

THE VENDOR'S GUIDE TO GEORGIA PROCUREMENT LAW

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Procurement laws can be complicated, frequently consisting of layers of arcane and sometimes conflicting federal, state and local rules. While lawyers do not need to be involved in every step of the procurement process, those who do manage the process may be able to salvage an award, protect proprietary information or avoid a regulatory problem simply by being attuned to potential legal issues. The purpose of this paper is to provide a brief overview of the laws that relate to Georgia state and local procurements so that vendors can make better decisions about when to involve legal counsel in procurement issues.

A. **Know Where to Look for the Applicable Rules**

A variety of federal, state and local laws can apply to any given procurement. For example, federal discrimination laws and socioeconomic program rules will apply to state or local procurements that are funded at least partially by the federal government. See, e.g., Qonaar Corp. v. MARTA, 441 F. Supp. 1168, 1174 (N.D. Ga. 1977). Georgia state purchasing statutes apply to most state agency procurements. See O.C.G.A. § 50-5-50, et seq. The Georgia Department of Administrative Services (“DOAS”), which administers most state agency procurements, published *The Georgia Procurement Manual* which imposes another layer of rules upon state procurements.¹ At the local level, many counties and municipalities have procurement codes within their local ordinances.² Local government construction projects are subject to the Georgia Local Government Public Works Construction Law codified at O.C.G.A. § 36-91-22, *et seq.*

Because these rules are often inconsistent, the vendor and its team must know

¹ See http://pur.doas.ga.gov/gpm/MyWebHelp/GPM_Main_File.htm (last accessed Dec. 26, 2012).

² Most Georgia county and municipal ordinances can be found at www.municode.com.

which requirements and deadlines apply to their procurement. Litigation arising from the duty-free concession at the Atlanta airport proves that the outcome of a dispute can hinge on which body of law applies. See Atlanta Duty Free, LLC v. George F. Maynard, Case No. 2004-cv-85515, (Fulton Sup. Ct. Oct. 22, 2004), rev'd on other grounds by 275 Ga. App. 381, 620 S.E.2d 616 (2005). There, the City released the solicitation under City Code Section 2-1193, which provides a list of non-exclusive evaluation criteria for proposals. The court, however, implicitly held that the duty-free contract was public works construction, which was governed by state law. The state law, O.C.G.A. § 36-91-21(c), required the government to disclose the evaluation criteria and their relative worth in the solicitation itself and to make the award based upon that evaluation criteria. As it turned out, the City considered a factor that was not disclosed in the solicitation document, which was permissible under its ordinances but impermissible under state law. Consequently, the court overturned the award. Id. at 8-11.

B. Cone of Silence

Most procurements employ a “cone of silence” requirement which prohibits vendors and their agents and representatives (including attorneys and lobbyists) from communicating with agency employees about the procurement. The agency will typically designate a contracting officer as the sole point of contact within the agency with respect to the procurement and will require that all communications between the contracting officer and vendor be written and copied to all other vendors to ensure equal access to relevant information.

The cone of silence does not take effect until the solicitation document is released. Lobbyists can be very effective in obtaining pre-solicitation information and,

in some cases, in assisting the agency in developing favorable specifications for the solicitation. They must nevertheless be careful not to invade the cone of silence once the solicitation is released. Even non-substantive communications with agency officials can provide valuable fodder in a bid protest.

By the same token, vendor teams have a valuable opportunity to raise the government's awareness of issues affecting the procurement during the pre-bid conference or through submission of written questions before bids are due. The government will typically provide all vendors with a copy of all questions received and answers given. This is the time to call attention to conflicting RFP terms, terms that cannot be satisfied, terms that violate controlling law or, in a subtle way, issues that might call attention to your team's strengths and your competitors' weaknesses. A vendor that speculates on what the agency intended to say in an RFP does so at its peril.

C. Protection of Trade Secrets and Confidential Information

Government vendors must strike a balance between the desire to showcase their knowledge, expertise and products to their prospective buyers and their need to protect proprietary information from their competitors. The Georgia Open Records Act allows state and local governments to withhold proposals and bids until "the final award of the contract is made, the project is terminated or abandoned, or the agency in possession of the records takes a public vote regarding the sealed bid or sealed proposal, whichever comes first." O.C.G.A. § 50-18-72(a)(10). This is sound policy because it prevents Bidder A from using Bidder B's competitive information in subsequent negotiations or in the best and final offer bidding.

Problems may ensue, however, after the award is made. In many industries, it is the usual suspects competing in procurements around the country. Disclosure of

proprietary information in one procurement can shift the competitive scales in other procurements. The Open Records Act partially addresses this situation by exempting from disclosure “[a]ny trade secrets obtained from a person or business entity which are of a privileged or confidential nature and ***required by law, regulation, bid, or request for proposal to be submitted to a government agency.***” See O.C.G.A. § 50-18-72(a)(34) (emphasis added).³

In order to maintain trade secret status, a bidder submitting a proposal should mark confidential only those portions of the proposal that may constitute a trade secret. Additionally, the Open Records Act now requires the bidder to submit an affidavit affirmatively declaring that the records meet the statutory trade secret definition. Id. Thereafter, the agency must notify the bidder of any requests for the protected information and allow the bidder ten days to seek judicial relief in the event the agency disagrees with the trade secret designation. Id.

It is important to note that a vendor’s failure to designate trade secrets in its proposal as confidential does not automatically waive trade secret protection. Georgia Dep’t of Nat. Res. v. Theragenics Corp., 273 Ga. 724, 725, 545 S.E.2d 904 (2001) (“Because the Open Records Act places ultimate responsibility for non-disclosure on EPD, however, it cannot simply rely upon Theragenic’s failure to identify all of its trade secrets at the time of the original filing as a waiver of the confidentiality of its proprietary material”). The government cannot rely upon the vendor’s designation or failure to designate, but must instead perform its own independent review of the materials in the proposal before making the final decision. Id. If the government’s

³ Georgia has adopted a broad definition of trade secret to include information in whatever form (including customer lists, product plans, devices, financial data and formulas) that is the subject of reasonable efforts to maintain its secrecy and that derives its value from the fact that it is not generally known to the public. O.C.G.A. § 10-1-761(4).

decision is to release records the vendor claims are protected, it must notify the vendor of its intent to release the records and allow the vendor at least ten days to seek a restraining order from the court. O.C.G.A. § 50-18-72(a)(34).

D. Avoid Even the Appearance of Collusion

A vendor may conclude that its chances of winning a contract might be enhanced if it forms a joint venture or some other teaming arrangement with a competitor. In and of itself, there is nothing wrong with this situation, but if not done correctly it can lead to disqualification and even give rise to civil or criminal antitrust liability. For example, O.C.G.A. § 16-10-22 makes it a felony for any person to enter into a contract, combination, or conspiracy in restraint of trade or in restraint of free and open competition in any transaction with the State of Georgia, any state agency or any political subdivision. To that end, most if not all solicitations require the offeror to certify that its proposal is not the product of collusion.

While an in-depth discussion of antitrust law is well beyond the scope of this paper, vendors should be aware that antitrust issues can arise if two vendors who would otherwise have competed for the contract form a joint venture. See COMPACT v. Metropolitan Gov't of Nashville & Davidson Cnty., 594 F.Supp. 1567, 1574 (M.D. Tenn. 1984). A joint venture may be viewed as an anticompetitive sham if the participants do not combine resources, change service areas or integrate operations during performance of the contract. See Am. Med. Response, Inc. v. City of Stockton, No. civ-s-05-1316, 2006 U.S. Dist. LEXIS 13131 (E.D. Cal., Mar. 27, 2006).

Because of the high stakes involved, vendors should consult with an attorney before forming any alliances with competitors.

E. Make Sure Your Proposal Is Complete

All too many proposals are rejected because the bidder failed to sign necessary forms or attach simple information required by the solicitation document. Before submission, it is recommended that bidders assemble a hard copy of the proposal and all attachments, and go through it carefully. A checklist of documents that are frequently required in solicitations is attached as **Attachment A**.

F. Protests

A protest is a formal, written objection to an agency's action in connection with a solicitation. In each case, the protest procedure concludes with a final decision from the procurement agency that either sustains or denies the protest. In deciding whether to file a protest, vendors and their counsel should thoroughly understand the protest and appeals process and carefully consider their likelihood of success. Many times, the likelihood of success is determined by who will be deciding the protest. For example, the City of Atlanta's Chief Procurement Officer testified in 2007 that he denied all 120-plus protests filed with him since he took office in 2002. Any protestor having the audacity to appeal to the City-paid procurement appeals hearing officer met with the same fate. Thus, vendors protesting City of Atlanta procurements should not expect any meaningful relief until the dispute finally makes its way into the court system.

On the other hand, protestors receive much fairer treatment before the Georgia Department of Administrative Services. The author's survey of all protests filed with DOAS from January 1, 2008 through July 2010 revealed that over 36 percent of the 158 protests (including appeals) filed were at least partially successful. The success rates are as follows:

Post-award protests	34 percent
Protests of sole source determinations	64 percent

Protests of vendor disqualification	36 percent
Protests of other pre-award actions	27 percent

This data shows that vendors should not be deterred from filing meritorious protests with DOAS.

1. Standing to Protest

Agency rules will usually dictate who may file a protest by limiting standing to actual bidders. For example, Fulton County’s protest procedure is limited to “[a]ny actual bidder or offerer who is aggrieved in connection with the solicitation or award.” See Fulton County Code, § 2-324(a). Thus, subcontractors and possibly even participants to a joint venture do not have standing to protest Fulton County procurements. *The Georgia Procurement Manual*, on the other hand, does not directly address the question of who has standing to protest, indicating only that “suppliers” may file protests. See *Georgia Procurement Manual*, § 6.5. While the Manual does not define the term “supplier,” that term is arguably broad enough to encompass subcontractors and others with an interest in the proposal.

If applicable rules do not specify who may file a protest, standing will be found if the protester shows that: (1) the challenged action caused him an injury in fact; and (2) he is asserting an interest arguably within the zone of interests to be protected by the applicable procurement rules. See *Amdahl Corp. v. Ga. Dep’t of Admin. Servs.*, 260 Ga. 690, 696-98, 398 S.E.2d 540 (1990).

2. Protestable Issues

There are likely as many protestable issues as there are procurements. The most common grounds asserted in protests are:

- The agency’s specifications give one bidder an unfair advantage over its

competitors or otherwise unfairly limit competition;

- The RFP's minimum requirements exclude small or disadvantaged businesses in violation of controlling federal law (which is applicable if the agency contract is federally assisted);
- A bidder had improper communications or an improper relationship with an agency official which compromised the evaluation process or gave the appearance of impropriety;
- The award was compromised by improprieties in post-award negotiations such as the disclosure of the financial terms of a competitor's bid;
- The award was based upon DBE or MBE participation points that should not have been awarded;
- The winning bidder failed to satisfy minimum qualifications or was not responsible or responsive;
- The winning bidder failed to submit a valid bid bond as required by the solicitation;
- The agency incorrectly concluded that the low bidder was not responsible or responsive;
- The winning bidder is guilty of anti-competitive conduct such as collusive bidding or collaboration with competitors;
- The agency applied evaluation factors or criteria that were different from those contained in the RFP;
- The award was based upon evaluation criteria disclosed in the RFP, but which conflicts with superior statutes, charter provisions or ordinances

that prohibit such considerations;

- The agency afforded more weight to one evaluation area than was disclosed in the RFP;
- Irregularities in the receipt or opening of bids such as the acceptance of a late bid or the opening of bids at different times; and
- The agency improperly designated the procurement as a sole source.

The protest must raise all claims and describe the evidence supporting those claims with some degree of specificity. Any claims that are not raised will likely be deemed waived. See, e.g., Georgia Procurement Manual § 6.5.4 (“If an aggrieved supplier fails to file a protest by the applicable deadline, DOAS may, at its discretion, deem such failure as the supplier’s voluntary relinquishment of any grounds the supplier may have for protesting through DOAS’ protest process or through subsequent litigation.”)

The most successful protests are those that identify violations by the agency of non-discretionary duties. For example, in a federally-assisted Atlanta airport concession RFP, the City awarded DBE participation points to a non-DBE vendor that proposed to satisfy the DBE goal by purchasing supplies from certified DBE firms. The federal DBE regulations, however, only allow the vendor to count “the gross receipts equal to the clearly defined portion of the work of the concession that the ACDBE performs with its own forces towards ACDBE goals.” *See* 49 CFR 23.55(d). Because the City had no authority to waive the DBE rules, the second-ranked bidder’s protest was successful.

In contrast, some protests involve judgment calls by the awarding agency which means that the decision to sustain or deny the protest is within the decision maker’s

discretion. For example, while a proposal may be incomplete or even contain material misrepresentations, the government likely has the delegated authority to “reject any and all bids or proposals and to waive technicalities and informalities.” See, e.g., O.C.G.A. § 36-91-20(c)(2). In R.D. Brown Contractors, Inc. v. Board of Education of Columbia County, 280 Ga. 210, 626 S.E.2d 471 (2006), for example, the winning bidder failed to attach a list of subcontractors it proposed to use for the contract as required by the terms of the RFP. The Supreme Court rejected a challenge to the award, ruling that “[a]s the genesis of the specification concerning the list of subcontractors is solely by the Board, we see no reason why the Board could not determine that it was not a material requirement, but rather a technicality that could be waived.” Id. at 213-14.

This is not to suggest that one should not file a protest that is based upon an award the agency had the discretion to make. Such a protest can, and often does, raise enough concerns that it causes the government agency to reverse course.

3. Protest Procedures and Remedies

(a) *Timing*

Protest proceedings are driven by the agency’s rules or the county or municipality’s ordinances. If a protest is not filed on time, it may be denied on that basis alone. Generally speaking, protests of some action or inaction occurring prior to the award of the contract must be filed before bids are submitted. This gives the agency an opportunity to correct the problem before going any further in the process. Protests of the award of a contract must usually be filed within ten days of the posting of the award.

Thus, if an offeror believes that an RFP is structured to give the incumbent contractor an unfair advantage, he must file a protest ***before*** submitting his bid. A

common mistake offerors make is to adopt a wait-and-see approach by complaining about an RFP provision only after they lose the contract. At that point it is too late; the offeror has waived all challenges related to any activity occurring prior to the award.

Upon receipt of a protest, the agency will usually solicit written responses from other interested parties which might include the user agency, other bidders, or the winning bidder as the case may be. Depending upon the government entity involved, there may be a hearing. DOAS has discretion to hold a hearing, the City of Atlanta holds evidentiary hearings as a matter of right, and Fulton County does not hold hearings under any circumstances. *Cf. Georgia Procurement Manual* § 6.5.8; Atlanta City Code § 2-1166(b)(2); Fulton County Code § 2-324(e). If a hearing is not granted, the protest will be decided based upon the protest record.

(b) Bonds

DOAS and Fulton County do not require protest bonds. The City of Atlanta requires the protestor to submit security in the amount of one percent of the financial offer or, if there is no fixed financial offer, \$100,000. *See* City Code, § 2-1161(b). If the Chief Procurement Officer denies the protest, he “shall assess against the protestor reasonable attorneys’ fees and other administrative costs incurred by the city in reviewing and responding to the protest.” *See* City Code, § 2-1161(c). Not surprisingly, given the City’s history of denying virtually all protests regardless of merit, the City Code does not require the return of the protest security in the event the protest is sustained. This provision is ripe for a due process challenge.

(c) Stay of Proceedings

Most agencies will stay all activity pending the outcome of a protest, although they usually have the power to move forward if it is determined to be in the interests of

the agency. See, e.g., Georgia Procurement Manual, § 6.5.5; see also Fulton County Code of Ordinances § 2-324(c). The City of Atlanta may be the lone exception. The City's ordinances do not authorize the stay of a procurement pending resolution of a protest. This unfortunately requires the protestor to petition the superior court for a temporary restraining order to prevent the challenged contract from taking effect. Absent this step, a court could very likely determine that the protesting party's challenge is moot. See, e.g., Hilton Constr. Co. v. Rockdale Cnty. Bd. of Educ., 245 Ga. 533, 537, 266 S.E.2d 157 (1980) ("If construction were not well underway, Hilton might well be entitled to be awarded the contract under the facts of this case once the administrative appeal reached the courts. But at this late date, equity will not intervene where Hilton's failure to post bond and exhaust administrative remedies has rendered equitable relief draconian").

(d) Remedies

The administrative remedies available to the successful protestor are limited and dependent upon the type of protest filed and the agency with whom the protest is filed. In the case of a successful pre-award protest, the agency will either amend the RFP or cancel it and issue another one. In the case of a successful post-award protest, DOAS may terminate the contract with the successful offeror and either negotiate with the second-ranked bidder, rescore the proposals, or rebid the contract altogether. See, e.g., Georgia Procurement Manual, § 6.5.6. The successful protestor cannot recover any monetary damages from the State. See Georgia Procurement Manual § 6.5.7 ("In no event will a supplier be entitled to recover any costs incurred in connection with the solicitation or protest process, including, but not limited to, the costs of preparing a response to the solicitation, the costs of participating in the protest/request for formal

review process or any attorneys' fees.")

Fulton County has adopted the opposite approach. A Fulton County hearing officer has no authority to do anything other than award the protestor its bid preparation costs. See Fulton County Code, § 2-324(f) ("If the protest is sustained, the county shall remedy the protest by awarding the protesting bidder, offerer, contractor or subcontractor the reasonable cost incurred in connection with the bid including bid preparation cost and cost other than attorney's fees.") A successful protestor in this position might be still obtain equitable relief in the courts, as discussed below.

4. Appeals from an Adverse Protest Decision

In almost all cases, an aggrieved bidder must obtain a final decision from the government on the protest before seeking relief in court. See, e.g., Cerulean Cos. v. Tiller, 271 Ga. 65, 516 S.E.2d 522 (1999) (long-standing Georgia law requires that a party aggrieved by a state agency's decision must raise all issues before that agency and exhaust available administrative remedies before seeking any judicial review of the agency's decision). At that point, the protestor may seek judicial relief. Id.

The type of judicial relief available depends upon the underlying protest rules. If the protestor had a right to demand an evidentiary hearing, the protest decision will be deemed a judicial decision which requires the protestor to file a petition for certiorari to the superior court. O.C.G.A. §§ 5-4-1; § 5-4-3; see also Mack II v. City of Atlanta, 227 Ga. App. 305, 489 S.E.2d 357 (1997) (rejecting frustrated bidder's equitable action seeking contract award because bidder's sole remedy was a petition for certiorari). This means that the superior court's review will be limited to the evidence and arguments presented in the underlying hearing, and the decision will stand if supported by "substantial evidence." O.C.G.A. § 5-4-12(b). In practice, however, this standard of

review is more restrictive than it sounds because “the substantial evidence standard is effectively the same as the any evidence standard.” See Emory Univ. v. Levitas, 260 Ga. 894, 897, 401 S.E.2d 691 (1991). Importantly, the filing of a petition for writ of certiorari (if accepted by the court) operates as a stay in the underlying dispute so there is no need to seek an injunction as to the performance of the contract. O.C.G.A. § 5-4-19.

If, on the other hand, the protestor does not have a right to demand a hearing under the applicable rules, the protest decision will be deemed an administrative decision which enables the protestor to seek *de novo* review in the superior court in the form of a declaratory judgment. What It Is, Inc. v. Jackson, 146 Ga. App. 574, 246 S.E.2d 693 (1978) (certiorari did not lie for party seeking to challenge board’s revocation of its liquor license because the hearing that was held was administrative rather than judicial, and it was not available as a matter of right); see generally Amdahl Corp. v. Ga. Dep’t of Admin. Servs., 260 Ga. 690, 398 S.E.2d 540 (1990) (unsuccessful protestor sought declaratory judgment and an injunction following denial of protest). As is the case with a certiorari proceeding, the court will not substitute its judgment for that of the agency, but it will enjoin a contract if the award violates the applicable procurement rules.⁴ The protestor will need to seek preliminary injunctive relief to avoid a laches problem. Hilton Constr. Co., 245 Ga. at 537.

5. Types of Judicial Relief Available

⁴ “Expert discretion is the lifeblood of the administrative process, but unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster with no practical limits or its discretion.” Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 167, (1962), quoting New York v. U.S., 342 U.S. 882, 884 (dissenting opinion). On the other side of that coin, if an agency has the authority to award a contract to someone other than the low bidder, a court will not force the agency to award to the lower bidder absent an abuse of discretion. SCA Servs. of Ga, Inc. v. Fulton Cnty., 238 Ga. 154, 155, 231 S.E.2d 774 (1977); accord Credle v. E. Bav Holding Co., 263 Ga. 907, 908 n.2, 440 S.E.2d 20 (1994).

(a) *Damages*

Georgia courts follow the majority rule which limits a frustrated bidder's damages to the costs of bid preparation. See City of Atlanta v. J.A. Jones Constr. Co., 260 Ga. 658, 659, 398 S.E.2d 369 (1990) ("To permit the recovery of lost profits would unduly punish the tax-paying public while compensating the plaintiffs for efforts they did not make and risks they did not take. Limiting recovery to reasonable bid preparation costs is in keeping with the legitimate governmental objective of rewarding the lowest qualified bidder and guarding against public officials shirking their duties while, at the same time, preventing unwarranted waste of taxpayers' money"); see also S & W Mech. Co. v. Homerville, 682 F. Supp. 546, 549 (M.D. Ga. 1988) (applying Georgia law to hold that "[t]he courts unanimously agree that the absence of a contract precludes the recovery of lost profits in frustrated bidder disputes").

If, on the other hand, the vendor can show that a federal constitutional right was violated (denial of due process or equal protection, for example), lost profits may be available under the Section 1983 of the Civil Rights Act. See Kim Constr. Co., Inc. v. Bd. of Trs. of the Vill. of Mundelein, 1992 U.S. Dist. LEXIS 15129 (N.D. Ill. 1992); Yadin Co., Inc. v. City of Peoria, 2007 U.S. Dist. LEXIS 12404 (D. Ariz. 2007); Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade Cnty., 333 F. Supp. 2d 1305, 1338-39 (S.D. Fla. 2004) (although court ruled that plaintiff had failed to prove its lost profits claim, court suggested that such a claim would be proper if it could be proven).

A frustrated bidder might also recover legal fees and expenses upon a showing that the agency "acted in bad faith, has been stubbornly litigious, or has caused unnecessary trouble and expense." See O.C.G.A. § 13-6-11 (authorizing recovery of litigation expenses when the defendant acts in bad faith, with stubborn litigiousness, or

causes plaintiff unnecessary trouble and expense); see also S & W Mech., 682 F. Supp. at 549 (frustrated bidder's only means of recovering litigation expenses is through O.C.G.A. § 13-6-11).

(b) *Injunctive Relief*

Frustrated bidders' efforts to obtain an injunction staying a public contract have met with mixed and limited results. Georgia courts will grant a preliminary injunction to maintain the status quo pending a final decision on the merits if the equities weigh in favor of the party seeking the injunction and there is no adequate remedy at law.⁵ See Garden Hills Civic Ass'n v. MARTA, 273 Ga. 280, 281, 539 S.E.2d 811 (2000). As a part of the balancing of the equities, the court may consider the plaintiff's likelihood of success on the merits. Id. The standard for a permanent injunction is the same, except that the plaintiff must prevail on the merits. See Bale v. Todd, 123 Ga. 99, 103, 50 S.E. 990 (1905).

The unavailability of lost profits under state law opens up the possibility of injunctive relief. See Mgmt. Sci. Am., Inc. v. Pierce, 598 F. Supp. 223, 227 (N.D. Ga. 1984) (damages limited to bid preparation costs are inadequate within the meaning of the Administrative Procedure Act). In Hilton Construction Co. v. Rockdale County Board of Education, 245 Ga. 533, 540, 266 S.E.2d 157 (1980), the Supreme Court ruled that the plaintiff should have won the contract and remanded to the trial court to determine whether injunctive relief or damages (presumably bid preparation costs) were appropriate. Accord Amdahl Corp. v. Ga. Dep't. of Admin. Servs., 260 Ga. 690,

⁵ A federal court, on the other hand, will apply a more rigid test requiring: (1) substantial likelihood of success on the merits; (2) that the movant will suffer irreparable injury unless an injunction is issued; (3) threatened injury to the movant outweighs possible injury injunction may cause the opposing party; and (4) an injunction will not disserve the public interest. See Bank of Am., N.A. v. Sorrell, 248 F. Supp. 2d 1196 (N.D. Ga. 2002).

697-98, 398 S.E.2d 540 (1990) (reversing entry of summary judgment against frustrated bidder's equity petition and remanding for a determination on whether the recovery of bid costs – the sole remedy available – was an adequate legal remedy). But see Mark Smith Constr. Co. v. Fulton Cnty., 248 Ga. 694, 285 S.E.2d 692 (1982) (“In view of the availability of an adequate remedy at law (money damages) and the hardship which a delay in construction of the fire station would impose on the general public, we cannot say that the trial court abused its discretion in this case” by denying injunctive relief) (citing Hilton, *supra*). The differing results in Amdahl and Mark Smith might be explained by the fact that the former involved a summary judgment determination while the latter involved a decision following an evidentiary hearing.

(c) *Mandamus*

Frustrated bidders seeking the award of a public contract have not had much success convincing courts to compel a public official to award them a contract through a writ of mandamus. A plaintiff seeking mandamus relief must show: (1) no adequate remedy at law; and either (2) a clear legal duty on the part of the public official; or (3) if the public official has discretion to act, a gross abuse of that discretion. See South View Cemetery Assn. v. Hailey, 199 Ga. 478, 483, 4 S.E. 2d 863 (1945).

Because mandamus is the remedy for inaction of a public official, it is not an appropriate mechanism for forcing an agency head to terminate a contract with one bidder and award it to another. See Hilton Constr. Co. v. Rockdale Cnty. Bd. of Educ., 245 Ga. 533, 540, 266 S.E.2d 157 (1979) (“Mandamus is not the proper remedy to compel ‘the undoing of acts already done or the correction of wrongs already perpetrated, and ... this is so, even though the action taken was clearly illegal’”). Nevertheless, many frustrated bidders request an injunction to prohibit the agency from

awarding a contract to anyone but the plaintiff and a writ of mandamus to compel the head to award the contract to the plaintiff.

In theory, if the injunction is granted and the bidder can show a clear legal right to the contract, mandamus would be proper. The problem with that theory is that the agency head usually has the discretion to reject any and all bids, regardless of price. See generally Qonaar Corp. v. MARTA, 441 F. Supp. 1168, 1174 (N.D. Ga. 1977) (denying Qonaar's motion to enjoin MARTA from canceling the solicitation to protect MARTA's interests because "the discretion vested in the agency must be interpreted very broadly"). As a result, mandamus will not lie unless the rejection of the bid(s) was an abuse of that discretion. See generally Metric Constructors, Inc. v. Gwinnett Cnty., 729 F. Supp. 101, 103 (N.D. Ga. 1990), aff'd, 969 F.2d 1047 (11th Cir. 1992) (disappointed bidder is not entitled to an injunction absent a showing that the government had no discretion to reject the plaintiff's low bid).

Conclusion

Given the potential legal pitfalls facing state and local government vendors, they need to have enough familiarity with the law to know when to involve a qualified attorney. This paper will hopefully aid in that endeavor.

Attachment A

PROPOSAL SUBMISSION CHECKLIST

1. Cover letter
2. Table of Contents
3. References
4. Financial Information
5. Bid or Performance Bond
6. Certificate of Insurance
7. Required forms executed and notarized, which may include:
 - a. Proposal Certification
 - b. Small or Minority Business Form
 - c. Sales and Use Tax Compliance Form
 - d. Georgia Security & Immigration Compliance Affidavits
 - e. Non-Collusion Affidavit
 - f. Acknowledgment of receipt of RFP addenda
 - g. Exceptions to contract terms
 - h. Lobbyist Registration and Vendor Certification