

HARRY PEPPER & ASSOCIATES, INC., v. The CITY OF CAPE CORAL,
Florida, and Gulf Contracting, Inc., a Florida Corporation

CASE SUMMARY

The issue in this case is whether a municipality has legal authority to accept a bid which, at the time of its submission, is facially nonconforming as to acceptable materials and components, but which is subsequently amended, **prior to acceptance**, to conform to the specifications as stated in the original proposal. The trial court, in essence, held that it had such authority. The appeals court disagreed and reversed the lower courts opinion.

OVERVIEW

The City of Cape Coral desired to build a water treatment plant, and published the necessary advertisement for bids. The instructions to bidders contained a condition requiring that certain specific and conforming pumps be used. Gulf Contracting Inc., submitted the lowest bid, but its bid listed a brand of pumps that was not acceptable. After the discovery of this nonconformity, the City contacted Gulf and asked the contractor to write a letter amending the bid so that it conformed to the specifications. Gulf complied and agreed to provide a conforming pump at the same price, thereby still being the lowest bidder. Subsequently the City of Cape Coral awarded the bid to Gulf Contracting, Inc. Harry Pepper and Associates, who was the next lowest bidder, filed a complaint for a temporary injunction to prevent the city from contracting with Gulf Contracting. The trial court denied to issue this injunction, and allowed the City to move ahead with contracting with Gulf Contracting.

On appeal, this decision was reversed. The appellate court held that the deviation in the bid was sufficiently material to destroy its competitive character, because the variation affected the amount of the bid by giving Gulf an advantage or benefit not enjoyed by the other bidders. The appellate court held that the city exceeded its authority by allowing Gulf to bring its bid into conformity with the specifications and then accepting it.

Public Contracts Law: Types of Contracts: Local Contracts Generally

The entire scheme of bidding on public projects is to insure the sanctity of the competitive atmosphere prior to and after the actual letting of the contract. In order to insure this desired competitiveness, a bidder cannot be permitted to change his bid after the bids are opened, except to cure minor irregularities.

The key is in the determination of what is and isn't a minor irregularity. The courts have traditionally given wide latitude in discretion of a local municipality, but the municipality cannot give an unfair advantage to a bidder, simply to still obtain that lowest bid price.

Public Contracts Law: Types of Contracts: Local Contracts Generally

The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by the other bidders.

The appeals court went on to assert the following from *Wester v. Belote*, 103 Fla. 976, 138 So. 721, 723-24 (1931), is:

The purpose of public contracting is.....

To protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the county at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the county, by affording an opportunity for an exact comparison of bids. From the above quote it is apparent that the entire scheme of bidding on public projects is to insure the sanctity of the competitive atmosphere prior to and after the actual letting of the contract. In order to insure this desired competitiveness, a bidder cannot be permitted to change his bid after the bids have been opened, except to cure **minor irregularities**.

Looking to the specific facts in this case it is clear that prior to the awarding of the contract on June 3 the City was aware of the nonconforming nature of Gulf's bid. The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by the other bidders. Here, there is no doubt that the difference between the conforming and nonconforming pumps was material, yet Gulf was permitted to modify its bid. Further, the inclusion of the nonconforming pumps was an advantage not enjoyed by other bidders, who were required to specify only approved equipment.

No one suggests that Gulf could have been required to perform the contract with conforming pumps, as its bid specifically stated that it would use Aurora, the nonconforming pumps. Therefore, Gulf had everything to gain and nothing to lose. After everyone else's bids were opened, Gulf was in a position to decide whether it wanted the job bad enough to incur the additional expense of supplying conforming pumps.

Faced with Gulf's substantially nonconforming bid, the City had but two proper alternatives: to award the contract to the next lowest bidder, who met the specifications, or to reject all bids and re-advertise for new ones. The City exceeded its authority by allowing Gulf to bring its bid into conformity with the specifications and then accepting it.