

STATE AND LOCAL BID PROTESTS



J. Matthew Maguire, Jr.
14 Piedmont Center, Suite 1100
3535 Piedmont Road
Atlanta, GA 30305
(404) 261-6020
(404) 261-3656 fax
mmaguire@balch.com
www.balch.com

STATE AND LOCAL BID PROTESTS

Most government authorities have implemented a protest procedure that enables aggrieved offerors or bidders to challenge any agency action arising from a solicitation. Each agency or government authority typically promulgates its own protest rules pursuant to a legislative grant of authority. The rules are published either in the agency regulations or county or municipal ordinances. When the state or local contract is federally assisted, federal regulations may apply. See, e.g., Qonaar Corporation v. MARTA, 441 F. Supp. 1168, 1174 (N.D. Ga. 1977).

Protests may challenge a provision in the solicitation document itself, something that occurred during the procurement process or the award of the contract. In each case, the protest procedure concludes with a final decision from the procurement agency that either sustains or denies the protest. As discussed in Section E.1, *infra*, judicial review is not generally available until the agency issues a final decision on the protest.

A. STANDING TO PROTEST

Agency rules will usually dictate who may file a protest. 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 Code of Laws of Fulton County, § 2-324(a). Thus, a subcontractor has no right to protest a Fulton County contract award. This rule also appears to exclude a prospective bidder, even if his protest asserts that he would have submitted a bid but for the county's failure to properly advertise the solicitation. The City of Atlanta's protest procedure, by contrast, is much more

accessible: “[a]ny actual or prospective bidder, offeror, contractor or subcontractor who is aggrieved in connection with the prequalification, solicitation or award of a contract may protest to the chief procurement officer.” See Atlanta Procurement and Real Estate Code, § 2-1161(a).

If the agency 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 Corporation v. Georgia Dept. of Admin. Svcs., 260 Ga. 690, 696-98, 398 S.E.2d 540 (1990).

B. PROTESTABLE ISSUES

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

- The agency failed to advertise the solicitation as required by law;
- The agency’s specifications give one bidder an unfair advantage over its competitors or otherwise unfairly limit competition;
- The RFP’s minimum requirements excluded 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 winning bidder failed to satisfy minimum qualifications or was not responsible or responsive;
- 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 amount of the winning bid exceeds the agency's budget authority.

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 Vendor Manual, § 3.8(2) (Announcing the Georgia Department of Administrative Services ("DOAS") rule that "[i]ssues not raised in the

initial protest may at the discretion of the State be deemed waived with prejudice by the protestor”).

C. PROTEST PROCEDURES AND REMEDIES

Protest proceedings are driven by the agency’s rules or the county or municipality’s ordinances. Upon receipt of a protest, the agency will receive written responses to the protest from other interested parties which would include the user agency, other bidders, or the winning bidder as the case may be.

The agency may hold an evidentiary hearing on the protest. The City of Atlanta, for example, allows a hearing but does not provide litigants with compulsory process. See Atlanta Procurement & Real Estate Code, § 2-1166(b)(2). The DOAS, which administers most state procurements, gives the protest decisionmaker sole discretion on whether to hold a hearing. See *Georgia Vendor Manual*, § 3.8(2). If a hearing is not granted, the protest will probably be decided based upon the written documents submitted.

The administrative remedies available to the successful protestor are limited and dependent upon whether he is pursuing a pre-award or award protest. 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 award protest, the agency will terminate the contract with the successful offeror and either execute a contract with the second place finisher or rebid the contract. The agency will usually stay all activity pending the outcome of the protest. Most agencies have the discretion, however, to go forward with

the contract if doing so is determined to be in the agency's interest. See, e.g., Georgia Vendor Manual, § 3.8(2) (DOAS) and Fulton County Code of Ordinances, § 2-324(c).

When the agency refuses to stay the contract, the challenger should take every action possible to prevent the contract from going forward, which includes requesting a temporary restraining order in superior court. Absent these steps, a court could very likely determine that protesting party is guilty of laches. See, e.g., Hilton Construction Company, Inc. v. Rockdale County 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"). The more money and effort that is spent in the furtherance of the contract, the more difficult it will be to wrest it from contractor initially selected. Id.

D. TIMING OF PROTESTS

Almost every agency has deadlines for the filing of protests. 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 five to 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. He may

not remain silent only to file challenge the terms of the RFP structure *after* the contract is awarded to the incumbent. At that point it is too late, and the offeror has waived all challenges related to any activity occurring prior to the award.

E. JUDICIAL RELIEF

The procedural hurdles and limited remedies available in a protest proceeding might tempt the frustrated bidder to avoid the procedure altogether and to seek immediate judicial relief. As discussed in more detail below, a disappointed bidder might be entitled to limited damages or injunctive relief in a court proceeding. More often than not, however, a frustrated bidder will be required to exhaust administrative remedies (i.e. pursue the protest to its conclusion) before a court will accept jurisdiction.

1. Exhaustion of Remedies Requirement

In most cases, Georgia courts will not use equitable powers to award a contract to a low bidder unless the low bidder exhausted administrative remedies. See, e.g., Curelean Companies v. Tiller, 271 Ga. 65, 516 S.E.2d 522 (1999). There are, however, several exceptions under which an aggrieved bidder might be able to seek immediate judicial relief: (a) when the protest procedure is optional rather than mandatory; (b) when the protest procedure is inadequate or futile; (c) when the agency lacks jurisdiction to award the contract in the first instance; and (d) when pursuing certain civil rights actions under 42 U.S.C. § 1983. Each exception is discussed in turn.

(a) Optional protest procedure

If a protest procedure is made available to an aggrieved bidder as a right, rather than as a requirement, the bidder may not be required to pursue that remedy. The City of

Atlanta's "right to protest" provides that "[a]ny actual or prospective bidder, offeror, contractor or subcontractor who is aggrieved in connection with the prequalification, solicitation or award of a contract *may* protest to the chief procurement officer." See City of Atlanta Procurement Code, § 2-1161(a) (emphasis added).

A Fulton County Superior Court judge recently ruled that an aggrieved party was not required to file a protest with the City of Atlanta before challenging a City contract award. See Swearingen Services, Inc., et al. v. City of Atlanta, et al., No. 2005-CV-96686 (Ga. Super. Ct., May 13, 2005), pp. 3-4 (citing Hunnicut v. Georgia Power Co., 168 Ga. App., 525, 526, 309 S.E.2d 862 (1983))¹; see also Crumpler v. Henry County, 257 Ga. App. 615, 617, 571 S.E.2d 822 (2002) ("The availability of a *discretionary* appeal to the board of county commissioners does not necessarily mean that Crumpler was required to exhaust that remedy before pursuing the statutory remedy available to him") (emphasis added); But see Kentucky v. United States, 62 Fed. Cl. 445, 448 (2004) (Dismissing plaintiff's complaint for failure to exhaust administrative remedies on application of the "well settled" rule that "where a statute creates a right and provides a special remedy, that remedy is exclusive") (citing United States v. Babcock, 250 U.S. 328, 331 (1919)).

Given the conflicting authorities, skipping the City of Atlanta's protest procedure is not recommended unless and until a Georgia appellate court rules that the protest is optional and not mandatory.

¹ The Swearingen case is currently on appeal to the Georgia Court of Appeals. A copy of the trial court's opinion is attached as Exhibit "A."

(b) Protest remedy is inadequate or futile

“Impossibility or improbability of obtaining adequate relief by pursuing administrative remedies is often a reason for dispensing with the exhaustion requirement.” Hilton Construction Company, Inc. v. Rockdale County Bd. of Educ., 245 Ga. 533, 539, 266 S.E.2d 157 (1980) (When State Board of Education had no authority to compel county board to award contract to plaintiff, plaintiff was not required to pursue the State BOE remedy); see also WMM Properties v. Cobb County, 255 Ga. 436, 440, 339 S.E.2d 252 (1986) (“Exhaustion of administrative remedies is futile only where further administrative review “would result in a decision on the same issue by the same body....”); accord Glynn County Bd. of Educ. v. Lane, 261 Ga. 544, 546, 407 S.E.2d 754 (1991) (“It is unreasonable to require of appellees the futile act of participating in a hearing before that body on the question of its own conduct”).

In the Glynn County case, the plaintiffs sought a mandamus to compel the local board of education to conduct a financial audit pursuant to local legislation requirements. The board argued that this was a “local controversy” involving “school law” for which the plaintiffs were first required to seek a hearing before the local board. The Supreme Court held that the matter was not a local controversy involving school law, but even if it was, exhaustion would not be required because the local board members “clearly have such a predisposition by virtue of their long-standing and firm resistance to the audit....” Id. at 545-46.

Relying upon the futility exception to avoid the protest procedure is not a recommended strategy because of the difficult standard of proof. However, this line of cases may prove useful in cases in which a protest deadline was missed.

(c) The agency lacks jurisdiction

A third arguable exception is when the challenge goes to the jurisdiction of the agency to act in the first instance. See Cravey v. Southeastern Underwriters Assoc., 214 Ga. 450, 457, 105 S.E.2d 497 (1958) (“The doctrine that before resorting to equity one must exhaust his administrative remedies, such as an appeal to the administrative agency to review an administrative order, does not apply *when the defect urged by the complaining party goes to the jurisdiction or power of the agency to issue the order*”) (emphasis added).²

The Cravey decision is probably not as far reaching as it sounds; otherwise any frustrated bidder could avoid the protest procedure by arguing that the contract was not awarded to the most responsible and responsive offeror as required by law. Although Georgia’s appellate courts have yet to expressly limit Cravey, they would likely do so by invoking the sometimes blurred distinction between the exercise of conferred and unconferrred powers. See, e.g., Summerville v. Georgia Power Co., 205 Ga. 843, 846, 55

² In Cravey, an association of insurance rating bureaus filed suit to challenge the insurance commissioner’s suspension of approved rate increases. The court determined that the commissioner’s suspension of the rate increase was *ex parte* and in violation of a statute which prohibits the commissioner from modifying a rate increase without first providing a hearing to interested parties. Id. at 458. That same statutory scheme, however, gave plaintiffs a right to a hearing before the commissioner to seek review of any *ex parte* order or decision of the commissioner, with an appeal to a court of competent jurisdiction. Id. at 456. The commissioner argued that plaintiff’s failure to request a post-suspension hearing before him barred their equitable action filed in superior court. Id. at 455. The Supreme Court of Georgia held that plaintiffs were not required to exhaust administrative remedies where, as here, the commissioner had no authority to suspend the rate increase in the first instance. Id. at 457, 459.

S.E.2d 540 (1955) (Distinguishing between acts beyond the scope of powers granted to the agency by law, which are void, and irregularities in the exercise of granted powers, which are valid); see also O.C.G.A. § 1-3-1(c) (“A substantial compliance with any statutory requirement, especially on the part of public officers, shall be deemed and held sufficient, and no proceeding shall be declared void for want of such compliance, unless expressly so provided by law”).³

Because the judiciary’s review of agency actions is limited to determining whether the agency “acted beyond the discretionary powers conferred upon it, abused its discretion, or acted arbitrarily and capriciously with regard to an individual’s constitutional rights,” see Bentley v. Chastain, 242 Ga. 348, 351, 249 S.E.2d 38 (1978), Cravey likely does not allow an end run around the protest procedure unless the agency acted beyond its granted powers. Id. at 352 (Under the separation of powers doctrine, the judiciary may not be burdened with the nonjudicial function of readjudicating questions which have already been committed to the administrative discretion of an administrative agency). If, for example, the Georgia Department of Transportation entered into a contract to operate a lottery in violation of the Georgia Constitution, a party seeking to challenge that contract could not be forced to first pursue the DOT’s protest procedure.

³ Decisions in this area are far from uniform. For example, in Faulk v. Twiggs County, 269 Ga. 809, 504 S.E.2d 668 (1998), the Georgia Supreme Court held that a county’s failure to properly advertise a solicitation as required by law does not void the contract. The Georgia Supreme Court did not reference a much earlier case, Stammons v. Sturgis, 145 Ga. 663, 668, 89 S.E. 774 (1916), which voided a public contract because of an error in one of the four weekly bid advertisements required by law. A cynic might say that the question of whether a public contract is void as *ultra vires* depends upon the result the court would like to see.

Although the language in Cravey is temptingly broad, the decision probably stands for the modest proposition that one need not file a protest to challenge a contract award when the agency had no authority to let the contract in the first place.

(d) Section 1983 Claims

If a frustrated bidder can show that violation of procurement rules deprived the bidder of a constitutional right it may, in some cases, circumvent the administrative process by filing a civil rights lawsuit under 42 U.S.C. § 1983. See Steffel v. Thompson, 415 U.S. 452, 472-473 (1974) (Section 1983 trumps state exhaustion of remedy requirements). Because the states, their agencies and their employees in their official capacities are protected by the Eleventh Amendment immunity in the federal courts, Section 1983 is only available against counties, municipalities and state officials acting in their individual capacities. Mt. Healthy City School. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).⁴

As discussed in more detail below, whether exhaustion is required in a Section 1983 claim depends upon the nature of the constitutional violation alleged.

i. Section 1983 procedural due process claims

Frustrated bidders most frequently claim that the government's failure to follow its procurement rules constitutes a violation of their procedural due process rights. Before making such a claim, the bidder must pursue the post-deprivation protest remedy to give the government an opportunity to correct the violation. See Flint Electric

⁴ The plaintiff may still pursue a Section 1983 claim in a state court, but, in Georgia at least, the state, its agencies and officials (acting in their official capacities) are protected by sovereign immunity. See Dollar v. Olmstead, 232 Ga. App. 520, 522, 502 S.E.2d 472 (1998).

Membership Corporation v. Whitworth, 68 F.3d 1309, 1314, *on rehearing at* 77 F.3d 1321 (11th Cir.1996) (State may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under 42 U.S.C. § 1983 occur). Thus, a frustrated bidder asserting a procedural due process claim must exhaust post-deprivation remedies. Id.

The wide variety of protest procedures raises the question of what types of procedures are sufficient to satisfy due process requirements. Generally speaking, the Due Process Clause requires an opportunity to be heard “at a meaningful time and in a meaningful manner.” See Parratt v. Taylor, 451 U.S. 527, 540 (1981). In an administrative or quasi-judicial proceeding, due process requires only an informal hearing, not strict adherence to the rules of evidence. See Jackson v. Spalding County, 265 Ga. 792, 794, 462 S.E.2d 361 (1995). Yet, many Georgia state agencies have discretion as to whether to conduct a protest hearing or to simply decide the issue upon written submissions from the interested parties. Although the latter practice has not been challenged on due process grounds, it probably comports with constitutional requirements for reasons that are not so obvious. If the protester does not have the right to demand a protest hearing, the adjudication of the protest is an administrative rather than quasi-judicial function. See South View Cemetery Assn. v. Hailey, 199 Ga. 478, 481, 34 S.E.2d 863 (1945).⁵ There is no “appeal” from an administrative decision; rather,

⁵ “The basic distinction between an administrative and a judicial act by officers other than a judge is that a quasi-judicial action, contrary to an administrative function, is one in which all parties are as a matter of right entitled to notice and to a hearing, with the opportunity afforded to present evidence under

the aggrieved party has the right to seek a temporary restraining order in a *de novo* proceeding in superior court. See Mack II v. City of Atlanta, 227 Ga. App. 305, 309, 489 S.E.2d 357 (1997). If, by contrast, the protester has a right to demand a hearing before the agency, he may appeal the agency decision only through a petition for writ of certiorari to the superior court. Id. The court’s review on certiorari is limited to the record created before the agency. See O.C.G.A. § 5-4-12.

Thus, whether it is a hearing before the agency or a subsequent *de novo* hearing in superior court, due process is satisfied “at a meaningful time and in a meaningful manner.” See Parratt v. Taylor, 451 U.S. 527, 540 (1981). Incidentally, the City of Atlanta has an interesting protest procedure that probably does fall short of procedural due process requirements. See Atlanta Procurement and Real Estate Code, § 2-1166(b)(2) (“At the hearing, all parties shall be provided a fair and impartial hearing and shall be allowed to produce any and all evidence *in either party's possession* concerning the complaint”) (emphasis added). The protestor’s inability to subpoena documents and witnesses for cross-examination at the hearing, which cannot be corrected through a subsequent certiorari proceeding that is limited to the record, is probably not a “meaningful” hearing. For that reason, frustrated bidders might consider foregoing the City’s protest remedy altogether by seeking immediate injunctive relief under the theory that the protest procedure is voluntary. See Section E.1(a), supra.

judicial forms of procedure; and no one deprived of such rights is bound by the action taken.” South View Cemetery Assn. v. Hailey, 199 Ga. 478, 481, 34 S.E.2d 863 (1945).

ii. Section 1983 substantive due process claims

The substantive component of the Due Process Clause protects “fundamental rights,” which are those that are “implicit in the concept of ordered liberty.” Palko v. Connecticut, 302 U.S. 319, 325 (1937). Although a plaintiff need not exhaust remedies before bringing a substantive due process claim, see, e.g., Pruitt v. City of Montgomery, 771 F.2d 1475, 1484 n.19 (11th Cir. 1985), the Eleventh Circuit does not recognize such claims arising from state procurements because they involve only state-created substantive rights. See Flint Electric Membership Corporation v. Whitworth, 68 F.3d 1309, 1313 (Violations of non-legislative state-created property interests are not fundamental rights and cannot support a substantive due process claim), *on rehearing at* 77 F.3d 1321 (11th Cir.1996) (citing McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc) (“Areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because ‘substantive due process rights are created only by the Constitution.’”)).

Even if the Eleventh Circuit were to recognize such claims, under Georgia law, even a low bidder has no property right in a contract unless the agency has no discretion to award the contract to anyone but the low bidder. See Metric Constructors, Inc. v. Gwinnett County, 729 F. Supp. 101, 103 (N.D. Ga. 1990), *aff’d*, 969 F.2d 1047 (11th Cir. 1992).

iii. Section 1983 equal protection claims

Frustrated bidders have also used Section 1983 to successfully challenge awards on equal protection grounds by alleging that minority set-aside programs are racially discriminatory. See Webster v. Fulton County, 44 F. Supp. 2d 1359 (N.D. Ga. 1999). In an interesting federal case out of New York, a frustrated bidder stated an equal protection claim that did *not* involve a racial or other suspect classification. See Liberty Environmental Systems, Inc. v. County of Westchester, 1998 U.S. Dist. LEXIS 17986, *4-5 (S.D. N.Y. 1998). The plaintiff survived summary judgment under rational basis scrutiny with evidence that the government intentionally manipulated the bid rankings, dispensed with certain RFP requirements for the winner but not the plaintiff, and did not hold public hearings in the area that would be affected by the winning bidder's plant, all to the winner's advantage and the plaintiff's disadvantage. Id.

Because equal protection claims do not allege procedural deficiencies, exhaustion of administrative remedies is not required. See Patsy v. Bd. of Regents, 457 U.S. 496, 516, 102 S. Ct. 2557 (1982) (Section 1983 race and sex discrimination case).

2. *Types of Relief Available*

(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. at 659 ("To permit the recovery of lost profits would unduly punish the tax-paying public while compensating the plaintiffs for effort 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 Mechanical 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”).

On the other end of the spectrum, there is one case from within the Eleventh Circuit that suggests the availability of lost profits under 42 U.S.C. § 1983 to a disappointed bidder. See Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade County, 333 F. Supp. 2d 1305, 1338-39 (S.D. Fla. 2004). The Hershell Gill plaintiffs successfully challenged a county’s minority and woman business enterprise program on equal protection grounds. Although the district court ruled that they had failed to prove their lost profits claim, the court suggested that such a claim would be proper if it could be proven. Id. (Citing two cases from other circuits which allowed lost profits in similar circumstances).

A frustrated bidder might also recover legal fees and expenses upon a showing that the agency “has 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 Mechanical Co. v. Homerville, 682 F. Supp. 546, 549 (M.D. Ga. 1988) (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. See Garden Hills Civic Association 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).

A federal court, on the other hand, will apply a more rigid test that requires a showing of: (1) substantial likelihood of success on the merits; (2) that the movant will suffer irreparable injury unless injunction issues; (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 America, N.A. v. Sorrell, 248 F. Supp. 2d 1196 (N.D. Ga. 2002). The standard for a permanent injunction is essentially the same as for a preliminary injunction except that the plaintiff must show actual success on the merits instead of a likelihood of success. See Siegel v. Lepore, 234 F.3d 1163, 1213 (11th Cir. 2000).

The unavailability of lost profits as a measure of damages opens up the possibility of injunctive relief. See Management Science America, 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. Inc. v. Rockdale County Bd. of Ed., 245 Ga. 533, 266 S.E.2d 157 (1980), for example, a frustrated bidder sought to enjoin a contract already underway. After agreeing that the plaintiff should have won the contract, the Georgia Supreme Court remanded to the trial court to determine whether injunctive relief was appropriate in light of the factual circumstances in that case. Id. at 540. In Amdahl Corporation v. Georgia Dept. of Admin. Svcs., 260 Ga. 690, 697-698, 398 S.E.2d 540 (1990), the Supreme Court reversed the entry of summary judgment as to a frustrated bidder's equity petition and remanded for a determination on whether the recovery of bid costs – the sole remedy to a frustrated bidder under Georgia law – was an adequate legal remedy. But see Mark Smith Construction Co. v. Fulton County, 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”) (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 with mandamus actions. 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 Association 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 Construction Company, Inc. v. Rockdale County 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 Corporation 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 County, 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).

F. CONCLUSION

Although bid protests are designed to be an informal process and dispute resolution mechanism, the procedure contains many traps for the unwary. Government contractors are urged to consult with an attorney before embarking down this road.