract No. 2010-01 ("the project"). The project was subject to various federal regulatory requirements for procurement and construction, including 24 C.F.R. § 85.36 and HUD Manual 7460.8, revision 2, and as such, SHA had to procure the construction through a competitive sealed bid process. Additionally, SHA had to award the contract to lowest responsible, responsive, and reliable bidder. (CP at 24)

The IFB contained the following notices to bidders regarding the solicitation process:

All bids must be submitted on forms furnished by the Spokane Housing Authority and shall be subject to all requirements of the Specifications, Drawings and all other Contract Documents.

Instructions to Bidders, Section 1.A. (CP at 35)

Contract award criteria can be summarized as follows: Lowest, Responsive, Reliable, Reasonable bid in the best interests of the Housing Authority. The contract will be awarded to the reliable bidder submitting the lowest proposal complying with the conditions of the Contract Documents, provided the bid is reasonable and it is to the interest of the Spokane Housing Authority to accept it. . . . The Spokane Housing Authority, however, reserves the right to reject any and all bids and to waive any informality in bids received whenever such rejection or waiver is in the interest of the Spokane Housing Authority.

Instructions to Bidders, Section 15.A. (CP at 38)

The Spokane Housing Authority reserves the right to reject the bid of any bidder who has previously failed to perform properly, or to complete on time, contracts of a similar nature; who is not in a position to perform the contract, or who has habitually and without just cause neglected the payment of bills or otherwise disregarded his/her obligations to subcontractors, materialmen, or employees.

Instructions to Bidders, Section 15.C. (CP at 39)

In determining the responsibility of a bidder, the PHA/IHA will consider such matters as the bidder's:

- (1) Integrity;
- (2) Compliance with public policy;
- (3) Record of past performance;
- (4) Financial and technical resources (including construction and technical equipment)

Instructions for PHA/IHA Programs, Section 4. (CP at 43)

Among a variety of certifications and other information required to be submitted with the bid, the IFB required that all bidders prepare and submit a "Bidder's Qualification and Subcontractor's List" form. The form required that the bidder identify such facts as the bidder's

experience, the portions of the work that the bidder would self-perform, the portions of the work that would be performed by subcontractors, and the name and qualifications of each subcontractor to be used on the project. (CP at 24, 87)

In addition, the technical specifications that were part of the IFB contained a requirement that the installer of the new windows have a minimum of five years of documented experience in window installation:

Installer Qualifications: Company specializing in performing the work of this section with minimum five years of documented experience.

Section 08 5313, Vinyl Windows. (CP at 24, 151)

Bids were due to be submitted on March 15, 2010. On that date, SHA received a number of bids, including a bid from Skyline. (CP at 25, 172-194)

In its bid, Skyline completed the "Bidder's Qualification and Subcontractor's List" form. In that form, Skyline identified that it was only in existence for three years but represented: (a) that its management had 20 years of experience in construction; (b) that it intended to use a subcontractor to perform the critical portion of the work (the window and door installation); and (c) that the listed subcontractor, McVay Brothers, had more than 20 years of experience in window and door installation work. (CP at 25, 189)

Skyline submitted the lowest bid price in response to the IFB. However, in its statement of qualifications, Skyline failed to demonstrate that it had the necessary experience for installation of windows. As a result, SHA initially determined that Skyline was not a responsible bidder. On March 22, 2010, SHA notified all bidders that SHA intended to award the contract to the second lowest bidder, who had the requisite experience. (CP at 25, 196)

Within the next two days, Skyline submitted a bid protest, arguing that the rejection of Skyline's bid was improper because Skyline possessed the required skill and experience to perform the work. As part of its argument, Skyline asserted that "SCI and or its team have been in general contracting for 20+ years" and that "we provided McVay Brothers as an additional installation company that also qualifies us under your guidelines." (CP at 25, 198-201, 203-206)

Following Skyline's initial protest, SHA requested additional information from Skyline to clarify the work that would be performed by Skyline and the work that would be performed by its listed subcontractor. (CP at 25-26, 212) Skyline responded to SHA's request for clarification on March 25, 2010. In its response, Skyline represented to SHA that all installation work would be performed by its subcontractor, not by Skyline.

(CP at 26, 214-216) Again, the only subcontractor identified by Skyline at the time was McVay Brothers.

SHA relied on the fact that Skyline intended to exclusively utilize a subcontractor for installation, which subcontractor had the necessary experience to perform the work required by the contract documents. Based on this representation from Skyline, SHA elected not to reject Skyline's bid following the protest by Skyline. On March 29, 2010, SHA notified Skyline that, based upon its representations made during the bid protest, SHA intended to award the contract to Skyline. (CP at 26, 218)

On April 12, 2010, the parties held a Pre-Construction Conference to discuss the award and execution of the contract. At the meeting, Skyline advised SHA that Skyline did not intend to use McVay Brothers as the subcontractor for the installation work. This statement was not consistent with the bid submitted by Skyline or with the subsequent representations of fact made by Skyline during the bid protest process. (CP at 26, 220)

After considering the matter, SHA advised Skyline that if it wanted to change subcontractors, Skyline needed to provide SHA with a list of the proposed subcontractors and to request a change or modification to its bid. Skyline never did so. (CP at 27, 225)

Over the course of the next few weeks, SHA made additional requests for copies of subcontracts so that Skyline could show that its subcontractors met the qualifications and experience requirements of the IFB. SHA also told Skyline that no contract would be executed until the information was provided to SHA. Despite these requests, Skyline still did not produce any subcontracts. (CP at 27, 226-233)

In a progress meeting on May 5, 2010, Skyline admitted that it did not have an executed subcontract agreement with McVay Brothers. Skyline also stated that it never intended to use McVay Brothers to perform all of the installation work on the project, despite the fact that it listed McVay Brothers and no other subcontractors. Skyline admitted that it prepared its own bid for the installation work and that it fully intended to use a variety of owner-operator subcontractors for the installation work, not necessarily McVay Brothers. (CP at 27, 236)

Skyline's project manager, Travis Young, admitted in deposition testimony that Skyline never intended to use McVay Brothers to perform all the door and window installation work:

Q. All right. Well, let's take a look at the second page of the document. There's -- about the sixth line down it says "Open items. Previous meeting minutes." Do you see that?

A. I do.

Q. And it says, "Need contracts for review. McVay will possible do part of work." Do you see that?

A. Um-hmm. "Will possible"? Yeah.

Q. Do you recall there being a discussion at the progress meeting about what work McVay might or might not perform?

A. I do.

Q. Do you recall making any statement at the meeting that McVay will do some but not all of the installation work?

A. Yes.

Q. You made that statement?

A. That we never intended for McVay to do all the work, yes.

Q. So you made the statement at the progress meeting that Skyline never intended McVay to do all the installation work, correct?

A. Correct.

(CP at 578-579)

Q. Now, down at the very bottom of this same page, there's a statement that says, "Travis said, 'We never intended to use McVay Brothers to do all the work.'" Do you see that?

A. I do.

Q. Is that an accurate quote of what you said at the meeting?

A. Yeah.

(CP at 579) In fact, Mr. Young admitted that Skyline intended to use a number of different subcontractors to perform the installation work, none of which were listed in Skyline's bid:

Q. Now, did you make a statement at that meeting that there were potentially seven subcontractors that were lined up to do the installation work?

A. I don't recall.

Q. Did you have four subcontractors signed up to do the work?

A. I don't recall how many, but I know we had some subcontractors prepared, yes.

(CP at 579)

Mark McVay of McVay Brothers—the only listed subcontractor for window installation work—also testified that McVay Brothers never offered to perform all of the window and door installations for the project:

Q. Do you know, did McVay Brothers ever submit a bid or proposal for installing windows, pre-hung doors, storm doors, and infills for \$106,655?

A. No.

Q. Now, if you look further down, it talks about the scope of work, and it refers to "McVay Brothers to install all windows, pre-hung doors, storm doors and infills for the project." Do you see that?

A. Yes.

Q. Did McVay Brothers ever submit a bid or proposal for that scope of work?

A. No, we discussed those rates, but as I had already said earlier, we're unable to provide that much labor for the project.

(CP at 295)

Q. Well, and really I guess what I'm curious about is in this particular letter it indicates that there is a subcontract for agreement with McVay Brothers for the complete installation of the project. Do you see that?

A. That is incorrect.

(CP at 295)

Q. And about midway down through that paragraph there is a sentence that reads, "Travis stated Skyline did not have a quote from McVay for installation prior to the bid, only for supplying windows, and did not use their numbers in preparing the bid proposal." Do you see that?

A. Yes.

Q. From your understanding of the relation, or not the relationship, from your understanding of the discussions and communications between McVay and Skyline, is that an accurate statement?

A. Yes.

(CP at 296)

Because of Skyline's admissions at the meeting on May 5, 2010, SHA notified Skyline in writing that it was not a responsible bidder for the project and that its bid was non-responsive to the IFB. As a result, SHA rescinded the notice of award to Skyline and rejected Skyline's bid. (CP at 27-28, 238) On May 12, 2010, SHA followed up its notice with a more detailed explanation of the basis for rejection of Skyline's bid. (CP at 28, 240-47)

On May 13, 2010, Skyline filed its Complaint for Damages and Injunctive Relief. (CP at 4-11) At the same time, Skyline filed a Motion for Temporary Restraining Order, seeking to restrain SHA from executing a contract with the next bidder. (CP at 665-67) Skyline understood that once SHA executed a contract with the next bidder, it would have no remedy as a disappointed bidder. (CP at 662-63)

The proposed Order Granting Temporary Restraining Order was never entered following the hearing on May 13, 2010 because Skyline never posted the injunction bond required by CR 65(c). (CP at 287-288) Because of the need to proceed with the work, SHA executed a contract with the next bidder. (CP at 28) At that point in time, Skyline had no further rights or remedies against SHA as a disappointed bidder.

IV. ARGUMENT

A. The Standard of Review Is *De Novo*.

Skyline appeals from the dismissal of its claim for damages on summary judgment. The standard of review for summary judgment is *de novo*, which means that the “appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment.” *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

“Summary judgment is properly granted when the pleadings, affidavits, depositions, and admission on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*; *see also* CR 56(c). An adverse party “may not rest upon mere allegations or denials, but must instead set forth specific facts showing the existence of a genuine issue for trial.” *McBride v. Walla Walla County*, 95 Wn. App. 33, 36, 975 P.2d 1029 (1999); *see* CR 56(e).

B. As a Matter of Law, Washington’s Public Works Bidding Laws Preclude a Claim for Damages by Disappointed Bidders.

Skyline’s appeal focuses solely on the issue of contract formation because it recognizes that it has no claim for damages without an enforceable contract. The reason is that, under Washington law, a disappointed bidder on a public works project may not sue the public entity for damages. *Dick Enter., Inc. v. Metro. King Cnty.*, 83 Wn. App.

566, 569, 922 P.2d 184 (1996); *see also Quinn Constr. Co., LLC v. King Cnty. Fire Prot. Dist. No. 26*, 111 Wn. App. 19, 30-31, 44 P.3d 865 (2002) (claim for bid preparation costs denied). In lieu of damages, the disappointed bidder may sue to enjoin the award of the contract to the next bidder, “because the public benefits from preventing a contract for an excessive amount.” *Dick Enter.*, 83 Wn. App. at 569. However, this remedy has a limited application because a disappointed bidder cannot obtain any relief *once the contract has been signed by another bidder*. *BBG Group, LLC v. City of Monroe*, 96 Wn. App. 517, 521-22, 982 P.2d 1176 (1999) (holding that disappointed bidder’s request for injunction was rendered moot once contract was executed with another bidder).

In this case, SHA rejected Skyline’s bid on May 5, 2010 and set forth the grounds for its rejection on May 12, 2010. Skyline filed a motion for injunctive relief on May 13, 2010 but elected not to pursue that remedy by posting the necessary injunction bond. (CP at 288) As a result, no temporary restraining order or preliminary injunction was entered. Consequently, SHA entered into a contract with the next bidder (CP at 28), thereby cutting off any relief Skyline had as a disappointed bidder.

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C. SHA Had the Discretion to Reject Skyline's Bid After the Notice of Award and Prior to Execution of the Contract.

Skyline undoubtedly abandoned its remedy of injunctive relief because it was clear that SHA had the obligation to reject Skyline's bid once it became known that Skyline listed a subcontractor it did not intend to use. SHA had a duty to reject a bid that was non-responsive. *Cornell Pump Co. v. City of Bellingham*, 123 Wn. App. 226, 232, 98 P.3d 84 (2004) (stating that a public entity "must also reject any bids that are nonresponsive"). SHA also had the discretion to reject Skyline's bid on the basis that Skyline was not a "responsible" bidder.

Generally, to be "responsive," a bid must conform to the material requirements of the solicitation. See *Procurement Handbook for Public Housing Agencies*, Ch. 6, ¶ 12.B (CP at 304-305) If a bid attempts to alter the terms of the solicitation, it is non-responsive and must be rejected:

The Contracting Officer must examine the low bid to be sure that the bidder did not alter the specifications or other terms and conditions (e.g., delivery schedules, payment terms, etc.) or attempt to impose different terms and conditions. If the bid does not conform to the solicitation, it must be rejected and the next lowest bid examined for responsiveness. Allowing a bidder to alter the material requirements of a solicitation gives the bidder an unfair advantage over the other bidders and destroys the integrity of the sealed bidding process.

Procurement Handbook, Ch. 6, ¶ 12.B (CP at 304-305) Similarly, a bid that contains a material variance is non-responsive. *Cornell Pump Co.*,

123 Wn. App. at 232. “The test of whether a variance is material is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders.” *Id.* at 232 (citations omitted). A bidder obtains a substantial advantage if the variance essentially transfers control of the award from the awarding agency to the bidder. *Id.* at 235.

With regard to “responsibility,” a bidder must possess the necessary qualifications to ensure that the work, if performed, will meet the contract requirements. *See Blount, Inc. v. United States*, 22 Cl.Ct. 221, 226 (1990). “Responsibility addresses the performance capability of a bidder, and normally involves an inquiry into the potential contractor’s financial resources, experience, management, past performance, place of performance, and integrity.” *Id.* at 227. Courts have ruled that they will not overturn the decision a public entity makes when reviewing responsibility of bidders, unless it is arbitrary. *See Chandler v. Otto*, 103 Wn.2d 268, 275, 693 P.2d 71 (1984).

“The determination of the municipal officials concerning the lowest responsible bidder will not be disturbed by the courts, unless it is shown to have been influenced by fraud, or unless it is an arbitrary, unreasonable misuse of discretion. When the officers have exercised their discretion in the award of the contract, the presumption obtains that such action was regular and lawful, and such presumption can be overcome only by proof that the officers acted without justification or fraudulently.”

Id. (quoting 10 E. McQuillin, *Municipal Corporations* § 29.73, at 398 (3d rev. ed. 1981)).

In this case, SHA's decision-making process correctly included the following considerations for determining Skyline's status as a responsible bidder:

A responsible bidder/offeror must:

1. Have adequate financial resources to perform the contract, or the ability to obtain them;
2. Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them;
3. Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them;
4. Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all the bidder's/offeror's existing commercial and governmental business commitments;
5. Have a satisfactory performance record;
6. Have a satisfactory record of integrity and business ethics; and
7. Be otherwise qualified and eligible to receive an award under applicable laws and regulations, including not be suspended, debarred or under a HUD-imposed LDP.

Procurement Handbook, Ch. 10, ¶ 10.2.A (referenced in CP at 288, 305)

While "responsiveness" is generally determined at the time of bid submission and "responsibility" is generally determined at the time of contract award, there are circumstances where a bid can be rejected post-award, including: (a) post-award conduct by the bidder that materially alters the bid; or (b) information is learned that calls into question the

bidder's ability to perform the work. *See, e.g., Planning Research Corp. v. United States*, 971 F.2d 736, 741 (Fed.Cir. 1992) (post-award "bait and switch" activity sufficient to disqualify bid); *Istari Constr., Inc. v. City of Muscatine*, 330 N.W.2d 798, 800 (Iowa 1983) (post-award disqualification allowed if contract contingency relating to responsibility was not met); *Delta Democrat Publ'g Co. v. Board of Pub. Contracts*, 81 So.2d 715, 717 (Miss. 1955) (post-award modification of contract terms by bidder allowed agency to reject bid).

In this case, Skyline's bid was non-responsive because Skyline improperly listed a subcontractor that it did not intend to use. It is generally accepted that a contractor's failure to comply with subcontractor listing requirements (including the listing of subcontractor the bidder does not intend to use) is a material irregularity or alteration in the bid, thereby rendering the bid non-responsive. *See, e.g., Land Constr. Co., Inc. v. Snohomish Cnty.*, 40 Wn. App. 480, 698 P.2d 1120 (1985) (holding that a bid was non-responsive if it listed a subcontractor that was not qualified and that error could not be overcome by substituting new subcontractor); *Star of the Sea Concrete Corp. v. Lucas Bros., Inc.*, 850 A.2d 559 (N.J.Sup. 2004) (stating that subcontractor listing requirements uphold important public policies and irregularities in listing subcontractors cannot be waived); *Carl Boland & Sons, Inc. v. City of Minneapolis*, 438 N.W.2d

735 (Minn. App. 1989) (holding that failure to comply with subcontractor listing requirement is an irregularity that cannot be waived); *Leo Michuda & Son Co. v. Metro. Sanitary Dist. of Greater Chicago*, 422 N.E.2d 1078 (1981) (holding that irregularity in subcontractor listing requirement cannot be corrected after submission of bid); *see also Valley Crest Landscape, Inc. v. City of Davis*, 49 Cal.Rptr.2d 184 (1996) (holding that post-bid modification of subcontractor percentage of work performed was a material irregularity that could not be waived); *Regional Scaffolding & Hoisting Co., Inc. v. City of Philadelphia*, 593 F.Supp. 529 (E.D. Pa. 1984) (upholding City's "no substitution" rule regarding post-bid changes to listed subcontractors).

At the time of submitting its bid, Skyline understood that it had to meet the required qualifications for the work, including the necessary experience with the type of work to be performed. Due to its limited years in existence, Skyline listed a subcontractor (McVay Brothers) that it believed would meet the necessary experience requirement and, thus, piggy-backed on McVay Brothers' experience in order to qualify as a responsible bidder. However, Skyline never intended to use McVay Brothers to perform the installation work. Skyline fully intended to use other subcontractors to accomplish the work, but did not list them or disclose this intent at the time of submitting the bid. Only after receiving

notice of the intent to award did Skyline notify SHA that Skyline intended to substitute other subcontractors to perform the work and that it did not have any firm offer or agreement with McVay Brothers. This after-the-fact, bait-and-switch tactic was a material variance and irregularity in the bid process, which required rejection of the bid as non-responsive, as a matter of law.

This misrepresentation put Skyline at an advantage above other bidders in three respects. First, other bidders who did not have the requisite experience were not able to bid the project. Second, other bidders who intended to use subcontractors were bound to do so by listing them. With no intent to use McVay Brothers, Skyline had the advantage of utilizing McVay Brothers' experience to qualify for the bid, without being bound to a price or subcontract. This would then allow Skyline to "shop" for other subcontractors who were cheaper but may not have had the experience of McVay Brothers. Third, because Skyline was not bound to McVay Brothers, it could have withdrawn its bid after the bid opening if it determined that it did not want the contract at the price submitted, alleging a bid mistake. All of these factors gave Skyline "a substantial advantage or benefit not enjoyed by other bidders." *Land Constr.*, 40 Wn. App. at 482.

Separate from the fact that Skyline's bid was non-responsive, SHA had the discretion to determine that Skyline was not a responsible bidder. Skyline only met the qualification requirements of the IFB by virtue of listing McVay Brothers as the window and door installer. Once Skyline admitted that it never intended to use McVay Brothers, the disclosure rendered Skyline unqualified. Furthermore, Skyline's deceptive bait-and-switch conduct relating to subcontractors seriously called into question Skyline's business ethics. Due to these facts, SHA was within its discretion to determine that Skyline's integrity and experience no longer met the level required to perform the work and to reject Skyline's bid.

D. The Trial Court Properly Held That the Notice of Award Did Not Create an Enforceable Contract.

Skyline argues that a notice of intent to award a contract equates to an acceptance and to the formation of a binding contract, thereby precluding SHA from rescinding the award and rejecting the bid. Skyline's argument relies exclusively on a single paragraph in the generic Instructions to Bidders generated by the U.S. Department of Housing and Urban Development ("HUD"). Skyline's argument ignores the more specific Instructions to Bidders prepared by SHA for this particular project and applicable law. Under the project-specific provisions and under

applicable Washington law, SHA retained the authority to reject Skyline's bid until a contract was executed between the parties.

Under the bid documents, all bids were to be "submitted on forms furnished by" SHA. *Instructions to Bidder*, ¶ 1.A. (CP at 35) In fact, "All of these forms must be included with the basic bid for the bid to be responsible and eligible for consideration and contract award." (CP at 24, 71) (emphasis in original) One of the forms was the "Bidder's Qualification & Subcontractor's List" which stated that bidders "must show" all subcontractors and the trade work to be performed. (CP at 87) (emphasis in original) Bidders were required to certify "that the information contained in this 'Bidder's Qualification & Subcontractor List is accurate, complete and current.'" *Id.*

Furthermore, all bids were subject to "all requirements of the Specifications, Drawings and all other Contract Documents." *Instructions to Bidder*, ¶ 1.A. (CP at 35) One of the Specification requirements was that the window installer be a "[c]ompany specializing in performing the work . . . with minimum five years of documented experience." (CP at 151)

In addition, the bid documents provided SHA with the authority to reject any bids that were not responsive to the bid requirements and to reject any bidders who were not reliable or responsible:

Contract award criteria can be summarized as follows: Lowest, Responsive, Reliable, Reasonable Bid in the best interests of the Housing Authority. The contract will be awarded to the reliable bidder submitting the lowest proposal complying with the conditions of the Contract Documents, provided the bid is reasonable and it is to the interest of the Spokane Housing Authority to accept it. . . . The Spokane Housing Authority, however, reserves the right to reject any and all bids and to waive any informality in bids received whenever such rejection or waiver is in the interest of the Spokane Housing Authority.

Instructions to Bidders, ¶ 15.A. (CP at 38) This authority was reiterated again in the HUD Instructions to Bidders as well:

The PHA/IHA may reject any and all bids, accept other than the lowest bid (e.g., the apparent low bid is unreasonably low), and waive informalities or minor irregularities in bids received, in accordance with the PHA's/IHA's written policy and procedures.

HUD Instructions to Bidders, ¶ 8(d). (CP at 44)

Significantly, in the same HUD Instruction to Bidders on which Skyline rests its entire argument, it is specifically contemplated that the award may be rescinded if the bidder fails to provide assurance of completion “*prior to execution of any contract under this solicitation.*” *HUD Instructions to Bidders, Provision 10(a)* (emphasis added). (CP at 45) In the event assurance of completion is not provided, “the PHA/IHA shall render the bidder ineligible for award. The PHA/IHA may then either award the contract to the next lowest responsible bidder or solicit new bids.” *Instructions to Bidders, Provision 10(d)*. (CP at 45)

Finally, bidders were advised that they would be required to sign a contract form presented by SHA following award: “The Form of Agreement between the Spokane Housing Authority and the Contractor shall be on a form furnished by the Spokane Housing Authority.” *Instructions to Bidders*, ¶ 13.A. (CP at 38) The successful bidder was required to execute the contract in the form prescribed by SHA:

For contracts in excess of \$35,000 . . . and subsequent to the award and within ten calendar days after the prescribed forms are presented for signature, the successful bidder shall execute and deliver to the Spokane Housing Authority a contract in the form furnished in such number of counterparts as the Spokane Housing Authority may require.

Instructions to Bidders, ¶ 16.A. (CP at 40) In the event of failure of the parties to execute the contract form as presented by SHA, SHA had the authority to award the contract to the next bidder:

The failure of the successful bidder to execute such contract and to supply the required bonds within ten days after the prescribed forms are presented for signature . . . shall constitute a default, and the Spokane Housing Authority may either award the contract to the next responsible bidder or re-advertise for bids

Instructions to Bidders, ¶ 16.E. (CP at 40)

SHA presented Skyline with a contract form that specifically required all subcontracts to be submitted and approved as a condition precedent to the enforceability of the SHA contract:

This contract is contingent on the Contractor providing any and all necessary Subcontractor contracts with Subcontractor(s) as listed on the Bidder's Qualification and Subcontractor's List (SHA-P23).

Contract Form, ¶ 2.3. (CP at 496) Skyline never furnished SHA with an executed subcontract with McVay Brothers for the door and window installation, thereby failing to satisfy this condition precedent to enforceability of any contract between SHA and Skyline.

Based on all of these terms of the Invitation for Bids (not just the one term relied upon by Skyline), SHA's notice of award to Skyline was a conditional award, subject to Skyline complying with all requirements of the bid forms, the specifications, and the contract form. It is undisputed that Skyline did not comply with these requirements. Skyline did not meet the experience requirements to install the windows, as required by the specifications. Skyline listed a subcontractor it did not intend to use for all of the door and window installation and failed to list other subcontractors it intended to use, contrary to the requirements of the Bidder's Qualification & Subcontractor's List form. Finally, Skyline refused to provide an executed contract form that included copies of executed subcontracts, as required by SHA's contract form. (CP at 491) Instead, Skyline returned a contract form that was expressly subject to Skyline's

unilateral modifications to the contract form, including Skyline's desired intent to use other subcontractors to perform the work. *Id.*

All of these events occurred post-award and significantly modified Skyline's bid and its status as a responsible bidder. When post-award conduct by a bidder materially alters the bid or when information is learned, post-award, that calls into question the bidder's ability to perform the work, a public entity is entitled to rescind the award and reject the bid. *See, e.g., Planning Research Corp.*, 971 F.2d at 741; *Istari Constr., Inc.*, 330 N.W.2d at 800; *Delta Democrat Publ'g Co.*, 81 So.2d at 717.

Skyline's argument would have the Court hold that a public agency cannot rescind an award when *post-award* conduct by a bidder materially alters the bid as originally submitted or when information is obtained *post-award* that substantially calls into question the qualifications of a bidder. Such a holding would seriously undermine the purposes of the competitive sealed bid process. Such a rule would reward contractors who submit false or misleading information for the purpose of securing an award. Unscrupulous contractors would gain a significant advantage over other bidders, thereby turning a fair and open forum into an arena of bait-and-switch tactics. Furthermore, the public would be exposed to having work performed by contractors who are not experienced or otherwise qualified to perform the work or to meet the requirements of the contract.

Skyline's argument that the award cannot be rescinded also ignores the fact that Skyline filed its own bid protest *after* SHA had issued a notice of award to another bidder. It is undisputed that SHA initially provided notice of the award to another contractor. (CP at 25, 196) Skyline submitted a bid protest and asked SHA to reconsider. (CP at 25, 198-206) If an award was not capable of being rescinded as Skyline argues, then Skyline never had standing to protest the initial award and SHA never had the authority to award the contract to Skyline following Skyline's protest.

Skyline relies on the case of *J.J. Welcome & Sons Constr. Co. v. State of Washington*, 6 Wn. App. 985, 497 P.2d 953 (1972) for the proposition that a contract was formed at the time of award.¹ Skyline's reliance on *J.J. Welcome* is misplaced. In *BBG Group, LLC v. City of Monroe*, 96 Wn. App. at 519-21, Division I of the Washington Court of Appeals explained that "contract formation" on a public project in the State of Washington does not occur at the time of award, but rather, occurs upon execution of the contract. To hold otherwise would essentially preclude any bid protests because the reasons or bases for a protest are generally not known until after award is made. *BBG Group, LLC*, 96 Wn.

¹ Skyline also cites to federal law for the proposition that a notice of award constitutes an enforceable contract. This proposition is contrary to Washington public works law, Skyline fails to provide any authority to explain why federal law would trump Washington law in this case.

App. at 519-21. The Court in *BBG Group, LLC* distinguished the decision in *J.J. Welcome*, noting that it was a case regarding reformation of contract rather than a case regarding standing to sue as a disappointed bidder. *Id.* at 520-21.

In this case, the undisputed evidence is that Skyline did not satisfy all conditions of the award and that SHA and Skyline never executed a contract. As a result, no contract was ever formed under applicable Washington law.

Even if a contract was initially formed by notice of award, a contract can be rescinded if it was entered into based on a misrepresentation of a material fact. *Yakima Cnty. Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 390, 858 P.2d 245 (1993). Even a party's innocent misrepresentation of a material fact may render a contract voidable. *See Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000); *Fire Protection Dist.*, 122 Wn.2d at 390 (citing *Restatement (Second) of Contracts* § 164(1) (1981)). A party seeking to have a contract voided based on misrepresentation need only establish that its assent to the contract was induced by a material representation which is not in accord with the facts, and the party is justified in relying on the assertion. *See Brinkerhoff*, 99 Wn. App. at 697.

Here, Skyline was required to disclose all subcontractors to be utilized on the project. Skyline listed McVay Brothers as its only subcontractor and *certified* that McVay Brothers would perform the window and door installation for the project. When SHA informed Skyline it did not have the necessary experience for the work, Skyline affirmatively represented that it would subcontract 100% of the installation work, and the only subcontractor identified was McVay Brothers. Because McVay Brothers had the requisite experience to satisfy the bid requirements and because Skyline affirmatively represented to SHA that McVay Brothers would perform all of the installation work, SHA awarded the contract to Skyline.

The undisputed evidence before the trial court was that these representations were false. McVay Brothers never submitted a proposal to Skyline to perform the window installation work. Skyline never intended to use McVay Brothers to perform the installation work. The undisputed evidence is that these misrepresentations were material and were relied upon SHA in issuing the notice of award. Consequently, when their falsity came to light, SHA was entitled to rescind the notice of award and reject Skyline's bid.

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- E. Skyline fails to identify any genuine issues of material fact relating to the bid documents or bidding process to overcome summary judgment.

Skyline argues that the trial court ignored language in the bid documents regarding the effect of a notice of award. Skyline argues that such language created an issue of material fact to avoid summary judgment. Skyline does not identify any other “issues of fact” that the trial court overlooked.

The problem with Skyline’s argument is that it fails to recognize that this is a case of contract construction. Contract construction:

“ . . . is a process by which legal consequences are made to follow from the terms of the contract and its more or less immediate context, and from a legal policy or policies that are applicable to the situation.”

Berg v. Hudesman, 115 Wn.2d 657, 663, 801 P.2d 222 (1990) (quoting Patterson, *The Interpretation and Construction of Contracts*, 64 Colum.L.Rev. 833, 835 (1964)). Contract construction is an issue of law for the court. *See Syrovoy v. Alpine Resources, Inc.*, 68 Wn. App. 35, 841 P.2d 1279 (1992) (stating that “the legal effect of a contract” is a question of law). As such, “summary judgment is proper even if the parties dispute the legal effect of a certain provision.” *State v. Brown*, 92 Wn. App. 586, 594, 965 P.2d 1102 (1998)

In this case, the trial court was presented with undisputed facts regarding the content of the bid documents, Skyline's bid submission, Skyline's representations to SHA in its initial bid protest following award to another contractor, and Skyline's post-award attempts to change its subcontractors after notice of award. These facts being undisputed, it was proper for the trial court to determine the legal effect of SHA's notice of award to Skyline, as a matter of contract construction.²

F. The trial court properly awarded SHA its attorney's fees and costs.

Skyline assigns error to the award of attorney's fees and costs, but only because the award was the result of the underlying dismissal of its claims. In other words, Skyline does not assign error to the legal bases upon which the trial court awarded SHA its attorney's fees and costs.

Under Washington law, a party may receive an award of attorney's fees and costs if authorized by statute, by contract, or on equitable grounds. *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 149 Wn.2d 98, 121, 63 P.3d 779 (2003) In this case, there are contractual and

² Even if the issue could be characterized as a matter of contract interpretation, the interpretation of an unambiguous contract is a question of law appropriate for summary judgment. *See Dice v. City of Montesano*, 131 Wn. App. 675, 684, 128 P.3d 1253 (2006). The fact that the parties assign different interpretations does not create an issue of fact. If the court can interpret the plain meaning of a contract without resort to extrinsic evidence, summary judgment is appropriate. *Id.* at 685.

statutory grounds for the trial court's award of attorney's fees and costs to SHA.

First, Skyline brought a claim for damages on the basis of an alleged contract. Under the terms of the alleged contract, the prevailing party in any dispute is entitled to recover attorney's fees and costs:

12.2 If either party to this Contract should commence a suit or action to interpret or enforce any portion of this Contract, the prevailing party therein shall recover from the nonprevailing party its attorney fees, expert witness fees and Costs incurred in such proceedings, and in preparing therefore, and in any appeal therefrom, which sums shall be included in any final judgment or award entered in the matter.

(CP at 499) Even though SHA disputed the existence of a contract, courts have held that a contractual attorney's fee clause can be enforced when the basis of the claim arises out of the contract, even though it is ultimately found that no valid contract exists. *See Mt. Hood Beverage Co.*, 149 Wn.2d at 121; *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 191-97, 692 P.2d 867 (1984). Therefore, the trial court properly awarded SHA attorney's fees and costs under the alleged contract.

Second, there is statutory authority for an award of attorney's fees and costs for disputes arising out of public works contracts:

The provisions of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party, except that: (a) The maximum dollar limitation in RCW 4.84.250 shall not apply; and (b) in applying RCW 4.84.280, the time period for serving offers of settlement on the adverse party shall be the period not less than thirty days and not more than one hundred twenty days after completion of the service and filing of the summons and complaint.

RCW 39.04.240(1). Under RCW 4.84.270, a defendant is entitled to an award of attorney's fees "if the plaintiff . . . recovers nothing." RCW 4.84.270. In this case, Skyline's claims for damages were dismissed and Skyline recovered nothing. As a result, the trial court properly held SHA to be a prevailing party for purposes of RCW 4.84.270 and RCW 39.04.240(1).

G. Motion for Attorney's Fees and Costs.

Pursuant to RAP 18.1, SHA requests that the Court of Appeals award SHA its attorney's fees and costs on appeal. The bases for an award of attorney's fees and costs are the contractual and statutory grounds set forth in Section IV, Subsection F, above.

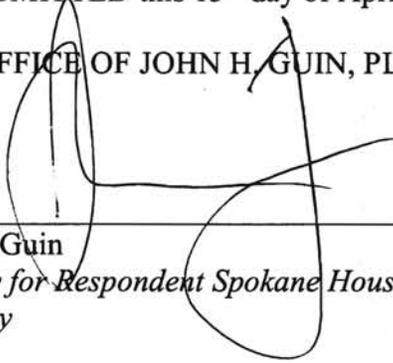
V. CONCLUSION.

Based on the foregoing, SHA respectfully requests that the trial court's summary judgment ruling and award of attorney's fees and costs

be affirmed. SHA also requests that it be awarded its attorney's fees and costs on appeal.

RESPECTFULLY SUBMITTED this 13th day of April, 2012.

LAW OFFICE OF JOHN H. GUIN, PLLC



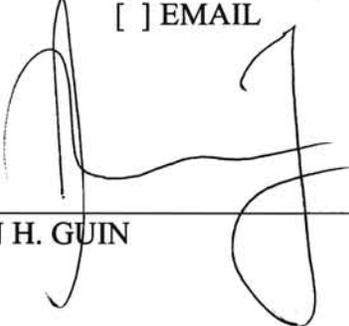
John H. Guin
*Attorney for Respondent Spokane Housing
Authority*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of April, 2012, I caused to be served a true and correct copy of the forgoing document to the following:

Kevin W. Roberts
Dunn & Black, P.S
111 North Post, Suite 300
Spokane, WA 99201

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- FAX TRANSMISSION
- EMAIL



JOHN H. GUIN