

STATE OF WISCONSIN

CIRCUIT COURT

OZAUKEE COUNTY

PRN ASSOCIATES LLC
and PGN ASSOCIATES LLC

Plaintiffs,

Case No. 05-CV-312

Case Codes: (30601) Administrative
Review

vs.

Honorable Paul V. Malloy

STATE OF WISCONSIN
DEPARTMENT OF ADMINISTRATION

Defendant.

**PLAINTIFFS' SURREPLY IN OPPOSITION TO
THE STATE'S MOTION TO DISMISS**

I. INTRODUCTION

Adm § 10.15 provides express remedies to wronged contractors even after the contract is let. This case cannot be moot. The State essentially concedes this by agreeing that Adm § 10.15 “gives the head of the procuring agency the authority...to settle protests, *undoubtedly to include monetary settlements.*” (Reply at 2) (emphasis added). Ch. 227 grants the authority to remand. Upon remand the procuring agency or the Secretary can and must engage Prism’s protest in good faith and fashion a fair settlement. Adm §§ 10.15(2), (3), (5).

As Adm 10 makes clear, the legislature has determined that it is in the public interest to allow Prism to seek recovery, even though the contract has gone forward. Other courts have recognized this same principle. “[A]llowing recovery of some measure of damages once injunctive relief is no longer effectively available furthers the purposes of the competitive bidding laws by encouraging proper challenges to misawarded public contracts by the most interested parties, and deterring government misconduct.”¹

II. ARGUMENT²

A. Relief is available.

1. Ch. 227 relief.

a) Remand for resolution and settlement allows a monetary settlement under Adm 10.

The State concedes that the procuring agency has the authority to make a monetary settlement under Adm 10.15(2). (Reply at 2). The State then mistakenly argues Prism’s protest was resolved “twice!” *Id.*

¹ *Kajima/Ray Wilson v. Los Angeles County Metropolitan*, 23 Cal. 4th 305, 314 (2000).

² The State does not dispute that at this stage Prism need only hypothesize facts that if proved would establish its claims. Thus, Prism has not attempted to place before the Court such facts. Separately, the State argued that procurement decisions are entitled to great weight and deference. (Brief at 4). However, the State has withdrawn this argument. (State of Wisconsin’s Reply Brief in Support of its Motion to Strike, July 30, 2006, p. 4).

The State's concession that the procuring authority can make a monetary settlement destroys the State's argument that relief is unavailable. That process has not occurred. The State made errors of law in abandoning Prism and in then denying its challenges. Remand to the agency is essential to require the procuring agency and DOA to properly apply state procurement law and negotiate with Prism under Adm § 10.15. Such a remand is specifically authorized by § 227.57(5). The State suggests that "settlement" is not required by Adm § 10.15. However, if the head of the procuring agency does not satisfactorily settle a dispute with a protesting bidder under 10.15(3), the DOA secretary, "shall take the necessary action to settle and resolve the protest." Adm § 10.15(5). Certainly there is no *guarantee* of monetary relief, but as the State concedes, the DOA must allow for such an award in "settling" the protest.

In addition, the Court is empowered to review the proceedings below to determine whether their fairness was impaired. Wis. Stat. § 227.57(4). The petition makes clear that the State acted in bad-faith with regarding to Prism. Further, the right to due process includes the right to an impartial decision maker, and that right extends to an administrative hearing. *Marder v. Regents*, 706 N.W.2d 110, 119-20 (Wis. 2005). Prism may well be able to prove that the decision makers for the protests and appeals were not impartial. In that event, this case should be remanded to allow proper consideration of the protests and appeals.

b) The State cites no authority for the proposition that the State must expressly consent to specific forms of relief.

In its response, Prism challenged the State to provide some authority for the *critical* proposition that the State must expressly consent to the relief sought. (Response at 8). The State has failed to provide any such authority. The cases cited by the State hold that a method *of review* prescribed by the legislature under 227 is exclusive. (Reply at 6-7). However, the avenue through which a petitioner seeks review is not at issue. The relevant issue is immunity from liability from

a money judgment. There is no authority for the State's position that the State must clearly and expressly consent to the relief sought.

As Prism argued, *State v. Miron Construction*, 181 Wis. 2d 1045 (Wis. 1994) shows the distinction between consent to relief and waiver of immunity. (Response at 9). The State's only reply is that *Miron* is not a ch. 227 case. (Reply at 6). That is irrelevant, as the question is more general, whether the State must consent to specific forms of relief in any context.

c) Ch. 227 is to be read broadly.

The State argued that Wis. Stat. § 227.57(9), which grants the Court the power to grant *whatever relief is appropriate*, must be read narrowly and cannot include damages. (Brief at 9). According to the State, the relief must be expressly mentioned or it is not available. *Id.*³ But as Prism showed, *Wagner v. State Medical Examining Bd.*, 181 Wis. 2d 633, 644 (Wis. 1994) ruled that a circuit court has wide discretion to order appropriate remedies, none of which are *expressly* set forth in the 227.57. (Response at 10). In reply, the State concedes that *Wagner* held that “a ch. 227 court has a number of remedies not expressly set forth in the statute.” (Reply at 8). However, the State argues that *Wagner* did not authorize a claim for damages. (*Id.*, 8-9).

But Prism did not and need not argue that *Wagner* expressly authorized a claim for damages. Instead, Prism argued that a remedy need not be expressly set forth in ch. 227 in order for the remedy to be available to a court in fashioning relief under 227.57(9). The State concedes this. It is not necessary that money damages be expressly set forth in ch. 227.

Further, the State ignores *Froebel v. DNR*, 217 Wis.2d 652, 667 (Ct. App. 1998)(Where a petitioner shows a violation by the agency under 227.57(5), the broad discretion under 227.57(9) is

³ The logical conclusion of the State's argument is that § 227.57(9) authorizes no relief because none is expressly provided for, but rather generally provided for. This absurd conclusion shows the fallacy of the State's argument.

properly invoked by the courts.). The Seventh Circuit also read § 227.57(9) broadly. *Froebel v. Meyer*, 217 F.3d 928, 936 (7th Cir. 2000).

The State concedes that the legislature has waived sovereign immunity, although it argues that ch. 227 is only a “limited” waiver of that immunity. But that argument is essentially an argument regarding the statutory interpretation of Wis. Stats. § 227.57. The plain language of § 227.57 strongly supports Prism's argument and the Court's power to fashion “whatever relief is appropriate.” While §§ 227.57(4) and (5) provide the Court with the authority to remand this matter for further proceedings under Adm § 10.15, the analysis above demonstrates that in appropriate cases, the Court itself can determine the issues and provide relief under § 227.57(9).

d) The cases cited by the State do not bar money damages.

The State argues that *Kegonsa*⁴ and *Keip*⁵ not just hold, but *unequivocally* hold, that ch. 227 does not provide authority for money damages. (Reply at 7).

But *Kegonsa* supports Prism’s argument, not the State’s. 87 Wis. 2d at 146 (“Finally, the court in rendering its decision has broad discretion to provide whatever relief is appropriate.”). *Kegonsa* did not address immunity to a particular form of relief, but to *tort* damages. *Id.*, at 147. Prism is not seeking tort damages.

Nor does *Keip* bar money judgments. The *Keip* court addressed a situation in which the plaintiff failed to state a cause of action or legal theory on which damages might be recovered. That is not the case here. Plaintiffs state causes of action for breach of statutory duties, breach of contract and promissory estoppel.

⁴ *Kegonsa Joint Sanitary Dist. v. Stoughton*, 87 Wis. 2d 131, 274 N.W.2d 598 (Wis. 1979).

⁵ *Keip v. DHFS*, 232 Wis. 2d 380, 398-399, 606 N.W.2d 543 (Ct. App. 1999).

The State argues that *Butzlaff*⁶ (a newly-located case) demonstrates that nothing in ch. 227 authorizes a claim for damages. (Reply at 7-8). However, *Butzlaff* does not even concern a ch. 227 proceeding, but rather a proceeding under Wis. Stat. § 103.10(13). The *Butzlaff* court gave no consideration whatsoever to the language of ch. 227. This decision cannot be read to interpret ch. 227 by implication. This is particularly true when the Supreme Court in both *Kegonsa* and *Wagner* have interpreted the remedies available broadly.

Moreover, the *Butzlaff* court was simply wrong about the unavailability of money damages in the administrative proceedings. Wis. Stat. § 103.10(12)(d) (“...providing back pay accrued not more than 2 years before the complaint was filed and paying reasonable actual attorney fees to the complainant.”). Thus, it appears that Judge Dykman was justified in writing a harsh dissent. *Butzlaff*, 223 Wis. 2d at 692.

2. *Aqua-Tech* allows the recovery of bid preparation costs.

Bid preparation costs can be recovered by a wronged bidder. *Aqua-Tech, Inc. v. Como Lake Protection & Rehabilitation District*, 71 Wis. 2d 541, 553-54 (1976); *D.M.K. v. Pittsfield*, 2006 WI App 40, P27, 711 N.W.2d 672 (2006).⁷ The State argues that Prism failed to seek an injunction and “thus cannot satisfy the condition precedent imposed by *Aqua-Tech*.” (Reply at 5).⁸

a) The condition precedent is excused as the State made the condition impossible to satisfy.

A condition precedent is excused where its performance is impossible. *Schlitz v. Equitable Life Assurance Soc.*, 226 Wis. 255, 267, 276 N.W. 336 (Wis. 1937). This is particularly true

⁶ *Butzlaff v. State Dep't of Health and Family Servs.*, 223 Wis. 2d 673, 590 N.W.2d 9 (Wis. Ct. App. 1998).

⁷ Prism does not concede that *Aqua-Tech*, a case which addressed a local government issue, controls procurements by the State, but will assume it does for purposes of this argument.

⁸ Prism effectively sought an injunction by filing a protest which requires that the procuring agency impose an automatic stay to any further activities on the subject contract while any protest and appeal are reviewed. Adm. 10.15(6).

when the performance is rendered impossible by the person who is trying to use the condition as a defense. 14-78 *Corbin on Contracts* § 78.1. That is exactly what the State did here.

The facts show that the contract was awarded to Weas on March 16, 2005, effective March 1, 2005. (Brief at 3). Prism's protest was filed on January 26, 2005 and was not denied until March 25, 2005. *Id.* Prism's appeal from that decision was not denied until June 6, 2005. *Id.* A stay to further proceedings should have been in place throughout this time. That obviously did not happen. Instead the State forged ahead with Weas making an injunction academic. Prism may be able to prove that over \$65 million of bonds were issued in March, 2005, for the purpose of financing the Kenilworth, and that by June 6, 2005, millions of dollars of work had already been performed on the Kenilworth.

It is clear that the alleged condition precedent, the obtaining of an injunction, is excused. The State proceeded to award the contract to Weas while Prism's protest was pending.⁹ Bonds may have been issued before UW-System even decided Prism's protest. Millions of dollars of work may have been done before the appeal or the protest was decided. When a contract is awarded, much less when substantial work is done, Wisconsin courts are reluctant to enjoin the work believing that to do so would only complicate matters. Thus, an injunction was unavailable to Prism.

And as explained below, Prism could not seek a *court* injunction until its administrative remedies were exhausted under Adm § 10.15. Moreover, Prism *did* seek the administrative equivalent of an injunction, as the filing of a protest stops any further action on the contract, but the State

⁹ Hawaii noted the perverse incentive given to the State to proceed immediately upon receipt of a protest. *Carl Corp. v. Department of Educ.*, 85 Haw. 431, 460, 946 P.2d 1 (Haw. 1997).

decided, at its peril, to proceed in the face of Prism's protest. Accordingly, the condition precedent, obtaining an injunction, is excused.

b) Waiver or estoppel bars the State from arguing an injunction is needed to recover damages.

The State argues that it is not estopped from asserting its *defenses* in this action, specifically that the State cannot be estopped from asserting its immunity from suit. (Reply at 9-10). The State misses the point. Prism does not argue that the State is estopped from asserting immunity. The State has already conceded that ch. 227 is a limited waiver of immunity which permits this suit. (Brief at 8, Reply at 6). There is no question that the State can be estopped, although intentional wrongful acts may be required. *Ryan v. Wisconsin Dep't of Revenue*, 68 Wis. 2d 467, 471, 228 N.W.2d 357 (Wis. 1975). The petition alleges and Prism may be able to prove such acts.

Alternatively, as described above, Prism may be able to prove that the State waived any requirement that an injunction is needed to recover damages.¹⁰ The State may not proceed with the award of a contract once a protest or appeal is filed. An automatic stay is imposed until a decision is rendered on the protest and appeal. Adm § 10.15(6). The Legislature created an exception to this requirement under which the State may proceed if the Secretary makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the state. *Id.*

¹⁰ It is in the public interest to permit the State to waive the condition precedent of obtaining an injunction. If the rule is as the State urges here, that an injunction must be obtained regardless of the urgency of the project, then taxpayers may well be forced to bear the cost of expensive delays or the cost of settlement of questionable claims in order to avoid expensive delays. There are projects where delay can be extremely expensive, thereby making it in the State's interest to proceed with the contract. The regulations recognize this, giving the Secretary of Administration the right to make a determination that it is best to proceed with a contract in the face of a protest. Adm 10.15(6). Other courts have recognized that there are "situations where a delay of several months before a contract may be awarded would have serious repercussions on the continuation of essential State functions." *Carl Corp.*, 85 Haw. at 453.

The State knew of Prism's protests but essentially ignored them and determined not to impose the automatic stay. Prism properly sought to preserve its remedies, as required by the administrative procedure set up to govern its claims, by filing its protest. It was not in a position to seek further injunctive relief until the Adm. § 10.15 process was concluded. “[J]udicial relief will be denied until the parties have exhausted their administrative remedies; the parties must complete the administrative proceedings before they come to court.” *State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶8, 242 Wis. 2d 94 (2001).

The State either improperly ignored the automatic stay in Adm § 10.15, or made the determination that it would go forward with Kenilworth because it was sufficiently important to do so. In either case, that decision waives any requirement that the protestor, Prism, needed to seek further injunctive relief. The legislature has left it up to DOA, under Adm § 10.15(6), to make the determination of whether delaying a public project under an administrative stay (the presumption under Adm. 10.15) is the better course for the State, or if it is better to go forward with the potentially wrong contractor, and risk the consequences of a protesting contractor successfully showing that it should have been awarded the contract. This regulatory scheme takes the decision about an injunction out of the courts’ purview and gives it to DOA. Once DOA waives the automatic stay, no further injunctive relief could be obtained. A court cannot tell the DOA to stay the project when it is clearly empowered to make that decision in its own discretion under the plain language of Adm. 10.15(6).

When the State waived the condition that a stay be imposed, the State consented to a form of relief, money damages, as Adm § 10.15 allows it to do. The State’s consent to money damages is legally no different than the State’s consent to an arbitration award in *Miron*. (Response at 9). *Miron* held that the Legislature’s consent was not needed for such consent.

c) An award to Prism need not result in double payment by the State.

In *D.M.K.* the rationale for requiring an injunction as a condition of recovery is to avoid taxpayers having to pay both damages and the contract price. *D.M.K.*, 2006 WI APP 40, ¶26. That situation can be prevented here. In the event that the contract was improperly awarded to Weas, as the petition alleges, then the State is under a duty to seek to recover the profit, or perhaps more, being paid out on the Weas contract.¹¹ Such recovery could come from any State employee who acted improperly, or could come from any employee of the Weas team who acted improperly.¹² Taxpayers would be better off in the long run because a clear message would have been sent regarding corrupt procurements.

d) *Aqua-Tech* does not say that damages can be recovered only if an injunction is obtained.

Finally, in making its argument that an injunction is a condition precedent, the State falls victim to the fallacy of the converse. The Supreme Court stated that if *Aqua-Tech* prevailed in its action for a permanent injunction, then it should be permitted to recover as damages its bid preparation costs. The Supreme Court did *not* state that if *Aqua-Tech* did *not* prevail in its action for a permanent injunction, then it should be *not* be permitted to recover as damages its bid preparation costs.

D.M.K. went beyond *Aqua-Tech* and requires an injunction as a condition of recovery. However, *D.M.K.* should not be applied here. *D.M.K.* is a municipal procurement case. The Kenilworth was a state procurement case. Extension of *D.M.K.* to this state procurement case would create a conflict with Adm 10. As discussed above, upon the filing of a notice of intent to protest,

¹¹ *Bechtold v. Wauwatosa*, 228 Wis. 544, 561-65, 280 N.W. 320 (1938); *Neacy v. Drew*, 176 Wis. 348, 355-56, 187 N.W. 218 (1922).

¹² News reports have Weas employees giving \$51,000 to the Doyle campaign, and have Doug Weas meeting with Marotta at the MAC after the issuance of the RFP.

award of the contract is halted. Adm 10.15(6). However, if “the Secretary, after consultation with the head of the contracting agency, makes a written determination that the award of the contract without delay is necessary to protect substantial interests of the state,” then the contract may be awarded. *Id.* Thus, Adm 10 and *D.M.K.* conflict. The legislature, as shown by Adm 10, wants the State to have the ability to proceed on critical contracts. The rationale of *D.M.K.* is exactly the opposite, and suggests contracts must be stopped if there is to be a recovery. *D.M.K.* cannot be extended to this state procurement case, as doing so would essentially read Adm § 10.15(6) out of the procurement code.

3. Takings.

The State argues that Prism has no takings claim. (Reply at 10-11). The State first argues that there is no contract upon which to base such a claim. However, the State concedes that Prism received a letter of intent. (Brief at 10-11). Further, it is not necessary that there be a contract in order for Prism to have a property right. The right to assert the statute of limitations is not a contract right, but nonetheless constitutes a vested property right. *State v. Haines*, 2003 WI 39, ¶13, 261 Wis. 2d 139, 661 N.W.2d 72 (2003).

The State next argues that the low bidder has no fixed, absolute right to the contract, and, thus, there is no takings claim. But even a cause of action, a contingent right like the letter of intent here, is property right protected by due process. *Brandt v. Brandt*, 161 Wis.2d 784, 789, 468 N.W.2d 769 (Ct.App.1991). It is not required that Prism’s right to the contract be fixed and absolute, if it was not.

Furthermore, Prism’s selection went a step farther than those considered in the State’s cases. Prism not only submitted the best proposal (analogous to the low bid), but Prism was given notice of intent to contract under Adm 10.08. At that point, Prism did acquire a fixed, absolute right

to a contract. That contract may have been only a letter of intent, but it was a contract nonetheless. (Response at 18). Prism's notice of intent to contract was taken from it. Thus, Prism is entitled to compensation. (Response at 12).

4. Court-fashioned remedy.

As described above and in Prism's initial response brief, the Court can fashion a remedy. (Response at 15). The State's only reply is that the remedies available to the Court must be expressly stated in ch. 227. (Reply at 11). But as Prism has shown, 227.57(9) provides ample authority to the Court to fashion a remedy where appropriate even in a case where a contract has gone forward with another.¹³

This principle of fashioning appropriate relief has been applied in the context of bidding on a public contract. *Kajima*, 23 Cal. 4th at 314. California recognized that, as a practical matter, a contract may be let, and even substantially completed, by the time that the basis for relief is persuasively demonstrated. *Id.* at 313 n.1. However, the public purpose is still best served by allowing damages. *Id.* at 314.

B. Timeliness.

The claim as to the second RFP process (*i.e.*, PRN's claim) is conceded to be timely. (Reply at 11).

As to the first RFP process, the record makes clear that as a matter of law there was but a single procurement for the Kenilworth, culminating in the selection of Weas. Moreover, as the petition alleges, the State lulled prism into not seeking its remedies earlier. When a defendant has been guilty of inequitable conduct, the doctrine of equitable estoppel precludes him from assert-

¹³ As described above, a remand for resolution and settlement under Adm. 10.15 is authorized under 227.57(5) and (4). §§ 227.57(9) provides the Court with the alternative to fashion relief independently in appropriate circumstances. Prism suggests that the unfairness below creates those circumstances.

ing the statute of limitations. *Hester v. Williams*, 117 Wis. 2d 634, 644-45, 345 N.W.2d 426 (1984). Prism's claims relative to the first RFP process and the improper "abandonment" of Prism, not by the SBC as the State urges but rather by the DOA secretary himself, are clearly timely, and properly before the Court in this action.

C. The State's obligation to Prism.

The State makes no reply to Prism's argument that the State was obligated to Prism, both by contract and by statute (ch. 16.75 and Adm 10.08). (Reply at 11). The State argues only that promissory estoppel cannot be asserted here because the Court cannot award damages. (Reply at 11). However, as shown above, the Court can provide whatever relief is appropriate. Thus, promissory estoppel is a valid theory of recovery from the State. California, among other states, has used the doctrine of promissory estoppel as the basis of recovery when a contract is improperly awarded. *Kajima*, 23 Cal. 4th at 310-15.

III. CONCLUSION

For all of the reasons set forth above, the State's motion to dismiss must be denied.

Respectfully submitted this ___ day of September, 2006

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