IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

Appeal No. ED101588

BYRNE & JONES ENTERPRISES, INC.
d/b/a BYRNE & JONES CONSTRUCTION,

Appellant,

v.

MONROE CITY R-1 SCHOOL DISTRICT, et al.

Respondents.

On Appeal From the Circuit Court of Monroe County, Missouri
The Honorable Rachel B. Shepherd, Judge
Case No. 14MN-CV00064

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

The issues herein do not invoke the exclusive jurisdiction of the Missouri Supreme Court. As a result, this appeal from a final judgment of the Circuit Court of Monroe County, Missouri, is within the general appellate jurisdiction of the Missouri Court of Appeals for the Eastern District, pursuant to Article V, Section 3, of the Missouri Constitution, as amended, 1982, and Section 477.050 MO. REV. STAT.

STATEMENT OF FACTS

Appellant Byrne & Jones Enterprises, Inc. d/b/a Byrne & Jones Construction (hereinafter "Byrne & Jones"), pursuant to Rule 84.04(f), provides the following Statement of Facts in support of Byrne & Jones' Appeal:

In early 2013, the Monroe City R-1 School District's (hereafter, the "District") solicited assistance from ATG Sports, Inc. (hereafter, "ATG") (a Kansas Corporation) in the design of the District's track and field complex (hereafter, the "Project"). (L.F. 2). Byrne & Jones and ATG were the only bidders on the Project. (L.F. 6). The District awarded the contract to design and build its project to ATG. (L.F. 8 and 53). This case involves Byrne & Jones' challenge to the District's award of its contract to ATG for ATG to design and build the Project. (L.F 3-55).

On or about March 25, 2014, Byrne & Jones filed its Petition for Declaratory Judgment requesting the court to enjoin the District from entering into the contract with ATG and award Byrne & Jones' its bid preparation fees in connection with the Project. (L.F. 3-55). Byrne & Jones alleged that the bidding procedures utilized by the District did not permit all bidders to compete on equal terms, did not give other bidders a fair opportunity to bid against ATG on the Project and that from the beginning of the process, ATG and the District were in collusion. (L.F. 9). Byrne & Jones asserts that in accepting the bid of ATG, the District acted arbitrarily, capriciously, unfairly, and in violation of the competitive bidding process required by law. (L.F 9). Further, Byrne & Jones alleges that in awarding the project to ATG, the District did not act in good faith, or in the best interest of the public, but acted in collusion with ATG and with personal favoritism for ATG. (L.F 9).

In its Petition, Byrne & Jones cites facts to support its allegations relating to the District's bidding procedure and award of its contract. These facts include, but are not limited to, the following:

1. In November 2013, ATG submitted unsealed plans and drawings to the District and met with the District to discuss those plans. (L.F. 5 at ¶ 8).
2. On November 21, 2013, representatives of the District met exclusively with representatives from ATG to discuss plans for the new stadium project and the Request for Proposals ("RFP") that ATG had prepared for the District to use. (L.F 5 at ¶ 9).
3. The RFP that was prepared by ATG and utilized by the District for the project was modeled and tailored to facilitate the award of the contract to ATG, and was biased against other bidders. (L.F. 5 at ¶ 10).
4. On December 11, 2013, and based on the private meeting ATG had with the District, ATG submitted revised plans, drawings and specifications to the District. (L.F. 5 at ¶ 11).
5. One potential bidder advised the District that is was not going to bid on the Project, because the Project "looks like it is fairly wired for ATG." (L.F. 6 at ¶ 14).
6. The plans prepared by ATG were in conflict with the specifications in many respects and, although, Byrne & Jones advised the District of the conflicts, the District did not correct them, which favored ATG to the disadvantage of other potential bidders. (L.F. 6 at ¶ 12).

7. On December 11, 2013, ATG submitted the final RFP to the District for the District to use and the revised plans and drawings that ATG had prepared. (L.F. 6 at ¶ 15).

8. The RFP prepared by ATG and included by the District in the Bid Documents contained structural drawings, elevations and other engineering calculations and dimensions, but those drawings were not sealed by a licensed Missouri engineer in violations of Missouri Statutes. (L.F. 6 at ¶ 16).

9. On January 7, 2014, ATG provided the District with a bid tabulation form and bidders checklist for use by the District and Byrne & Jones was not given the opportunity to provide any of this information to the District. (L.F. 7 at ¶ 20).

10. On January 8, 2014, ATG privately discussed its bid with the District and then provided the District with a "breakdown of what was discussed and also provided it with clarification on designated alternates," while Byrne & Jones was not given the same opportunity to provide a breakdown or clarification on its bid or alternates. (L.F. 7 at ¶ 21).

11. Under the bid tabulation prepared by the District in consultation with the ATG, Byrne & Jones submitted the low base bid and the low total bid when all of the alternates were added, but as a result of discussions and collaboration solely between ATG and the District, the District selected only 7 out of 13 alternates and ATG was the low bidder on each selected. (L.F. 7-8 at ¶¶ 24-25).

12. The alternates ATG was not the low bidder on were removed so that ATG would appear to be the low bidder, and not Byrne & Jones which was, in fact, the low bidder. (L.F. 8 at ¶ 25).

13. The District advised Byrne & Jones that the Board of Education decided that ATG presented a better opportunity for local contractors, but this criteria was never mentioned in the RFP or any specifications and ATG had not even provided a list of local contractors at that time. (L.F. 8 at ¶ 27).

14. Byrne & Jones notified the District that the dimensions and specifications in the RFP prepared by ATG were not consistent with industry practice or typical construction and the specifications contained inconsistencies that gave ATG an unfair bidding advantage over other bidders. (L.F. 8 at ¶ 29).

15. After Byrne & Jones alerted the District that the drawings, site plans and specifications submitted by ATG for use in the project were not sealed and were not prepared by an architect, engineer or land surveyor licensed in the state of Missouri and that the specifications did not match the drawings, the District never clarified or corrected these problems, which gave ATG an unfair bidding advantage. (L.F. 9 at ¶ 30).

On May 22, 2014, the Trial Court entered its judgment sustaining the District's Motion to Dismiss Byrne & Jones' Petition on the basis that Byrne & Jones did not have standing to challenge the District's award of the contract as a "low bidder." (L.F. 67).

Byrne & Jones now appeals the Trial Court's May 22, 2014 judgment. (L.F. 69 and Appendix A1).

POINTS RELIED ON

I. The Trial Court erred in dismissing Count I of Plaintiff Byrne & Jones Enterprises, Inc.'s ("Byrne & Jones'") Petition in that Byrne & Jones had standing to challenge the award of a Design Build Contract by the Monroe City R-1 School District ("District") to another firm because the District did not permit all bidders to compete on equal terms and/or did not give all bidders a fair opportunity to bid and/or because the District acted arbitrarily, capriciously, unfairly, and, therefore, Byrne & Jones had standing to enjoin the award of the District's contract to the other bidder.

La Mar Constr. Co. v. Holt County, R-II School Dist., 542 S.W.2d 568 (Mo. Ct. App. 1976).

Metropolitan Express Services, Inc. v. City of Kansas City, 23 F.3d 1367 (8th Cir. 1994).

Public Communications Services, Inc. v. Simmons, 409 S.W.3d 538 (Mo.App. W.D. 2013).

State ex rel. Stricker v. Hanson, 858 S.W.2d 771 (Mo. Ct. App. 1993).

II. The Trial Court erred in dismissing Count I of Plaintiff Byrne & Jones Enterprises, Inc.'s ("Byrne & Jones'") Petition in that Byrne & Jones had standing to challenge the award of a Design Build Contract by the Monroe City R-1 School District ("District") to another firm because the District did not permit all bidders to compete on equal terms and/or did not give all bidders a fair opportunity to bid and/or because the District acted arbitrarily, capriciously, unfairly, and, therefore, Byrne & Jones had standing to recover its bid preparation costs from the District.

Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority, 23 Cal. 4th 305, 308 (Cal. 2000).

Meccon, Inc. v. Univ. of Akron, 126 Ohio St. 3d 231 (Ohio 2010).

North Twin Builders, LLC v. Town of Phelps, 2011 WI App 77 (Wis. Ct. App. 2011).

Owen of Georgia, Inc. v. Shelby County, 648 F.2d 1084 (6th Cir. Tenn. 1981).

Standard of Review

A motion to dismiss for failure to state a cause of action attacks the adequacy of plaintiff's pleadings. *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 463 (Mo. banc 2001). It assumes that all of the pleaded facts are true and liberally grants to the plaintiff all reasonable inferences therefrom. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 768 (Mo. Banc 2007) (internal citations omitted). "[T]he petition is reviewed in almost academic manner, to determine if the facts alleged meets the elements of a recognized cause of action, or of a cause that might be adopted in [the] case." *Bosch*, 41 S.W.3d at 464. (quoting *Nazeri v. Mo. Valley Coll.,* 860 S.W.2d 303, 306 (Mo. banc 1993)). Whether or not an Appellant has standing is an issue of law which is reviewed de novo. *Manzara v. State*, 343 S.W.3d 656, 659 (Mo. banc 2011).

Argument

The Trial Court found that Byrne & Jones does not have standing, as a low bidder, to challenge the District's award of the Contract. This ruling was based on findings and conclusions which, as explained below, were erroneous applications or declarations of the law.

For all of the reasons set forth below, this Court should reverse and remand this cause to the Trial Court with instructions to allow Byrne & Jones standing to continue prosecution of its Petition to enjoin Monroe City R-1 School District from entering into a contract with ATG Sports, Inc. for the design and construction of the stadium facility project and for the recovery of Byrne & Jones' bid preparation costs.

I. The Trial Court erred in dismissing Count I of Plaintiff Byrne & Jones Enterprises, Inc.'s ("Byrne & Jones'") Petition in that Byrne & Jones had standing to challenge the award of a Design Build Contract by the Monroe City R-1 School District ("District") to another firm because the District did not permit all bidders to compete on equal terms and/or did not give all bidders a fair opportunity to bid and/or because the District acted arbitrarily, capriciously, unfairly, and, therefore, Byrne & Jones had standing to enjoin the award of the District's contract to the other bidder.

Byrne & Jones has standing to challenge the District's award of the design build contract to ATG because Byrne & Jones, as a Missouri corporation, alleges that the District exercised its discretion to solicit and evaluate bids unlawfully and capriciously. Byrne and Jones has a right, as a participant in the Missouri public bidding process, for the opportunity to compete for public contracts in a field where no favoritism is shown in order to provide public entities and the general public with the best work, services, and product.

Missouri courts have long acknowledged the notion that "competitive bidding procedures for public contracts should ensure 'that all who wish to bid shall have a fair opportunity to compete in a field where no favoritism is shown or may be shown to other contestants.'" *State ex rel. Stricker v. Hanson*, 858 S.W.2d 771, 778 (Mo. Ct. App. 1993) (internal citation omitted). Legislative requirements governing public contracting "are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts, and to secure

the best work or supplies at the lowest price practicable, and are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest." *O. J. Photo Supply, Inc. v. McNary*, 611 S.W.2d 246, 248 (Mo. Ct. App. 1980) (internal citations omitted).

Under Missouri law, the District was obligated to provide all potential bidders a fair opportunity to compete to provide the services the District solicited by its public invitation to bid for its contract. Missouri Revised Statute §177.086 (2014) sets forth the statutory requirements for the District's advertising and awarding of its Track and Field Contract (the "Contract"), and states the following:

> No bids shall be entertained by the school district which are not made in accordance with the specifications furnished by the district and all contracts shall be let to the lowest responsible bidder complying with the terms of the letting, provided that the district shall have the right to reject any and all bids.
>
> § 177.086.2 R.S.Mo.

This statute, however, does not permit the school district to act arbitrarily; instead it must exercise its discretion based upon facts reasonably tending to support its decision. *KAT Excavation, Inc. v. City of Belton*, 996 S.W.2d 649, 651 (Mo. Ct. App. 1999)(internal citations omitted)(emphasis added). In awarding a public works contract to the "lowest and best bidder", a public entity must exercise its discretion "in good faith, in the interest of the public, without collusion or fraud, nor corruptly, nor from motives of personal favoritism or ill will, and not abused." *Id.*

The prohibition against public entities awarding public contracts in bad faith and through collusion or fraud applies to the District's award of its contract in the present case. In *La Mar Constr. Co. v. Holt County, R-II School Dist.*, the court entertained a construction company's challenge to a School District's award of a construction contract and bidding procedure under § 177.086 R.S.Mo. The *Lamar* court explained that "[s]afeguards for the public protection are built into the statute and they require that a school board exercise its discretion responsibly. The rejection of the lowest bid must not be made fraudulently, corruptly, capriciously or without reason. The officials must exercise and observe good faith and accord all bidders just consideration, avoiding favoritism and corruption." *La Mar Constr. Co. v. Holt County, R-II School Dist.*, 542 S.W.2d 568, 571 (Mo. Ct. App. 1976).

Since *Lamar*, more recent Missouri federal and state cases have acknowledged that while, generally, an unsuccessful bidder on a government contract lacks standing to challenge the award of the contract to another bidder, unsuccessful bidders to public contracts who challenge the fairness and lawfulness of the bidding process do have standing to assert their claims. In *Metropolitan Express Services, Inc. v. City of Kansas City*, the Eighth Circuit reversed the District Court's dismissal of the claims of Metropolitan Express Services for lack of standing. In so doing, the *Metropolitan Express* Court held,

> Applying the Missouri standing requirements, we conclude that an unsuccessful bidder has standing to challenge a contract that was not fairly bid. In *State ex rel. Stricker v. Hanson,* the court recognized that "competitive bidding procedures for public contracts should ensure that all who may wish to bid shall have a fair opportunity to compete in a field

> where no favoritism is shown or may be shown to other contestants…" Thus, an unsuccessful bidder that was denied a fair opportunity to bid on a public contract is within the zone of interest to be protected by competitive bidding requirements.
>
> *Metropolitan Express Services, Inc. v. City of Kansas City*, 23 F.3d 1367 (8 Cir. 1994) (citing *State ex rel. Stricker v. Hanson* 858 S.W.2d 771, 778 (Mo.Ct. App. 1993).

In *Metropolitan Express*, the Plaintiff contended that it did not have a fair opportunity to compete because the City had provided the successful bidder with information that other bidders did not receive and conducted negotiations with the successful bidder, not the other bidders. The *Metropolitan Express* court specifically held that "an unsuccessful bidder has standing to challenge a contract if the bidding procedure did not permit all bidders to compete on equal terms." *Id.* at 1371. Because Plaintiff contended it did not have a fair opportunity to compete, it had standing to challenge the bidding procedures. This is exactly what Byrne & Jones alleged in its Petition.

In *Public Communications Services, Inc. v. Simmons*, the Missouri Court of Appeals followed *Metropolitan Express Services* and held that "an unsuccessful bidder has standing to challenge a contract award under Missouri law "if the bidding procedure did not permit all bidders to compete on equal terms." 409 S.W.3d 538, 546 (Mo.App. W.D. 2013).

While the *Metropolitan Express* and *Public Communications* courts commented that prior decisions did not afford unsuccessful bidders standing to challenge the award of public contracts, both courts specifically held "Missouri decisions recognize that

members of the public have standing to challenge the contract award where the contracting authority exercises its discretion to solicit and evaluate bids unlawfully or capriciously." *Id.*

Finding that Public Communications alleged a wrongful award of the contract to another bidder without giving other bidders a "fair opportunity," the court also noted that Plaintiff alleged Defendant acted arbitrarily, capriciously, unfairly, or in violation of the competitive bidding process. *Id.* at 547. Because these allegations "challenge the fairness and lawfulness of the…process" by which the contract was awarded to another bidder, the court held that Public Communications "has standing to assert its claims." *Id.*

Byrne & Jones has standing to challenge the District's contract award under the *Public Communications* court's decision. Just like Public Communications, Byrne & Jones' Petition challenges the fairness and lawfulness of a public entity's (the District's) procurement process by which a bidder (ATG) was awarded a public contract. Further, Byrne and Jones alleged that the District unfairly, arbitrarily and capriciously awarded a public contract without giving other bidders a "fair opportunity to bid." Under *Public Communications*, Byrne & Jones squarely has standing to assert its claims.

Missouri's competitive bidding requirement, that no favoritism is shown or may be shown to bidders, obligated the District to fairly procure bids and award its contract in the present case. The Trial Court improperly distinguished *Public Communications* on the basis that the *Public Communications* case "does not involve the interpretation or application of Section 177.086, RSMo." (L.F. 68 and Appendix A2). The *Public Communications* court, however, cited *Lamar* (a case hearing a challenge to a school

district's bidding and award of a contract under Section 177.086, RSMo) for the proposition that "[t]he rejection of the lowest bid must not be made fraudulently, corruptly, capriciously or without reason. The officials must exercise and observe good faith and accord all bidders with just consideration, avoiding favoritism and corruption." *Public Communications*, at 546 (quoting *Lamar*, at 571). The District had a duty to Byrne & Jones, as a Missouri corporation bidding on the Project, to give it the opportunity to compete for the contract on a level field where no favoritism is shown or may be shown to other bidders.

Missouri cases holding that an unsuccessful bidder to a government contract generally does not have standing do not apply to the present case. Byrne & Jones does not allege that it has a special pecuniary interest in the award of the District's contract. Instead, Byrne & Jones seeks to enforce its right, as a Missouri corporation, to participate in the Missouri public competitive bidding process where all bidders are given a fair opportunity to provide the public with the best service possible. Byrne & Jones has standing to challenge the District's bidding process and award of its contract, as a participant in public competitive bidding serving the public's interest by compelling the lax or erring District to perform the public duty imposed upon it to provide all bidders with a fair opportunity to bid.

II. The Trial Court erred in dismissing Count I of Plaintiff Byrne & Jones Enterprises, Inc.'s ("Byrne & Jones'") Petition in that Byrne & Jones had standing to challenge the award of a Design Build Contract by the Monroe City R-1 School District ("District") to another firm because the District did not permit all bidders to compete on equal terms and/or did not give all bidders a fair opportunity to bid and/or because the District acted arbitrarily, capriciously, unfairly, and, therefore, Byrne & Jones had standing to recover its bid preparation costs from the District.

An unsuccessful bidder should be permitted to recover its costs in preparing a bid for a public entity for a public service contract when the public entity acts arbitrarily or capriciously. There are no Missouri cases that have ruled on this issue, but courts in many other states have upheld such recovery for the unsuccessful bidder.

In *Meccon, Inc. v. Univ. of Akron*, 126 Ohio St. 3d 231 (Ohio 2010), the Ohio Supreme Court decided the issue of whether bid-preparation costs may be recovered as damages by a bidder who establishes that its bid on a public-improvement project was wrongfully rejected because the public authority awarding that contract failed to comply with state competitive-bidding laws. The challenger and unsuccessful bidder, Meccon, alleged that the University of Akron's (the "University's") award of its bid to another bidder was in violation of the University's policies and Ohio statutes. *Id.* at 232. In response, the University filed a motion to dismiss for lack of subject matter jurisdiction, arguing that disappointed bidders were entitled only to injunctive relief and that Meccon's claim for bid-preparation costs was not cognizable. *Id.*

The *Meccon* Court ruled that "[w]hen a rejected bidder establishes that a public authority violated state competitive-bidding laws in awarding a public-improvement contract, that bidder may recover reasonable bid-preparation costs as damages if it is later determined that the bidder was wrongfully rejected…" *Id.* at 234. The Court explained that the rule "seems best calculated to strike a balance between protecting the public from incurring extra cost due to the misconduct of the public authority, ameliorating the damages sustained by the lowest and best bidder in its good-faith participation in the competitive-bidding process, and deterring the public authority from violations of the competitive-bidding law." *Id.* at 235.

In *North Twin Builders, LLC v. Town of Phelps*, the Wisconsin Court of Appeals decided whether North Twin Builders, as a disappointed bidder, must first obtain injunctive relief for procedural violations of a competitive bidding statute before pursuing its costs of preparing its failed bid as damages. 2011 WI App 77, 153 (Wis. Ct. App. 2011). The Town of Phelps ("Town") appealed the trial court's summary judgment awarding North Twin Builders compensatory damages for the Town's violation of the applicable competitive bidding statute. *Id.* at 149. The Town argued that North Twin Builders was not entitled to recover the costs of preparing its unsuccessful bid because it did not first obtain injunctive relief. *Id.*

The *North Twin Builders* Court ruled that "a disappointed bidder may recover bid preparation expenses for a violation of the competitive bidding statute regardless of whether it has sought injunctive relief." *Id.* at 150. In light of its holding, the Court determined whether such relief is consistent with public policy underlying competitive

bidding statutes. *Id.* at 156-157. The Court explained that "[s]tatutory bidding requirements are designed to prevent fraud, collusion, favoritism and improvidence in the administration of public business, as well as to insure that the public receives the best work or supplies at the most reasonable price practicable." *Id.* at 157. The Court further noted that "[t]he bidder, who has expended time and money in preparing its bid, 'is in a particularly good position to challenge the bidding authority's action and thereby protect the rights of the public.'" *Id.* at 158 fn. 6. Ultimately, the *North Twin Builders* Court found that the "public interest is best served by allowing disappointed bidders to recover expenses for preparing their bid…", and that such limited remedy "encourages bidders to fulfill their role as advocates for the public interest" and "encourages public bidding authorities to fully comply with statutory bidding requirements." *Id.* at 158.

Similarly, in *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority*, the California Supreme Court considered whether a lowest responsible bidder, who is wrongfully denied a public contract had a cause of action for monetary damages against a public entity, and if so, whether those damages include bid preparation costs and lost profits. 23 Cal. 4th 305, 308 (Cal. 2000)[1].

In that case, the plaintiff Kajima/Ray Wilson ("Kajima") protested the Los Angeles Metropolitan Transportation Authority's ("MTA's") award of a public contract to another bidder, because MTA arbitrarily made award its award based on an unwritten

[1] This case explains that the "majority of jurisdictions…allow by either statute or case law recovery of bid preparation and in some cases bid protest costs…", and that these jurisdictions "reason that while competitive bidding statutes are enacted for the public's benefit, not the aggrandizement of the individual bidder, allowing recovery of bid preparation costs encourages proper challenges to misawarded public contracts by the most interested parties, and deters public entity misconduct." See *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority*, 23 Cal. 4th 305, 319-320, f.n. 5 and 6 (Cal. 2000).

MTA policy that resulted in the disqualification of Kajima's bid. *Id.* at 309. The trial court awarded Kajima its bid preparation costs and lost profits. *Id.* The Court of Appeal confirmed the trial court's decision, concluding that MTA's application of the unwritten policy was arbitrary and an abuse of discretion. *Id.* at 309-310.

The *Kajima/Ray Wilson* Court reversed the Appellate Court award of lost profits but affirmed that bid preparation costs were recoverable under a theory of promissory estoppel. *Id.* at 308. The court noted that competitive bidding statutes are "enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest[,]" but, "as a practical matter, in benefiting the public by requiring fairness in evaluating and accepting bids, and thereby increasing competition, the competitive bidding laws also benefit bidders." *Id.* at 316-317. In limiting monetary damages to Kajima's bid preparation costs, the court explained that, "[a]n award of monetary damages to the lowest responsible bidder for the misaward of a public works contract would be in the public interest as well as that of the injured bidder because such an award would deter such misconduct by public entities in the future." *Id.* at 312 (internal citations omitted).

In *Owen of Georgia, Inc. v. Shelby County*, the Sixth Circuit Court of Appeals, interpreting Tennessee law, also dealt with the issue of whether an unsuccessful bidder had standing to challenge the award of a public contract by a municipality to another bidder. 648 F.2d 1084, 1086 (6th Cir. Tenn. 1981). In that case, Owen of Georgia, Inc. ("Owen") filed suit against Shelby County ("County") alleging that County violated the

applicable competitive bidding statute[2] (the "Act") and seeking, among other things, compensation for expenses and lost profits resulting from County's award of its contract to another bidder. *Id.* The district court concluded that Owen lacked standing to seek injunctive relief or damages because there was no evidence of fraud or bad faith on behalf of the defendants, but that Owen did have standing to seek declaratory relief. *Id.* at 1087. Owen appealed the ruling that it lacked standing to seek or obtain preventative, specific or monetary relief. *Id.* at 1088.

After holding that Owen had standing to contest the County's award of its contract to another bidder[3], the *Owen of Georgia* court addressed the issue of damages. The County argued that Owen was not entitled to its bid preparation costs "in view of the overwhelming authority that competitive bidding requirements contracts for public works exist to protect the public rather than the bidders…", and that Owen could not have compelled the court to award the contract to it because of the provision in the statute "which permits rejection of all bids." *Id.* at 1094.

The *Owen of Georgia* court held, however, that Owen could recover the "expenses it incurred in its unsuccessful participation in the competitive bidding process[,]" under a theory of promissory estoppel. *Id.* at 1096. The court explained that the County invited bidders to respond to its bid pursuant to the Act and that the procedures therein, "protect the local government's interest as well as those who respond to the County's invitation."

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[2] "All open market purchase orders or contracts shall be awarded to the lowest bidder who is financially responsible, taking into consideration the qualities of the articles to be supplied, their conformity to specifications, their suitability to the requirements of the County government, and the delivery terms. Any and all bids may be rejected for good cause." *Id.* at 1088 (internal citations omitted).

[3] *Id.* at 1090.

Id. The public entity is "able to obtain the lowest price for its work from a pool of qualified bidders, and all contractors are placed on equal footing…assured that their bids will receive fair and honest consideration." *Id.* at 1095. The court explained that, by solicitation of bids under the Act, the County promised to award the contract to the lowest financially responsible bidder in the event it awarded the contract at all, and in reliance on this promise Owen submitted its bid, creating an informal contract, requiring neither consent nor consideration. *Id.* The court concluded that Owen became entitled to damages when County breached this informal contract. *Id.*

This Court should adopt the reasoning of the *North Twin Builders*, *Meccon, Kajima/Ray Wilson*, and *Owen of Georgia* courts for the present dispute. As a participant in the public bidding process, Byrne & Jones is in the proper position to challenge the District's bid procurement and contract award for the Project under Missouri statute and protect the public's interest by its challenge. Further, allowing bid preparation costs as a limited remedy for violations of competitive bidding statutes both serve the public interest the statutes seek to protect and encourage bidders to participate in the process by ensuring that public entities allow all to compete on equal terms.

CONCLUSION

For all of the foregoing reasons, the Trial Court's Judgment, dated May 22, 2014 should be:

1. Reversed and remanded as to the finding that Byrne & Jones does not have standing to enjoin the District's award of the design-build contract to

another firm, because the District acted arbitrarily and capriciously and did not permit all bidders to compete on equal terms.

2. Reversed and remanded as to the finding that Byrne & Jones does not have standing to recover its bid preparation costs, because the District acted arbitrarily and capriciously and did not permit all bidders to compete on equal terms and acted arbitrarily and capriciously.

CERTIFICATIONS PURSUANT TO RULE 84.06

AND LOCAL RULES 360 AND 363

The undersigned counsel certifies by signature below that this Brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06 and Local Rule 360, and contains 5,704 words based upon the word count function in Microsoft Word for Windows 2010.

CERTIFICATE OF SERVICE

The undersigned certifies by signature below that on June 30, 2014, he served an electronic copy in .pdf format of the foregoing Appellant's Brief upon counsel of record for Respondents pursuant to this Court's electronic filing system.

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ORAL ARGUMENT REQUESTED