American Bar Association
Forum on the Construction Industry

What Emergency Relief is Available to a Defaulted Construction Contractor Who Seeks to Challenge the Propriety of the Award of the Completion Contract Without Competitive Bidding?

Eileen M. Diepenbrock, Esq.
Chris A. McCandless, Esq.

400 Capitol Mall, Suite 1800
Sacramento, CA 95814
www.diepenbrock.com

April 24-26, 2008
La Quinta Resort and Club—Palm Springs, California

©2008 American Bar Association

I. INTRODUCTION

During the course of a contractor's business, not many letters are as significant as the one that notifies the contractor it is terminated from a public works construction project.

> Dear Contractor:
>
> Please be advised that, effective immediately, the City hereby terminates Contractor for default. Contractor's employees, contractors and agents will be permitted onsite only after reasonable notice, under escorted security, and only as necessary to pick up and take out equipment and/or other possessions that are not necessary for the completion of the work. Otherwise, Contractor's officers, employees, agents, and contractors are not permitted at the jobsite without prior written authorization from the City.
>
> Sincerely,
>
> City Manager

Upon receipt of such a letter, the relationship between the owner and contractor that once began with aspirations of a successful, on-time, on-budget, and profitable project, becomes virtually irreparable, and both sides must begin to implement strategies for completing the project and mitigating damages.

A default termination is recognized as a drastic remedy for an owner, and should only be imposed for good reasons.[1] Regardless of whether a termination for default is based upon the contractor's failure to perform in a timely manner, the most common reason for a default termination, or whether the contractor is terminated for other reasons, such as violating material contract terms, the significance and effect of such a default cannot be understated.[2] A default termination can stigmatize a contractor and potentially affect its ability to secure future contracts. Indeed, the existence of a known default on a prior public contract may be grounds for a public entity to find the contractor to be non-responsible. Most significantly, however, a defaulted

contractor likely will be held liable to the public entity for the excess costs of project completion.[3] Naturally, the public entity will want to complete its project as quickly as possible, while the defaulting contractor may wish to challenge the termination and/or challenge the manner in which the public entity chooses to complete the project in order to avoid the potential for damages. Thus, once a default termination occurs, the table is set for immediate litigation between the parties.

This article considers the emergency relief that may be available to a defaulted contractor to prevent a public entity from immediately moving forward with completion of a project using a different contractor without invoking a competitive bidding process. Whether a public entity can move forward without competitive bidding usually depends upon the nature and propriety of the termination, the terms of the contract itself, and the public entity's legal authority to contract. For example, if the termination for default was not proper in the first instance, a subsequent procurement likely would be improper as well. As such, a defaulted contractor would want to remedy the wrong as quickly as possible. Thus, immediately challenging the award of a completion contract to another contractor may be one way to have the propriety of the default termination heard at an early stage in any litigation.

In addition to discussing some of the merits of these issues, this article first addresses the procedural remedies available in a federal court, as well as to an arbitrator, that might be used by a defaulted contractor to attempt to block a further contract procurement by a local public entity to complete the project. While a defaulted contractor may choose to simply litigate the propriety of a termination, without obtaining some emergency relief at the outset, a final determination on the merits may come long after project completion. Thus, in order to mitigate potential damages

and downstream risk, a defaulted contractor should consider the various remedies and grounds upon which emergency relief might be available.

II. WHAT EMERGENCY REMEDIES ARE AVAILABLE IN FEDERAL COURT TO ENJOIN OR COMPEL LOCAL STATE ENTITY ACTION?

For purposes of this article, it is assumed that the public entity is a local one, a city, and that the parties will resort to federal court based on diversity jurisdiction.[4] Thus, once a defaulted contractor decides to seek emergency relief, counsel must determine how to proceed in federal court and what standards and law will be applied.

In an appropriate circumstance, a federal court may have authority to grant equitable relief requiring action by a local government entity. Historically, a federal court has enjoyed the power to direct local government body action when necessary.[5] Emergency relief in federal court typically is in the form of an injunction, temporary or permanent, but might also include or be referred to as a writ of mandamus.[6] The most common form of emergency relief available in federal court, as in other courts, is the temporary restraining order ("TRO"). A TRO is a form of injunctive relief issued to preserve the status quo pending the hearing on the application for a preliminary injunction.

Federal Rules of Civil Procedure, Rule 65, governs the issuance of injunctions in federal courts. Rule 65 includes the requisite contents and scope of a federal court TRO, as well as other requirements. According to Rule 65, a TRO is available in federal court with or without notice to the adverse party.[7] In order to obtain a TRO, the moving party must show "specific facts" in an affidavit or verified complaint clearly demonstrating "that immediate and irreparable injury, loss, or damage will result" to the movant before the adverse party can be heard in opposition.[8] Additionally, whether or not a federal court will issue a temporary injunction typically involves, in some form or another, consideration of (1) the likelihood of success on the merits of the

movant's claim, (2) a balancing of the potential hardships to the parties resulting from issuance or non-issuance of the injunction, and (3) the public interest.[9]

In a diversity action, federal courts typically look to the substantive state law to determine the rights of the parties.[10] It has been held that the right upon which a cause of action is based is state created, and that Rule 65(a) contemplates a federal standard governing the procedure for preliminary injunctions in federal court.[11] There is a split of authority, however, as to how Rule 65 applies in a diversity action, and whether or not a federal court must apply state law related to the right to an injunction, or whether federal remedial law applies as a matter of procedure. For instance, some cases hold the right to obtain an injunction in federal court is a matter of substantive law, with the availability of injunctive relief itself being "substantive," while the procedure for obtaining an injunction in federal court is governed by Rule 65.[12] Thus, following the *Erie* doctrine[13]: "[t]he general equitable powers of federal courts should not enable a party suing in diversity to obtain an injunction if state law clearly rejects the availability of that remedy."[14] Under this rationale, for example, a federal court sitting in diversity will not grant injunctive relief where a state statute prohibits such relief in a particular contract dispute.[15]

Some cases hold, however, that a federal court may issue an injunction based on a state substantive right, even where a state court could not grant the same remedy.[16] The Supreme Court's interpretation on this issue has not been entirely consistent and has not provided a dispositive answer.[17] Nonetheless, the Supreme Court has proclaimed that "[s]tate law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts."[18] While not dispositive, such language certainly suggests the availability of injunctive relief in federal court even where such a remedy might not be available in state court.

In evaluating whether injunctive relief is available in federal court, then, one inevitably must look to the substantive state rights at issue and, in the process, determine whether state law prohibits injunctive relief altogether. Thus, if state law either allows, or at least does not prohibit, injunctive relief to challenge awards of public contracts, injunctive relief would be available to challenge a completion or reprocurement contract made without competitive bidding. As discussed below, however, the inquiry does not end there. In looking to the substantive rights, the most critical analysis is the likelihood of success on the merits of the party's claim – in this case, the likelihood of success on the merits of a contractor's challenge to a local state agency action.

III. WHAT EMERGENCY REMEDIES ARE AVAILABLE TO AN ARBITRATOR TO ENJOIN OR COMPEL LOCAL STATE ENTITY ACTION?

In evaluating whether an arbitrator similarly may issue emergency injunctive relief to enjoin or compel local state entity action, one must consider the arbitration clause itself, which will define the arbitrator's scope of authority. Absent an indication that the parties did not intend to limit an arbitrator's power to issue injunctive relief, an arbitrator likely enjoys such power. Where "a contract contains an arbitration clause, there is a presumption of arbitrability."[19] Under the Federal Arbitration Act,[20] "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."[21] Nothing in the Federal Arbitration Act itself purports to limit an arbitrator's power to issue injunctive relief.

In evaluating an arbitrator's scope of authority, courts generally apply ordinary state law contract principles in determining whether parties agreed to arbitrate certain disputes and the scope of an arbitrator's powers.[22] Thus, where the arbitration provision, as interpreted by the relevant state law, can be interpreted to provide authority to issue injunctive relief, an arbitrator likely enjoys such power.[23] Consequently, courts have both upheld and rejected arbitrators'

issuances of injunctions depending upon whether the scope of the arbitration can be interpreted to preclude issuance of injunctions.[24] For example, where an arbitrator issues an injunction that purports to bind persons not in privity of contract with the parties to the arbitration, such an injunction may exceed an arbitrator's powers.[25] In such a case, a federal court reviewing an arbitrator's issuance of an injunction may find that the injunction is void in part and good in part and, accordingly, vacate a portion of an award and leave the remaining portion intact.[26]

Of course, the presence of an arbitration clause itself poses other practical issues for a defaulted contractor seeking to challenge the completion contract. As discussed above, such a contractor will want to move forward as swiftly as possible with the challenge. The inevitable delays associated with setting up the arbitration process, including most especially the appointment of the arbitrator, can be an unnecessary hindrance and/or obstacle. Accordingly, regardless of the presence of an arbitration clause, the defaulted contractor may want to apply for preliminary injunctive relief in federal court to stay the award of the completion contract pending the outcome of the arbitration. As discussed in the companion article by Joel B. Rosen and John M. Tedder, whether the federal court will hear such an application depends upon the particular Circuit in which the federal court sits.[27]

IV. EVALUATING THE LIKELIHOOD OF SUCCESS ON THE MERITS

Arguably the most significant factor in determining whether any preliminary injunctive relief will issue, is the evaluation of the likelihood of success on the merits of the moving party's claim. In addition to considering whether or not injunctive relief is a permissible remedy, federal courts still must assess the merits of a request for injunctive relief in a diversity action by evaluating the substantive rights of the parties. As noted above, this involves consideration of the respective state law.[28] For instance, in Advance Tank Const. Co. v. Arab Water Works,[29]

the Eleventh Circuit was required to interpret substantive provisions of the Alabama Code in order to determine whether the district court's injunction preventing the execution of a contract between the city water board and the second lowest bidder was proper. For its decision, the court expressly relied on the Alabama Supreme Court's interpretation of Alabama law. In the context of emergency relief challenging a reprocurement contract, the starting point is the substantive state law concerning the statutory authority and duties of the public entity with respect to contracting.

It is well settled that the general purposes of competitive bidding are to "invite competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable."[30] Therefore, as a general proposition, most public construction projects must be competitively bid at the outset.[31] As a result, where a public entity fails to follow its competitive bidding process, the terminated contractor might challenge the validity of the reprocurement itself based on the public entity's failure to follow statutory process. Where a public entity has exceeded its authority, the resulting contract generally is considered void and can be set aside by a court,[32] thus providing substantive grounds to seek injunctive relief. In that case, an injunction can be an effective remedy to challenge a state agency's failure to competitively bid.[33] Similarly, an injunction may be effective to prevent a state agency from moving forward with an improperly awarded contract.[34]

While there are an abundance of cases discussing various state laws and challenges to awards of initial construction contracts let without competitive bidding, there are fewer cases discussing the propriety of reprocurement following termination. Logically, though, the terminated contractor may look for guidance to the requirements for, and policies underlying,

competitive bidding in the first place and argue that there should be no exception merely because it is a reprocurement.

Illustrating this, for example, is City of Chicago v. Hanreddy,[35] where the court held that a local entity may not proceed without competitive bidding in the face of a contractor's failures where statutory authority to so proceed was lacking. There, the contractor defaulted on its obligation to complete a sewer interceptor. The City of Chicago attempted to complete the project itself using day labor. A taxpayer challenged the method of contract completion, claiming the completion of the project could only be procured through competitive bidding. The court held that if the cost of completing a contract would exceed the statutory limit for purposes of competitive bidding, then the city was not authorized to complete the project by day labor. Rather, the court held the city must relet the project to the lowest responsible bidder pursuant to its statutory authorization.[36] The court explained:

> To hold that the [competitive bidding] statute does not apply to an unfinished public improvement … would be to permit contracts for public improvements to be let to irresponsible parties, which … would open wide the door to fraud and destroy competition, and enable city officials to do indirectly what in express terms they are prohibited from doing by the statute. The object of the statute is to require the municipalities of this State to advertise for bids upon any work or other public improvement which they propose to construct, and to let the same to the lowest responsible bidder. The statute is in general terms and applies to all public improvements where the costs exceed $500, and the fact that a contract for the improvement had once been let and the work abandoned before completion, if the cost of completing the same will exceed the sum of $500, does not authorize the municipality to complete the improvement by day labor, but a contract for its completion must be let to the lowest responsible bidder after an advertisement for bids. To hold otherwise would be to nullify the statute.[37]

In a Wisconsin case, Center Drainage Dist. v. Capitol Indemnity Corp.,[38] a contractor hired to cleanout drainage ditches within the district was terminated before completion of its

contract. The local district thereafter completed the work without competitive bidding and the performance bond surety sought to defend an action against it by claiming the completion contract had been illegally procured. The trial court agreed the contract had been illegally let and found in favor of the surety. On appeal, however, the court held that, even though the district failed to follow competitive bidding requirements, the defense of illegality could not be used by the surety to avoid its obligations.[39]

Even if substantive law generally would require competitive bidding of completion contracts, the owner can be expected to assert any of the exceptions that allow a public entity to proceed without competitive bidding. For example, some statutes permit the letting of a public contract in the first place by using an informal bidding process.[40] If competitive bidding was not required at the outset, absent unusual changes in the nature of the project, the exemption presumptively would apply to the reprocurement.

One exception in particular that owners may assert is that the completion contract falls within an emergency exception to competitive bidding. States generally recognize that, under "emergency" circumstances, a state agency may contract without the formal bidding process.[41] However, for that exception to apply, the need for the completion contract must fall within the definition of "emergency." For example, while not a termination for default case, Marshall v. Pasadena Unified School District[42] is instructive because it found that a completion contract following a termination for convenience did not satisfy the emergency exception to competitive bidding and thus was an invalid contract. In that case, the Pasadena Unified School District invoked its contractual right to terminate for convenience a contract for a school modernization project and then purported to award a completion contract to another contractor under the "emergency" exception. The claimed "emergency" was that prompt completion was required for

instruction/curriculum and the unfinished project was unsafe. In a subsequent legal challenge to the validity of the completion contract, the court of appeal concluded that an emergency, as defined by California law ("a sudden, unexpected occurrence that poses a clear and imminent danger, requiring immediate action to prevent or mitigate the loss or impairment of life, health, property, or essential public services")[43] did not exist. Specifically, the purported emergency stemmed from the District's decision to terminate the original contract for its own "convenience." That event was not a "sudden, unexpected occurrence" posing a clear and imminent danger requiring prompt action to protect life, health, property, or essential public services.[44] Depending on the reason for the default termination – i.e., the default is not because the contractor created an imminent safety issue – a default-terminated contractor similarly should be able to challenge the use of an emergency exception for the award of a completion contract. The fact that a project must be completed by a particular time, or that a contractor is not performing, or even that the state of the project poses safety hazards, is not sufficient unless there in fact has been a "sudden, unexpected occurrence" creating the dangerous situation.

Another argument the contractor may face is that the nature of the completion contract is really just a continuation of the original construction contract rather than a new project.[45] In Shore v. Central Contra Costa Sanitary District,[46] a California court distinguished between an owner's termination of a contractor's right to proceed with the work versus the termination of the contract itself. Where only the right to proceed had been terminated, the court found that the owner was not required to comply with California's competitive bidding laws because the completion contract was merely a "continuation" of the city's existing and still legal contract with the original contractor.[47] Because the contract language allowed the owner to take over and complete the contract, the court agreed that the local entity was not letting a new and separate

contract, but instead was exercising its rights under the original contract. As such, the public entity was not required to reprocure the completion of its project by following California's statutory competitive bid requirements.[48]

The original contract language also must be considered because it may provide a public entity with sufficient grounds to proceed with completion of a contract without further competitive bidding. For instance, in Trustees of Sanitary District of Chicago v. Poe,[49] a sanitation district ordered its contractor to discontinue all work under the contract, proceeded to complete the project with its own forces using day labor, and then sued to recover the additional expense necessary to complete the unfinished work. The contract expressly provided that if the contractor should fail for any reason to complete by a specified date, then the district would have the right proceed with its own employees and by day labor.[50] The court found that similar provisions in contracts of this nature have been held valid by a number of state courts.[51] As such, the court held that the district was not required to relet the contract under the competitive bidding statute because the contract language excused this requirement.

A California court reached the same conclusion considering the following contract language:

> should the contractor at any time during the progress of said works, refuse, or neglect to supply a sufficiency of materials or workmen, the **owner shall have the power to provide materials and workmen (after three days' notice in writing given) to finish the said works**, and the reasonable expenses thereof shall be deducted from the amount of said contract price.[52]

Thus, where the contract expressly provided for a city's right to proceed with the work after a contractor's failures, the court allowed the city to proceed without competitive bidding.

Each of the foregoing cases demonstrates how the propriety of a completion contract might be challenged or defended based on contractual or statutory arguments. Independent of

these requirements, a terminated contractor might also choose to invoke well recognized legal principles such as the duty to mitigate. An owner seeking to complete its project presumably will seek to recover its resulting damages from the terminated contractor and/or its surety. Once an owner has terminated a contractor, however, it is obligated to mitigate its damages.[53] Consequently, in seeking emergency relief, a terminated contractor may use a public entity's failure to competitively bid as evidence of a failure to mitigate damages, citing an underlying purpose of competitive bidding as finding the lowest cost.[54] In contrast, of course, an owner may contend that time is of the essence in completion and the nature of the competitive bidding process may cause too significant a delay in progress.

Another potentially effective means of seeking emergency relief may be to challenge the propriety of the termination itself, rather than the reprocurement. If the termination is improper, then the contractor presumably would still enjoy the right to proceed with completion of the contract. For this strategy, one should consider the burden of proof in a termination case. As noted at the outset, a default termination is a drastic sanction.[55] In some courts, therefore, it has been held that the government has the initial burden of establishing that the contractor was in default.[56] In those cases, if a default is established, the burden then shifts to the contractor to demonstrate its default is excused.[57] Therefore, an early challenge and request for injunctive relief may be effective to flush out evidence the public entity believes supports its decision to terminate. In the absence of such evidence, a contractor's likelihood of success on the merits increases, and thus gives way to a greater chance of obtaining emergency injunctive relief.

Apart from the availability of injunctive remedies, both the defaulted contractor and the public owner must consider the substantive rights under the law of the state governing the construction contract. As demonstrated above, the availability of emergency relief for a

defaulted contractor may depend not only the merits of the termination itself, but the public entity's authority to contract, exceptions to public bidding laws, the language of the contract itself, and the parties' duties to mitigate damages. Each of these matters may well support or diminish a contractor's likelihood of success on the merits of its claim, and thus, its potential for securing emergency relief.

IV. CONCLUSION

A defaulted contractor's rationale for seeking emergency relief and immediately contesting a public owner's decision to terminate and relet the completion of a construction project to another cannot be understated. In addition to its reputation, a defaulted contractor faces potentially grave economic consequences if the public owner is permitted to proceed unchallenged and unchecked. Similarly, a public owner that neglects to proceed with caution and legal authority after a termination for default might find itself spending far more of its own funds to complete its project than initially projected. To mitigate these uncertainties, contractor's counsel must conduct a swift analysis of the emergency remedies available, the forum within which to seek such remedies, the procedures and standards to apply, and, ultimately, the underlying likelihood of obtaining emergency relief.

---

[1] See, J.D. Hedin Constr. Co. v. United States, 408 F.2d 424, 431 (Ct. Cl. 1969)("default-termination is a drastic sanction, which should be imposed (or sustained) only for good grounds and on solid evidence").

[2] Failure to deliver or perform on time is the most common basis for default termination. WALTER F. PETTIT, CARL L. VACKETTA & DAVID V. ANTHONY, GOVERNMENT CONTRACT DEFAULT TERMINATION 1-4 (Fed. Publications 1st ed. 1991, with 1995 supplement)(including good discussions of various reasons for default termination and relevant common contract clauses).

(Continued…)

(Continued…)

[3] Most default termination provisions expressly call for the contractor to pay any excess costs associated with the completion of the work. Additionally, statutory authority may require a defaulting contractor to cover excess costs of completion. See, e.g., Cal. Public Contract Code § 10258 (upon termination by a state agency, contractor and its surety become expressly liable for completion costs that exceed the unpaid contract balance); see also Part 52, Title 48 of the Code of Federal Regulations ("Federal Acquisition Regulations" or "FAR"), section 249-10 (allowing for termination of right to proceed; "liability includes any increased costs incurred by the Government in completing the work").

[4] 28 U.S.C. § 1332. A city is a citizen of its respective state for purposes of diversity jurisdiction. "[I]t is well settled that for purposes of diversity of citizenship, political subdivisions are citizens of their respective States . . . ." Illinois v. City of Milwaukee, 406 U.S. 91, 97 (1972).

[5] See, e.g., Missouri v. Jenkins, 495 U.S. 33 (1990)(recognizing federal court power to issue mandamus orders to compel local governments to levy taxes where necessary to satisfy debt obligations or to comply with constitutional requirements); Griffin v. Prince Edward County School Bd., 377 U.S. 218, 233 (1964)(directing a county to levy taxes to raise funds to operate schools without racial discrimination).

[6] A writ of mandamus is an extreme form of equitable relief "designed to require an official to perform an act required by law." See Corn v. City of Lauderdale Lakes, 904 F.2d 585, 587 (11th Cir. 1990). Federal Rules of Civil Procedure, Rule 81(b), officially abolished the "writ of mandamus" in federal courts. Pursuant to 28 U.S.C. § 1651, however, federal courts are authorized to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This may include a writ of mandamus to correct clear abuse of discretion or a failure to carry out a ministerial duty. See, e.g., Armstrong v. Martin Marietta Corp., 138 F.3d 1374, 1385 (11th Cir. 1998); see also Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co., 260 F.2d 637, 640 (2d Cir. 1958)(explaining that equitable orders might still be referred to as "mandamus"). A writ of mandamus order essentially provides the same relief as a mandatory injunction, which requires some action to be taken by the party subject to the injunction. See Meghrig v. KFC Western, Inc., 516 U.S. 479, 484 (1996).

[7] Federal Rules of Civil Procedure ("FRCP"), Rule 65(b)(1)

[8] Id.

[9] See e.g., Amoco Production Co. v. Village of Gambell, Alaska, 480 U.S. 531, 542 (1987)(preliminary injunction). Each jurisdiction may have its own variation of the test to be applied but the standard essentially is the same. For example, some courts may hold that a moving party meets its burden by demonstrating either a combination of probable success on the merits and the possibility of irreparable injury; or, serious questions as to the matters and the

(Continued…)

(Continued…)

balance of hardships tips sharply in favor of issuing the requested relief. See Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Group, Inc., 886 F.2d 490, 497 (2nd Cir. 1989). Other courts apply a more traditional test requiring the balancing of four factors: (1)whether there exists a strong likelihood of success on merits, (2) whether the moving party would suffer irreparable injury without injunction, (3) whether issuance of injunction would cause substantial harm to others, and (4) whether public interest would be served by issuance of injunction. See Mich. Rehab. Clinic Inc., P.C. v City of Detroit, 310 F. Supp. 2d 867 (E.D. Mich. 2004).

[10] See, e.g., Sims Snowboard, Inc. v. Kelly, 863 F.2d 643, 647 (9th Cir. 1988).

[11] Continental Group, Inc. v Amoco Chemicals Corp., 614 F.2d 351 (3rd Cir. 1980).

[12] Sims Snowboard, 863 F.2d 643, 647(temporary injunctive relief could not be granted under Rule 65 where state statute expressly prohibited injunction in particular contract dispute at issue); see also, Aerosonic Corp. v. Trodyne Corp., 402 F.2d 223 (5th Cir. 1968)(federal court is in effect only another court of state in which it sits and it applies same law that would be applied if action had been brought in state courts); Franke v Wiltschek, 209 F.2d 493 (2nd Cir. 1953); John Paul Mitchell Sys. v. Quality King Distribs., Inc., 106 F. Supp. 2d 462 (S.D.N.Y. 2000); Kinderhill Select Bloodstock, Inc. v. United States, 835 F. Supp. 699, 700 (N.D.N.Y. 1993);

[13] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[14] Id.; and Safety-Kleen Systems, Inc. v. Hennkens, 301 F.3d 931, 935 (8th Cir. 2002).

[15] Sims Snowboard, 863 F.2d 643, 647

[16] Perfect Fit Industries, Inc. v. Acme Quilting Co., Inc., 646 F.2d 800, 806 (2d Cir. 1981); see also Clark Equipment Co. v Armstrong Equipment Co., 431 F.2d 54 (5th Cir. 1970)(cert. den. (1971) 402 US 909)(federal courts in diversity cases have power to enforce state-created substantive rights by well-recognized equitable remedies even though such remedy might not be available in courts of state); Black & Yates, Inc. v Mahogany Asso., 129 F.2d 227 (3rd Cir. 1942)(cert. den. (1942) 317 US 672)(in a diversity case, equitable remedies are to be determined in accordance with federal court's own rules, should be uniform throughout federal courts, and, notwithstanding the *Erie* doctrine, are not subject to limitation or restraint by state law);.

[17] Compare e.g., Gasperini v. Ctr for Humanities, 518 U.S. 415, 426 (1996); Chambers v. NASCO, 501 U.S. 32, 52 (1991); Monessen S.W. Ry. v. Morgan, 486 U.S. 330, 335-36 (1988); Guaranty Trust Co. v. York, 326 U.S. 99, 112 (1945); Grupo Mexicano Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 319 n.3 (1999); and Burlington N. R.R. Co. v. Woods, 480 U.S. 1, 3 (1987).

[18] Guaranty Trust Co., 326 U.S. at 106.

(Continued…)

(Continued…)

[19] AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 650 (1986).

[20] 9 U.S.C. § 1 *et seq*.

[21] See Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1139 (9th Cir. 1991).

[22] See First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944 (1995); AT&T Technologies, 475 U.S. at 648 (arbitration is a matter of contract); Tittle v. Enron Corp., 463 F.3d 410, 418 (5th Cir. 2006)(arbitrators derive their authority from an agreement between the parties).

[23] See, e.g., Ever-Gotesco Res. & Holdings, Inc. v PriceSmart, Inc., 192 F.Supp 2d 1040 (S.D. Cal. 2002)(issue of interim relief was within the arbitrator's authority to determine); Schultz v AT&T Wireless Servs., 376 F.Supp. 2d 685 (N.D.W. Va. 2005)(remedy of injunctive relief was available to customer through arbitration process).

[24] See, e.g., Comedy Club, Inc. v. Improv W. Assocs., 2008 U.S. App. LEXIS 1258 (9th Cir. January 23, 2008)(rejecting a portion of arbitrator's injunction); Diapulse Corp. of America v. Carba, Ltd., 626 F.2d 1108 (2nd Cir. 1980)(judicial review of arbitrator's award is limited as proscribed in the Federal Arbitration Act; upholding injunctive relief, but remanding for a more definite terms for injunction).

[25] Comedy Club, Inc., 2008 U.S. App. LEXIS 1258 (under California law, court compared arbitrator's power to power identified in Rule 65, court held that arbitrator acted beyond the scope of authority by issuing injunction that enjoined persons not in privity with the arbitration agreement).

[26] Lyle v. Rodgers, 18 U.S. 394, 409 (1820); Coutee v. Barington Capital Group, L.P., 336 F.3d 1128, 1134 (9th Cir. 2003);

[27] Seeking Emergent Relief Pending a Mandatory Arbitration Subject to the Federal Arbitration Act. JOEL B. ROSEN and JOHN M. TEDDER **(**2008 American Bar Association Forum on the Construction Industry).

[28] See, e.g., Sims Snowboard, Inc., 863 F.2d at 647.

[29] 910 F.2d 761, 768 (11th Cir. 1990).

[30] 10 McQuillin, Municipal Corporations § 29.29, at 302 (3rd ed. 1981).

[31] E.g., *Alabama*: Ala. Code section 41-16-50 *et seq*., and Crest Constr Corp. v. Shelpy County Bd. of Educ., 612 So.2d 425 (Ala. 1992)(construction contracts involving a cost of $7,500 or more made by or on behalf of, any county, municipality, certain schools, or other local

(Continued…)

(Continued…)

authority must be let to the lowest responsible bidder by free and open, competitive bidding on sealed bids); *Illinois*: 55 ILCS 5/5-1022 ("Any purchase by a county with fewer than 2,000,000 inhabitants of services, materials, equipment or supplies in excess of $ 20,000, other than professional services, shall be contracted for in one of the following ways: (1) by a contract let to the lowest responsible bidder ...; or (2) by a contract let without advertising for bids in the case of an emergency if authorized by the county board"); *Colorado*: Colo. Rev. Stat. Section 31-15-712, and 31-25-516 (contracts by counties, municipalities, and local authorities for construction, goods, and nonprofessional services must be awarded to the lowest responsible bidder); *New Mexico*: N.M. Stat Ann. Sections 13-1-100, 13-1-105, and 13-1-102, (1992 Repl. Pamp.)(all construction contracts awarded either by state agencies or by local public bodies must be let by competitive bidding); *California*: Cal. Pub. Contract Code § 20162, and Amelco Elec. v. City of Thousand Oaks, 27 Cal. 4th 228 (2002)("General law cities … are statutorily required to award public contracts in excess of $ 5,000 to the lowest responsible bidder").

[32] E.g., *Florida*: Harris v. Sch. Bd., 921 So. 2d 725, 735 (2006)(citing Florida Supreme Court in Wester v. Belote, 138 So. 721 (1931)("contract entered into in violation of statutes and rules requiring competitive bids 'is absolutely void, and . . . no rights can be acquired thereunder by the contracting party'"); *New York*: N.Y. Gen. Mun. Law section 103, and Tri-Co Electric Corp. v. Commissioner of General Services, 101 Misc. 2d 430 (1979)(declaring all contracts are void by reason of the State's failure to secure competitive bids), and Gerzof v. Sweeney, 16 N.Y.2d 206 (1965); *Oregon*: Twohy Bros. Co. v. Ochoco Irr. Dist., 108 Ore. 1 (1923)(failure to comply with the statute requiring competitive bids for public contracts, renders the contract void); *California*: Miller v. Mckinnon, 20 Cal. 2d 83, 89 (1942)(contracts let without authority of law are void).

[33] See, e.g., Scabia Construction Co. v. City of Boston, 35 Mass. App. Ct. 181 (1993); and Harry Pepper & Assocs. v. Cape Coral, 352 So. 2d 1190 (Fla. 1977).

[34] See, e.g., Stafford Construction Co. v. Terrebonne Parish School Bd., 612 So. 2d 847 (La. App. 1992); and Della Construction, Inc., v. Lane Construction Co., 42 Conn. Supp. 202 (1991);

[35] 211 Ill. 24 (1904).

[36] Id. at p. 33.

[37] Id. at p. 32. The Hanreddy court discusses the contractor's actions as an "abandonment" of the contract. There is a distinction between a true abandonment of contract, meaning mutual consent to abandon a contract, and where the contractor abandons the work of the project without consent of the owner. "In speaking of abandonment … courts sometimes use the words 'abandoned the contract' when in reality they mean that the contractor has abandoned work on the project." State Highway Commission v. Delong Corp., 9 Ore. App. 550 (1971)(quoting 5 Williston, Contracts 733, 734, § 785 (3d ed 1961)). Thus, where a contractor merely abandons

(Continued…)

(Continued…)

its work, the public entity may then "terminate" the contract based on the contractor's default. See, e.g., Mellen v. Vondor-Horst Bros., 44 Utah 300 (1914).

[38] 33 Wis. 2d 294, 297 (1967).

[39] Id. at 300.

[40] E.g., *Rhode Island*: R.I. Gen. Laws sections 37-2-18 and 37-2-22 (contracts exceeding the amount provided by section 37-2-22 shall be awarded by competitive sealed bidding unless it is determined in writing that this method is not practicable or that the best value for the state may be obtained by using an electronic reverse auction as set forth in section 37-2-18.1); *Kentucky*: Ky. Rev. Stat. Ann section 45A.080(1) (the requirement for awards based on competitive sealed bidding is relaxed when it has been determined in writing to be impracticable; if competitive sealed bidding is found to be "impracticable," then the public request for proposals may be issued); *Colorado*: Colo Rev. Stat section 31-15-712 (for city procurements of improvements with a value exceeding $5,000, if no bids are received or if the bids are considered to be too high, then the city may enter into negotiations concerning the contract); *California*: Cal. Public Contr. Code § 10122 (permitting state agencies use of informal bidding in case of certain emergencies as well as when competitive bidding is deemed to be "not in the best interests of the state").

Similarly, under the Federal Acquisition Regulations, section 49.405 (Completion by another contractor), where a surety fails to arrange for completion of a construction contract, a federal agency may award a completion contract based on sealed bidding "or any other appropriate contracting method or procedure." Thereafter, the government may make written demand upon the defaulted contractor for the total amount of the excess. FAR 49.402-6.

[41] E.g., Cal. Public Contr. Code §§ 10122 (emergency contracting for the State of California), 20113 (emergency contracting for school districts), 20134 (emergency contracting for counties), and 20168 (emergency contracting for cities); Conn. Gen. Stat. § 10-287(b)(requiring competitive bidding for school building construction with exceptions, including, contracts "of an emergency nature"); Iowa Code § 468.126 (relating to repair work on levees, "[t]he board at any time on its own motion, without notice, may order done whatever is necessary to restore or maintain a drainage or levee improvement"); KRS § 424.260(4) (requiring certain advertising for bids by local entities with an exception for emergencies); NY CLS Pub A § 1209 (applying to the New York City Transit Authority and requiring competitive bids except in emergencies); and S.D. Codified Laws § 9-47-3 (emergency exception for municipalities relating to contracts for water or drainage systems).

[42] 119 Cal. App. 4th 1241 (2004).

[43] Cal. Public Contr. Code § 1102.

[44] 119 Cal. App. 4th at 1255.

(Continued…)

(Continued…)

[45] See, e.g., Shore v. Central Contra Costa Sanitary Dist., 208 Cal.App.2d 465, 469 (1962); Garvey School Dist. v. Paul, 50 Cal.App. 75, 80 (1920)

[46] Shore v. Central Contra Costa Sanitary Dist., 208 Cal.App.2d at 469.

[47] Id. at 469.

[48] Id. at p. 470.

[49] 138 Md. 541 (1921).

[50] Id. at p. 548.

[51] Id. (citing Home Building and Conveyance Co. v. Roanoke, 91 Va. 52 (1895); Foxen v. Santa Barbara, 166 Cal. 77 (1913); People v. Peyton, 214 Ill. 376 (1905); and Perry v. Los Angeles, 157 Cal. 146 (1909); and Tiedeman on Municipal Corporations, 3911, Sec. 172 ["If however, a contract has been properly awarded to the lowest bidder, who has defaulted and abandoned it, a new advertisement and award is not necessary, the original contractor having made himself liable for the extra expense incurred."]).

[52] Garvey School Dist., 50 Cal. App. at 76.

[53] See e.g., Manhatten Lighting Equipment Co., Inc., ASBCA 7419, 61-2 BCA

[54] See fn. 29, above (general purposes of competitive bidding are to "invite competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies **at the lowest price practicable**" [emphasis added]).

[55] fn. 1, above.

[56] See, e.g., Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 765 (Fed. Cir. 1987)(for federal contracts brought before the boards of contract appeals).

[57] Florida Engineered Constr. Prods. Corp. v. United States, 41 Fed. Cl. 534, 538-539 (1998).