

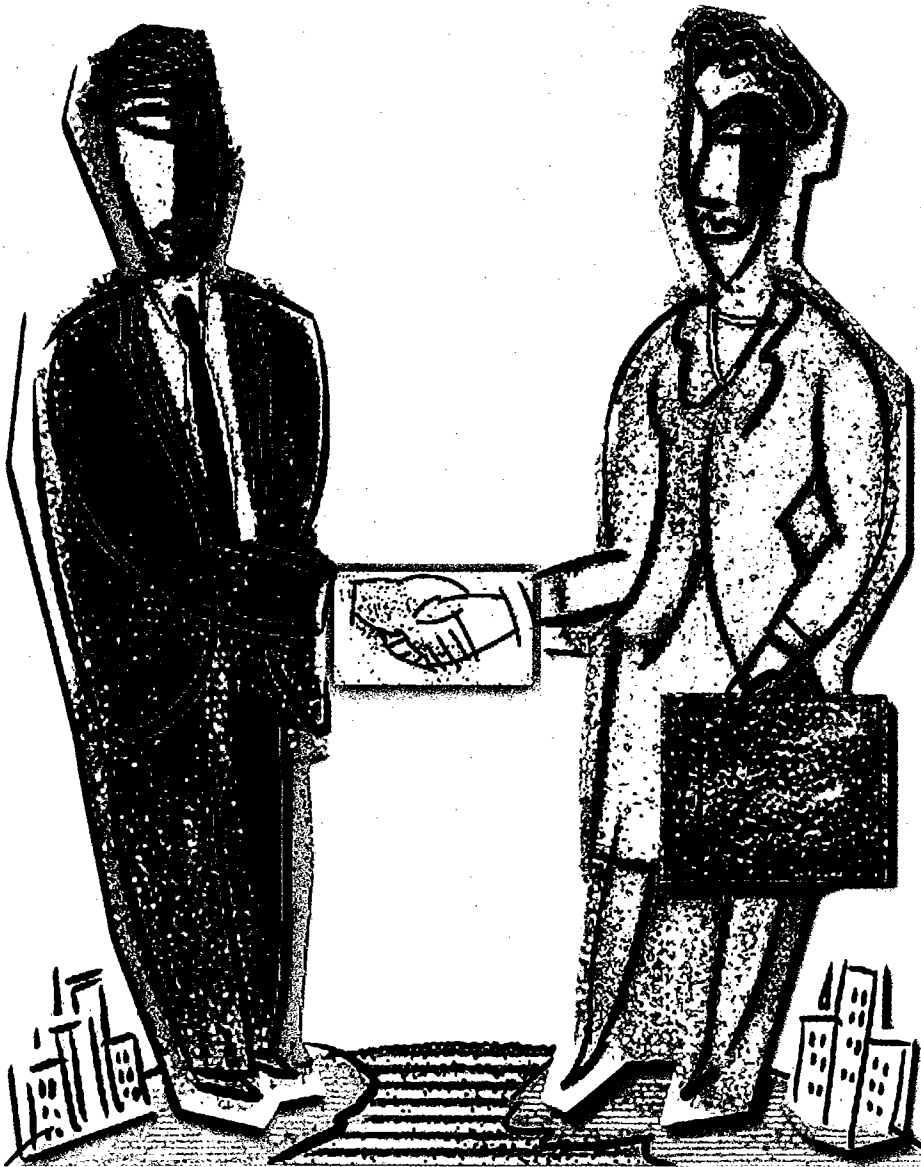
Government Contracting in Georgia

By J. Matthew Maguire Jr.

With very limited exceptions, federal, state and local laws require government entities to award contracts through competitive processes, such as Requests for Quotation and Requests for Proposals. In theory, these procedures ensure that the purchaser, i.e., the government agency, obtains the best value for the taxpayers' money.¹ In practice, these procedures

work with varying degrees of success. Unfortunately, in many instances the best offeror is passed over due to the agency's arbitrariness or bias or the offeror's simple confusion as to the agency's specifications.

This article is written for general practitioners who represent firms that provide goods or services to government agencies in Georgia. The first section provides a general overview of typical procurement processes and some tips for a smooth procurement process. The second section of the article discusses administrative and judicial remedies for the unsuccessful offeror contemplating a challenge to an adverse agency decision. The article is not designed to be a "how to" litigation manual, rather, it provides a general overview of what to expect once the decision is made to challenge an agency's decision regarding a government contract.



NAVIGATING THE PROCUREMENT PROCESS

General Overview of Procurement Process

The procurement process typically begins with a Request for Quotation (RFQ) or a Request for Proposal (RFP). The government agency will typically use an RFQ to obtain the most competitive price for commodities like a fleet of previously specified automobiles. The agency will use an RFP, by contrast, for service contracts, such as advertising, information technology consulting and engineering because those contracts contain more variables than just price and delivery date.

Before bids or proposals are due, the agency will typically allow offerors to ask questions either in a formal question and answer session or in writing. If the latter is used, the agency will furnish its written response to all questions to all offerors. Any other contact with the agency by the offeror is usually forbidden.

RFQ bids are usually opened publicly, the lowest responsive bidder is announced, and the contract is awarded on that basis. Once the bid is accepted, a court will not relieve a bidder who, through ignorance, submits a bid that is too low.² Because RFPs usually contain more variables and require more subjective analysis, agencies typically designate a team of staff members and consultants to evaluate each proposal against the selection criteria set forth in the RFP. Most agencies require the evaluation team to complete evaluation forms for each proposal. The evaluation team ranks the offerors in order of preference and then the agency notifies all offerors of its intent to enter into negotiations with the top-ranked offeror. The negotiation phase is the final opportunity for the agency and the top-ranked offeror to resolve any contingencies and formalize the contract. The agency should not substantially modify the terms of the RFP during the negotiation phase without allowing all offerors the opportunity to propose modified terms.

If the agency and top-ranked offeror reach a meeting of the minds, a contract is executed. If they do not reach a meeting of the minds, the agency will enter into negotiations with the second-ranked offeror, and, if necessary, all other qualified offerors until a contract is finalized.

Tips for a Successful Procurement

1. Read and Understand the RFP and Applicable Rules

The importance of reading and understanding the RFP and procurement rules cannot be overemphasized. This would seem to be an obvious point, but countless offers are rejected because the offeror failed to adhere to the requested format or missed the submission deadline—in some cases by a matter of minutes.³

While most RFPs typically reference the issuing agency's rules, other state or federal rules might also apply. For example, if you are bidding on a contract for "public works construction"⁴ in Georgia, and the value of the contract exceeds \$100,000, the competitive

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award process will be governed by the Georgia Local Government Public Works Law, O.C.G.A. § 36-91-1, *et seq.* If the state or local agency accepts federal funding, federal procurement regulations will apply, but you will also be required to satisfy state or local rules that do not conflict with the federal regulations.⁵ In the remaining cases, you should be able to find the procurement rules at the agency's Web site.

Failure to understand the applicable rules could lead to missed opportunities. For example, if a provision in the RFP unfairly hampers your client's ability to compete or gives another firm an unfair competitive advantage, most agencies will require that a protest of the RFP be filed on a very short time frame.⁶ If you wait until the bid is rejected and then protest the award to the winning bidder, you will have waived your objections to the terms of the RFP itself.⁷

2. Understand Rules Pertaining to Lobbyists

If your client decides to use a lobbyist to help secure a government contract, remember that he is acting as your client's agent. A lobbyist cannot do anything with respect to the procurement that his client could not otherwise do.

Also be aware that a vendor who employs a lobbyist to lobby a Georgia state agency "shall cause such lobbyist to register with the State Ethics Commission and to file the [appropriate] disclosures."⁸ Those disclosures include the specific contract for which the lobbyist has been hired and the compensation to be paid to the lobbyist.⁹ Please keep in mind that some agencies prohibit payments to lobbyists from funds received from the agency.¹⁰

3. Use the Open Records Act Wisely

Many bidders and attorneys fail to take full advantage of the Georgia Open Records Act to obtain competitors' proposals and the agency's evaluations of all proposals.¹¹ In Georgia, those documents become public records upon the award of the contract except to the extent they contain protected trade secrets.¹²

Have your records request drafted and ready to file *before* the agency announces the award so that you can file the request on the day of the announcement if your client does not win the contract. You will likely need these documents to prepare a protest, which will be due within days of the announcement.¹³ Request the complete procurement file, including, without limitation, all offerors' questions and agency responses, evaluation factors, agency evaluation forms, the winner's proposal, all correspondence between the winner and the agency, and all minutes, notes, and audio or videotapes from meetings between the winner and the agency. You will be surprised at what you find. In several unreported cases, unsuccessful offerors have learned through open records requests that their proposals received the highest score by the agency evaluation team. In another unreported case, an open records request uncovered evidence suggesting that agency officials shared confidential pricing information from sealed proposals with another bidder in violation of the applicable procurement rules.

4. Disadvantaged Business Enterprise Requirements

Most government contracts have a Disadvantaged Business

Enterprise (DBE) component to them.¹⁴ DBE programs seek to increase contracting opportunities for firms that are at least 51 percent-owned by women or members of certain ethnic groups presumed to be "socially and economically disadvantaged."¹⁵ Certified DBEs and non-DBE firms that satisfy DBE goals (by subcontracting or partnering with DBE firms) typically receive additional points in the proposal scoring process or additional compensation from the agency.¹⁶

A typical program sets a DBE participation goal for a particular contract, expressed as a percentage of the total contract amount, to be performed by qualified DBE firms.¹⁷ Non-DBEs that are unable to satisfy the DBE goal must demonstrate "good faith efforts" to do so by, for example, reaching out to DBE subcontractors through minority contracting groups or offering assistance and even financing to DBE firms.¹⁸ Your good faith efforts will be compared against the other offerors, which might put you in the unenviable position of having to explain why you were the only offeror who failed to satisfy DBE goals.¹⁹

Although many state and local governments have formulated their own DBE-type programs,²⁰ if they accept federal road, transportation or airport funding, they must adhere to U.S. Department of Transportation DBE rules.²¹ Fortunately, the U.S. D.O.T., the Georgia D.O.T. and the Georgia Department of Administrative require only one application and one certification.²²

If your client is not eligible to be a DBE, it may satisfy DBE goals by forming a joint venture with a DBE or by subcontracting with DBEs.²³ The non-DBE partner in a joint ven-

ture must be prepared to demonstrate that the DBE partner is a bona fide participant in the work and the risks and rewards of the contract.²⁴ If a non-DBE firm chooses to subcontract to DBE firms, all of the goods and services necessary to fulfill the contract that are purchased from DBEs will count towards the DBE participation goal.²⁵

REMEDIES FOR THE UNSUCCESSFUL BIDDER

Protests

1. Filing a Protest

A protest is a formal, written objection to an agency's action in connection with a solicitation. This

is your chance to tell the agency why you think they made the wrong decision. You may protest a provision in an RFP, the award of a contract or even the decision to not competitively bid a business opportunity so long as you can show that you are harmed by that decision.

Although protests begin informally with a letter, that letter has some very significant consequences. First, if it is not filed on time (usually within five to 10 days of the adverse decision), the agency is authorized to deny your protest on that basis alone.²⁶ Second, your protest letter must raise all claims and describe the evidence supporting those claims with some degree of specificity. Any claims that you do not raise or support are waived.²⁷ Simply telling the agency that you think you had a stronger proposal without any fur-

ther explanation is not sufficient. Moreover, your claims may not always be that the agency did not properly evaluate the proposals. You might argue, for example, that an action taken by the agency is void because it exceeds the authority delegated to the agency by the General Assembly.²⁸

If you protest a provision in the RFP and succeed, the agency will either amend the RFP or cancel it and issue another one. If you succeed in protesting the award of a contract, the agency will probably terminate the contract with the successful offeror and execute a contract with you. As discussed below, there are some circumstances in which the successful protestor does not win the contract. In those cases, you would be entitled to recover bid preparation costs, but lost profits under the disputed contract



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The difficulties with protests might lead one to consider avoiding that process and simply suing the agency in court. This is not advisable. In almost all cases, an aggrieved bidder must "exhaust administrative remedies" before seeking relief from a court, and a protest procedure is an administrative remedy.

would not be available.²⁹ In addition, if you are able to prove that the agency "has acted in bad faith, has been stubbornly litigious or has caused [you] unnecessary trouble and expense," you can recover your attorneys' fees and expenses.³⁰

2. Protest Hearings

In some—but not all—instances, the agency will hold an evidentiary hearing on your protest. The City of Atlanta, for example, allows a hearing but does not provide litigants with compulsory process.³¹ The Department of Administrative Services (DOAS) and the Georgia Technology Authority (GTA), which together administer most state agency procurements, give the protest decision maker sole discretion on whether to hold a hearing.³² If a hearing is not granted, the protest will probably be decided based upon the written documents submitted to the decision maker.

Do not expect to win your protest at the agency stage, because the agency serves as the judge, jury and litigant. In essence, you are asking the agency officials to find that their co-workers made a mistake. If a hearing is held, your primary goal should be to create a record for appeal by asserting all arguments and tendering all supporting witnesses and evidence available to you.

The difficulties with protests might lead one to consider avoid-

ing that process and simply suing the agency in court. This is not advisable. In almost all cases, an aggrieved bidder must "exhaust administrative remedies" before seeking relief from a court,³³ and a protest procedure is an administrative remedy.³⁴ That remedy will be exhausted when the agency issues a final decision on the protest.

3. Take Steps to Stay the Contract

When you protest a contract award, the agency will usually stay the contract with the successful offeror until your protest is adjudicated. This prevents the agency and successful contractor from expending time and money on a contract when there is still some uncertainty as to whether it was awarded to the proper party. Most agencies have the discretion, however, to go forward with the contract if doing so is determined to be in the agency's interest.³⁵ You should take every action possible to prevent the agency and contractor from going forward up to and including filing a temporary restraining order in superior court. If you do not take these steps, a court could very likely determine that you won the protest, but that you "sat on your rights" by allowing the agency and other party to perform the contract during your protest.³⁶ The more money and effort that is spent in the furtherance of the contract, the more diffi-

cult it will be to wrest it from the contractor initially selected.³⁷ Even if your efforts to stay the contract are ultimately unsuccessful, the fact that you took all reasonable steps to stay the contract should defeat a claim that you sat on your rights.

Appeals from Protest Denials and Alternative Remedies

What do you do if the agency denies your protest? You have the right to appeal, but determining where and how to appeal can be tricky. If you had the right to a hearing, whether or not one was held, you must file a petition for writ of certiorari to the superior court in the county in which the hearing was held.³⁸ In a writ of certiorari, you are asking the court to function in an appellate capacity to review the record below and correct errors of law made by the protest decision maker. The court in certiorari is limited to the evidence presented to the agency; if you discover the smoking gun document that proves your case after your protest hearing, you are out of luck,³⁹ which is why it is so important to use the Open Records Act effectively to develop your evidence. Your burden is to prove that the agency's decision (i.e., the denial of your protest) is not supported by "substantial evidence."⁴⁰ This is a difficult, but not impossible, burden.⁴¹

If you did not have the right to a hearing on your protest, your remedy is to file a declaratory judgment action in superior court seeking a declaration that the agency exceeded its authority in rejecting your bid. As a part of that action, you should request a preliminary and permanent injunction to restrain the agency from awarding the contract to anyone but you.⁴² As is the case with a certiorari proceeding, the court will not substitute its judgment for that of the agency (which is presumed to have expertise in its area of operations), but it will enjoin a contract if the award violates the agency's procurement rules.

To obtain preliminary or permanent injunctive relief, you will have to show that you do not have an adequate remedy at law.⁴³ Because a frustrated bidder is not entitled to recover lost profits under the contract,⁴⁴ you should argue that you cannot be made whole unless the court uses its equitable powers to award the contract to you.⁴⁵

A court will enter 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.⁴⁶ A court will enter a permanent injunction to prevent an illegal act that will cause irreparable injury to a property right or protected interest, for which there is no adequate remedy at law.⁴⁷

CONCLUSION

While the vast majority of government solicitations are administered fairly and efficiently, the involvement of human beings in the process will always give rise to some exceptions. Protests are difficult to win because of the discre-

tion our courts give to public officials, but they are an essential component to the integrity of any solicitation process. The most important ingredient to a successful protest is preparation, which requires a thorough understanding of the agency's rules, the selection criteria for the solicitation and the offers themselves, all of which are within the public domain. ☉



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Endnotes

1. *City of Atlanta v. J.A. Jones Construction Co.*, 260 Ga. 658, 398 S.E.2d 369 (1990).
2. Although generally a bid is treated as an offer that cannot be revoked or amended once it is accepted, courts will allow revocation if based upon an unintentional unilateral miscalculation and (1) enforcement of the mistake would be unconscionable; (2) the mistake relates to the substance of the consideration; (3) the mistake occurred regardless of the exercise of ordinary care; and (4) the other party has not been prejudiced. *First Baptist Church v. Barber Contracting Co.*, 189 Ga. App. 804, 807-808, 377 S.E.2d 717 (1989). On the other hand, agencies enjoy almost unfettered discretion to reject any and all bids, so long as they do not abuse that discretion by rejecting a compliant bid in favor of a noncompliant bid. *Metric Constructors, Inc. v. Gwinnett County*, 729 F. Supp. 101, 103 (N.D. Ga. 1990).
3. *In City of Atlanta v. J. A. Jones Constr. Co.*, 195 Ga. App. 72, 77-78, 392 S.E.2d 564, *rev'd on other grounds by* 260 Ga. 658, 398 S.E.2d 369 (1990), for example, the Court of Appeals held that the City had no discretion to accept a low bid that was submitted three minutes late.
4. "Public works construction" is defined as "the building, altering, repairing, improving, or demolishing of any public structure or building or other public improvements of any kind to any public real property.... Such term does not include the routine operation, repair, or maintenance of existing structures, buildings or real property." O.C.G.A. § 36-91-2(10).
5. In fact, O.C.G.A. § 36-91-22(d) requires state and local agencies to comply with Georgia law and federal law if federal funds are implicated. If state law conflicts with federal law, then federal law will control. *Id.* This is consistent with the constitutional doctrine of federal preemption, which requires that federal law take precedence over state law when: (1) the federal statute expressly pre-empts state law; (2) "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; and (3) "compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Boyes v. Shell Oil Products Co.*, 199 F.3d 1260, 1267 (11th Cir. 2000).
6. The Georgia Technology Authority, for example, requires that any protest of any aspect of the solicitation be filed within five days of when the grounds for the protest were discovered or should have been discovered. Ga. Comp. R. & Regs. r. 665-2-11-.07(c)(1). In contrast, the Georgia Department of Administrative Services ("DOAS"), which administers procurements for most state government agencies, specifies that protests to anything occurring during the solicitation must be filed at least two days prior to the proposal due date. See GEORGIA VENDOR MANUAL, § 3.8(2).
7. GEORGIA VENDOR MANUAL, § 3.8(2).
8. See Executive Order signed by Georgia Governor Sonny Perdue on October 1, 2003.

9. *Id.*
10. The Georgia Department of Community Health ("DCH"), for example, has recently asked contractors to execute a contract amendment certifying that "[n]o portion of funds paid under this Contract shall be used for lobbying purposes." While the First Amendment prevents a government agency from banning lobbying outright, it would likely permit government contractors to demonstrate that payments to lobbyists were not made from the same account that receives contractual payments from that agency. *See generally*, *Rust v. Sullivan*, 500 U.S. 173, 197-198 (1991) (statute conditioning federal funds on a ban of abortion-related activity was constitutional as long as grantees were not precluded from engaging in abortion-related activities with private funds, in a separate capacity). DCH offers little guidance on how to comply with such a restriction. Compliance may be a simple matter of accounting that requires the maintenance of separate accounts for revenue derived from the agency and other revenue. Perhaps the safer alternative would be to create a separate legal entity that derives no revenue from the agency, but that makes all payments to lobbyists.
11. *See, e.g.*, O.C.G.A. § 50-18-70, *et seq.*, known as the Georgia Open Records Act. *See also* *McFrugal Rental of Riverside v. Garr*, 262 Ga. 369, 418 S.E.2d 60 (1992) ("The very purpose of the Open Records Act 'is to encourage public access to government information and to foster confidence in government through openness to the public'").
12. O.C.G.A. § 50-18-72(a)(6)(B); *see also* *Georgia Department of Human Resources v. Theragenics Corp.*, 273 Ga. 724, 545 S.E.2d 904 (2001) (government agency has an affirmative duty to prevent the disclosure of another entity's trade secrets, even if not specifically marked as such).
13. In Georgia, the agency has three days from receipt of an open records request to locate the records and advise the requestor of when they will be made available. O.C.G.A. § 50-18-70(f). Some agencies, like the Georgia Technology Authority, require that protests of contract awards be filed within five days of the announcement of the award. Ga. Comp. R. & Regs. r. 665-2-11-.007(c)(1). The protest must include "a specific detailed statement of all legal and factual grounds relied upon by the Protestor in filing its Protest," and any grounds not asserted are irrevocably waived. Ga. Comp. R. & Regs. r. 665-2-11-.007(b)(4)(v). Thus, an unsuccessful offeror contemplating a protest does not have much time to obtain the relevant supporting documents from the agency to support a protest.
14. DBE programs have been the subject of significant litigation because they treat members of one racial group or gender differently from members of other groups or genders. While a discussion of the constitutional implications of DBE programs is beyond the scope of this paper, the general rule is that race-based classifications are subject to strict scrutiny, which means that they must be narrowly tailored to serve a compelling government interest. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 115 S. Ct. 2097 (1995). General societal discrimination is not sufficient to support a race based classification; there must be evidence of past discrimination by that particular government entity. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274, 106 S. Ct. 1842 (1986). Absent such evidence, a DBE program is unconstitutional. *Id.*
15. *See* 49 C.F.R. 26.1 (U.S. Department of Transportation's statement of objectives for the DBE program).
16. 49 C.F.R. 26.55.
17. *Id.*
18. 49 C.F.R. Part 26, Appendix A.
19. *Id.*
20. The City of Atlanta, for example, has an Equal Business Opportunity program, which provides for additional consideration by the City for firms that are majority-owned and controlled by women and members of certain racial groups and women. *See* *Atlanta Procurement & Real Estate Code*, § 2-1441, *et seq.* Certification under this program is not contingent upon a presumption or showing of economic disadvantage.
21. 49 C.F.R. 26.3.
22. The application is called the Georgia Uniform Certification Application. It may be downloaded from the Georgia Department of Transportation website, found at www.dot.state.ga.us/dot/eo-div/documents/pdf/dbeapplication/dbe-application-1-13-04.pdf.
23. 49 C.F.R. 26.55.
24. 49 C.F.R. 26.5 defines the term "joint venture" as "an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest."
25. 49 C.F.R. 26.55(e).
26. For example, the Georgia Technology Authority requires that any protest of any aspect of the solicitation be filed within five days of when the grounds for the protest were discovered or should have been discovered. Ga. Comp. R. & Regs. r. 665-2-11-.07(c)(1). In contrast, the Georgia DOAS specifies that protests to anything occurring during the solicitation must be filed at least two days prior to the proposal due date. *See* *GEORGIA VENDOR MANUAL*, § 3.8(2).
27. For example, the Georgia DOAS rule states that "[i]ssues not raised in the initial protest may at the discretion of the State be deemed waived with prejudice by the protestor." *GEORGIA VENDOR MANUAL*, § 3.8(2).
28. A state agency or a municipality has only those powers expressly granted or necessarily implied by a statute. *See* *Beazley v. DeKalb County*, 210 Ga. 41, 43, 77 S.E.2d 740 (1953) (counties and municipal corporations can exercise no power except those that are expressly given or are necessarily implied from express grant of other powers, and a reasonable doubt of the existence of a particular power is resolved in the negative). The contours of this rule are sometimes difficult to determine. In *Hunnicut v. Georgia Power Co.*, 168 Ga. App., 525, 526, 309 S.E.2d 862 (1983), the court held that the Public Service Commission had no jurisdiction to

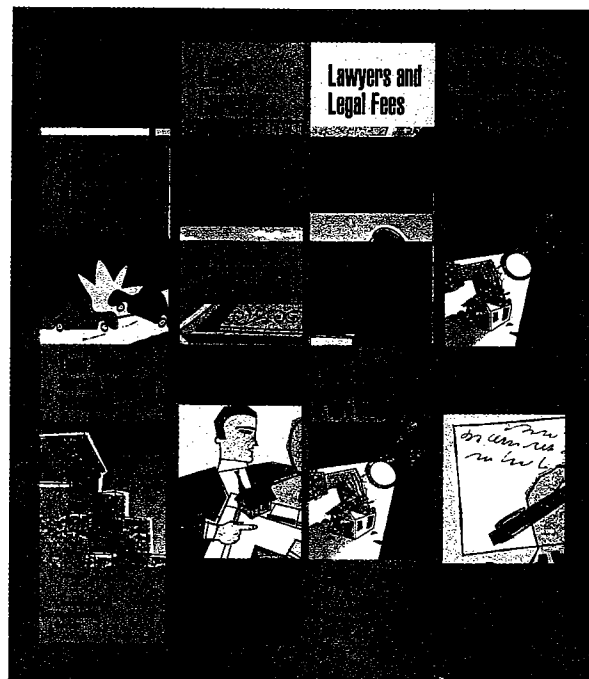
- require a party to exhaust administrative remedies prior to asserting a tort claim because "[w]e find no statute from which it might be inferred that the PSC has exclusive or even primary jurisdiction over disputes which are premised upon the alleged wrongful termination of utility service." *But see* *Floyd County Board of Commissioners v. Floyd Co. Merit System Bd.*, 246 Ga. 44, 268 S.E.2d 651 (1980) (statutory grant of authority to provide "necessary office space, equipment, and employees to the board for accomplishment of its duties" necessarily implies the power to hire and fire employees).
29. *City of Atlanta v. J. A. Jones Constr. Co.*, 260 Ga. 658, 659 (1990) ("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."); *Amdahl Corp. v. Georgia Dep't of Admin. Servs.*, 260 Ga. 690, 697, 398 S.E.2d 540 (1990).
 30. 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).
 31. *See Atlanta Procurement & Real Estate Code*, § 2-1166(b)(2).
 32. *GEORGIA VENDOR MANUAL*, § 3.8(2) & *Ga. Comp. R. & Regs. r. 665-2-11-.07(i)(2)*.
 33. 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) ("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"). One exception is if the bidder can prove that it would be impossible or improbable to obtain adequate relief through the administrative process (*e.g.,* if the hearing is before the same person or persons who made the decision in the first place). *See Glynn County Bd. of Educ. v. Lane*, 261 Ga. 544, 546, 407 S.E.2d 754 (1991). Alternatively, 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. § 1981 or § 1983. *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974) (Section 1983 trumps state administrative exhaustion of remedy requirements). Some bidders have argued under § 1983 that an agency's noncompliance with bidding procedures deprived the bidder of a property interest without due process of law. *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). Other bidders have successfully argued under § 1981 or 1983 that an agency's award of a contract pursuant to a minority business program violated the Equal Protection Clause of the U.S. Constitution because it discriminated on the basis of race. *See generally, Webster v. Fulton County*, 44 F. Supp. 2d 1359 (N.D. Ga. 1999) (white contractor successfully challenged Fulton County's Minority and Female Business Enterprise program as being racially discriminatory). In those cases, the adequacy of the protest procedure is not at issue, and the bidder is not required to demonstrate that it exhausted that remedy. *See Patsy v. Bd. of Regents*, 457 U.S. 496, 516 2557 (1982).
 34. *See Hilton Construction v. Rockdale County Bd. of Educ.*, 245 Ga. 533, 539 (1980).
 35. *See, e.g., GEORGIA VENDOR MANUAL*, § 3.8(2) (DOAS); *Ga. Comp. R. & Regs. r. 665-2-11-.07(j)* (GTA); and *Fulton County Code of Ordinances*, § 2-324(c).
 36. *See, e.g., Hilton Construction*, 245 Ga. at 537 ("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.").
 37. *Id.*
 38. O.C.G.A. § 5-4-1 and § 5-4-3. This is the sole remedy available to the aggrieved bidder unless the bidder can prove that the agency decision maker did not exercise "judicial functions." *See 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). If the parties are entitled to notice and a hearing, and they have the right to present evidence under "judicial forms of procedure," the decision maker will be found to have exercised a judicial function. *Id.*; *Cf. 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).
 39. *Bell v. City of Valdosta*, 47 Ga. App. 808, 171 S.E. 572 (1933).
 40. O.C.G.A. § 5-4-12(b). Because the Supreme Court has held that "in Georgia the substantial-evidence standard is effectively the same as the any-evidence standard," the any-evidence standard is more frequently referenced in certiorari proceedings. *See, e.g., City of Atlanta v. Smith*, 228 Ga. App. 864, 493 S.E.2d 51 (1997).
 41. For example, in *Hilton Construction*, 245 Ga. at 537, the court ruled that a government entity had abused its discretion in selecting a higher bidder as "the responsible bidder submitting the lowest acceptable bid" because "[w]hatever may be meant by the word 'responsible,' we are certain that being 'unknown' does not show the bidder was not 'responsible'". The court also ruled that the board did not have discretion to reject a low bid because the bidder

was late on another unrelated project without investigating whether the delay was the fault of the bidder. *Id.* at 538.

42. Many unsuccessful bidders make the mistake of filing an action for mandamus to compel the agency head to award the contract to that bidder. In that context, Georgia courts have consistently denied mandamus because it "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.'" *Id.* at 540; *Mark Smith Construction Co., Inc. v. Fulton County*, 248 Ga. 694, 696, 285 S.E.2d 692 (1982).
43. *See, e.g., Amdahl Corp. v. Georgia Dep't of Admin. Servs.*, 260 Ga. 690, 697-98 (1990). In *Amdahl*, the court held that a frustrated bidder was entitled to seek equitable relief but remanded the case to the trial court for a determination on whether the recovery of bid costs - the sole remedy to a frustrated bidder under Georgia law - was an adequate remedy at law. *Id.*
44. *See supra* text accompanying note 29.
45. This argument has had some only limited success in Georgia courts. In *Amdahl*, 260 Ga. at 697-98, for example, the Supreme Court remanded the case to the trial court to determine whether the recovery of bid costs was an adequate remedy. In *Hilton Construction*, 245 Ga. at 540, the Supreme Court remanded the case back to the trial court for a finding on the appropriateness of injunctive relief.
46. *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.*
47. *See Cantrell v. Henry County*, 250 Ga. 822, 824, 301 S.E.2d 870 (1983) (inadequate remedy at law); *Clark's Valdosta, Inc. v. Valdosta*, 224 Ga. 331, 161 S.E.2d 867 (1968) (injury to property right or protected interest); *Reeves v. Du Val*, 214 Ga. 630, 106 S.E.2d 797 (1959) (irreparable harm).

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