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John M. Rapp, dba Rapp Construction Company v.
Salt Lake City, a municipal corporation; and
Marriott Corporation, a corporation : Brief of
Respondent

Utah Supreme Court

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IN THE SUPREME COURT 1975
OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY,
J. Reuben Clark Law School

JOHN M. RAPP, dba RAPP
CONSTRUCTION COMPANY,
Plaintiff-Appellant,

vs.

Case No.
13552

SALT LAKE CITY, a municipal
corporation; and MARRIOTT
CORPORATION, a corporation,
Defendants-Respondents.

Brief of Defendant-Respondent
Salt Lake City

Appeal from the District Court of Salt Lake County,
State of Utah
Honorable Ernest F. Baldwin, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN M. RAPP, dba RAPP
CONSTRUCTION COMPANY,
Plaintiff-Appellant,

vs.

SALT LAKE CITY, a municipal
corporation; and MARRIOTT
CORPORATION, a corporation,
Defendants-Respondents.

Case No.
13552

Brief of Defendant-Respondent Salt Lake City

NATURE OF CASE

This is an appeal from an Order of the District Court of the Third Judicial District in and for Salt Lake County, granting Defendant-Respondent, Salt Lake City, Summary Judgment and dismissing the Complaint as to Defendant, Marriott Corporation. At the hearing on the motion for Summary Judgment, Respondent Salt Lake City contended that Appellant

was barred from bringing his suit against Salt Lake City by the doctrine of Governmental Immunity which, under the facts of this case, has not been waived by the Utah Governmental Immunity Act, Sec. 63-30-1 et seq., *Utah Code Ann.*, 1953, as amended.

DISPOSITION IN THE LOWER COURT

The lower Court granted Summary Judgment as to Respondent Salt Lake City based upon its contention of governmental immunity at the hearing of the motion and after memoranda were filed.

STATEMENT OF FACTS

On or about November 30, 1972, the City did enter into a "Lease and Concession Agreement" with Airline Foods, Inc., which is a subsidiary of Defendant Marriott Corporation. Pursuant to the terms of said Agreement, real property located at the Salt Lake City International Airport was leased to Airline Foods for the purpose of operating an in-flight catering kitchen upon the demised premises. It was agreed that Salt Lake City was to construct "at its expense" a building or buildings on the premises for use as an in-flight catering kitchen in accordance with plans and specifications prepared by Airline Foods and approved by the Salt Lake City Engineer. It was agreed that the City's expense was limited by the following provision:

"Lessor shall pay for the 'cost of the project'.
Provided that in the event the 'cost of the project'

shall exceed the total sum of Five Hundred Fifty Thousand (\$550,000) Dollars, the Lessee shall promptly pay Lessor upon demand the amount by which the 'cost of the project' exceeds such sum and which is the result of change orders and other amendments and supplements to the construction contract or contracts issued or executed by Lessor at the written request of and approved by Lessee. . . ."

On or about April 26, 1973, Salt Lake City mailed to two contractor's associations, Associated General Contractors of America, 1135 South West Temple Street, Salt Lake City, Utah, and Intermountain Contractors, P. O. Box 1829, Salt Lake City, Utah, a Notice to Contractors requesting bids on the project. (A copy of which is set out in full text in Appendix.) On or about May 30, 1973, Salt Lake City caused the said Notice to Contractors to be published in the *Deseret News*, a newspaper of general circulation in Salt Lake City. (A copy of said notice is set out in full text in Appendix.) No Notice of Invitation for Bids was sent to individual contractors and no individual contractor was requested to submit a bid, contrary to what is implied in Appellant's Brief under "Statement of the Facts" on page three. In response to the Invitation for Bids, three bids were received, i.e., Bodell Construction Company in the amount of \$718,114.00, Rapp Construction Company (Appellant), in the amount of \$648,888.00 and J.J.G. Construction Company, (hereinafter referred to as "J.J.G.") in the amount of \$540,000.000. The preliminary estimate made by the Salt Lake City Engineer's Office was in the amount of

\$650,000.00. Following the opening of the bids on May 17, 1973, the low bid submitted by J.J.G. in the amount of \$540,000.00 was accepted by the Salt Lake City Board of Commissioners.

The obligations of Airline Foods under said Lease and Concession Agreement were guaranteed by Defendant Marriott Corporation and the said Agreement did contain a provision that Marriott Corporation would be permitted to bid on all or any portion of the construction work. It is believed by Respondent, Salt Lake City, that J.J.G. is a wholly owned subsidiary of Defendant Marriott Corporation.

After the said Lease was approved by the Salt Lake City Board of Commissioners, it was duly filed of record with the Salt Lake City Recorder's Office, pursuant to Sec. 10-10-61, *Utah Code Ann.*, 1953, as amended, which record was, as required by law, open to the inspection of all interested persons.

POINT I

PLAINTIFF'S ACTION IS BARRED BY GOVERNMENTAL IMMUNITY

In the absence of a statute to the contrary, it has always been the law that no private action for tort will lie against a municipality for an act or acts committed while such municipality is performing a governmental function. *Niblock v. Salt Lake City*, 100 U. 573, 111 P.2d 800 (1941). See also: *Davis v. Provo*, 1 U.2d

244, 265 P.2d 415 (1953) ; *Cobia v. Roy City*, 12 U.2d 375, 366 P.2d 986 (1961) ; and *Brinkerhoff v. Salt Lake City*, 13 U.2d 214, 371 P.2d 211 (1962).

The right to institute an action is purely statutory since it did not exist at common law and is strictly a legislative function. As Justice Wolfe stated in his concurring opinion in the *Niblock* case:

“However, since the decision of this court has steadfastly refused to so limit the doctrine, the prevailing rule must continue to be the law until the Legislature sees fit to change it.” *Niblock v. Salt Lake*, supra, at p. 805.

In 1965 the Utah Legislature saw fit to enact the Utah Governmental Immunity Act, Sec. 63-30-1, et seq., *Utah Code Ann.*, 1953, as amended, waiving governmental immunity in certain cases. However, only in those cases specifically waived by the Act is a plaintiff allowed to bring a suit against a municipality. The Act must clearly be applied to preserve sovereign immunity and waive it only as clearly expressed. *Hope v. Utah State Road Commission*, 30 U.2d 4, 511P.2d 1286 (1973).

Sec. 63-30-3, *Utah Code Ann.*, 1953, as amended, provides:

“Except as may be otherwise provided in this act, all governmental entities shall be immune from suit for any injury which may result from the activities of said entities wherein said entity is engaged in the exercise and discharge of a governmental function.”

As to negligent acts of employees, Sec. 63-30-10, *Utah Code Ann.*, 1953, as amended, provides for a waiver of immunity, except in eleven specified cases, two of which have application to the case at hand. The first is: “[When the claim] arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused, . . .” Sec. 63-30-10(1), *Utah Code Ann.*, 1953, as amended.

The funds for the construction of the in-flight kitchen, subject of this suit, were obtained from the issuance of bonds which are to be paid from revenue derived from the Salt Lake City International Airport, and, as such, are a “special fund” to be used for a special purpose. Under the “Special Fund” doctrine, there is no requirement that a contract for the construction of a building be let through competitive bidding. See, *Utah Power & Light Co. v. Provo City*, 94 U. 203, 74 P.2d 1191 (1937). The statute requiring competitive bidding only requires such:

“Whenever the board of commissioners . . . of any city . . . shall contemplate making any new improvement *to be paid for out of the general funds of the city*, . . .” Sec. 10-7-20, *Utah Code Ann.*, 1953. (Emphasis added)

Therefore, the advertising for bids in this case was completely within the discretion of the City since it was not obligated so to do by statute. *Velasquez v. Union Pac. RR.*, 24 U.2d 217, 469 P.2d 5 (1970). The City has the right, without the requirement, to make certain that

it was obtaining the best price for the project. Hence, the City was exercising a discretionary function and cannot be sued "whether or not the discretion is abused." See, *Wilcox v. Salt Lake City*, 26 U.2d 78, 484 P.2d 1200 (1971).

The second and more compelling reason that suit cannot be maintained in this instance is found in Subsection (6) which says that immunity from suit is not waived if the injury "arises out of a misrepresentation by said employee whether or not such is negligent or intentional." Sec .63-30-10(6), *Utah Code Ann.*, 1953, as amended. As this Section clearly states, a suit cannot be maintained against a municipal corporation for injury caused by misrepresentations made by its employees while performing a governmental function. See, *Boyce v. State of Utah*, 26 U.2d 138, 486 P.2d 387 (1971). Misrepresentation is one of the basic elements of Appellant's claim against Respondent, Salt Lake City Corporation, as will be noted in Paragraphs 6 and 7 of Appellant's Complaint. For such misrepresentations, whether negligent or intentional, by commission or omission, if any actually occurred, Appellant cannot maintain his action as it is barred by governmental immunity.

That the action taken in this matter was a governmental function cannot be disputed. This Court has so held in the case of *Wade v. Salt Lake City*, 10 U.2d 374, 353 P.2d 914 (1960). This Court held that the operation and the maintenance of an airport is performed as a governmental function. Therein this Court held:

“We are aware of the diversity of respectable authority heading in almost all directions anent interpretations of statutes dealing with airport operation. The variegation ably is treated in 66 A.L.R. 2d 634. We prefer to conclude that our statutes have spoken rather clearly and emphatically in favor of tagging the operation of airports in this state by state political subdivisions under statutory authority as being accomplished in a *governmental capacity*, and until it is alleged and justified as an operation either sanctioned by different future legislation, *the municipal airport at Salt Lake City must be held to be operating under such capacity.*” (Emphasis added) *Wade v. Salt Lake City*, supra, at p. 915.

POINT II

THIS ACTION IS BASED ON TORT AND NOT UPON IMPLIED CONTRACT.

In an attempt to circumvent governmental immunity, Appellant alleges some sort of a warranty based upon some wildly concocted implied contract. There can be no implied contract with Salt Lake City for the following reasons:

1. THE ONLY METHOD OF CONTRACTING IS BY ACTION OF THE BOARD OF COMMISSIONERS AND MUST BE COUNTER-SIGNED BY THE CITY RECORDER.

The general rule of law is that a municipality may not be obligated on an implied contract. When employees of the City of Akron, Ohio, petitioned the court for an award of overtime pay based upon implied contract, the court held:

“What the plaintiff is doing in this case is turning that promise into an implied promise to pay in the event that he is unable to use all his accumulated overtime, but *it has been held time and again that the only manner in which a municipality may enter into a contract, agreement or obligation is by ordinance or resolution of its council.* There can therefore be no contract, agreement or obligation against a municipality and *no implied liability.* All liability *ex contractu* must be expressed and be entered into by ordinance or resolution of the council.” (Emphasis added) *Zehenni v. City of Akron*, 19 Ohio Misc. 11, 250 N.E. 2d 630, 632 (1968).

This Court stated the same proposition thusly:

“Every person contracting with a municipal corporation, or one who proposes to enter into a contract with such corporation, *is bound to take notice of the provision of the city ordinances and any limitations therein contained.* In the case before us, while the plaintiff was misled into thinking that it had entered into a contract with the defendant, it was nevertheless charged with knowledge that the proposed contract was *without binding effect until it was approved by the governing body of the city.*” (Emphasis added) *Thatcher Chemical Company v. Salt Lake City Corp.*, 21 U.2d 355, 445 P.2d 769, 771 (1968).

The ordinance which the Court referred to in the *Thatcher* case and upon which is based its reason for so holding was, in part:

“... that no liability against Salt Lake City in excess of one hundred fifty dollars shall be created by the commissioner of any statutory de-

partment without sanction of the board of commissioners first had and approved, Except as herein provided, no person other than the board of commissioners shall create any liability against the city." Sec. 24-1-15, *Revised Ordinances of Salt Lake City, Utah*, 1965.

This ordinance is still in effect; therefore, the only method by which Salt Lake City can enter into a contract is by sanction of the Board of Commissioners.

A further provision of the Salt Lake City Revised Ordinances requires:

"He [city recorder] shall countersign all contracts made in behalf of the city, and every contract made in behalf of the city or to which the city is a party shall be *void unless signed by the recorder*." (Emphasis added) Sec. 25-16-6, *Revised Ordinances of Salt Lake City, Utah*, 1965.

This section of the Salt Lake City Revised Ordinances was enacted pursuant to the mandate of the Utah Legislature, Section 10-10-61, *Utah Code Ann.*, 1953, as amended, which requires:

"He [city recorder] shall countersign all contracts made on behalf of the city, and every contract made on behalf of the city or to which the city is a party shall be *void unless signed by the recorder*. He shall maintain a record of all contracts, properly indexed, *which record shall be open to the inspection of all interested persons*." (Emphasis added).

It has been said that where there is a charter provision or a statute or ordinance prescribing the method by which an officer or agent of a municipal corporation

may bind the municipality by contract, that method must be followed and there can be no implied contract or implied liability of the municipality under such circumstance.

“Many cases hold that if a statute or the charter requires certain express contracts of a municipality to be preceded by certain steps or to be made in a certain way, and expressly or impliedly forbids the execution of such contracts in any other way, then no implied contract can arise when the expressed contract is invalid for failure to comply with such statutory or charter provisions, nor where, in the absence of an express contract, the implied contract would have come within such statute if it had been expressed. The fiction of an implied promise or agreement, on the theory of the liability based on quantum meruit, cannot be substituted for an expressed contract which is void for non-compliance with mandatory terms of the statute or charter.” 10 *Mun. Corp., McQuillin*, Sec. 29.112, p. 544.

A myriad of cases have stated this proposition, only a few of which are quoted as follows:

“Where there is a statute or ordinance prescribing the method by which an officer or agent of a municipal corporation may bind the municipality by contract, that method must be followed, and *there can be no implied contract or implied liability of such municipality*. Where the agents of a city are restricted by law as to the methods of contracting, *the city cannot be bound otherwise than by compliance with the conditions prescribed for the exercise of power.*” (Emphasis added) *Wacker-Wabash Corp. v. City of Chicago*, 350 Ill. App. 343, 112 N.E.2d 903, 908 (1953).

The California Supreme Court said:

“The contract whose validity plaintiff seeks to establish was not signed by the city manager as the charter requires. It could not have been signed since the area to be included was never defined nor approved by the city attorney or the council. It is well settled that *when a municipal charter contains an express limitation upon the mode in which the city may contract, the city is bound only by contracts executed in accordance with the charter provisions*; in other words, where the statute provides the only mode by which the power of the contract shall be exercised, the mode is the measure of the power. (Cases cited) The rule applies equally to contracts made by the city in a governmental or proprietary function. (Cases cited) *When the charter provision has not been complied with, the city may not be held liable in quasi contract, and it will not be estopped to deny the validity of the contract.* (Cases cited)” (Emphasis added) *Dynamic Industries Co. v. City of Long Beach*, 323 P.2d 768, 771 (1958).

In the case of *Satrom v. City of Grand Forks*, 159 Cal. App. 2d 294, 163 N.W. 2d 522 (1968), the court stated, at p. 527:

“Where the statute expressly permits the City to contract only upon the governing body’s authorization, and further provides that a contract be executed on the part of the City *by its executive officer and by the city auditor, no valid contract exists where such statutory requirements have not been complied with. . . .* But where the statute expressly fixes certain requirements for execution of a contract, we do not believe *municipal officers can ignore such requirements and create*

an implied contract by their conduct since municipal contracts must be executed in accordance with statutory requirements.” (Emphasis added)

Courts have also held that this is the case even though benefits are conferred upon the municipality by completion of the contract.

“Where a contract is made by a municipal corporation which is not warranted by the statutory authority conferred upon it, the governing body of the corporation has at all times the right to *treat the contract as void and refuse compliance therewith*. A reason frequently advanced in support of this rule is that since the powers of a municipal corporation are wholly statutory, *every person who deals with such a body is bound to know the extent of its authority and limitations in its powers*. It is generally held that when a contract has been entered into by a municipal corporation with respect to a subject matter which was not within its corporate powers, or which it is authorized to make only under prescribed conditions, within prescribed limitations, or in a *prescribed mode or manner*, the corporation cannot be held liable on the contract regardless of whether the other party thereto has fully carried out its part of the agreement. The corporate powers of such a corporation cannot be extended by the doctrine of estoppel. (Emphasis added) *Hoboken Local No. 2, etc. v. City of Hoboken*, 133 N.J.L. 334, 44 A.2d 329, 332 (1945).

“It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officer of the corp-

oration, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglects this, or chooses to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated." *Dynamic Ind. Co. v. Long Beach*, supra, at p. 772.

It is generally accepted practice that a contractor submitting a bid is a mere volunteer and there is no anticipation on the part of the contractor that he will be paid for his costs in preparing the bid if his bid is not accepted.

One mandatory requirement prescribed by the State Legislature and carried out in the City Ordinances is that all contracts must be countersigned by the City Recorder in order for them to be valid. If this is not done such contract is void.

"Countersignature of a municipal contract by a particular officer is essential to its enforcement where the statute requiring it is mandatory." 63 *C.J.S. Mun. Corp.* §1007 (c), p. 593.

As was stated in the *Thatcher* case, every person contracting with the City is bound to take notice of the provision that no contract can be entered into except be it sanctioned by the Governing Body and countersigned by the City Recorder. For this reason, no implied contract can be formed if it is for an amount exceeding one hundred fifty dollars or if it is not countersigned by the City Recorder. Even if such contract is formed, because it is claimed that it was sanctioned by the Board of Commissioners because of some action which they may

have taken, then such contract is void for want of countersignature by the City Recorder.

2. THERE CAN BE NO IMPLIED CONTRACT BECAUSE THERE WAS NO CONSIDERATION GIVEN.

It is a well settled rule that a contract must have consideration and that in order to be binding each party must give some legal consideration to the other by conferring the benefit upon him or suffering a legal detriment at his request. *Manwill v. Oyler*, 11 U.2d 433, 361 P.2d 177 (1961).

Salt Lake City did not give to Appellant: "Ten Dollars and other good and valuable consideration." It did not give One Dollar, not One Cent, nor did it give even a peppercorn. All that was promised on the part of Salt Lake City was that it would consider the bid of Appellant. If "A" says to "B": "If you will give me a price at which you will sell your horse, I will consider it." Do you have a binding contract? No! The promise to consider the offer is not sufficient consideration.

Salt Lake City did not in any way obligate itself by requesting bids. It could reject all bids including plaintiff's and J.J.G. Construction Company's (the low bid and that bid which was accepted) if it so desired, and it was so designated in the request for bids. (See Notice to Contractors in Appendix). Salt Lake City was not required to accept Plaintiff's bid even if it had been the lowest responsible bid (which it was not). As discussed under Point I, the funds from which the in-

flight kitchen were to be constructed are special funds and under the "Special Fund" doctrine there is no requirement to advertise for bids. *Utah Power and Light Co. v. Provo*, supra. Therefore, no statute requires the City to accept the lowest responsible bid. In the absence of a statute requiring acceptance of "the lowest responsible bid," a municipality need not let to such bidder if it merely adopts a policy of advertising for bids. Under such conditions it may let to a higher bidder or to none at all as it so desires. *Lee v. City of Ames*, 199 Iowa 1342, 203 N.W. 790 (1925); *Archambault v. Mayor of Lowell*, 278 Mass. 327, 180 N.E. 157 (1932).

The court in the *Archambault* case stated, at p. 159:

"In the absence of the not unusual provision requiring contracts to be awarded the lowest responsible bidder such a requirement is not to be implied, but it is to be inferred that the awarding of the contracts is left to the reasonable judgment of the municipal officers charged with the responsibility therefor. (Cases cited)."

The *Lee* case held, at p. 793:

"It is well settled that a municipal corporation need not, in making its contracts, advertise for bids and let to the lowest bidder in the absence of an express statutory requirement, and where a city is not required to advertise for bids, neither is it required to let to the lowest bidder, in case it does adopt such course. (20 Enc. of Law (2d Ed.) 1165, and cases cited.)"

Herein lies part of the difference between the case at hand and the case cited by Appellant, *Heyer Products Co. v. U.S.*, (Ct. Cl. 1956) 140 F. Supp. 409.

In the *Heyer* case the government was required by statute to accept the bid "most advantageous to the government price and other factors considered." 41 *U.S. Code Ann.*, Sec. 152. It was on the basis that Heyer's bid was the "most advantageous to the government," that the court found some sort of an implied contract which conferred upon the bidder certain rights. That case was referred back to the trial court and when at trial the trial court found Heyer's bid to be defective and not "the most advantageous to the government," the Court of Claims then held that Heyer was not entitled to collect for his costs in preparing the bid. *Heyer Products Co., Inc. v. U.S.*, (Ct. of Cl. 1959) 177 F. Supp. 251. Hence, the consideration in the *Heyer* case upon which the court based an implied contract was the implied promise:

"However, we said that by the solicitation for bids, the Government impliedly promised that it would give honest and fair consideration to all bids received and would not reject any one of them arbitrarily or capriciously, but would award the contract to that bidder whose bid in its honest judgment was most advantageous to the Government." *Heyer Products Co., Inc. v. U.S.*, supra, at p. 252.

In the instant case there was no such obligation, no implied promise to let the contract to the bidder whose bid was most advantageous to the government nor to the lowest responsible bidder, but any and all bids could be rejected; hence, the only promise given was that the bid would be considered and that is not sufficient consideration upon which to base an implied contract.

POINT III

ADVERTISING FOR AND RECEIVING BIDS CREATES NO IMPLIED CONTRACT AND A REJECTED BIDDER HAS NO STANDING.

It should be noted that Appellant cites several cases stating that an unsuccessful bidder making a prima facie showing of arbitrary or capricious consideration of the bids by an agency will entitle such unsuccessful bidder to a hearing. The following cases cited by Appellant can summarily be disposed of and disregarded so far as standing in the case at bar is concerned: *Scanwell Laboratories v. Shaffer*, 137 U.S. App. D.C. 371, 424 F.2d 859 (1970); *Wheelabrator Corp. v. Clafee*, 147 U.S. App. D.C. 238, 455 F.2d 1306 (1971); *M. Steinhil & Co. v. Seamans*, 147 U.S. App. D.C. 221, 455 F.2d 1298 (1971); *Blackhawk Heating & Plumbing Co. v. Driver*, 140 U.S. App. D.C. 31, 433 F.2d 1137 (1970); *Ballerina Pen Co. v. Kunzig*, 140 U.S. App. D.C. 98, 28 L.Ed. 2d 234, 433 F.2d 1204 (1970), cert. denied, 401 U.S. 950, 91 S.Ct. 1186 (1971); *Simpson Electric Co. v. Seamans*, 317 F. Supp. 684 (D.D.C. 1970); *Keco Ind. v. Laird*, 318 F. Supp. 1361 (D.D.C. 1970); *Armstrong & Armstrong, Inc. v. U.S.*, 356 F. Supp. 514 (D.C.E.D. Wash. 1973); *Continental Business Enterprises, Inc. v. U.S.*, 452 F.2d 1016 (Ct. Cl. 1971); and *Curtiss-Wright Corp. v. McLucas*, 364 F. Supp. 750 (D.C.N.J. 1973). The above cited cases have no application in the case at hand because the decision in each and every one of those cases was based upon the Administrative Procedure Act, 5 U.S.C.A. Section 500

et seq., and the contractors in those cases were held to have standing based upon the Judicial Review Section of said Act, 5 *U.S.C.A.* Section 701 et seq. The specific Section which applied in these cases was 5 *U.S.C.A.* Section 702, which reads as follows:

“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof.” Pub.L. 89-554. Sept. 6, 1966, 80 Stat. 392.

For example, the Court stated this to be the case in *Scanwell Lab.* and regarding standing said:

“They may not base decisions on arbitrary or capricious abuses of discretion, however, and our holding here is that one who makes a prima facie showing alleging such action on the part of an agency or contracting officer has standing to sue under Section 10 of the Administrative Procedure Act.” *Scanwell Lab. v. Shaffer*, supra, at p. 869.

The statement of Appellant on page 14 of his brief to the effect that the case of *Salt Lake City v. State*, 22 U.2d 37, 448 P.2d 350 (1968), held that a municipality in Utah may be bound by an implied contract, formed only from the conduct of the parties, is completely erroneous. In that case there had been an agreement entered into and such is stated in the facts of the case.

“... the city fathers entered into an agreement with the leaders of the territorial government which was subsequently reduced to writing in the form of a series of documents including ordin-

ances, statutes, and resolutions duly and regularly enacted and passed." (Emphasis added) at p. 351.

It should further be noted that the Court states that the series of documents including ordinances, statutes and resolutions were duly and regularly enacted and passed. This writer would assume that what the Court said was that all formalities had been complied with. In fact the opinion sets out the agreement made and entered into as of the 25th day of October, A.D. 1926 by and between Salt Lake City, a municipal corporation of Utah, and the State of Utah, which contract was "duly executed". See, *Salt Lake City v. State*, supra, at p. 353.

Therefore, Appellant's implication that the contract was not countersigned by the City Recorder is also erroneous. The acts referred to by the Court when it stated:

"The actual agreements reached by and between the two bodies politic must be determined from a consideration of all the *documents available*, together with the understanding of the parties as manifest by *what was done in connection therewith.*" (Emphasis added) *Salt Lake City v. State*, supra, at p 355,

were the enacting of ordinances, statutes and resolutions and not actions which would create an implied contract, but a written contract which completely complied with all statutory requirements.

This leaves Appellant with only one case (the *Heyer Produtcs* case) in support of his contention that

he has standing by virtue of an implied contract. This is the only case that this writer could find (and evidently the only one which Appellant could find) which holds that a bidder who is unsuccessful has obtained an implied contract. As a matter of fact, only one out of four Judges in that case found the basis for standing to be an implied contract. Two Justices dissented in part and held that the Plaintiff in that case had standing based upon the fact that it was a claim founded upon an Act of Congress, but not upon the basis of an implied contract. One Judge in dissenting in total stated:

“If the officer acting on behalf of the Government was guilty of the acts alleged in the petition, it would amount to fraud. A suit founded on fraud would sound in tort, and it is clear that this court has no jurisdiction of tort actions. *Martilla v. United States*, 118 Ct. Cl. 177. The plaintiff, in order to recover, must show that he has a contract that he shall receive fair consideration of his bid, or that a statute by its own terms authorizes his recovery in the event his bid does not receive fair consideration. Neither the facts nor the statutes involved justify a conclusion that the Government made a contract with plaintiff to give him fair consideration. On the other hand, there is nothing in the statute which, by its own terms, would authorize the plaintiff to recover a judgment if the contracting officials had not given his bid fair consideration. Without one or the other basis, I cannot see how the court can render judgment for the plaintiff.” *Heyer Products Co. v. U.S.*, supra, at p. 414.

Thus, it leaves Appellant with one Judge from the Court of Claims (not a very persuasive authority) to

support his contention. The great weight of authority, in fact all authority found by this writer, except the *Heyer* case, is contrary. The case of *Edelman v. Fed. Housing Admin.*, 382 F.2d 594 (1967), is a good example and expressly holds contrary to the *Heyer Products* case and is a much better reasoned opinion. Therein the Court stated:

“Appellant seeks to avoid the statutory policy of governmental immunity clearly established in the Federal Tort Claims Act, 28 U.S.C. §2680, by several arguments directed toward excluding the facts of this case from the operation of the Act. None of these claims can be accepted . . . (among these contentions) . . . Appellant contends that by advertising for bids, FHA obligated itself to give fair consideration to all bids, and that by allegedly favoring Tally’s bid it did not give fair consideration to appellant’s bid. In doing this, argues appellant, FHA breached an implied contract with appellant entitling appellant to damages measured by his expense in preparing and submitting his bid. (See *Heyer Products Co. v. United States*, supra) The District Court, disagreeing with the Court of Claims decision in *Heyer Products Co. v. United States*, supra, held that this claim also sounded in tort. We do not find it necessary to reach this question. It is apparent that if appellant were permitted to prove a breach of an implied contract of fair consideration by showing that the entire auction was a sham, the effect would be to permit an unsuccessful bidder to attack the auction on the grounds of fraud and misrepresentation—a suit which, as we have pointed out, is doubly barred.” (Emphasis added) *Edelman v. Fed. Housing Admin.* supra, at p. 597.

The Court also said:

“[I]t is well established that an unsuccessful bidder has no standing in a suit to challenge the legality of the bidding procedure. . . . Bidding procedures are for the benefit of the public generally and confer no private right on the bidder. It avails appellant nothing to assert that he is not an unsuccessful bidder because Tally’s bid was void; this is the issue which he is barred from litigating. . . . The appellant never entered into a contract with the FHA. *The invitation to bid specifically reserves to the FHA the absolute right to decline to enter into a contract with any bidder.* Regardless of whether or not Tally’s bid was valid, there was no contract of sale with appellant because the FHA never accepted appellant’s bid.” (Emphasis added) *Edelman v. Fed. Housing Admin.*, supra, at p. 597.

In stating that any contract theory to the effect that bidding and all aspects of the sale would fairly be conducted, the Court stated:

“Furthermore, in order to recover on a contract theory, appellant would have to prove an implied contract with the FHA to the effect that the agency would fairly conduct all aspects of the auction, including guaranteeing to each prospective bidder, equal access to all relevant information. It can hardly be contended on the facts of this case (which facts were very similar to the case at hand) that the FHA entered into such a broad contract. *What appellant seeks is judicial review of an allegedly improper sale by the FHA and there is no question that the courts do not possess that power.* *Gart v. Cole*, 166 F. Supp. 129 (S.D.N.Y.) aff’d. 263 F.2d 244 (2 Cir.

1958); *Choy v. Faragut Gardens 1, Inc.*, 131 F. Supp. 609 (S.D.N.Y. 1955). It follows that the complaint was properly dismissed.” (Emphasis added) *Edelman v. Fed. Housing Admin.*, supra, at p. 597, 598.

Other cases citing *Edelman* and holding to the same effect are:

Jones v. Tennessee Valley Authority, 334 F. Supp. 739 (1971) at p. 744; *I-Ridge Lumber Co. v. U.S.*, 443 F.2d 452 (1971) at p. 456; *Gary Aircraft Corp. v. U.S.*, 342 F. Supp. 473 (1972) at p. 477.

Even if the *Heyer Products* case were persuasive authority, it does not give any comfort to the Appellant in the case at hand. The implied contract which the Court held was created by the acts of the parties was only to the effect:

“It was an implied condition of the request for offers that each of them would be honestly considered, and that the offer which in the honest opinion of the contracting officer was the most advantageous to the Government would be accepted.” *Heyer Products Co. v. U.S.*, supra, at p. 412.

“Among these rights is the right to have its bid honestly considered. The Government is under the obligation to honestly consider it and not to wantonly disregard it. If this obligation is breached and plaintiff is put to needless expense in preparing its bid, it is entitled to recover such expense.” (Emphasis added) *Heyer Products Co. v. U.S.*, supra, at p. 413.

The only obligation which the Court found in the *Heyer Products* case was that the bid be honestly and fairly considered, that it would not be wantonly disregarded and that if it was the bid which was the most advantageous to the Government, it would be accepted. After the case was referred back to the Trial Court and judgment was given to the Government, the case was again appealed and in that appeal the Court stated:

“So the question before us is, was the plaintiff’s bid rejected in good faith or arbitrarily or capriciously? If its rejection was not fraudulent nor arbitrary nor capricious nor so unreasonable as to necessarily imply bad faith, plaintiff has established no right to recovery.” *Heyer Products Co. v. U.S.*, 177 F. Supp. 251 (1959), at p. 252.

The question then was whether the plaintiff’s bid was the most advantageous to the government or not, and if not there was no breach of warranty under the implied contract. The Trial Court found that Heyer Products Co. bid was defective and was not the most advantageous to the Government, therefore, the Court of Claims held:

“We cannot say that OTAC did not act in good faith in deciding that Weidenhoff’s bid was the one most advantageous to the Government. Certainly we cannot say that the rejection of plaintiff’s bid was arbitrary or capricious or lacking in good faith.

It results that plaintiff’s petition must be dismissed.” *Heyer Products Co., Inc. v. U.S.*, supra, at p. 257.

Salt Lake City certainly did give fair consideration to all bids which were received and accepted that bid which

was most advantageous to the City and the taxpayers thereof. Appellant does not contend that the lowest bid was defective in any way or that it was nonresponsive to the request for bids. It is his contention that in spite of that fact that the lowest bid was \$108,888.00 lower than his, it was his bid that should have been accepted because the lowest bidder had a competitive advantage. In every bidding procedure there is undoubtedly a competitive advantage to one bidder or another. Such things as better buying ability, goods purchased previously at a lower price, etc., may allow one bidder to bid at a lower price allowing that bidder a competitive advantage. A contractor may even bid a job at a loss in order to keep his force employed. A claim cannot in any event be based upon the fact that a competitor had an advantage, but only upon whether his bid was the lowest responsible bid or not. In the case at bar, Appellant does not contend that his bid was the lowest responsible bid and it is for this reason that the *Heyer Products* case lends no comfort to the Appellant in this case.

While the Court in the *Heyer Products Co.* case never discussed the problem of consideration for the implied contract, it would be the allegation of this writer that there was none. As previously discussed, the only consideration which this writer could possibly find in the *Heyer* case, on the part of defendant, was its promise to give fair consideration to the bid submitted by Heyer. That obligation was placed upon the defendant by virtue of 41 *U.S.C.A.* Sec. 152(b), (said Section

has since been repealed and is now covered by 2305 of Title 10), which required that the award of contracts be given to the bidder who: "will be the most advantageous to the government." Since the United States was already obligated by law to consider the bids fairly, it could not be consideration for the subsequent claimed implied contract. Doing an act which a party is already obligated to do cannot constitute consideration for a promise or an action on the part of the other party. *VanTassell v. Lewis*, 118 U. 356, 222 P.2d 350 (1950).

POINT IV

THE GREAT WEIGHT OF AUTHORITY IS CONTRARY TO *HEYER PRODUCTS CO.* AND HOLDS THAT ADVERTISING FOR AND RECEIVING BIDS CREATES NO IMPLIED CONTRACT, AND THAT A REJECTED BIDDER HAS NO STANDING.

The rules governing bidding for public contracts are analagous to the rules governing auction sales. That is, an ordinary advertisement for bids or tender is not itself an offer, but the bid or tender is an offer which creates no rights until accepted. *Levinson v. U.S.*, 258 U.S. 198, 66 L.Ed. 563, 42 S. Ct. 275 (1972); *U.S. v. Conti*, 119 F.2d 652 (1941); *Weitz v. Independent Dist.*, 79 Ia. 423, 44 N.W. 696 (1890); *Cedar Rapids Lum. Co. v. Fisher*, 129 Ia. 332, 105 N.W. 595 (1906); *Cole County v. Central Mo. Tr. Co.*, 302 Mo. 222, 257 S.W. 774 (1924); *Straw v. Williamsport*, 286

Pa. 41, 132 A. 804 (1926); *O'Dowd v. Waters*, 130 S.C. 232, 125 S.E. 644 (1924); *Bromley v. McHugh*, 122 Wash. 361, 210 P. 809 (1922); *Escote Mfg. Co. v. U.S.*, 169 F. Supp. 483 (1959); *Beirne v. Alaska State Housing Authority*, 454 P.2d 262 (1969); *Universal Const. Co. v. Arizona Console. Masonary, etc.*, 93 Ariz. 4, 377 P.2d 1017 (1963); *O. C. Kinney, Inc. v. Paul Hardeman, Inc.*, 151 Colo. 571, 397 P.2d 628 (1963).

Even though the charter of a municipality or a state statute expressly requires that a contract shall be awarded to the lowest responsible bidder, a contract is not formed until the lowest bid is in fact accepted. *Farrell v. Bd. of Ed.*, 10 N.J. Misc. 88, 157 A. 656 (1932); *In re. Summitt Hill School Dir's. Removal*, 289 Pa. 82, 137 A. 143 (1927); *Arthur Venneri Co. v. Housing Auth. of City of Patterson*, 29 N.J. 392, 149 A.2d 228 (1959). Even after acceptance of the bid, no contract is formed until the requisite formality has been complied with. *Covington v. Basich Bros. Const. Co.*, 72 Ariz. 280, 233 P.2d 837 (1951); *Berkeley Unified School Dist. v. James I. Barnes Const. Co.*, 112 F. Supp. 396, (D.C.N.D. Cal. 1953); *Franklin Snow Co. v. Commonwealth*, 303 Mass. 511, 22 N.E.2d 559 (1939); *Wayne Crouse, Inc. v. School Dist. of Brad-dock*, 341 Pa. 497, 19 A.2d 843 (1941).

Advertising for bids is nothing more than a solicitation of bids for doing the work and does not itself import any contractual obligation. *William A. Berbusse, Jr., Inc. v. North Broward Hospital Dist.*, (Fla. App.)

117 So. 2d 550 (1960); *Anderson v. Public Schools*, 122 Mo. 61, 27 S.W. 610 (1894). Advertisement is a mere invitation to enter into a bargain rather than an offer. *O'Keefe v. Lee Calan Imports, Inc.*, 128 Ill. App. 2d 410, 262 N.E.2d 758 (1970). An unsuccessful bidder even if he be the lowest bidder cannot maintain an action at law against the local government for its failure to grant him a contract. *Talbot Paving Co. v. Detroit*, 109 Mich. 647, 67 N.W. 979 (1896). The lowest bidder cannot maintain an action because invitation to bid is merely solicitation to offer and not an offer itself. *Malen Const. Corp. v. Bd. of County Road Comm. of Wayne County*, 187 F. Supp. 937 (1960). The courts theorize that bidding and the provisions of bid statutes are intended for the benefit of the local government and its taxpayers not for the benefit of disappointed bidders. *General Steel Products Corp. v. New York City*, 187 N.Y.S.2d 74 (1959); *Thatcher Chemical Co. v. Salt Lake City Corp.*, supra; *Malloy v. New Rochelle*, 198 N.Y. 402, 92 N.E. 94 (1910); *Kayfield Construction Corp. v. Morris*, 15 A.D.2d 373, 225 N.Y.S.2d 507 (1962); *U.S. v. Purcell Envelope Co.*, 249 U.S. 313, 63 L.Ed. 620, 39 S.Ct. 300 (1919); *Somers Const. Co., Inc. v. Board of Ed. for Southern Gloucester County Regional High School Dist.*, 198 F. Supp. 732 (1961). The New York court observed:

“[The petitioner] did not obtain a vested or property interest in the contract merely by reason of the fact that it submitted the lowest bid.” *Kayfield Const. Corp. v. Morris*, supra, at p. 514.

The Alabama Court added:

“The provision for letting the contract to the lowest responsible bidder is for the benefit of the public and does not confer on a bidder any right enforceable at law or in equity.” *Townsend v. McCall*, 262 Ala. 554, 80 So. 2d 262, 265 (1955).

The Utah Supreme Court has stated:

“The purpose of a system of competitive bidding tends to improve competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts, and secure the best work or supplies at the lowest price practicable, and *such a system is designed for the benefit of the citizens and taxpayers and the public interest generally.*” (Emphasis added) *Thatcher Chemical Co. v. Salt Lake City Corp.*, *supra*, at p. 771.

POINT V

APPELLANT IS CHARGED WITH CONSTRUCTIVE NOTICE OF THE TERMS OF THE CONTRACT IT CLAIMS SHOULD HAVE BEEN DISCLOSED TO APPELLANT PRIOR TO BIDDING.

Appellant's claim is based upon the provisions of a contract which was public record and open to inspection of any interested person. Respondent, Salt Lake City, did not attempt to hide any material facts from Appellant, nor did it take any devious action. Appellant does not allege any irregularities in the contract nor does he allege that it was improper in any way. His

sole allegation is that the contents of that contract should have been disclosed by the City to Appellant. The Salt Lake City Recorder is required by law to ". . . maintain a record of all contracts, properly indexed, which record shall be open to inspection of all interested persons." Sec. 10-10-61, *Utah Code Ann.*, 1953, as amended.

Such record is constructive notice of the contents of any contract and for that reason the City is not obliged to disclose information contained therein.

CONCLUSION

Within the facts of the case at hand there could be no implied contract. The determination of whether there is an implied contract is a legal matter which the court based upon the foregoing authorities should find to the negative. There can be no implied contract because the required formalities of contracting with Salt Lake City have not been met. This alleged contract was in excess of \$150 and was not approved by the Board of Commissioners of Salt Lake City nor was it countersigned by the City Recorder, both defects which will cause any contract to be void. Further there was no consideration given by Salt Lake City to the Appellant and the contract must fail for want thereof.

Mere solicitation for bids is not an offer and for this reason no contract can be formed. A contract, in order to be binding and have any effect and force, must

have an offer, an acceptance and consideration. The alleged implied contract lacks two of the three requirements.

If Appellant were allowed to maintain a suit upon an implied contract he would be allowed to do that which the Utah Legislature saw fit to prohibit, i.e., to sue for misrepresentations, which is a tort action and barred by Governmental immunity.

As the Court stated in *Edelman v. FHA*, 251 F. Supp. 715 (1966), at p. 717:

“In spite of the fact, however, that Edelman claims in his complaint that he has a contract with the FHA, it is crystal clear that he has no such contract. The court is not bound by the conclusions of the pleader and will not permit the essential character of the suit to be disguised or distorted by the ‘artful drafting of a complaint.’ Actually Edelman is in the position of an ‘unsuccessful bidder’ and as such he has no standing to sue.”

Even if an implied contract were allowed, it must follow that such contract could in no way be broad enough to include the implied promise that the City would fairly conduct all aspects of the bidding. It could only be found that the City impliedly promised to give fair and honest consideration to plaintiff's bid; that it would not wantonly disregard it; that if plaintiff's bid were the lowest responsible bid, it would be accepted. This Salt Lake City did. Plaintiff's bid was not the lowest bid. In fact, it was \$108,888.00 higher than the bid which was accepted. It follows that Salt

Lake City did give its fairest consideration to Appellant's bid and rejected it because it was not the lowest responsible bid. Salt Lake City accepted that bid which was the most advantageous to the government, the taxpayers, and all concerned.

Since there can be no implied contract, this action is an action in tort which is barred by the governmental immunity doctrine inasmuch as the Legislature has not seen fit, under the facts in this case, to waive immunity under the Governmental Immunity Act. For this reason, it is urged that this Court affirm the decision of the lower court.

Respectfully submitted,

JACK L. CRELLIN
Salt Lake City Attorney
O. WALLACE EARL
Assistant City Attorney
Attorneys for Salt Lake
City Corporation

APPENDIX

Notice mailed to Contractor's Association

NOTICE TO CONTRACTORS

Sealed proposals will be received at the office of the City Recorder, Room 200, City and County Building, until 5:00 o'clock P.M., Wednesday, May 16, 1973 for the work of constructing an In-Flight Kitchen at the Salt Lake City International Airport, Project No. 19A-52, according to the plans on file in the City Engineer's office.

Bids will be publicly opened in Room 301, City and County Building at or about 10:30 A.M. on Thursday, May 17, 1973, by the Board of City Commissioners.

In lieu of submitting proposals to the City Recorder, bidders may present sealed proposals to the Board of Commissioners at open meeting on said date of bid opening prior to the opening of the first bid.

Instruction to bidders, specifications and forms for contract and bond, together with plans and profiles, when prepared, may be obtained at the office of the City Engineer, Room 401, City & County Building.

On the outside of envelope, the bidder shall indicate the nature of the bid.

The right is reserved to reject any or all bids.

Bid bonds will be accepted in lieu of certified check.

BY ORDER OF THE BOARD OF COMMISSIONERS OF SALT LAKE CITY, UTAH, THIS 26th
DAY of April 1973.

HERMAN J. HOGENSEN
City Recorder

First Publication April 30, 1973

Last Publication May 4, 1973

(MAILED - April 26, 1973)

Notice published in Deseret News

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MAILED MAY 1, 1973

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