

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 App. 2d Dist. 2015), review granted and opinion superseded, 188 Cal.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).

unjust for the successful bidder to retain that benefit so wrongfully obtained. Other jurisdictions have followed suit.³

A protesting bidder also may be liable for damages to a successful bidder whose bid it challenges if its protest results in that successful bidder's loss of the project where the protest ultimately is determined to be without merit. In *Davis & Associates, Inc. v. Midcon, Inc.*,⁴ the court recognized that a claim for lost profits could be made in that circumstance if the protest was shown to be unlawful, fraudulent, or otherwise inequitable.

Recovery of lost profits on the denied contracts rarely are awarded against an owner's agents. In *Morie Energy Management, Inc. v. Badame*,⁵ the New Jersey Supreme Court denied a bidder's claim for lost profits against an architect whose negligent preparation of illegal specifications for a public building project caused a contract award to be cancelled. The court ruled that the competitive bidding laws were for the benefit of the public and did not grant a private right to recover lost profits from either the public contracting agency or its architect.

§ 2:183 Injunctive relief to direct or stay of award

Injunctive relief as a remedy for award controversies ordinarily is granted only if requested prior to award of the disputed contract.¹ Where outright acquisition of contract award by mandatory injunction is unavailing, injunctive direction to rebid a

³See *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); *Integrity Management Intern., Inc. v. Tombs & Sons, Inc.*, 836 F.2d 485, 34 Cont. Cas. Fed. (CCH) ¶ 75419 (10th Cir. 1987); *Tectonics, Inc. of Florida v. Castle Const. Co., Inc.*, 753 F.2d 957 (11th Cir. 1985); *Della Const., Inc. v. Lane Const. Co.*, 42 Conn. Supp. 202, 612 A.2d 147 (Super. Ct. 1991); *Fordice Const. Co. v. Central States Dredging Co.*, 631 F. Supp. 1536 (S.D. Miss. 1986). See also *Integrity Management Intern., Inc. v. Tombs & Sons, Inc.*, 836 F.2d 485, 34 Cont. Cas. Fed. (CCH) ¶ 75419 (10th Cir. 1987).

⁴*Davis & Associates, Inc. v. Midcon, Inc.*, 127 N.M. 134, 1999-NMCA-047, 978 P.2d 341 (Ct. App. 1999).

⁵*Morie Energy Management, Inc. v. Badame*, 241 N.J. Super. 572, 575 A.2d 885 (App. Div. 1990).

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¹See *Linc Government Services, LLC v. United States*, 108 Fed. Cl. 473 (2012) (granting injunctive relief to set aside the government's "best value" determination as arbitrary and unreasonable); *Hamp's Const., L.L.C. v. Housing Authority of New Orleans*, 52 So. 3d 970 (La. Ct. App. 4th Cir. 2010) (holding that the Louisiana public bid law entitled a bidder denied a contract on grounds of non-responsibility to a hearing, and ruling that a bidder was entitled to injunctive relief barring the award of a contract where a public agency failed to