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# Municipal Law: Municipal Corporations: Recovery for Value of Services Furnished Without Compliance With Statutory Bidding Requirements

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of record had an inherent power to appoint such assistants as they deemed necessary to expedite and properly conduct judicial business.[20] A court's power to determine its requirements for functioning efficiently and performing its duties was again considered in *In re Court Room*,[21] in which a circuit court had held that Milwaukee County had to provide it with suitable quarters. The supreme court agreed, holding that in order to preserve the full and free exercise of the judicial functions of the court, the circuit court could demand reasonable quarters. Finally, in the case of *State ex rel. Reynolds v. County Court*,[22] wherein a Kenosha county judge had an air conditioner installed because the heat in the courtroom made it difficult to conduct hearings, the supreme court held that this was a matter of necessity. Although the question wasn't raised in the case, the supreme court held that the court had the power to determine the necessity for air conditioning.

In view of these cases, it would appear that Wisconsin subscribes to the position that if an expenditure is reasonably necessary for the court's efficient and effective operation, funds may be allocated for it by judicial order.

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**Municipal Corporations: Recovery From Municipality for Value of Services Furnished Without Compliance with Statutory Bidding Requirements**—The Wisconsin Supreme Court decided in *Blum v. City of Hillsboro*[1] that the plaintiff contractor had a cause of action for unjust enrichment against the defendant municipality as a result of services performed under an amended municipal contract which, as amended, was rendered invalid for failure to comply with the procedure required by the competitive bidding statute.[2] The

20. *In re* Janitor of Supreme Court, 35 Wis. 410 (1874).
21. 148 Wis. 109, 134 N.W. 490 (1912).
22. 11 Wis. 2d 560, 105 N.W.2d 876 (1960).

1. 49 Wis. 2d 667, 183 N.W.2d 47 (1971).
2. WIS. STAT. § 62.15(1) (1969) provides:
All public construction, the estimated cost of which shall exceed $1,000 shall be let by contract to the lowest responsible bidder; all other public construction shall be let as the council may direct. The council may also by a vote of three-fourths of all the members-elect provide by ordinance that any class of public construction or any part thereof may be done directly by the city without submitting the same for bids.

original contract was for excavation on a dam and lake in the amount of $47,438.50, and was let pursuant to the provisions of the bidding statute. This originally valid contract was subsequently modified, however, when the mayor and council members of the municipality asked the contractor to do additional lake bottom excavation at the same unit price of 40 cents per cubic yard as agreed upon in the original contract. All the services required by the municipality were fully performed by the contractor pursuant to the supplemented contract and the contractor sought to recover the total price for his services, $153,902.50. The municipality made partial payment of this sum, in the amount of $81,840.00, but refused to pay the balance of $72,062.50. Plaintiff then brought suit, but the trial court sustained defendant's demurrers. The issue raised on appeal was whether a cause of action would lie against the city under theories of unjust enrichment,[3] equitable estoppel,[4] or promissory estoppel[5] for additional work done on a public works

3. In City of Wauwatosa v. Milwaukee County, 22 Wis. 2d 184, 193, 125 N.W.2d 386, 390 (1963), the court stated:

> Under the doctrine of unjust enrichment the basis for recovery is the duty of a person, who has received property or money or other things of value under such circumstances that in equity and in good morals he ought not to keep, to return the property or its value—not his promise, agreement or intention.

*See also* Weber v. Sunset Ridge, Inc., 269 Wis. 120, 68 N.W.2d 706 (1955); Probst v. City of Menasha, 245 Wis. 90, 13 N.W.2d 504 (1944); Federal Corp. v. Radtke, 229 Wis. 231, 281 N.W. 921 (1938).

4. The court, in Bratt v. Peterson, 31 Wis. 2d 447, 454, 143 N.W.2d 538, 541 (1966), defined equitable estoppel as follows: "Estoppel consists of action or nonaction on the part of the one against whom the estoppel is asserted . . . which induces reliance by another . . . either in the form of action or non-action, to the detriment of the latter." In addition to good faith reliance, there must be such inequitable conduct as to amount to fraud to warrant application of the doctrine of estoppel. McKenna v. State Highway Comm'n, 28 Wis. 2d 179, 135 N.W.2d 827 (1965). Application of the doctrine involves a denial of the offending party's right to show existing facts, on the ground that justice will thereby be promoted. Sparks v. Kuss, 195 Wis. 378, 216 N.W. 929 (1928).

5. The doctrine of promissory estoppel may arise from the making of a promise, even though without consideration, if it was intended that the promise should be relied upon and in fact it was relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would result in other injustice. In Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 193 N.W.2d 267 (1965), the court adopted § 90 of the *Restatement of Contracts* as correctly setting forth the rule of promissory estoppel in Wisconsin. Section 90 states:

> A promise which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promisee and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise.

*See also* Mortgage Associates, Inc. v. Monona Shores, Inc., 47 Wis. 2d 171, 177 N.W.2d 340 (1970); Annot., 48 A.L.R.2d 1069 (1956).

contract which failed to comply with the compulsory procedure of the competitive bidding statute.

A municipality has no power to make contracts for public improvements unless it proceeds in the manner prescribed by law,[6] and any contract entered into without following statutory or charter provisions is void.[7] Failure to comply with these mandatory provisions may prevent recovery on any theory.[8] Noncompliance with statutory or charter procedures has barred recovery on contracts for the use of patented materials or processes.[9] Municipal agreements to allow claims for damages or additional work by a contractor also have been held illegal as a result of failure to comply with certain legislative mandates.[10] Even substantial compliance with compulsory statutory procedure may not be sufficient to allow recovery on the contract.[11] However, it may not be neces-

6. For example, WIS. STAT. § 62.09(10)(f) (1969) requires the municipal comptroller to "countersign all contracts with the city if the necessary funds have been provided to pay the liability that may be incurred thereunder, and no contract shall be valid until so countersigned." WIS. STAT. § 62.15(12) (1969) also requires the comptroller to countersign before the contract becomes valid. In this regard, *see* Ellerbe & Co. v. City of Hudson, 1 Wis. 2d 148, 85 N.W.2d 663 (1957); Lurye v. State, 221 Wis. 68, 265 N.W. 221 (1936). WIS. STAT. § 62.12(6)(c) (1969) provides that no city may enter a contract unless it is authorized by a majority of the city council. WIS. STAT. § 62.15 (1969) requires the Board of Public Works to advertise for bids for work on all public construction, the estimated cost of which exceeds $1,000.

7. Bechthold v. City of Wauwatosa, 228 Wis. 559, 280 N.W. 320 (1938).

8. A municipal contract beyond the scope of the municipality's corporate power is ultra vires and void. Center Drainage Dist. v. Capitol Indem. Corp., 33 Wis. 2d 294, 147 N.W.2d 245 (1964); Kiel v. Frank Shoe Mfg. Co., 245 Wis. 292, 14 N.W.2d 164 (1944).

9. WIS. STAT. § 62.15(7) (1969) sets forth a procedure for municipalities wishing to arrange to have a patented article, material or process available to contractors bidding on construction projects. Compliance with the statute is mandatory. Neacy v. City of Milwaukee, 171 Wis. 311, 176 N.W. 871 (1920); Cawker v. City of Milwaukee, 133 Wis. 35, 113 N.W. 417 (1907).

10. WIS. STAT. § 66.295 (1969) authorizes municipalities, under certain circumstances, to pay for public work, done in good faith, despite unenforceability of the applicable contracts. In Wilcox v. Porth, 154 Wis. 422, 143 N.W. 165 (1913), the court held that failure to verify a claim rendered void any agreement by the municipality to pay the claim since the municipality's charter gave it the authority to acknowledge and pay only verified claims. *See also* Lee v. City of Racine, 64 Wis. 231, 25 N.W. 33 (1885).

11. In Bechthold v. City of Wauwatosa, 228 Wis. 559, 280 N.W. 320 (1938), the plaintiff sought to enjoin the municipality from making further payment on a contract alleged to be void as a result of the failure by the Board of Public Works to run advertisements for bids according to statutory mandates. The court agreed with the plaintiffs' position:

> If as argued in this case it is held that because it does not affirmatively appear that any taxpayer has sustained a loss or has been injured by the failure to advertise for the minimum length of time prescribed, payment should not be enjoined, the court in every case where the provisions of the statute are disregarded will be called upon

sary to comply with every incidental provision of a particular statute in order to negotiate a valid contract.[12] In this regard, it is most important to determine whether non-compliance with a particular provision violated that procedure which the legislature intended to be mandatory.

Wisconsin formerly adhered to the majority view[13] that a municipal contract which failed to comply with the bidding statute was invalid, and, thus, contractors have been denied the right to sue either directly under the contract[14] or on the quasi-contractual theory of unjust enrichment.[15] The principle reason for such a position has been to insure fulfillment of the purpose of the bidding statute, which is to prevent fraud, collusion, favoritism and improvidence in the administration of public business, as well as to

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to determine whether or not substantial injury has been sustained. No one will know in such cases whether the contract is valid or void until the matter has been settled by the courts. The conditions under which a municipality may contract will then be fixed not by the legislature but by the court.

228 Wis. at 564-65, 280 N.W. at 323. However, while the court recognized a "hands off" judicial policy regarding such areas of municipal action presently subject to express legislative control, it, nevertheless, made clear that it would not be completely without power if the circumstances were appropriate:

Whether a court of equity will exercise its powers in cases where the money has been paid out is quite a different question than whether the court should exercise its powers to prevent payment. In the first case the court determines upon what consideration its equitable powers should be exercised. That is a judicial question. In the second case the question is whether a valid mandate of the legislature shall be upheld. That is a matter not committed to the discretion of the court.

228 Wis. at 565, 280 N.W. at 323. By the *Blum* decision, the court apparently has altered the position under consideration. Instead of considering whether a valid mandate of the legislature should be upheld, the court in *Blum* invoked its equitable discretion, despite the fact that the contested sum had not been paid, and determined that some relief could be given without defeating a valid mandate of the legislature.

12. In *Bechthold,* the court also said that failure to comply with every "incidental provision" of § 62.15, that is, those provisions not essential to the accomplishment of the legislative purpose, would not necessarily invalidate the contract. 228 Wis. at 564, 280 N.W. at 323. While the court specifically indicated § 62.15, it would seem logical that such language would extend to other statutory provisions prescribing procedures to be followed in negotiating municipal contracts.

13. 10 E. McQUILLIN, MUNICIPAL CORPORATIONS § 29.28, at 321 (3d ed. 1966); Annot., 33 A.L.R.3d 1164 (1970).

14. Bechthold v. City of Wauwatosa, 228 Wis. 559, 280 N.W. 320 (1938).

15. Federal Paving Corp. v. City of Wauwatosa, 231 Wis. 655, 286 N.W. 546 (1939); Shulse v. City of Mayville, 223 Wis. 624, 271 N.W. 643 (1937) (recognizing the rule); Journal Printing Co. v. City of Racine, 210 Wis. 222, 246 N.W. 425 (1933); Wagner v. City of Milwaukee, 196 Wis. 328, 220 N.W. 207 (1928); Cawker v. Central Bitulithic Paving Co., 140 Wis. 25, 121 N.W. 88 (1909); Chippewa Bridge Co. v. City of Durand, 122 Wis. 85, 99 N.W. 603 (1904) (apparently recognizing the rule).

insure that the municipality receives the best work and supplies at the most reasonable price.[16] In *Blum,* the court recognized that to permit recovery under the doctrines of either equitable or promissory estoppel would defeat the purpose of the statute, since these doctrines, if recognized, would compensate the contractor according to the agreed contract price.[17] However, while only a minority of the jurisdictions allow unjust enrichment as a basis of recovery in such situations, the trend is in this direction since it has been recognized that unjust enrichment can be remedied, while not defeating the purpose of the bidding statute, by establishing limitations on the measure of damages recoverable.[18] With this in mind the court adopted the minority position in the following respect:

> We here conclude that when work has been performed for a municipality under a contract which is *malum prohibitum* and not *malum in se,* which contract is entered into in good faith and is devoid of any bad faith, fraud or collusion, and where the statute imposes no penalty, a cause of action based upon the equitable doctrine of unjust enrichment can be maintained.[19]

Wisconsin's prior position, which denied recovery under unjust enrichment for the reasonable value to the municipality of work completed pursuant to an invalid contract, was not completely reversed. The court, apparently conscious of the "hands off" judicial policy regarding areas of municipal action presently subject to expressed legislative control,[20] sought to allow the plaintiff limited

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16. The provisions of statutes, charters and ordinances requiring competitive bidding in the letting of municipal contracts are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable . . . .

10 E. McQUILLIN, *supra* note 13, § 29.29, at 321.

17. 49 Wis. 2d at 676, 183 N.W.2d at 52. Under the doctrines of equitable estoppel and promissory estoppel, the municipality would be estopped to deny the validity of the contract. Therefore, application of these doctrines would permit recovery at the contract price. Utschig v. McClone, 16 Wis. 2d 506, 114 N.W.2d 854 (1962); 28 AM. JUR. 2D *Estoppel and Waiver* § 33 (1971).

18. As the court recognized, it has been pointed out by other authority that: "Quasi-contractual recovery will impose upon a municipality no greater liability, and the removal of profits will discourage repeated violations." 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 10.27, at 755-56 (1967). However, the court appears to have deemed it necessary to go a step further to insure that allowing recovery will not defeat the purpose of the bidding statute by excluding from the amount of recovery not merely profits, but "profits including overhead expense." 49 Wis. 2d at 674, 183 N.W.2d at 50.

19. 49 Wis. 2d at 673, 183 N.W.2d at 50.

20. In Wagner v. City of Milwaukee, 196 Wis. 328, 331, 220 N.W. 207, 208 (1928), the court recognized that:

recovery without defeating the purpose of the bidding statute by allowing recovery for unjust enrichment subject to certain prescribed limitations:

> The question is not how much the plaintiff has parted with, but how much has the municipality benefited.
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> In this case, the measure of damages should be limited by at least two factors: (1) Recovery should be limited to an amount which represents the *actual cost* to the plaintiff, without allowing profits including overhead expense, and (2) in no event should it exceed the *unit cost* of the original contract. Subject to these limitations, any recovery would be limited to the value of the *actual benefit conferred* as distinguished from the reasonable value of the work performed and materials furnished by the plaintiff.[21]

In such a case, the contractor clearly will not be allowed to recover the reasonable value of his materials or services provided. Instead, it appears that recoverable damages will be limited to the least of the three measures: actual benefit conferred, unit cost of the original contract, or actual cost excluding profit and overhead elements. With the adoption of these alternate limitations, the purpose of the bidding is not defeated by allowing recovery for unjust enrichment. By restricting compensation to the "actual benefit conferred,"[22] any excessive cost to the municipality due to inefficient management by the contractor is substantially elimi-

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> The law requiring contracts to be let to the lowest bidder is based upon public economy, and originated, perhaps, in the distrust of public officers whose duty it is to make contracts. It is of great importance to taxpayers, and ought not to be frittered away by exceptions . . . . The legislature having seen fit to hedge about municipal action by restrictions so obviously of value to the body politic, it is not for the courts to alter or vary them. Courts have no authority to throw the law into a melting pot, and recast it at pleasure.

*See also* Ricketson v. City of Milwaukee, 105 Wis. 591, 81 N.W. 864 (1900).

21. 49 Wis. 2d at 674, 183 N.W.2d at 50 (emphasis added).

22. In contract law, it is said that a valuable consideration for a promise may consist of an actual benefit to the promisor, in which case "actual benefit" means that the promisor has, in return for his promise, acquired some legal right to which he would not otherwise have been entitled. Irving v. Irwin, 133 Cal. App. 374, 24 P.2d 215 (1933); Woolum v. Sizemore, 267 Ky. 384, 102 S.W.2d 323 (1937). The limitation of recovery to the "actual benefit conferred" in this instance appears to have been intended to be a generic limitation under which the two more specific limitations, actual cost and unit cost, would fall. The court distinguished actual benefit conferred from reasonable value. Actual benefit conferred would only consist of that value of the materials or services as enjoyed by the municipality, and would not take into account any considerations of worth as determined by the contractor.

nated. By the further restriction to "original unit cost,"[23] the municipality, at least theoretically, is insured of obtaining work and supplies at the most reasonable price. Finally, by totally eliminating profits, including overhead allocations, in determining "actual cost,"[24] compliance with the statute should be effectively encouraged such that the fundamental legislative purpose behind the bidding statute will be fulfilled. The court, having embarked upon a relatively uncharted sea of recognizing recovery for unjust enrichment of a municipal contract rendered invalid for failure to comply with statutory procedure, has attempted by these limitations to narrowly define their course, and, in the final analysis, appears to have arrived at a just result without defeating the legislative mandate.

It is noteworthy that several methods of recovery may be available to one seeking relief under a contract which does not strictly comply with the bidding statute or other compulsory statutory provisions.[25] For example, one may sue on the basis of the contract alone and recover the full contract price if such contract was awarded for the repair and reconstruction of public facilities under

23. It is not altogether clear whether the announcement of this limitation to the unit cost of the *original* contract presumes the existence of a *modified* contract and requires an originally valid contract as a condition precedent to any recovery at all. Although it is true that good faith might be more apparent in the case where there was an original agreement which complied with the bidding statute and was only rendered invalid by a subsequent agreement which did not, there seems to be no compelling reason for a blanket denial of recovery in all cases of initial invalidity.

24. Actual cost and reasonable value are not synonymous. Schacht v. Oriental Storage & Transfer Co., 155 Wis. 121, 143 N.W. 1058 (1913). *See also* Boehck Constr. Equip. Corp. v. O'Brien, 29 Wis. 2d 649, 139 N.W.2d 650 (1965). Reasonable value is the price which the property or services will bring when offered for sale by one willing, but not obliged, to sell, and bought by one who is willing, but not compelled, to purchase. Connoley v. Beyer Crushed Rock Co., 355 Mo. 684, 689, 197 S.W.2d 653, 656 (1946). Reasonable value may include a profit, whereas that would not be an element of actual cost. Herein lies the critical distinction. In *Blum*, the court went beyond the limitation of actual cost by excluding "profit including overhead expenses." Overhead expenses could properly be included as actual cost. If a contractor seeking recovery for unjust enrichment were allowed to include overhead expenses in determining his actual cost, he might be tempted to overestimate such overhead expenses in an attempt to recover a limited profit. Considering that the court sought first to insure that the statute would not be defeated in allowing recovery for unjust enrichment, the exclusion of overhead expenses from the limitation of actual cost does not seem unreasonable.

25. Quasi-contractual recovery in Wisconsin for services rendered pursuant to invalid municipal contracts is given exhaustive consideration in Comment, *Municipal Corporations: Remedies of the Private Contractor Against a Wisconsin Municipality Where the Contract is Ultra Vires or Defective*, 48 MARQ. L. REV. 228 (1964).

circumstances which constituted an emergency.[26] Moreover, contracts may include a clause providing for increases in the quantity of construction stipulated in the original contract, without resubmission for bids, by an amount not to exceed 15% of the original contract price.[27] Such a clause should always be included in a contract where, as in the instant case, the amount of construction or excavation to be performed under the contract is known to be susceptible to change.[28] Finally, in the case of contracts completed prior to July 1, 1969, though the contract may have been rendered invalid or recovery barred for any reason, one can request the municipality to pay the "fair and reasonable value" of any benefits it may have received and continues to retain as a result of the contractor's efforts.[29] Should all of these optional methods of recovery prove to be either unavailable or unsuccessful, it is now possible to bring an action for limited damages under the theory of unjust enrichment according to the rule announced in *Blum*.

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26. WIS. STAT. § 62.15(b) (1969).

27. WIS. STAT. § 62.15(c) (1969).

28. It is quite clear that such a clause would not have helped the contractor in *Blum* since the amount he sought to recover was an increase substantially beyond the 15% allowed by this section.

29. WIS. STAT. § 66.295 (1969). This remedy was not available to the plaintiff in *Blum* because at the time he brought his action the statute only allowed the municipality to grant relief for work performed prior to December 1, 1960. The statute was cited by the defendant, however, for the proposition that its mere existence indicated that payment in the case of an invalid contract should be at the municipality's sole discretion. The court disagreed, for it saw "no reason why a municipality *may* pay a moral claim in its discretion, but should not be *required* to." 49 Wis. 2d at 675, 183 N.W.2d at 51.