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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

D.H. WILLIAMS CONSTRUCTION,

Plaintiff and Appellant,

v.

EMMETT'S EXCAVATION, INC.,

Defendant and Respondent.

F061558

(Super. Ct. No. 09CECG01049)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Donald R. Franson, Jr., Judge.

Doerksen Taylor and Charles L. Doerksen for Plaintiff and Appellant.

Coleman & Horowitz, Darryl J. Horowitz and C. Fredrick Meine III for Defendant and Respondent.

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In 2005, Clovis Unified School District (District) was building an educational center. Appellant, D.H. Williams Construction, Inc. (Williams), submitted the lowest bid for the concrete and fencing portion of this project. In general, school districts are required by law to award construction contracts to the “ ‘lowest responsible bidder.’ ”

*(D.H. Williams Construction, Inc. v. Clovis Unified School Dist. (2007) 146 Cal.App.4th 757, 763 (D.H. Williams I.)* The school district must also determine whether the bid is responsive, i.e., “whether the bid ‘promises to do what the bidding instructions demand.’ ” (*Id.* at p. 764.) The District rejected Williams’s bid as “non-responsive” and awarded the contract to the next lowest bidder, respondent, Emmett’s Excavation, Inc. (Emmett). (*Id.* at p. 762.)

Williams filed a petition for writ of mandate in the trial court naming the District as the respondent and Emmett as the real party in interest. The trial court granted the petition and awarded the contract to Williams. On appeal, this court held that Williams’s bid could not be declared nonresponsive but that the appropriate remedy was for the District to conduct a due process hearing before awarding the contract to determine whether Williams was responsible. Accordingly, the judgment was reversed. (*D.H. Williams I, supra*, 146 Cal.App.4th at p. 761.)

After the remittitur issued in May 2007, the District informed Williams that it was deemed a nonresponsible bidder. A hearing on the issue was set for July 2007. At the hearing a settlement was reached. However, the settlement was never approved by the District. In the meantime, Emmett completed the project. Williams was advised by letter in April 2008 that the project was complete. This letter also suggested that any future due process hearing was now moot.

In March 2009, Williams filed the underlying complaint against the District and Emmett for declaratory relief and promissory estoppel. Williams sought a declaration against the District and Emmett that, as a result of the District’s failure to comply with the competitive bidding requirements, (1) the contract was void or otherwise unenforceable *ab initio* and (2) all money paid to Emmett must be disgorged except to the extent that Emmett could establish entitlement to its reasonable costs of performance, excluding profit, pursuant to Public Contract Code section 5110. Public Contract Code section 5110 provides that if a competitively bid contract is determined to be invalid due

to defects in the competitive bidding process caused by the public entity, the contractor is entitled to be paid its reasonable costs, excluding profit.

Williams also sought damages against the District based on promissory estoppel. Under this theory, the lowest responsible bidder that is wrongfully denied a public contract may recover its bid preparation costs from the public entity. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 308.) However, lost profits are not recoverable. (*Ibid.*)

Williams dismissed the District from the action without prejudice. Emmett then moved for judgment on the pleadings. The trial court granted the motion. The court held that Williams did not have standing to assert a private cause of action under Public Contract Code section 5110 to compel Emmett to disgorge the profits from its contract and that declaratory relief was not available because only past wrongs were involved.

Williams states that it is not seeking relief under Public Contract Code section 5110. Rather, Williams seeks a declaration against Emmett that the contract awarded to Emmett is void and that Emmett must disgorge its profit. Regarding the court's holding that declaratory relief was inappropriate because only past wrongs were before the court, Williams contends the trial court ignored the reality of the situation. According to Williams, "[t]here is an ongoing wrong in that Emmett's Excavation continues to hold on to profits from an illegal contract and D.H. Williams continues to suffer pecuniary injury from the misaward of the contract."

As discussed below, the trial court properly granted judgment on the pleadings. Therefore, the judgment will be affirmed.

### **DISCUSSION**

Since the District was dismissed from this action and Williams is not attempting to state a cause of action under Public Contract Code section 5110, the only issue on appeal is whether the trial court correctly determined that declaratory relief was inappropriate.

Under Code of Civil Procedure section 1060, “[a]ny person ... who desires a declaration of his or her rights or duties with respect to another ... may, *in cases of actual controversy* relating to the legal rights and duties of the respective parties, bring an original action ... in the superior court for a declaration of his or her rights and duties ....” (Italics added.) The court may refuse to exercise this power in any case where its declaration is not necessary or proper at the time under all the circumstances. (Code Civ. Proc., § 1061.) Accordingly, the trial court has discretion to grant or deny declaratory relief and its decision will not be disturbed on appeal unless it is clearly shown that the discretion was abused. (*Osseous Technologies of America, Inc. v. DiscoveryOrtho Partners LLC* (2010) 191 Cal.App.4th 357, 364.) However, whether a claim presents an “actual controversy” is a question of law that we review de novo. (*County of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 606 (*County of San Diego*).)

Code of Civil Procedure section 1060’s “actual controversy” language encompasses a probable *future controversy* relating to the legal rights and duties of the parties. (*County of San Diego County, supra*, 164 Cal.App.4th at p. 606.) One purpose of declaratory relief is to quiet or stabilize an uncertain or disputed legal relation. (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 647 (*Meyer*).) Another purpose is to resolve doubts regarding uncertainties or controversies that might otherwise result in subsequent litigation. (*Ibid.*) In other words, declaratory relief acts as a practical means of resolving controversies so that parties can conform their conduct to the law and prevent future litigation. (*Meyer, supra*, 45 Cal.4th at p. 648.) As such, declaratory relief operates prospectively to declare future rights, rather than to redress past wrongs. (*County of San Diego, supra*, 164 Cal.App.4th at p. 607.) “A declaratory judgment ‘serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the

interests of preventive justice, to declare rights rather than execute them.” ’ ” (*Id.* at pp. 607-608.)

Here, Williams is not seeking a prospective declaration of rights. Rather, Williams is claiming it is entitled to damages for past wrongs. Characterizing the dispute as an ongoing controversy because Emmett is continuing to hold on to the profits from an “illegal contract” does not change the true nature of the case. Declaratory relief under these circumstances would not prevent future litigation. If the courts were to adopt Williams’s position, declaratory relief would be available for nearly every contract dispute.

The contract was awarded to Emmett in 2005 and completed by Emmett in 2008. There are no future rights to be declared. Accordingly, no “actual controversy” exists within the meaning of Code of Civil Procedure section 1060. Thus, the trial court acted within its discretion in denying declaratory relief and awarding Emmett judgment on the pleadings.

#### **DISPOSITION**

The judgment is affirmed. Costs on appeal are awarded to respondent.

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LEVY, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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CORNELL, J.