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When Bidder on Public Project Defrauds the State, Louisiana 1st Circuit Refuses the State Any Remedies

In my view, the Louisiana First Circuit just rendered a very poor decision. The decision was written by Judge William J. Kline (serving pro tempore) in the matter [State of Louisiana v. Infinity Surety Agency, LLC, et al](#), 2010 CA 0123, Louisiana First Circuit Court of Appeal (Rendered September 10, 2010).

In Louisiana, when a successful bidder to a public works project fails to execute the contract within the specified time frame, the State has a right to retain the bid bond as liquidated damages.

So, what happens when the successful bidder represents that it could provide an acceptable performance...but through an unauthorized surety? In such a case, the successful bidder is awarded the contract, but cannot proceed with work within the required time frame because of a failure to bond the project pursuant to the La. R.S. 38:2219 requirements.

A case last month out of the Louisiana First Circuit addressed this question, concluding that the State was not entitled to liquidated damages.

The reason?

Since the purported surety was unauthorized, the bid itself did not meet the statutory requirements of the [Public Works Act](#). The bid, in other words, was non-responsive and should have been rejected by the State.

What if the bidder made a misrepresentation – an outright fraudulent misrepresentation – that the surety had authority to bond the project and would in fact bond it? The First Circuit says it doesn't matter:

Although the State also argues that [the contractor and surety] should not be allowed to escape paying the penalty by its alleged fraud, there is no ambiguity in the statute. The bid did not meet the

requirements of the statute and is null and void. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law should be applied as written.

Doesn't this remedy seem harsh, or maybe an absurd consequence? After all, the contractor and surety defrauded the state intentionally...while the State was just guilty of an oversight, or was duped. The First Circuit says this:

Admittedly, this conclusion seems harsh because in circumstances of this sort, when there are two breaches of statutory responsibility, one breach could be intentional and the other an oversight...Had the State rejected the bid up front, however, there would have been no delay in awarding the contract to the lowest responsible bidder.

I think the Court might have made a mistake here. This explanation for the "harsh" conclusion is lacking of any good logic, acknowledging two breaches of statutory authority, but failing to acknowledge that maybe the State couldn't have rejected the bid upfront...because it was lied to.

In this decision, the First Circuit has chosen to read one statutory mandate as more important than the other. Namely, the First Circuit reads the duty of the State to reject non-conforming bids literally and without sympathy, but merely glazes over any statutory and legal requirement that the contractor and surety not commit a fraud on the State.

Further, the First Circuit ignores clear language elsewhere in the Public Works Act: that if the bidder is awarded the contract, and does not perform, it forfeits its bid bond. Here, clearly, the bidder was awarded the contract, and did not perform. The conclusion that the bid might have been unresponsive because of a mistake in the bid or outright fraud, doesn't change the facts: the bidder won, and could not perform.

What about the State's tort claim against the contractor and surety for the misrepresentations? Surely, the tort claim would have merit – or at least be deserving of a trial....

Not so, said the First Circuit. "The alleged tort claim should never have arisen," it concludes, because the bid should have been rejected.