



FAPPO 2023 SPRING CONFERENCE ORLANDO, FL

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Imagine new possibilities.

Introduction

- The discussion will focus on several court cases from different jurisdictions including the U.S. Supreme Court which have had an impact on the interpretation of procurement contracts and bid documents.

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Introduction

- ▶ Finding applicable case law
 - Trial court decisions are only binding on parties involved
 - State Appeals court decisions may or may not be controlling – but establish an interpretation
 - State Supreme Court decisions are always controlling, within the state of proceedings
 - U.S. Supreme Court Decisions – constitutional issues

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3 types of law

- ▶ What are they?



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Statutory Law

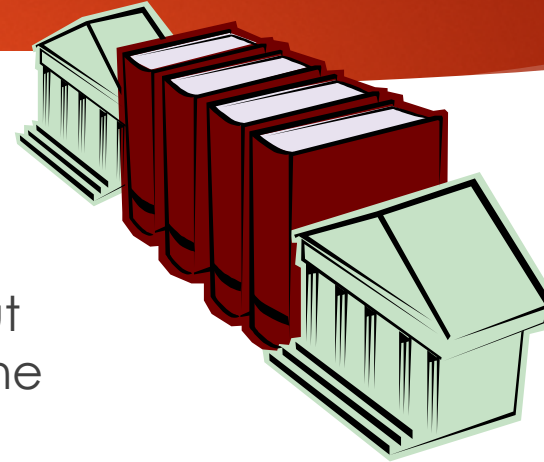
- Constitutions
 - United States
 - Individual States
 - Local government charters
- Legislative acts of all 3 levels
- Rules and regulations of all 3

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Administrative Law

- Rules and regulations by Administrative Agencies to carry out regulatory duties and direction of the Executive Branch
- Full force and effect of codified laws



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Common Law

- Created by judicial decisions
- Federal case law
- State case law
- Binding interpretation of statutory law
- Sets *precedence* to follow

Precedent

- Stare Decisis
- Latin "**to stand by things decided**". When a court faces a legal argument, if a previous court has ruled on the same or a closely related issue, then the court will make its decision in alignment with the previous court's decision.

Getting to the U.S. Supreme Court


- Few procurement cases get to the Supreme Court – 8,000 cases are appealed – a fraction actually get heard
- What would be the basis for a case to be heard by the court?

Richmond v Croson 488 U.S. 469

- 14th amendment – guarantee of equal protection
- Richmond ordinance – 30% set-aside
- Croson found non-responsive for failure to comply with plan
- 4th circuit court of appeals found plan unconstitutional –
- Richmond appealed to Supreme Court



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- Court affirmed appeals court decision
 - City failed to demonstrate a compelling government reason for plan AND to demonstrate that it's remedy had been narrowly tailored
 - NEED FOR ADISPARTIY STUDY

Is the RFP Evaluation Just a Ranking Tool- State of Florida, Department of Lottery v. GTECH-(816 So.2d 648 (Fla. Dist. Ct. App. 2001)

- Proposals for on-line lottery system
- Automated Wagering Int'l (incumbent) and Gtech only proposers
- Proposals ranked by evolution committee – AWI 1st ranked
- Lottery negotiated contract with AWI – negotiated contract omitted and changed material provisions
- Gtech filed protest (in FL first step in Administrative Hearing)
 - ▶ Administrative judge found in favor of State, upholding the negotiated agreement
- State was enjoined from moving forward and State appealed



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Appeals court affirmed

- *...“RFP process is more than just a simple ranking tool to determine a preferred provider”*
- *State can't ...“negotiate the price and terms that bore “little resemblance to the proposal that earned AWI preferred provider status in the first instance.”*

Petroleum Traders Corp. v. Balt. Cty., 413 Fed 588 (4th Cir. 2011)

- When is a contract formed?
- Contract for diesel and gasoline with price fluctuation
- Baltimore issued term contract award to PTC, April 11, 2004
- Baltimore purchased fuel in accordance with contract for a year and half.
- In September 2005 oil prices started to rise (Hurricane Katrina) and Baltimore locked in prices through December, 2005
- Prices on open market dropped in November, and Baltimore demanded PTC to renegotiate prices-PTC refused, as PTC had already purchased the futures
- April, 2005, Baltimore locked in prices through December, 2006

PTC v Baltimore

- Baltimore desired price stability over buying open market and resulting price fluctuations
- PTC asked for quantities and assurance that Baltimore would comply with contract
- Baltimore construed this as a breach, and formally terminated contract December 7, 2005
- Because of early termination PTC lost a considerable amount in futures already purchased
- PTC filed suit for recovery of losses


- At trial Baltimore argued that no contract existed, and could not be sued for losses
 - Charter and code require signature of county executive, and approval as to form by legal – as these two formalities were not met Baltimore argued that there was no contract
- Baltimore was arguing that there was no valid contract, but also argued that PTC breached the contract
- Judge determined there was a valid contract and jury only needed to decide if Baltimore justifiably terminated contract



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- Jury awards \$500,000 to PTC
- Baltimore appeals – argues that absent the charter and code requirements, the contract is not valid – argues the term contract award was signed by agent who did not have actual authority, only apparent authority
- Decision

- Appeals court AFFIRMS lower court and jury award
- Maryland law and case law, a contract can be found valid,. *If both parties to the transaction have acted and proceeded as if all preliminary formalities and regulations had been complied with, and rights have attached.*"
- *Baltimore County behaved as though there were a contract throughout the course of the agreement. Indeed, the County does not even dispute this conclusion. Perhaps this is because Baltimore County was more than willing to treat its agreement as a valid contract when it was advantageous for it to do so.*

- 
- *Baltimore County's course of conduct during the term of the contract encouraged this reliance. Every Baltimore County purchase order issued to PTC reaffirmed PTC's belief that it had a contractual relationship with Baltimore County.*
 - *Even if the contract was invalid at time of award, continuing to behave as if there was a contract, then you will have to comply with the contract requirements.*


Harry Pepper & Associates v. City of Cape Coral (352 So. 2d, 1190)

- Bid for construction of water treatment plant – required all pump mfgs' to bid, must be submitted for approval and acceptance PRIOR to bid date
- Gulf contracting submitted bid, but submitted name of mfg. that had not been approved and was not acceptable to engineer
- Gulf was apparent low bidder (12% delta in bids)
- City engineer contacted Gulf and asked them to indicate they would use acceptable pump mfg. if awarded bid and no change in pricing– Gulf did so

- 
- Contract awarded to Gulf
 - Pepper, number two bidder, filed suit, contending change was unlawful
 - City contended it was a minor irregularity, and in the best interests of the City*



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- 
- Found an unfair atmosphere had been created, as Gulf had everything to gain, and nothing to lose
 - Gulf was in a position to decide whether it wanted the job bad enough to incur the additional expense of supplying pumps*

Times Publishing Co. v. City of Clearwater, (830 So. 2d, 844)

Supreme Court of Florida

- ✓ Public Records jurisdiction case
- ✓ Personal/private e-mail sent from municipal computer
- ✓ Are all e-mails transmitted or received by public employees, on agency computer, subject to public records under Section 119?
- ✓ Times reporter requested copies of ALL e-mails sent/received by two Clearwater employees using City's computer network

Times Publishing (cont.)

- Employee's reviewed their e-mail for public/personal – (in accordance with City policy)
- ▶ No other review of e-mails
- City copies “*public*” e-mails and provided them to Times Publishing
- Times Publishing filed suit to obtain e-mails designated “*private*”
- Asserted, under 119, that Times was entitled to ALL e-mails generated and stored on City's computer network

Findings - Times Publishing Co.

- ▶ At trial court, injunction was denied, thereby not forcing City to provide all e-mails
- ▶ Circuit court granted injunction and ordered City to “make every reasonable effort to retrieve, preserve and secure from destruction” all e-mails sent or received by employees in question
- ▶ Second District affirmed trial court order, after a review of e-mails in question
- ▶ Sent to the Supreme Court by the District Court, as the issue was of great public importance*

Findings - Times Publishing Co. (cont.)

- ▶ “Private” or “personal” e-mails fall outside the current definition of public records, because
 - ▶ they are neither “made or received pursuant to law or ordinance” or “created or received in conjunction with official business of the City, or
 - ▶ ‘in connection with official business of the City’, or ‘in connection with the transaction of official business’
- ▶ AGO opinion that creation of e-mail header makes all e-mails, regardless of content, public record – Supreme Court disagreed
 - ▶ Unanimous Supreme Court decision **



When is a piggyback NOT a piggyback

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Accela v Sarasota County, 993, So. 2d

- Land management software solution
 - Visited Two Local Jurisdictions
- that Used CSDC Software and
- Each had converted from their Current System
- proposed piggybacking on vendor's most
 - ▶ Current Contract from Wisconsin (Amanda)



- The Amanda product by CSDC

- ▶ Some revisions included
- ▶ land management use instead of agricultural
- ▶ contained multiple modules –
 - ▶ Wisconsin adopted nine
- ▶ Sarasota adopted forty, eight of which were common to both users
- ▶ Also greater number of users, and longer period for install and implementation


- 
- These changes resulted in;
 - Increased “Modules” cost: 176k to 711k
 - Increased Implementation: 269k to 688k
 - Increased Maintenance: 31k to 179k
 - Accela filed suit alleging that the County did not to follow its’ own procurement regulations


- We know that piggybacking requires, at a minimum;
 1. Other local government or public entity
 2. The vendor extends the terms and conditions of the existing contract
 3. Other government entity competed
- competitively

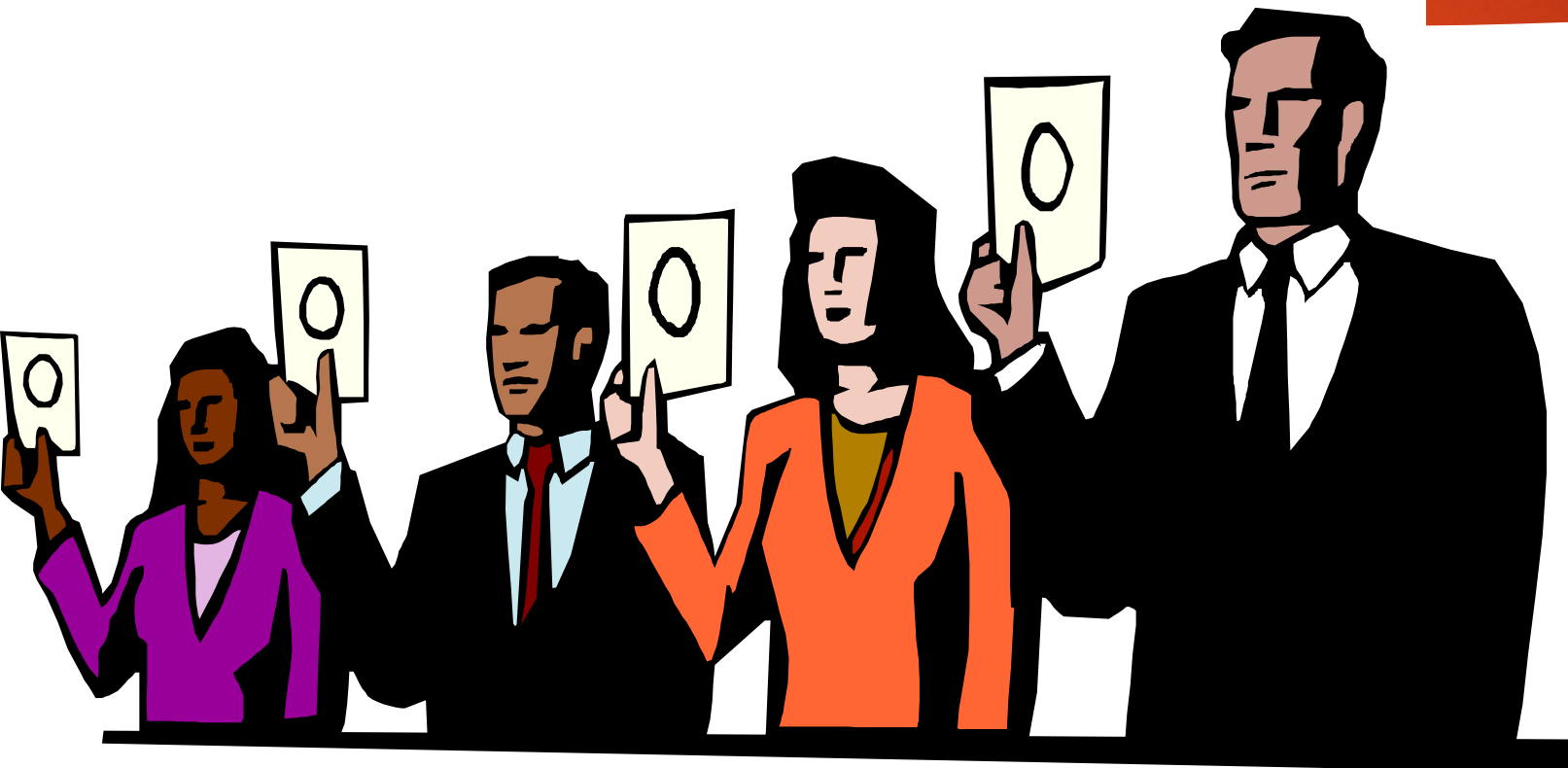


At trial,

- 1) and
- 3)
 - ▶ Were meant
- question is “were the terms and conditions extended to Sarasota”?

- 
- Unit prices of core modules were the same
 - Unit prices of additional modules were in accordance with contract
 - Implementation and maintenance costs were comparable in terms of unit pricing
 - Is this an allowable piggyback?

- 
- Trial court granted summary judgement in favor of Sarasota County, contract was allowable
 - Accela appealed



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- Terms and Scope of New
- Contract must be Substantially the
 - Same as Original Contract
- Cannot Use Another Entity's
- Contracts Merely as a Basis to
 - Begin Negotiations

Liberty County v. Baxter's Asphalt (421 So. 2d, 505 – (FL Supreme Court decision))

- ITB requested bidders to bid on Alternate A and B
- Gulf did not receive communication instructing to bid on both alternates and only submitted on Alternate B
- Gulf's bid price for B was lowest, and this price was also lower than Baxter's Alternate A
- Commission waived irregularity and awarded the full contract on the basis of Gulf's Alternate B price
- Baxter filed suit*



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- Baxter obtained temporary injunction preventing contracting
 - At trial, court ruled in favor of county, quashing the injunction and court disqualified Gulf, finding failure to bid on A violated § 336.44 – county construction of roads – work began on project
 - Liberty County appealed to Florida Supreme Court

 - DECISION?



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- Supreme court reversed district court, and found Gulf's failure to comply was not material, and further
- “a public body has wide discretion in soliciting and accepting bids for public improvements and it's decision, when based on an honest exercise of this discretion, will not be overturned by a court”
- Court found that **Gulf was not put in a superior position to Baxter or other bidders, by its failure to submit a bid on Alternate A***



Let's look at a similar case involving agency discretion and see if decisions are similar

[L. Pucillo & Sons, Inc. v. New Milford, 73 N.J. 349, 351, 375 A.2d 602, 603 \(NJ Supreme Court\)](#)

NJ municipality's discretion to waive certain deviations in bidding specifications

Garbage collection bid – terms of 1, 2, 3 and 5 year – bidders to provide a bid price by each term

Pacio Sanitation bid, but not on a 5-year term

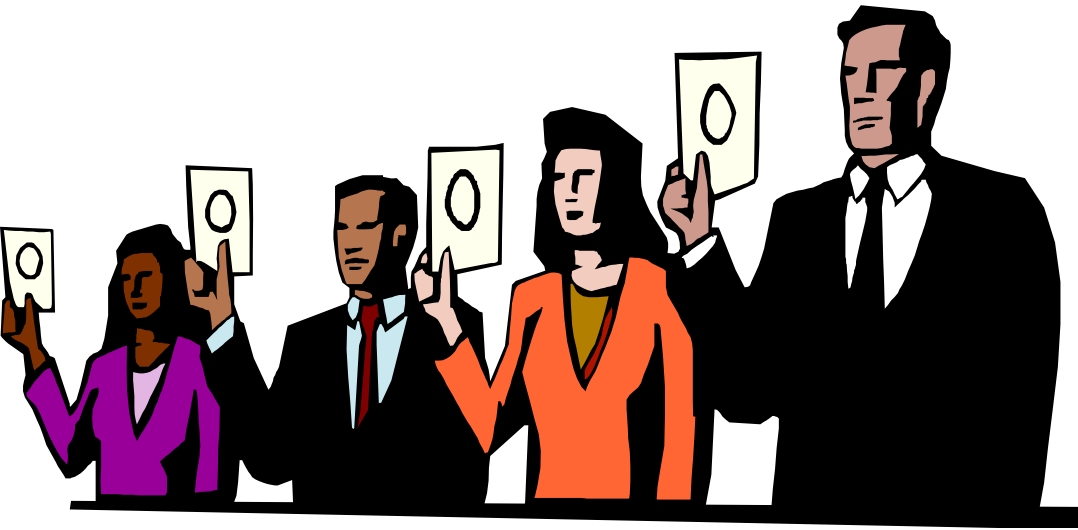
L. Pucillo and one other submitted bids on all terms

New Milford chose to award 3-year term contract to Pacio as low bidder

- ▶ *"City reserves the right to waive any informalities and the right to reject any and all bids in the best interest of the City"*

L. Pucillo filed suit

- The city argued specifications allowed waiving the non-conformance of the 5-year term, and Pacio was low, responsive and responsible bidder, and best interest of city
- The appellate court found for New Milford, finding that specifications were “permissive” and waivable
- Plaintiff appealed to NJ Supreme Court
 - Decision?
 - Same level of discretion in NJ?



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➤ Supreme court reversed appellate court

▶ *"bidders are cautioned that all terms must be bid upon. Failure to indicate a bid may render the bid informal and cause its rejection".*

city argued that gave it wide latitude in determining what was in the City's best interest

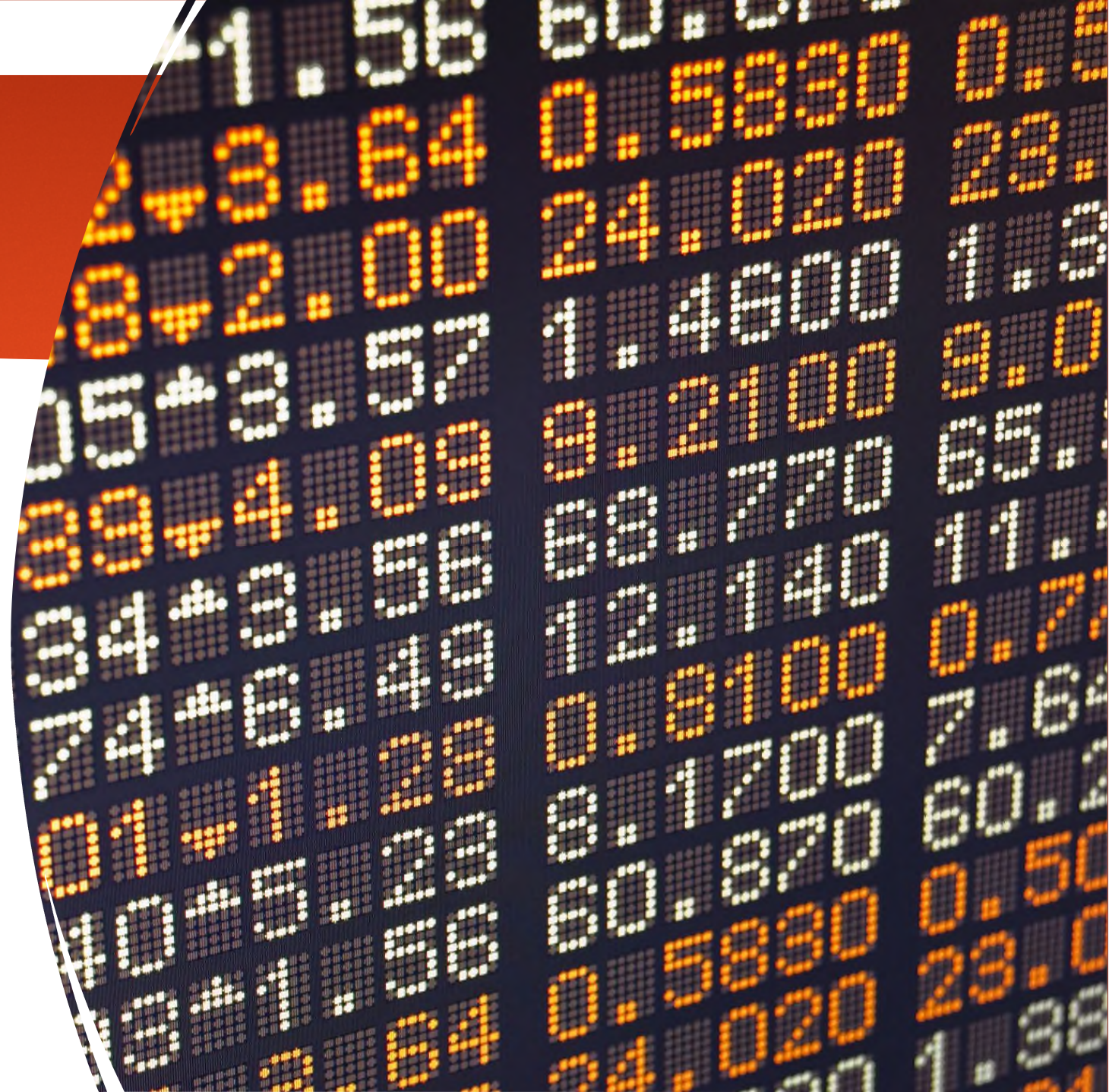


- Court

- *"long-standing judicial policy in construing cases governed by local public contracts law, has been to curtail the discretion of local authorities by demanding strict compliance"*.

Robinson Electric v. Dade County (417 So. 2d, 1032)

- ▶ Dade Housing Authority issued bid for renovation of housing project
- ▶ Bid specs required bid bond or certified check or bank draft in the amount of 5% of total bid
- ▶ In addendum, this was restated as “security was to be in the form of 5% bid bond”
- ▶ Robinson was apparent low bidder, but submitted bid bond in the form of cashier's check
- ▶ Commission awarded contract to Robinson*



Robinson Electric (con't)

- ▶ Number three bidder, (Markowitz), filed for injunction, contending Robinson's bid was non-responsive, because it lacked the required security – County argued this was a minor irregularity
- ▶ Trial court agreed with Markowitz, and ordered County to rebid
- ▶ Robinson appealed trial court decision *



Findings – Robinson

- ❖ Appeals court reversed trial court, and ordered award to Robinson
- ❖ In determining whether specific non-compliance constitutes non-waivable irregularity, courts have applied two criteria;
- ❖ 1) whether the effect of a waiver would deprive the agency of its assurance that the contract will be entered into, performed and guaranteed according to specified requirements, AND

Findings – Robinson (Cont.)

- ❖ 2) whether it is such a nature that its waiver would adversely effect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the common standard of competition
- ❖ i.e., a variance is material if it gives the bidder a substantial advantage over the other bidders, and thereby restricts competition
- ❖ Here, the courts concluded no irregularity existed, and it was apparent that competitive bidding was not affected. It prevented none from bidding, and all were on equal footing*

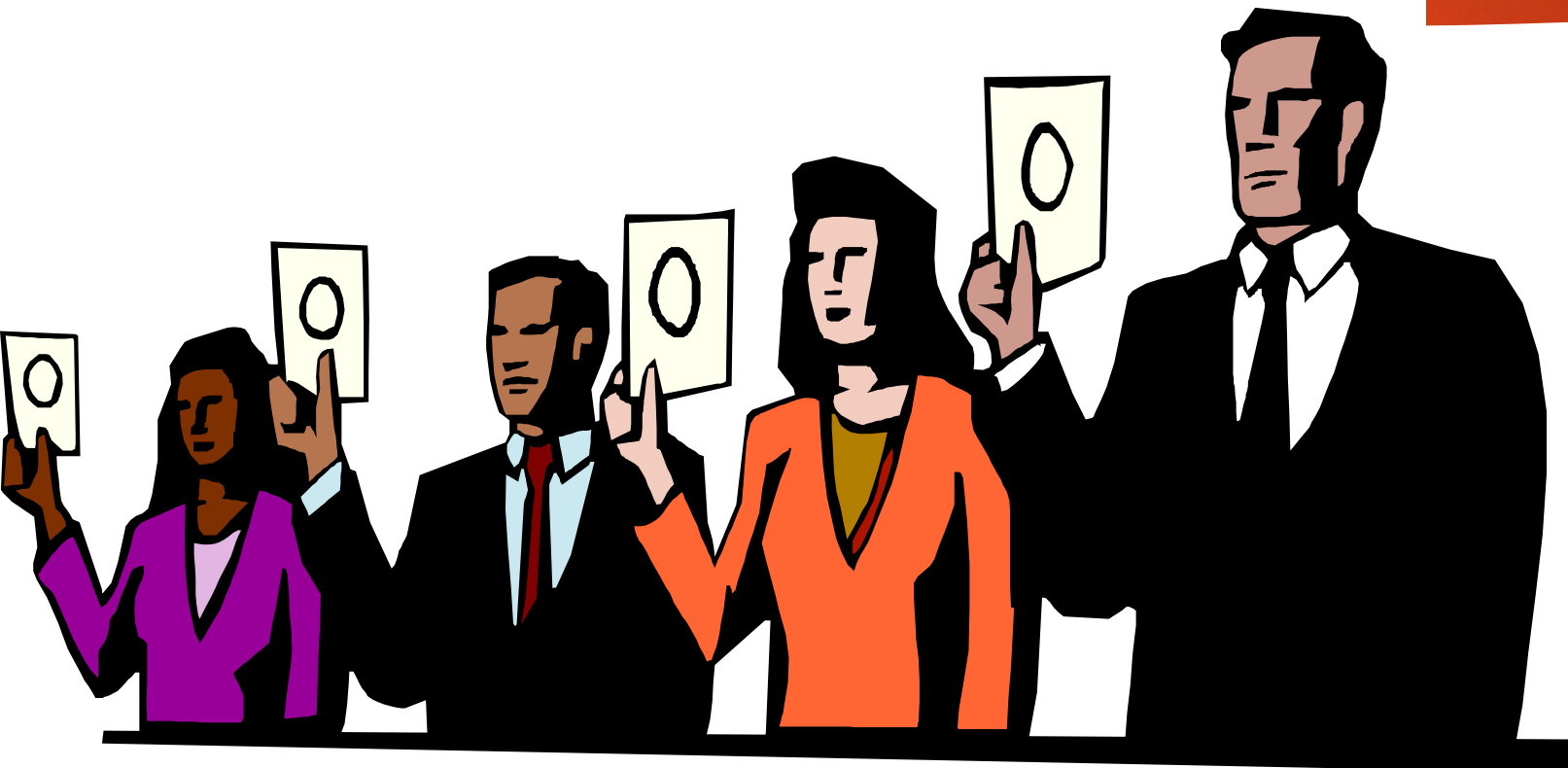


Can a Public Entity Decide to Reject a Bid if the Bidder Was Encouraged to Submit a Bid by the Project Architect but Failed to Attend a Mandatory Pre-Bid Conference?

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Gibbs Construction v Louisiana State University

- Formal bid advertisement required attendance at mandatory pre-bid
- One bidder at pre-bid
- Gibbs was not present,
- After pre-bid, project architect contacted Gibbs and requested they submit a bid – architect lined through portion of document requiring attendance
- Gibbs submitted low bid
- Gibbs bid rejected, and bid was awarded to another – Gibbs filed suit**
- is agency an issue?



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- Court of Appeals – university properly refused to consider bid by Gibbs because the company was not represented at pre-bid, as required in bid documents
 - Direction by project architect could not override the document requirements and legal advertising*

- ***Can a Public Entity Award a Contract to the Apparent Low Bidder if This Bidder Fails to Acknowledge an Addendum as Required in the Bid Specifications?***

Martel Constructing v. Montana State Board of Examiners

- Successful bidder had failed to acknowledge certain addenda, but was awarded contract, after assurances that bid price included changes required in addenda
- Martel (second bidder) filed suit contending failure by bidder to acknowledge addenda made bidder non-responsive
- Trial court held in favor of Martel, and ordered State to reject awarded contract
- Case was appealed to state supreme court*

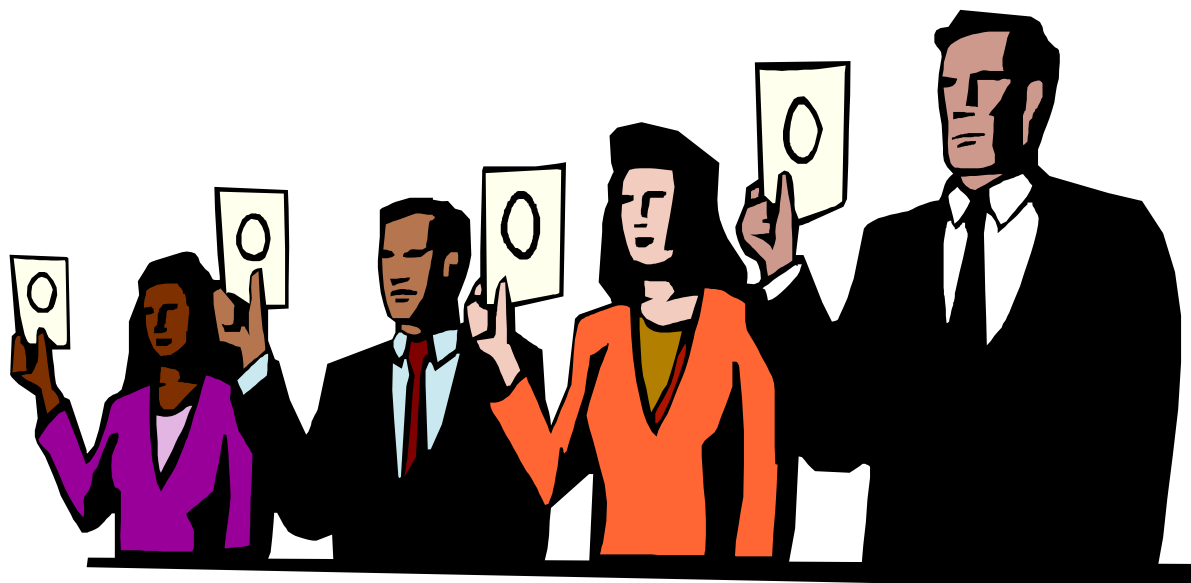


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- Supreme court reversed lower court
- State, in determining qualifications of bidder and ability to perform, are acting in discretionary manner
- There was a meeting of the minds between the state and bidder
- Successful bidder, in submitting bid bound itself to full performance of contract documents
- Failure of successful bidder to make written acknowledgement of receipt of addenda was an immaterial irregularity that could be waived by state
- Wide discretion in determining what is best for the agency*

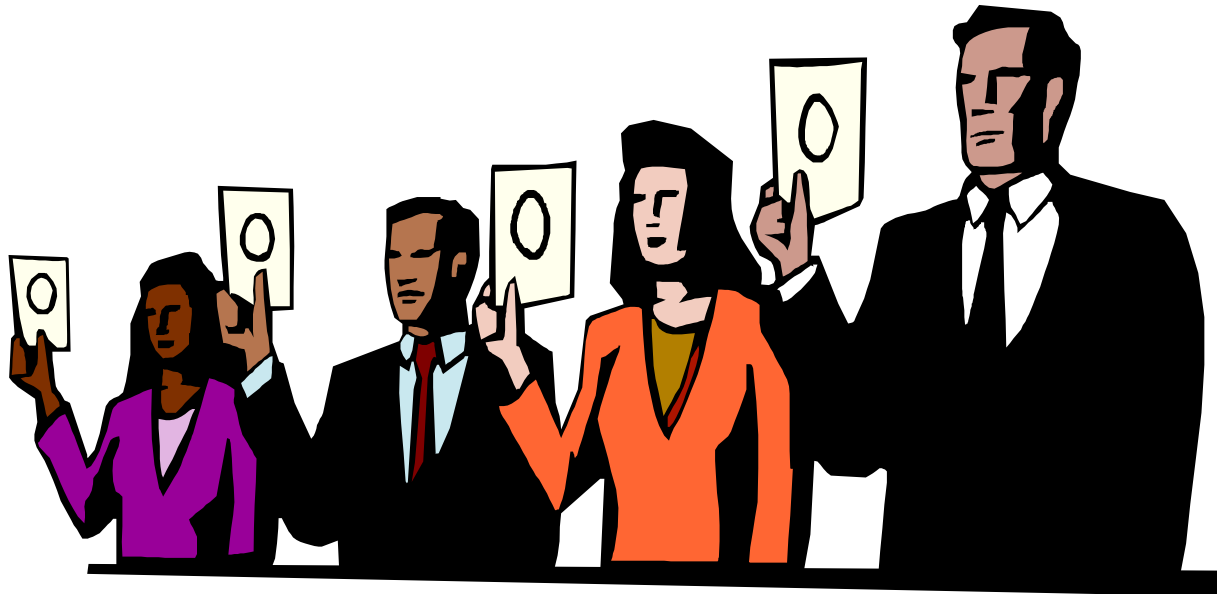
▶ *Hewitt Contracting v Melbourne Regional Airport*

- Contract for construction work at airport
- Date and time for receipt of bids set in advertisement and documents (11:00AM)
- Hewitt submitted a timely bid as required
- Another contractor submitted bid after advertised deadline (minutes after 11:00AM)
- This bid was lowest, and ultimately accepted by Airport Authority
- Hewitt sued, contending untimeliness of bid submittal disallowed the award to bidder*




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- Trial court upheld right of airport to award to low bidder of their choice
- Hewitt appealed this trial ruling to 5th District Court of Appeal*



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- Appeals court affirmed ruling of trial court
 - Agency has legal authority to award a contract to a contractor whose bid submission was not timely.
 - The appellate court found that appellee (airport) has, and should have, the discretion to waive the irregularity of a contractor's untimely bid and to accept the late bid under the circumstances.

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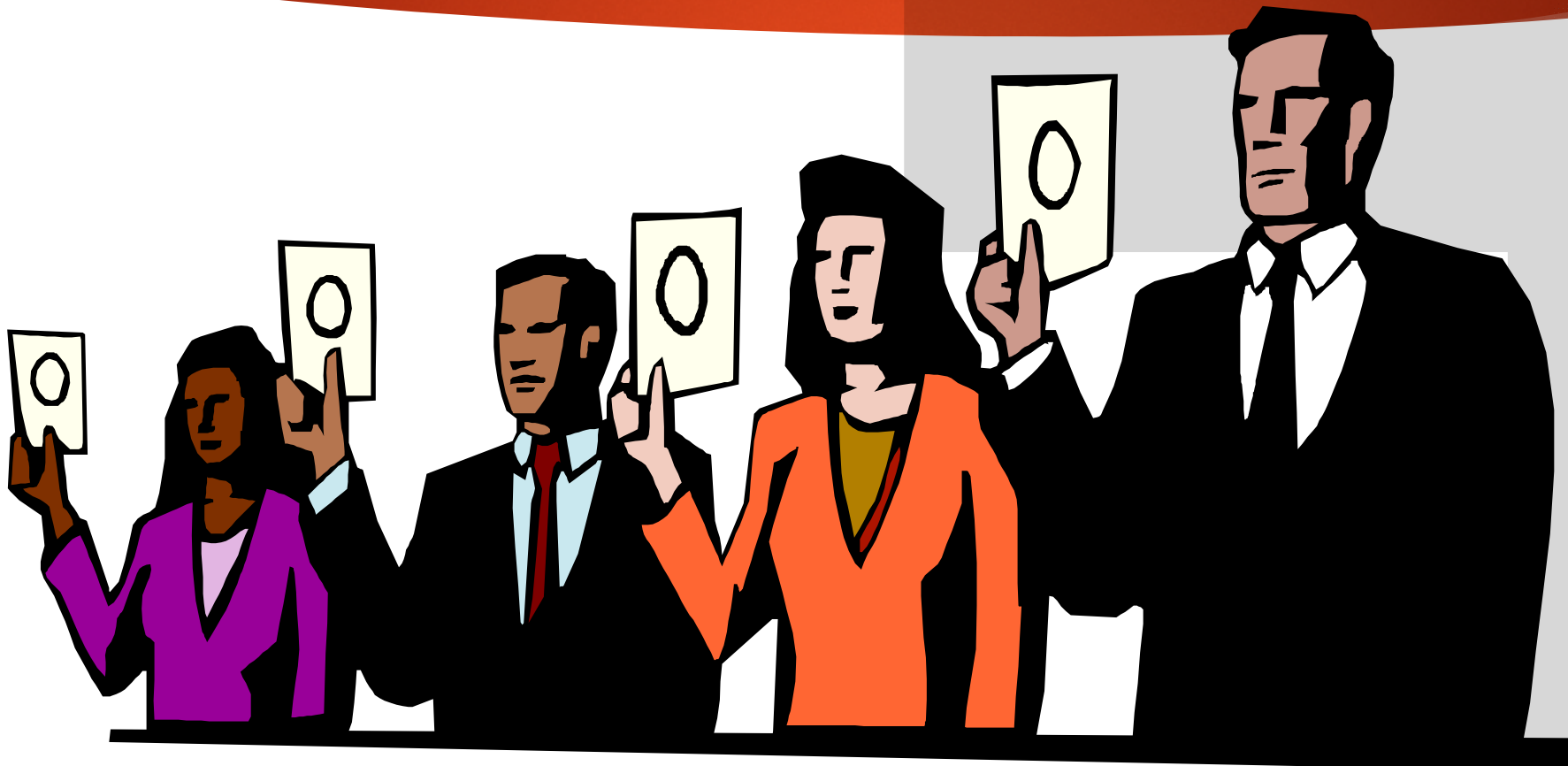
Rushlight Sprinkler Co., v. City of Portland

- Rushlight submitted bid in the amount of \$429,444.20., with bid bond
- Next low bid was \$671,000
- After opening, Rushlight noted an error in their bid, (omission of \$99,225.68), and asked to withdraw bid
- Bid was awarded to Rushlight, and bid deposit check was cashed
- Rushlight refused to proceed and sought to recover damages*

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some facts

- 3rd and 4th lowest bids were \$673,232 and \$684,291
- City officials surmised low bid was too good to be true
- Engineer stated bid was “very low”, and a very decided difference between bid and City’s estimate



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FINDINGS

- ▶ Court noted that an offer and acceptance are deemed to affect a meeting of the minds, even if offeror made a material mistake, providing acceptor (City) was NOT aware of mistake
- ▶ But, if acceptor knew of mistake, and if it was basic, or if a reasonable man, should have inferred there was a basic mistake, a meeting of the minds does NOT occur
- ▶ Bidder must prove that not only was a mistake made, but acceptor had reason to be aware
- ▶ City was aware of mistake, and sought to take unconscionable advantage of error
- ▶ Equity is always prepared to grant relief from such situations *

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QUESTIONS?

- ▶ AND MAYBE SOME ANSWERS
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