

STATE OF INDIANA )  
 )ss:  
COUNTY OF MARION )

MARION SUPERIOR COURT  
CIVIL DIVISION 10  
CAUSE NO. 49D10-0411-PL-002105

CITY OF LAWRENCE and )  
G. MATTHEW VAIL, M.D. individually and )  
on behalf of all others similarly situated, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
LAWRENCE UTILITIES, LLC, )  
 )  
Defendant. )

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**ORDER GRANTING PARTIAL SUMMARY JUDGMENT  
AND STAYING ACTION**

**Introduction**

Plaintiff City of Lawrence (“Lawrence”) seeks declaratory relief regarding public-private operating agreement (“Agreement”) for public water service with Defendant Lawrence Utilities, LLC (“LLC”). Lawrence moves for partial summary judgment to void the Agreement. The LLC opposes summary judgment largely arguing estoppel. The Court finds the Agreement violates Indiana bidding law, and is void under public policy.

Stay is entered until further order of the Court to allow consistent and undisturbed public water service while the Court and the parties consider future proceedings, if any.

**Issues**

Is the Agreement void for violating Indiana bidding law?

Is Lawrence estopped from challenging the Agreement now?

## **Background**

On December 29, 1998, Lawrence entered a contract with the Indianapolis Water Company to sell its water utility. That contract was terminated by agreement around July 1, 2001. On August 8, 2001, Lawrence and the LLC entered into a twenty-year contract to operate the water utility. The Agreement was signed by the Mayor and subsequently approved at public meetings of the Lawrence Common Council and Lawrence Board of Public Works. It provides the LLC pay Lawrence specific amounts each year, but not less than \$1,000,000 annually. The contract also provides for general rate increases for public water rates of 30%, 30%, and 25% for 2002, 2003, and 2004 respectively. During the first two years of the Agreement, Lawrence received over \$3,000,000. In addition, the LLC has expended approximately \$13,000,000 for improvements.

There is no dispute on record that the Agreement is a “public-private agreement” (“PPA”) as defined by I.C. 5-23-32-7. However, the parties dispute whether the Agreement is a PPA subject to public bidding.

No bid proposals were requested or received, and no bid process ever took place regarding the Agreement.<sup>1</sup> On December 22, 2003, the Indiana State Board of Accounts specifically found non-compliance with bidding laws during its audit of Lawrence.

On April 23, 2004, Lawrence and a citizen ratepayer filed the Complaint for Declaratory Relief seeking to “void” the Agreement and other relief. On November 10, 2004, the Plaintiffs filed its Motion for Partial Summary Judgment mainly claiming the

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<sup>1</sup> Section 1.07 of the Agreement requires compliance with all applicable laws. The record here does not reflect the nature or compliance of bidding requirements related to the improvements.

Agreement is illegal since it was not publicly bid. On July 25, 2005, the LLC entered its opposition to partial summary judgment largely arguing Lawrence is estopped from its lawsuit, but the Agreement is nevertheless proper since: a) the law does not mandate bidding for PPA's; b) The Agreement is a "service" contract exempt from bidding; and the Agreement was made under "emergency" and exempt from bidding.

The LLC also moves to dismiss the claims of the ratepayer, which the Court denies by separate order.

## **Applicable Law and Analysis**

### General

Summary judgment is proper if the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. T.R. 56 (C). The moving party must establish the "absence of any genuine issue of fact as to a determinative issue." Jarboe v. Landmark Community Newspaper, Inc. (1994), Ind., 664 N.E.2d 118, 123. If there is sufficient evidence, the burden then shifts to the non-movant to make sufficient showing to establish the existence of a genuine issue for trial. Shell Oil Co. v. Lovold Co. (1998), Ind., 705 N.E.2d 981. On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning Fiberglass Corp. v. Cobb (2001), Ind., 754 N.E.2d 905, 909.

The party claiming estoppel has the burden to show its necessary elements. Story Bed and Breakfast LLP v. Brown County Area Plan Comm. (2005), Ind., 819 N.E.2d 55, 67. Therefore, Lawrence has the burden upon summary judgment, but the LLC has the separate burden to prove estoppel.

Under Indiana law, a court must interpret a statute to ascertain and give effect to the intent of the legislature. A statute is to be examined and interpreted as a whole, given common and ordinary meaning to words used in English language and not overemphasizing a strict literal or selective reading of individual words. Foremost Life Insurance Company v. Indiana Department of Insurance (1980), Ind., 409 N.E.2d 102. An unambiguous statute must be held to mean what it plainly expresses, and given its plain and obvious meaning. Indiana Department of State Revenue v. Horizon Bancorp (1994), Ind., 644 N.E.2d 870.

#### The Statute Is Unambiguous and Was Violated

The General Assembly enacted several relevant statutes which the parties interpret differently:

1. I.C. 5-23-4-1. A governmental body may enter into an operating agreement with an operator for the operation . . . of any public facility for any public service to be performed on behalf of the governmental body.
2. I.C.5-23-5-1. Any public-private agreement contemplated by this chapter must require the governmental body to request proposals under this chapter before entering into the public-private agreement.
3. I.C.5-23-5-2 to11. *Under these sections, proposals for public-private agreements shall be solicited through a " request for proposals", including public notice, negotiation with responsible offerors, recommendation to the appropriate board, more public notice, public hearing, written basis for the recommendation within prescribed time periods, and a final determination by the appropriate board.*

The Court finds these provisions (“Statute”) are unambiguous and require government bidding since “any” PPA “must” request proposals and bidding “before” it is entered. The LLC argues not all PPA’s are subject to bidding requirements under the Statute. But no reasonable reading of the Statute leads to this conclusion. The legislative intent is obvious: all Indiana PPA’s are subject to public bidding without exception. Accordingly, the LLC’s claims of “service contract” and “emergency” are inapplicable and moot.

The Agreement was clearly made in violation of the Statute. But the Statute provides no language declaring any agreement “void”, or any remedial measures if an agreement is made without bidding. Is the Agreement then necessarily void?

#### The Agreement Is Not Automatically Void, But Void Under Public Policy

Indiana common law shows a lengthy tradition of recognizing and respecting the freedom to contract, and the public policy supporting enforcement of contracts. Safety National Casualty v. Cinergy Corp. (2005), Ind. App. 829 N.E.2d 986. Nevertheless, Indiana courts may refuse enforcement on *public policy grounds* when:

1. A contract violates a statute;
2. A contract clearly tends to injure the public in some way; or
3. A contract is otherwise contrary to the declared public policy of Indiana.  
*Under this category, the following considerations should be balanced:*
  - a. **The nature and subject matter of the contract;**
  - b. **The strength of the public policy underlying the statute;**
  - c. **Likelihood that refusal to enforce the contract will further the public policy;**
  - d. **How serious or deserved would be the suffering by the party seeking enforcement; and**
  - e. **The parties’ relative bargaining power and freedom to contract.**

Fresh Cut, Inc. v. Fazli (1995), Ind., 650 N.E.2d 1126, 1130; *see also* Straub v. B.M.T. by Todd (1994), Ind. 645 N.E.2d 597.

The law becomes less settled regarding enforcement of contracts made in violation of a statute, as we have here (No. 1 above). On the one hand, some courts have recently said public contracts not made “in strict compliance” with statutory provisions are “void and unenforceable.” City of Gary v. Majors (2005), Ind., 822 N.E. 2<sup>nd</sup> 165, 171, n.3. But Lord Devlin describes a more prudent approach in the English case of St. John Shipping Corp. v. Joseph Rauk, Ltd. (1966), 3 All E.R. 683:

If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it . . . But unless you get a clear implication of that sort, I think that a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect is, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another which may be easily broken without wicked intent.

Indeed, Continental Basketball Association, Inc. v. Ellenstein Enterprises, Inc. (1996), Ind., 669 N.E.2d 134 seemingly adopts this approach. In that case, the parties made a franchise agreement which did not comply with the registration and disclosure requirements of Indiana franchise law. Despite the fact that formal statutory requirements were not followed, the Indiana Supreme Court declined to find the contract void since the statute did not contain words like “void” or “unenforceable.” The Court reasoned: “The legislature did not intend that every contract made in violation of the [statute] be void. Rather, we take the same balancing approach we did in Fresh Cut and analyze the agreement using the factors identified . . . ” Id. at 140. The court adopted this cautious approach “because we value the freedom to contract so highly, we will not find that a contract contravenes a statute unless the language of the implicated statute is clear and unambiguous that the legislature intended that the courts not be available to enforce . . . ” Id. at 140.

The Court then applies Continental here. Since the Statute fails to use words like “void” or “unenforceable,” nor provides any remedies, the Court must conclude that PPA’s without bidding are not automatically void. Rather, the Court takes the Fresh Cut approach, that is, balancing specific public policy considerations, to determine whether *this* Agreement is void:

- a. **The nature and subject matter of the contract.** The provision of public water service is essential and fundamental. It is a basic prerequisite for public health, public safety, and the well being of the community.
- b. **The strength of the public policy underlying the Statute.**

A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master. Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees . . .

I.C. 5-14-3-1 (Indiana Open Records Act)

Likewise, the purpose behind competitive bidding statutes is to safeguard the public against fraud, favoritism, graft, extravagance, improvidence and corruption, and to insure honest competition for the best work or supplies at the lowest reasonable cost. Town of New Ross v. Ferretti (2004), Ind.App., 815 N.E.2d 162, 168; Schindler Elevator Corp. v. Metro. Dev. Comm'n (1994), Ind. App., 641 N.E.2d 653, 657; *see also* Shook Heavy & Env'tl. Constr. Group v. City of Kokomo (1994), Ind., 632 N.E.2d 355, 358. The Indiana Code is besieged with laws where the General Assembly requires public bidding for public business,

often ensured by criminal sanctions.<sup>2</sup> Ninety-two years ago, Shaw v. Elijah (1913), Ind.App., 102 N.E. 885 explained the common law policy favoring fair bidding for government business: "Under the principles of the common law any contract that is made for the purpose of, or whose necessary effect or tendency is to lessen competition and restrain bidding at judicial sales, is held to be illegal because opposed to public policy. The object in all such sales is to get the best price that can be fairly had for the property. The policy of the law, therefore, is to secure such sale from every kind of improper influence . . . and the courts will not enforce contracts founded in such practices." Id. at 887 (quoting Camp v. Bruce, 96 Va. 521, 31 S. E. 901, 43 L. R. A. 146, 70 Am. St. Rep. 873). The Indiana Supreme Court long ago acknowledged that "the paying public has the constitutional right to know how their money is being spent." State ex rel. County Welfare Board of Starke County et al. v. Starke Circuit Court (1958), Ind., 147 N.E.2d 585, 589.

It is obvious that public access to public business is a strong and traditional public policy in Indiana. Open bidding on public business is clearly part and parcel of that tradition.

c. **Likelihood that refusal to enforce the contract will further the public policy.**

If the Agreement is not enforced, the clear public policy favoring public bidding

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<sup>2</sup> Research shows 183 statutes refer to "bidding" for procedural or substantive purposes. Notable examples include: I.C. 4-1-5-1 et.seq. (sale of bonds for universities); I.C. 4-13.6-5-1 et.seq. (public works projects); I.C. 5-10-1.1-5 (contract for state employee deferred comp); I.C. 5-16-1-1.1 et.seq. (public works); I.C. 5-22-7-1 et.seq. (general state purchasing); I.C. 8-22-4-4 (airport authority purchasing); I.C. 8-23-9-13 (state highway); I.C. 12-15-11-1 et.seq. (Medicaid provider service); I.C. 13-21-6-2 (solid waste management construction); I.C. 20-20-5-13 (public school textbooks); I.C. 36-1-12-1 et.seq. (public contracts); I.C. 36-9-28-5 (water improvements).

on public business will be furthered and upheld. It will now allow Lawrence to follow the law, that is, public notice, written explanation and full public hearing.

- d. **How serious or deserved would be the suffering by the party seeking enforcement.** Although the LLC paid Lawrence over \$3,000,000 and spent at least \$13,000,000 in improvements, the net effect of such expenses to the company, its officers or employees is inconclusive.
- e. **The parties' relative bargaining power and freedom to contract.** The parties' bargaining power and freedom to contract is equal and undisturbed.

Given the paramount importance of our freedom to contract, the Court is reluctant to disturb the Agreement. But public access to public business is crucial to a free market and a free community. The proper provision of public water service is essential. The open and prudent use of public resources and ratepayers' money is rooted deep in Indiana law. These considerations all weigh heavily against enforcement of the non-bid Agreement. Any other conclusion deprives the public of its time-honored right to know - and leaves no recourse when the government breaks the law.

All in all, the Court finds the Agreement is void because it violated Indiana public policy under the balance of Fresh Cut considerations. This determination is alone dispositive of Lawrence's Motion for Partial Summary Judgment.

#### Equitable Estoppel Does Not Apply

Any party claiming equitable estoppel must show its (1) lack of knowledge and of the means of knowledge as to the facts in question, (2) reliance upon

the conduct of the party estopped, and (3) action based thereon of such a character as to change its position prejudicially. City of Crown Point v. Lake County (1987), Ind., 510 N.E.2d 684, 687. But government entities are not subject to equitable estoppel unless a party has detrimentally relied on the government's assertion or silence when there was a duty to speak, and the estoppel serves a "public interest." Dept. of Local Gov. Finance v. Commonwealth (2005), Ind., 820 N.E.2d 1222, 1228; Equicor Development, Inc. v. Westfield-Washington Township Plan Comm. (2001), Ind., 758 N.E.2d 34, 39; Brown County v. Booe (2003), Ind. App. 789 N.E.2d 1, 11; Johnson County Plan Comm. v. Tinkle (2001), Ind. App., 748 N.E.2d 417, 420. Our courts have stated two good reasons for this rule. First, estoppel should not be applied against governments when both parties had access to the correct information. Id. at 420; Story Bed and Breakfast LLP v. Brown County Area Plan Comm., supra. at 67. The Indiana Supreme Court developed such logic about city government contracts 67 years ago in Hamer v. City of Huntington (1939), Ind., 21 N.E.2d 407, 411:

Any party dealing with a municipality is bound to take notice of the limited powers of the municipality and of the laws governing the municipality in making contracts (citations omitted). If one dealing with the city could plead ignorance of the laws governing the city . . . and thereby make valid a contract made by the city contrary to [statute], the affect of such statute . . . would be destroyed.

Id. at 411.

Even more importantly, Indiana law further provides a governmental entity cannot be estopped by the *prior* unlawful acts of its own public officials. Johnson County Plan Comm. v. Tinkle, supra. at 419; Cablevision of Chicago v. Colby Cable Corp. (1981), Ind. App., 417 N.E.2d 348, 354. The Indiana Supreme Court first formulated this reasoning 120 years ago in Platter v. Board of Comm. of Elkhart County (1885), 103 Ind. 360, 2 N.E. 544:

The disobedience of statute by a public officer creates an incurable difficulty. It cannot be remedied or removed by subsequent confirmation of the original acts, whatever the form of the confirmation assumes . . . the acts of officers cannot bind the local public by estoppel where the officers performing these acts cannot bind them by a direct contract. It would be strange, indeed, if an estoppel could validate a sale of property made in violation of law, since, to allow an estoppel to so operate, would frustrate the purpose of the statute and enable the officers to do by indirect means what they could not do by direct proceeding.

Id. at 557.

All in all, a contract between private parties is binding and subject to court enforcement.

But government contracts are made for the people – and with the people’s money. So the law allows public officials to act on the people’s behalf to conform with the law, even when it means voiding a contract.

The LLC fails to establish the general elements of equitable estoppel, fails to show it unfairly relied on the government, and fails to show how estoppel will serve any public interest. On the contrary, the record shows LLC had advice from able counsel, and as much or more knowledge of Indiana bidding law as Lawrence. So Lawrence cannot be estopped *now*, even if its Mayor, Common Council, and Board of Public Works entered the Agreement *before*. If a previous violation of the Statute cannot be corrected, the Statute is rendered meaningless, and the intent of the General Assembly is contravened. Such alternative does not serve the public interest, and is not permissible under our law.

## **Conclusion**

The Statute is unambiguous and applies to the Agreement. The Agreement violates the Statute.

But the Statute does not automatically void contracts made without bidding. Rather, the Agreement is void under public policy analysis because the vital importance of open bidding for water service weighs against its enforcement.

All in all, Lawrence shows the absence of any genuine issue of fact as to the determinative issue of bidding, and is entitled to judgment as a matter of law.

The LLC fails to show the general elements of equitable estoppel. In addition, Lawrence's decision to seek compliance with the statute does not harm the public interest. Most importantly, Lawrence cannot now be estopped by the prior acts of its public officials.

Therefore, the Agreement is void.

### **Order**

Lawrence's Motion for Partial Summary Judgment is granted.

Stay is entered in these proceedings until further order of the Court.

Dated this 1st day of November 2005.

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David J. Dreyer, Judge