

attorney's fees.¹ A damage remedy against individual members of a public owner usually is deemed barred by the doctrine of quasi-immunity.²

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¹See *Meccon, Inc. v. Univ. of Akron*, 126 Ohio St. 3d 231, 2010-Ohio-3297, 933 N.E.2d 231 (2010) (upholding a wrongfully rejected bidder's entitlement to bid preparation costs, where the bidder had timely sought and been denied injunctive relief); *Beta Analytics Intern., Inc. v. U.S.*, 75 Fed. Cl. 155 (2007) (granting the remedy of bid preparation costs, and ruling that the bidder's actual costs were the basis of recovery unless the government proved that those actual costs were excessive); *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St. 3d 475, 2006-Ohio-2991, 849 N.E.2d 24 (2006) (awarding successful protester its bid preparation costs only, and stating and that "when a municipality violates competitive bidding laws in awarding a competitively bid project, rejected bidder cannot recovery its lost profits as damages"); *Lakloey, Inc. v. University of Alaska*, 141 P.3d 317 (Alaska 2006) ("A successful bid protestor . . . is not automatically entitled to an award of its entire bid preparation costs upon a showing of bid irregularities, but must demonstrate a loss of time or resources, or identify additional costs incurred, because of the bid irregularities."); *Solpac, Inc. v. City of Fresno*, 2003 WL 139564 (Cal. App. 5th Dist. 2003), unpublished/noncitable, (Jan. 17, 2003) (proper remedy for a successful bid protest was damages for bid preparation costs. The bidder's lost profits were speculative); *Ritchie Paving, Inc. v. City of Deerfield*, 275 Kan. 157, 61 P.3d 669 (2003), opinion modified and superseded on denial of reh'g, 275 Kan. 631, 67 P.3d 843 (2003) (held that unsuccessful bidder had a cause of action to recover bid preparation costs based on the theory of promissory estoppel); *Lovering-Johnson, Inc. v. City of Prior Lake*, 558 N.W.2d 499 (Minn. Ct. App. 1997); *Keco Industries, Inc. v. U. S.*, 192 Ct. Cl. 773, 428 F.2d 1233 (1970); *Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204 (Minn. 1990); *Danzl v. City of Bismarck*, 451 N.W.2d 127 (N.D. 1990); *City of Atlanta v. J.A. Jones Const. Co.*, 260 Ga. 658, 398 S.E.2d 369 (1990); *City of Cape Coral v. Water Services of America, Inc.*, 567 So. 2d 510 (Fla. 2d DCA 1990); *S & W Mechanical Co., Inc. v. City of Homer-ville*, 682 F. Supp. 546 (M.D. Ga. 1988); *Paddock Equipment Co. v. University of South Carolina*, 289 S.C. 219, 345 S.E.2d 749 (Ct. App. 1986).

See also *Gordon, Bid Protests: The Costs Are Real, but the Benefits Outweigh Them*, 42 Pub. Cont. L.J. 489 (Spring 2013); *Public contracts: low bidder's monetary relief against state or local agency for nonaward of contract*, 65 A.L.R.4th 93; *Recovery from United States of costs incurred by unsuccessful bidder in preparing and submitting contract bid in response to government solicitation*, 30 A.L.R. Fed. 355; 2000 Model Procurement Code for State and Local Governments § 9-101(7):

(7) *Entitlement to costs.* In addition to any other relief, when a protest is sustained and the protesting bidder or offeror should have been awarded the contract under the solicitation but is not, then the protesting bidder or offeror shall be entitled to the reasonable costs incurred in connection with the solicitation, including bid preparation costs other than attorney's fees.

See also *Certified Construction, Inc. v. Crawford*, 138 Haw. 315, 382 P.3d 127 (2016) (upholding dismissal as untimely of a bid protest challenging licensure requirements of the bid invitation).

²See *Bachner Co., Inc. v. Weed*, 315 P.3d 1184 (Alaska 2013) (denying an

Lost profit damages seldom are awarded against public agencies.³ In *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority (MTA)*,⁴ the California court of appeal affirmed an award to a disappointed low bidder of its lost profits, overhead, bid preparation costs, and bid protest expenses, including attorney's fees. The court held that the Authority acted arbitrarily and capriciously when it awarded a contract to the second lowest bidder based upon an evaluation which gave less points to the low bidder than to the second low bidder for use of the exact same subcontractor. Although recognizing that prior case law had permitted recovery of lost profits and overhead only against private owners, the court stated that "[w]e see no reason to draw a bright line in public works cases to preclude recovery of any specific type of damage . . . including lost profits and overhead." On appeal, the Supreme Court of California reversed

unsuccessful bidder's suit against four procurement committee members for "intentional interference with prospective economic opportunity" and debt privation of the right to contract for alleged bad faith in protecting its bid, where the procurement committee members were protected by qualified immunity and their actions were not found to have been made in bad faith).

³See *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St. 3d 475, 2006-Ohio-2991, 849 N.E.2d 24 (2006) (awarding successful protester its bid preparation costs only, and stating and that "when a municipality violates competitive bidding laws in awarding a competitively bid project, rejected bidder cannot recovery its lost profits as damages"); *Solpac, Inc. v. City of Fresno*, 2003 WL 139564 (Cal. App. 5th Dist. 2003), unpublished/noncitable, (Jan. 17, 2003) (proper remedy for a successful bid protest was damages for bid preparation costs. The bidder's lost profits were speculative); *Cleveland Constr., Inc. v. Cincinnati*, 118 Ohio St. 3d 283, 2008-Ohio-2337, 888 N.E.2d 1068 (2008) (denying lost profit damages under a section 1983 claim, but upholding the remedy of bid preparation costs, and ruling that the bidder's actual costs were the basis of recovery unless the government proved that those actual costs were excessive).

For successful claims brought by bidders under 42 U.S.C.A. § 1983 for a deprivation of federal rights under the color of state law, recovery of lost profits on the contract might be available. See *State Mechanical Contractors, Inc. v. Village of Pleasant Hill*, 132 Ill. App. 3d 1027, 87 Ill. Dec. 532, 477 N.E.2d 509 (4th Dist. 1985); *Telephone Associates, Inc. v. St. Louis County Bd.*, 364 N.W.2d 378 (Minn. 1985); *Peerless Food Products, Inc. v. State*, 119 Wash. 2d 584, 835 P.2d 1012 (1992); *Stride Contracting Corp. v. Board of Contract and Supply of City of Yonkers*, 181 A.D.2d 876, 581 N.Y.S.2d 446 (2d Dep't 1992); *Ralph L. Wadsworth Const. Co., Inc. v. Salt Lake County*, 818 P.2d 600 (Utah Ct. App. 1991); *City of Atlanta v. J.A. Jones Const. Co.*, 260 Ga. 658, 398 S.E.2d 369 (1990); *City of Cape Coral v. Water Services of America, Inc.*, 567 So. 2d 510 (Fla. 2d DCA 1990); *Carl Bolander & Sons Co. v. City of Minneapolis*, 451 N.W.2d 204 (Minn. 1990).

⁴*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transp. Authority*, 23 Cal. 4th 305, 96 Cal. Rptr. 2d 747, 1 P.3d 63 (2000), rev' g *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority*, 82 Cal. Rptr. 2d 348 (App. 2d Dist. 1999).

the recovery of lost profits and overhead, and allowed recovery only of bid preparation costs.

**§ 2:182 Damage remedy by or against successful bidder—
Lost profits**

Recovery of damages in the form of anticipated lost profits from a successful bidder, as a result of misrepresentations that helped secure the contract, have been recognized in recent years.¹ In the important decision of *Iconco v. Jensen Construction Co.*,² an unsuccessful bidder was allowed to sue the successful bidder for “unjust enrichment” under state common law based upon the successful bidder’s misrepresentations as to small business status. The successful low bidder had misrepresented its status as a small business concern, which led to the wrongful award of a contract. The United States Court of Appeals for the Eighth Circuit ruled that the unsuccessful bidder was entitled to recover from the successful bidder the profits that the successful bidder earned on the erroneously awarded contract because it would be

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¹See *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.*, 184 Cal. Rptr. 3d 279 (Cal. App. 2d Dist. 2015), review granted and opinion superseded, 188 Cal. Rptr. 3d 371, 349 P.3d 1065 (Cal. 2015) (upholding the right of an unsuccessful bidder to sue the successful bidder for intentional tortious interference with prospective business advantage, where bids were submitted using labor costs substantial less than statutorily required prevailing wage rates); *Chenango Contracting, Inc. v. Hughes Associates, Landscape Architects PLLC*, 128 A.D.3d 1150, 8 N.Y.S.3d 724, 317 Ed. Law Rep. 1032 (3d Dep’t 2015) (allowing an installer of artificial turf to sue a design professional for tortious interference with prospective advantage by intentionally creating a “restrictive specification” that excluded the installer’s product, and by refusing to recognize the installer’s product as “equal” to the named product); *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 131 Cal. Rptr. 2d 29, 63 P.3d 937 (2003) (denying disgorgement of successful bidder’s profits earned under a foreign contract obtained by illegal means, but upholding the right of the unsuccessful bidder and its agent to recover damages against the successful bidder based on interference with prospective economic advantage); *Nationwide Roofing & Sheet Metal, Inc. v. Trotwood Heating, Inc.*, 36 Ohio App. 3d 11, 520 N.E.2d 602, 34 Cont. Cas. Fed. (CCH) ¶ 75484 (2d Dist. Montgomery County 1987) (upholding suit for fraud by second low bidder against low bidder arising out of alleged fraudulent certification or small business status). See also Oshiro and Hahn, *Private Rights of Action for Procurement Violations*, 35 Constr. Law. 17 (Fall 2015) (reviewing the panoply under which an unsuccessful bidder may bring suit against the successful bidder, owner or design professional such as tortious interference, defamation, commercial disparagement, statutory deprivation of civil liabilities and negligence).

²*Iconco v. Jensen Const. Co.*, 622 F.2d 1291, 27 Cont. Cas. Fed. (CCH) ¶ 80493 (8th Cir. 1980).