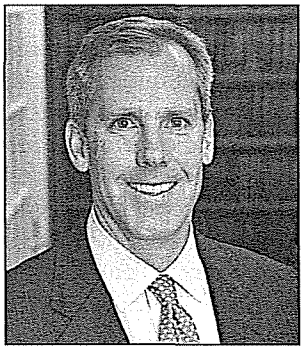
Corey Airport Services, Inc. v. Clear Channel Outdoor, Inc.: Transforming Frustrated Bidders into Hopeless Losers

BY J. MATTHEW MAGUIRE, JR.



Your client was unquestionably the most qualified offeror for a state and local procurement that resulted in an award to its competitor. You have evidence that government officials had someone else in mind for the contract, and that they violated their own procurement rules in order to make that happen. You have state action. You have unequal treatment. You even have evidence of a custom or policy of such misconduct. So why not bring a Fourteenth Amendment equal protection claim under the Civil Rights Act of 1871, 42 U.S.C. § 1983, in lieu of, or in addition to, a bid protest premised on arbitrary action? Attorneys, including this author, have gone down that path. But it is not a path for the fainthearted. In fact, it is barely a path at all in the wake of recent decisions from the Eleventh Circuit Court of Appeals. This article describes the various types of equal protection claims and the elements of those claims. It then examines the eight-year equal protection battle waged by an unsuccessful bidder in *Corey Airport Services, Inc. v. Clear Channel Outdoor, Inc.*,[1] and asks whether the Eleventh Circuit's 2012 ruling has foreclosed such claims.

Equal Protection Claims Generally

Equal protection claims can be divided into three general categories: (1) claims that a statute discriminates on its face; (2) claims that a neutral application of a facially neutral statute has a disparate impact; and (3) claims that a facially neutral statute is being unequally administered.[2]

To prevail on the first variation of equal protection claims, the plaintiff must show that there is no rational relationship between the statutory classification and a legitimate state goal.[3]

To prevail on the second variation of equal protection claims, the plaintiff must show purposeful discrimination.[4] Discriminatory purpose in this context "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group."[5]

To prevail on the third variation of equal protection claims, where the plaintiff complains about the unequal application of a facially neutral statute, he or she must show: (1) the plaintiff was treated differently from similarly situated persons; and (2) the defendant unequally applied the facially neutral statute for the purpose of discriminating against the plaintiff.[6] This is the type of equal protection claim that is most likely to arise in the procurement context. Although the test requires a showing of purposeful discrimination, until recently, courts have not required a showing that the purposeful discrimination was due to plaintiff's membership in an identifiable group.

In *Snowden v. Hughes*, a 1944 US Supreme Court case, a candidate in the Republican primary election for an Illinois state senate seat brought suit under the equal protection clause claiming he was improperly denied access to the ballot.[7] The plaintiff disclaimed any contention that class or racial discrimination was involved, arguing simply that the defendant's failure to certify him as a duly elected nominee denied him equal protection of the laws.[8] The Court applied the traditional test:

> The unlawful administration by state officers of a state statute fair on its face, resulting in unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional and purposeful discrimination.[9]

The Court explained that the purposeful discrimination "may appear on the face of the action taken with respect to a particular class ***or person***, or it may only be shown by extrinsic evidence showing a discriminatory design to favor ***one individual*** or class over another not to be inferred from the action itself."[10] Thus, it was clear under *Snowden v. Hughes* that evidence of the defendant's intent to favor one individual over another would satisfy the purposeful discrimination requirement.

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The *Snowden v. Hughes* Court ruled against the plaintiff ostensibly because the plaintiff failed to allege purposeful discrimination on the part of the defendant.[11] Importantly, however, the Court's finding of no purposeful discrimination had nothing to do with whether or not the plaintiff was a member of an identifiable group or class. Rather, the Court ruled that there was no purposeful discrimination because the defendant's failure to certify the plaintiff "was unaffected by and unrelated to the certification of any other nominee."[12] Put another way, the plaintiff failed to identify a similarly situated comparator that was treated differently. This finding is more relevant to the first prong of the *Snowden v. Hughes* test, which is that the defendant applied laws unequally to those entitled to be treated alike. Subsequent Eleventh Circuit decisions do a better job of isolating and applying the elements of the *Snowden v. Hughes* test. In *Strickland v. Alderman*, for example, the Eleventh Circuit held that because the evidence did not support the jury's finding that Strickland was similarly situated to other property owners, "we need not address whether Strickland has shown purposeful discrimination."[13]

It was not until the 1987 decision of *E & T Realty v. Strickland* that the Eleventh Circuit elaborated on the "purposeful discrimination" requirement in a claim alleging unequal application of neutral laws.[14] In that case, the property owner-plaintiff sued Jefferson County, Alabama, alleging that the county denied the owner's sewer tap application while granting applications to others who were similarly situated. The court remanded for further findings on whether the plaintiff and the comparator he offered were similarly situated.[15] The court also remanded for further findings on whether the county had purposefully discriminated, guiding the lower court that purposeful discrimination "implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of' . . . its adverse effects upon an identifiable group."[16] The *E & T Realty* court succinctly stated that "for plaintiffs to prevail, defendants' conduct must have been deliberately based on an unjustifiable, group-based standard."[17]

The *E & T Realty* court's application of the "purposeful discrimination" element from the *Snowden v. Hughes* test changed the law on unequal treatment equal protection claims. While a plaintiff under *Snowden v. Hughes* could state a claim merely by alleging different treatment of similarly situated individuals with the intent of discriminating against *the plaintiff*, under *E & T Realty*, the plaintiff needed to show that the defendant intended to discriminate against plaintiff *because of* plaintiff's membership in an identifiable group. The Eleventh Circuit did not attempt to answer the question of what is an identifiable group until the *Corey Airport Services* decision in 2012, discussed *infra*.

Class of One Equal Protection Claims

After *E & T Realty*, it was clear, in the Eleventh Circuit at least, that an equal protection plaintiff must allege membership in an identifiable group (whether protected or not). That changed in 2000, with the US Supreme Court's decision in *Village of Willowbrook v. Olech*.[18] There, the Village of Willowbrook required the plaintiffs to grant a 33-foot easement in order to connect to the municipal water supply, while requiring only a 15-foot easement from other similarly situated property owners. The Supreme Court held that the plaintiffs successfully stated a "class of one" claim by alleging: (1) they were intentionally treated differently than similarly situated property owners; and (2) there was no rational basis for the difference in treatment.[19] Thus, *Olech* recognizes an equal protection claim that the plaintiff was arbitrarily singled out as a "class of one," rather than as a member of an identifiable class.[20]

In *Engquist v. Oregon Dept. of Agriculture*, the US Supreme Court rejected "class of one" claims in the context of public employment because those cases often involve "discretionary decisionmaking based on a vast array of subjective, individualized assessments."[21] In *Douglas Asphalt Co. v. Qore, Inc.*,[22] the Eleventh Circuit relied upon *Engquist* to reject the "class of one" theory in the context of public contracting, finding "obvious similarities" between a government-contractor relationship and an employer-employee relationship.[23]

The *Corey Airport Services* Case

In 2002, the City of Atlanta released an RFP seeking a contractor to manage the advertising concession at Hartsfield-Jackson Atlanta International Airport. The city awarded a no-bid contract to Barbara Fouch, a close friend of then-Mayor Maynard Jackson, in 1980. The original contract, as amended, expired in 1997 and then was renewed on a month-to-month basis. The city found that Corey met all minimum qualifications, but selected Fouch's team (Clear Channel Outdoor, Inc., as prime contractor and Fouch as its DBE subcontractor) as the top-ranked offeror. Corey filed a protest, appealed the denial of that protest, and then in 2004 opted to file a section 1983 action against the city, Clear Channel, Fouch, and several city officials alleging the defendants conspired to deny Corey its right to equal protection. In sum, Corey alleged:

- The 2002 RFP was skewed to favor the incumbent because it provided only a 30-day grace period before rental payments would be due to the city, which meant that any bidder except the incumbent would have to begin making rental payments long before any revenue could be generated, and that the city refused without explanation to modify the RFP to make it even-handed;
- There were improper contacts between Fouch's team and the city during the procurement process in violation of the city's procurement rules;
- The city improperly revealed the terms of Corey's financial offer to Fouch's team during negotiations, in violation of the city's procurement rules;

- The city manipulated the scoring of the proposals to favor the Fouch team;
- The city allowed Fouch's team to improve its financial offer without a similar opportunity being afforded to Corey, also in violation of the city's procurement rules; and
- The city improperly certified Fouch as a DBE and awarded her team 15 DBE participation points, without which Corey would have had the highest total evaluation score.[24]

Corey was careful to state that it was not claiming that it was the victim of race discrimination, nor did it plead a "class of one" claim. Instead, Corey made the novel argument that it was effectively shut out of the procurement because it was a political outsider. Corey relied generally upon US Supreme Court and Eleventh Circuit cases holding that a plaintiff may state such a claim if it proves: (1) the plaintiff was treated differently than similarly situated persons; and (2) the defendant unequally applied the facially neutral statute for the purpose of discriminating against the plaintiff.[25]

The trial court denied all defendants' motions for summary judgment on the section 1983 and section 1983 conspiracy claims.[26] The Eleventh Circuit reversed as to the individual city defendants, finding they were entitled to qualified immunity.[27] The case proceeded to trial against the city and the Fouch team and resulted in a plaintiff's verdict of $17.5 million.[28] The defendants appealed and, while that appeal was pending, the city and Corey entered into a settlement of nearly $4 million.[29] On June 4, 2012, the Eleventh Circuit Court of Appeals reversed the district court, ruling that Corey had failed to state equal protection claims, thus erasing the verdict altogether.[30]

The Eleventh Circuit's holding was predicated upon its finding that "political outsiders" are not an identifiable group.[31] The court reasoned that the group must be identifiable by a set of common traits beyond merely being victims of the government action.[32] The court was plainly troubled by the difficulties in distinguishing between political insiders and political outsiders:

> No objective criteria plainly fix whether a person or entity is an "insider" or an "outsider." "Insiders" and "outsiders" do not bear immutable characteristics. Furthermore—unlike with political parties or other longer-term voluntary group affiliations—they do not even have to declare or register themselves as members of their respective grouping. The most one can hope for in separating persons based on such subjective criteria—"insiders" and "outsiders" based virtually on friendship with government officials—would be a spectrum or a fuzzy series of wholly indeterminate and overlapping groups each of which would be inadequate to qualify as identifiable for purposes of an Equal Protection Clause claim.[33]

The court's policy concern was that "[i]f the law allowed groups defined basically as the 'bid-losers' to be the basis for an Equal Protection Clause claim, every government bid process—with winners and losers—would theoretically support such an equal protection claim."[34] "Federal courts are not intended to be constant overlords of government contracts."[35]

Could Corey have shown membership in an identifiable group by, for example, proving that individuals associated with the winning bidder had made campaign contributions to city officials or had served on the campaign committees of certain city officials? Such evidence would arguably be more concrete than the "fuzzy" friendships with government officials that concerned the Eleventh Circuit. On the other hand, such connections are usually more subtle, with campaign contributions and election support often coming from lobbyists and others who are at least one step removed from the bidder.

Conclusion

In light of recent Eleventh Circuit decisions, an unsuccessful bidder harmed by a state or local government's misapplication of procurement rules will be unable to obtain relief through a section 1983 equal protection claim unless he or she can show membership in an identifiable class, such as a racial group.[36] Even if the bidder is able to clear the liability hurdles, the prospects for recovering damages beyond mere bid preparation costs are questionable at best.[37] For all of these reasons, unsuccessful bidders should think twice before pursuing a section 1983 equal protection claim. PL

Endnotes

1. 682 F.3d 1293 (11th Cir. 2012).
2. E & T Realty v. Strickland, 830 F.2d 1107, 1112 n.5 (11th Cir. 1987).
3. Dandridge v. Williams, 397 U.S. 471, 485–86, 105 S. Ct. 2862 (1970).
4. Personnel Admin. of Massachusetts v. Feeney, 442 U.S. 256, 272, 99 S. Ct. 2282 (1979).
5. *Id.* at 279 (cits. omitted).
6. *E & T Realty*, 830 F.2d at 1109–10 (citing Snowden v. Hughes, 321 U.S. 1, 8, 64 S. Ct. 397 (1944)); Strickland v. Alderman, 74 F.3d 260, 264 (11th Cir. 1996).
7. *Snowden*, 321 U.S. at 2–4.
8. *Id.* at 7–8.
9. *Id.* at 8.
10. *Id.* (citations omitted) (emphasis added).
11. *Id.* at 10.
12. *Id.*
13. 74 F.3d at 264–65.
14. 830 F.2d 1107, 1114 (11th Cir. 1987).
15. *Id.* at 1111–12.
16. *Id.* at 1114 (citing *Feeney*, 442 U.S. at 279). *Feeney* was a discriminatory impact case in which the plaintiff alleged that a Massachusetts statute granting employment preferences to veterans had the effect of discriminating against women because 98 percent of veterans at that time were men. 442 U.S. at 271. Because there was no evidence that the Massachusetts Legislature subjectively intended to discriminate against women, the Supreme Court found against the plaintiff. *Id.* at 281. The *E & T Realty* court put it even more succinctly, holding that "for plaintiffs to prevail, defendants' conduct must have been deliberately based on an unjustifiable, group-based standard." *E & T Realty*, 830 F.2d at 1114.

17. *Id.*
18. 528 U.S. 562, 120 S. Ct. 1073 (2000).
19. *Id.* at 564.
20. 553 U.S. 591, 601, 128 S. Ct. 2146 (2008).
21. *Id.* at 603. The Court distinguished *Olech* because it involved "the existence of a clear standard against which departures, even for a single plaintiff c[an] be readily assessed." *Id.* at 602. Because the employer-employee relationship is typically characterized as one involving broad discretion, the Court was guided by the "common sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 607 (quoting Connick v. Myers, 461 U.S. 138, 143, 103 S. Ct. 1684 (1983)).
22. 541 F.3d 1269 (11th Cir. 2008).
23. *Id.* at 1274.
24. Corey Airport Services, Inc. v. City of Atlanta, 632 F. Supp. 2d 1246, 1273 (N.D. Ga. 2008).
25. *E & T Realty*, 830 F.2d at 1112–13 (citing Snowden v. Hughes, 321 U.S. 1, 8, 64 S. Ct.. 397 (1944); Strickland v. Alderman, 74 F.3d 260, 264 (11th Cir. 1996);
26. 632 F. Supp. 2d at 1273, 1286–87.
27. Corey Airport Servs., Inc. v. Decosta, 587 F.3d 1280, 1285 (11th Cir. 2009).
28. Péralte C. Paul & Steve Visser, *Jury finds for Corey in lawsuit against Hartsfield-Jackson; city*, Atlanta Journal-Constitution, July 26, 2010, http://tinyurl.com/aqn3bz2 (last accessed Dec. 5, 012). The jury awarded $8.5 million in compensatory damages against all defendants, plus $8.5 million in punitive damages against Clear Channel and $500,000 in punitive damages against Fouch. *Id.*
29. City of Atlanta Resolution 11-R-00767, adopted May 2, 2011, approved May 4, 2011, http://tinyurl.com/bxl59y4 (last accessed Jan. 14, 2013).
30. Corey Airport Services, Inc. v. Clear Channel Outdoor, Inc., 682 F.3d 1293 (11th Cir. 2012).
31. As previously stated, the US Supreme Court did not require a showing of membership in an identifiable group. *Snowden v. Hughes*, 321 U.S. at 7–8. The Eleventh Circuit found such a requirement in Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 269, 113 S. Ct. 753 (1993) and *Feeney*, 442 U.S. 256. Since *Bray* and *Feeney* did not involve claims that the defendant unequally applied neutral laws for the purpose of discriminating, they are arguably not controlling. *Bray* involved a 42 U.S.C. § 1985(3) civil rights conspiracy claim brought by abortion clinics and abortion rights activists against anti-abortion protestors who were allegedly interfering with ingress and egress into abortion clinics. The Court held that section 1985(3) claims requires evidence of "some racial or perhaps otherwise class-based invidiously discriminatory animus behind the conspirator's action," and concluded that "[w]hatever may be the precise meaning of a "class," . . . beyond race, the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors." *Id.* at 269. *See also* Childree v. UAP/GA AG CHEM, Inc., 92 F.3d 1140, 1147 (11th Cir.1996) (dismissing section 1985(3) claim because a whistleblower is not an identifiable group). *Feeney* involved a claim that a Massachusetts civil service preference for veterans had a discriminatory impact upon women because 98 percent of the veterans at that time were men. *Feeney*, 442 U.S. at 259, 270. Because *Feeney* was a discriminatory impact case, the plaintiff was required to show that legislative body that enacted the statute, though neutral on its face, was motivated at least in part to discriminate against women. *Id.* at 276. While "the Fourteenth Amendment cannot be made the refuge from ill-advised . . . laws," *id.* at 281, the deference the judicial branch typically shows to the legislative branch is no longer justified if there is proof of discriminatory purpose. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265–66, 97 S. Ct. 555 (1977).
32. Corey Airport Services, Inc. v. Clear Channel Outdoor, Inc., 682 F.3d at 1298 (citing *Bray*, 506 U.S. at 269).
33. *Id.*
34. *Id.*
35. *Id.*
36. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097 (1995) (government set aside program providing for race-based classifications violated Equal Protection Clause).
37. Although the general rule is that an unsuccessful bidder is not entitled to recover lost profits because they are too speculative in the absence of a contract, *see, e.g.*, S & W Mech. Co. v. Homerville, 683 F. Supp. 546, 549 (M.D. Ga. 1988), there is some authority allowing such a recovery under section 1983. *See* Yadin Co., Inc. v. City of Peoria, 2008 WL 906730 (D.Ariz. 2007). *See also* Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade County, 333 F. Supp. 2d 1305, 1338–39 (S.D. Fla. 2004) (although the court ruled that plaintiff had failed to prove its lost profits claim, the court suggested that such a claim would be proper if it could be proven). The plaintiff in *Corey Airport Services* was able to establish its lost profits to the jury's satisfaction by using the winning bidder's pro forma projections from its proposal, and several years of actual performance data from the winning bidder.

COMING ATTRACTIONS

MARCH 14–16, 2013
19th Annual Federal Procurement Institute and Midyear Council Meeting
Loews Annapolis Hotel
Annapolis, MD

MAY 2–3, 2013
8th Annual State and Local Procurement Symposium
Hilton Nashville
Nashville, TN

AUGUST 9–12, 2013
Annual Educational Programs and Council Meeting
Westin St. Francis
San Francisco, CA

NOVEMBER 14–16, 2013
Fall Educational Program and Council Meeting
InterContinental Miami
Miami, FL

MARCH 20–22, 2014
20th Annual Federal Procurement Institute and Midyear Council Meeting
Loews Annapolis Hotel
Annapolis, MD

APRIL 24–25, 2014
9th Annual State and Local Procurement Symposium
Grove Park Inn and Spa
Asheville, NC