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## CONTRACTS - MUNICIPAL CORPORATIONS - REVOCABILITY OF OFFER SUBMITTED UNDER STATUTORY COMPETITIVE BIDDING

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CONTRACTS — MUNICIPAL CORPORATIONS — REVOCABILITY OF OFFER SUBMITTED UNDER STATUTORY COMPETITIVE BIDDING—In accordance with statutory provisions,<sup>1</sup> the city commissioners of Atlantic City advertised for bids for certain public improvements. Plaintiff submitted a sealed bid accompanied by a deposit of \$5,000, as required by the advertisement, to guarantee execution of the contract if it were the successful bidder. When the bids were opened, plaintiff was the lowest bidder by a considerable margin. Investigation disclosed that an appreciable error had been made in the calculation of its bid, however, and before any official action had been taken, plaintiff advised the city commission of the mistake and withdrew the bid. Nevertheless, the contract was subsequently awarded to plaintiff, and on its refusal to perform, the \$5,000 was declared forfeited. In a suit in equity for return of the deposit, *held* plaintiff may recover \$5,000. A competitive bid is in the nature of an option to the municipality and may not be withdrawn, but equity may grant relief by way of rescission of the bid on the basis of mistake. *Conduit & Foundation Corp. v. Atlantic City*, (N.J. 1949) 64 A.(2d) 382.

When, under a competitive bidding statute,<sup>2</sup> an offer is made to a municipality in response to an advertisement for bids,<sup>3</sup> the question frequently arises whether the bidder may withdraw his offer before it has been accepted by the formal award of the contract. At law, the view is almost uniformly taken that such an offer is irrevocable;<sup>4</sup> though the bidder gives notice of his revocation to the municipality before any action has been taken, the revocation may be ignored.<sup>5</sup> If the bidder is awarded the contract he is obliged to perform or forfeit his deposit as liquidated

<sup>1</sup> 2 N.J. Rev. Stat. (1937) §40:50-1. For any contract over \$1,000 the municipality must publicly advertise for bids and shall award the contract to the lowest responsible bidder. (The council may reject all of the bids and readvertise.) There is no express statutory provision that bids shall be irrevocable on submission.

<sup>2</sup> These statutes commonly enumerate the type of contract for which competitive bidding is required and the procedure to be followed, and provide that the contract be awarded to the lowest responsible bidder. Less frequently, the statute (or city charter) will expressly declare bids irrevocable. *Baltimore v. Robinson Constr. Co.*, 123 Md. 660, 91 A. 682 (1914). The statutes of at least one state provide for withdrawal or correction of a bid. *Krasin v. Village of Almond*, 233 Wis. 513, 290 N.W. 152 (1940).

<sup>3</sup> Customarily, the response to an advertisement for bids is construed as an offer (cf. rules governing auction sales). *Goldberg v. Daniels*, 231 U.S. 218, 34 S.Ct. 84 (1913). It is conceivable that the advertisement could be so worded that a bid would be an acceptance. 1 WILLISTON, CONTRACTS, rev. ed., §31 (1936).

<sup>4</sup> 22 R.C.L., Public Works, §13. *Contra*, *Bromagin & Co. v. Bloomington*, 234 Ill. 114, 84 N.E. 760 (1908). However, if the municipality unreasonably delays taking action on the bid, it may be withdrawn and the deposit recovered. *Lupfer & Remick v. Freeholders of Atlantic Co.*, 87 N.J. Eq. 491, 100 A. 927 (1917). This is also true when the statutory procedure has not been followed by the municipality or the award does not conform to the advertisement. *L.R.A.* 1915A, 225. In absence of a competitive bidding statute, a bid may be withdrawn any time before acceptance. *Gray Constr. Co. v. Sioux Falls*, 43 S.D. 395, 179 N.W. 497 (1920).

<sup>5</sup> In fact, it has been held that the municipality has no right to allow withdrawal of the bid. 3 McQUILLIN, MUNICIPAL CORPORATIONS, §1324 (1943). *Contra*, *Moffett, Hodgkins & Clarke Co. v. Rochester*, 178 U.S. 373, 20 S.Ct. 957 (1900).

damages.<sup>6</sup> It is fundamental in the common law of contracts that a promise embodied in a mere offer is not in itself binding without the presence of contractual elements, and that an offer may be withdrawn before acceptance.<sup>7</sup> In holding that the bidder is bound by the mere submission of his offer<sup>8</sup> (subject to the possibility of equitable relief<sup>9</sup>), courts have not always made clear why they hold inapplicable the general rule that an offer may be withdrawn before acceptance. Frequently, the point is assumed without analysis. If the statute under which the contract is to be let declares that bids submitted thereunder shall be irrevocable, the question is easily answered.<sup>10</sup> However, this is not the usual case.<sup>11</sup> The mere fact that the offer was intended to be irrevocable would seem insufficient, in view of the common law requirement of consideration.<sup>12</sup> Some courts intimate that irrevocability of the offer is the price paid for the privilege of submitting the offer; it is a condition imposed on the bidder, which he is powerless to escape.<sup>13</sup> The principal case is illustrative of those cases<sup>14</sup> which have stayed within conventional contract law by treating the offer as an option to the municipality; the consideration binding the offeror being the assurance of an award of the contract as against all competitors, if the bid is the lowest responsible one submitted.<sup>15</sup> More commonly, courts treat the question simply as one of statutory construction;<sup>16</sup> that is, the irrevocability of a bid once submitted is a necessary incident of the legislative policy behind such statutes.<sup>17</sup> Whatever the legal theory may be, it would seem that a bidder in the

<sup>6</sup> The bidder cannot be held liable for damages in excess of his deposit, however. *Bowes Co. v. Milton*, 255 Mass. 228, 151 N.E. 116 (1926).

<sup>7</sup> *Payne v. Cave*, 3 T.R. 148, 100 Eng. Rep. 502 (1789); 1 WILLISTON, CONTRACTS, rev. ed., §55 (1936). Detrimental reliance on the offer does not prevent revocation before acceptance. *James Baird Co. v. Gimbel Bros., Inc.*, (C.C.A. 2d, 1933) 64 F. (2d) 344.

<sup>8</sup> That a bid may not be withdrawn even before the bids are opened, see *Baltimore v. Robinson Constr. Co.*, 123 Md. 660, 91 A. 682 (1914).

<sup>9</sup> Rescission has been granted even where the statute declares the bid irrevocable. See, e.g., *Moffett, Hodgkins & Clarke Co. v. Rochester*, supra, note 5.

<sup>10</sup> It is clearly competent for the legislature to so provide. 1 WILLISTON, CONTRACTS, rev. ed., §31 (1936).

<sup>11</sup> See note 2, supra. Cf. note 1, supra.

<sup>12</sup> Revocation is possible even though the offeror expressly promises that the offer will not be withdrawn. *Bancroft v. Martin*, 144 Miss. 384, 109 S. 859 (1926).

<sup>13</sup> *Baltimore v. Robinson Constr. Co.*, 123 Md. 660, 91 A. 682 (1914); *United States v. Conti*, (C.C.A. 1st, 1941) 119 F. (2d) 652.

<sup>14</sup> Cf. *Daddario v. Town of Medfield*, 294 Mass. 438, 5 N.E. (2d) 23 (1936).

<sup>15</sup> If the municipality is free to accept any of the bids, this theory is not available; but presumably it would be applicable if, in lieu of accepting the lowest bid, all bids must be rejected and the proposal readvertised. Obviously, the bidder's submission of the required deposit does not constitute consideration to bind his own offer.

<sup>16</sup> "[I]t is plain that the statute contemplated some obligation on the part of the bidders, even though there was none on the part of the city." *Wheaton Bldg. & Lbr. Co. v. Boston*, 204 Mass. 218 at 222, 90 N.E. 598 (1910).

<sup>17</sup> If the purpose of such statutes is protection of the public [*City of Hattiesburg v. Cobb Bros. Constr. Co.*, 174 Miss. 20, 163 S. 676 (1935)], then it can be said that bids are irrevocable to prevent collusion or withdrawal in bad faith on discovery that the bid was lower than competition required. If, however, emphasis is placed on the statute's purpose to protect the bidder, as other New Jersey cases have held [e.g., *Sellitto v. Cedar Grove Tp.*, 132 N.J.L. 29, 38 A. (2d) 185 (1944)], it seems inconsistent to say it prevents a bidder in the position of the plaintiff in the principal case from withdrawing his bid.

position of the plaintiff in the principal case may not rely on self-help by revocation under the law of contracts, but must seek the intervention of a court of equity.

*Richard H. Conn*