

<p>SUPREME COURT, STATE OF COLORADO 2 E. 14th Avenue, Suite 300 Denver, Colorado 80203</p> <p>Court Below: COURT OF APPEALS, STATE OF COLORADO 2 E. 14th Avenue, Suite 300 Denver, Colorado 80203 Case: 2005 CA 1535</p> <p>Trial Court: DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202 Case: 04 CV 3760, Div. 8, Hon. R. Michael Mullins</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Petitioner DENNY CONSTRUCTION, INC., a Colorado corporation v. Respondent CITY AND COUNTY OF DENVER, COLORADO, ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, a municipal corporation of the State of Colorado</p>	
<p>Attorney for <i>Amicus Curiae</i>: Rachel L. Allen, # 37819 COLORADO MUNICIPAL LEAGUE 1144 Sherman Street Denver, CO 80203-2207 Phone: (303) 831-6411 Fax: (303) 860-8175 Email: rallen@cml.org</p>	<p>Colorado Supreme Court Case: 2007 SC 236</p>
<p>AMICUS CURIAE BRIEF OF THE COLORADO MUNICIPAL LEAGUE IN SUPPORT OF RESPONDENT</p>	

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COMES NOW the Colorado Municipal League (the "League") by its undersigned counsel and, pursuant to Rule 29, C.A.R., submits this brief as *amicus curiae* in support of the position of Respondents, the City and County of Denver and the Denver Water Board ("Denver Water").

STATEMENT OF FACTS AND OF THE CASE

The League hereby adopts and incorporates by reference the statement of facts and of the case in the brief of the Denver Water Board.

STATEMENT OF ISSUES ON APPEAL

As announced in its Order of November 26, 2007, granting the petition for certiorari, the issue before the Court in this appeal is whether Colorado law prohibits lost profits arising out of the loss of bonding capacity as a matter of law. Amicus will address the issue certified for review.

SUMMARY OF ARGUMENT

Amicus hereby adopts and incorporates by reference the argument in Denver's Answer Brief and submits the following additional argument.

Colorado statutes require a contractor to post a performance bond for the timely completion of essential projects. Denny Construction is claiming that Denver Water should pay \$845,000.00 to compensate Denny for future profits that Denny alleges it lost because Denver Water improperly foreclosed on a performance bond that Denny posted in connection with the construction of a maintenance facility for Denver Water. Award of damages on this basis would substantially frustrate the purpose of the bonding statute. For this reason, and for the reasons stated in the Answer Brief of Denver Water, the decision of the Court of Appeals in the case as bar should be affirmed.

ARGUMENT

A. The purpose of the General Assembly in adopting the performance bonding statute would be undermined by awarding lost future profits against a public entity.

The Colorado Contractor's Bonds and Lien on Funds Statute, §§ 38-26-101 to 110, C.R.S., and specifically the "bonding statute" at §§ 38-26-

105 to 106, C.R.S., require the general contractor to execute a performance and payment bond for not less than one-half the total amount payable with respect to a public works project when that project will cost the state of Colorado, or any political subdivision, including a municipality, more than \$50,000.00. § 38-26-106(1), C.R.S. A public entity is prohibited from paying the general contractor until the bond is filed. § 38-26-106(2), C.R.S.

The bond requirement serves a critical public purpose to guarantee that successful bidders honor the terms of their bids. 13 McQuillin Mun. Corp. § 37.193 (3rd ed.); Steeley v. Nolen, 578 So 2d 1278, 1280 (Ala. 1991); Berry v. City of Drumright, 110 Okla. 223, 237 P. 102, 102 (Okla. 1925). Colorado's statute is typical of those described in McQuillin's. The purpose of these statutes is twofold: to benefit the municipality by assuring proper completion of the work for which taxpayers or ratepayers are paying, while providing assurance that persons employed or furnishing materials for public works projects are fully and promptly paid. See 13 McQuillin Mun. Corp. § 37.196.10 (3rd ed.); Flaugh v. Empire Clay Products, Inc., 157 Colo. 409, 410, 402 P.2d 932, 933. Without such a bond, the public entity's obligation to see that the project is properly completed would be frustrated

and its ability to compensate subcontractors and laborers that the contractor did not pay would be complicated.

Both the public entity and the contractor incur incidental benefits from the statutory bonding scheme because the public entity receives an increased number of bids from contractors who have diminished risk of nonpayment with public contracts. Furthermore, as a primary purpose of bonding statutes is protection of subcontractors and suppliers from the failures and insolvencies of contractors on municipal projects, these statutes also serve the public interest by encouraging an increased number of competitive bids from subcontractors and suppliers on public projects, for whom the bond alleviates the risk of nonpayment. 13 McQuillin Mun. Corp. § 37.196.10 (3rd ed.); Ardon Elec. Co., Inc. v. Winterset Const., Inc., 354 Ill.App.3d 28, 820 N.E.2d 21 (Ill. App. 1 Dist. 2004).

Colorado courts have embraced the policy behind the Colorado's bonding statute. For example, in General Electric Company v. Webco Construction Co., 164 Colo. 232, 433 P.2d 760 (Colo. 1967), this Court recognized the two important purposes served by the bond requirement.

One undertaking was for the faithful performance of the contract and the other bound the principal and surety to make prompt payment to suppliers for all labor and material used or required to be used in the performance of the general contract. Id. at 233.

Recognizing the necessity for public improvements, the General Assembly provided protections to the public entity in their construction. If a construction project proceeds according to the terms of the contract, then the public entity has no reason to foreclose on the bond. A public entity only moves to foreclose on a bond when the public entity believes that the contract has not been faithfully performed or when the payment is delayed or never made to suppliers for labor and material used in the performance of the general contract. Most of the time, bonds are foreclosed upon in appropriate circumstances. Inevitably, however, there will be occasional situations where it is determined later that the bond should not have been relied upon, as the facts of this case illustrate.

The fulfillment of the purpose of the bonding statute would be materially undercut by permitting recovery of lost future profits. A public entity would be reluctant, and as a practical matter effectively precluded, from exercising a bond in even the most dire circumstances if the possibility exists that a public entity may later have to pay damages for alleged loss of future profits to the contractor. Awarding special damages would effectively eliminate the utility of a bond and frustrate its purpose. A statute must be construed to further legislative intent evidenced by the entire statutory

scheme. Martinez v. Continental Enterprises, 730 P.2d 308, 315 (Colo. 1986). Awarding damages based on lost future profits would have the result of knocking the pins out from under the body of statutes that address bonding requirements for public entities.

The Court should interpret the Colorado Contractor's Bonds and Lien on Funds Statute in a way that compliments rather than frustrates the purpose of the statute. Crowe v. Tull, 126 P.3d 196 (Colo. 2006); B.G.'s, Inc. v. Gross ex rel. Gross, 23 P.3d 691 (Colo. 2001); Graven v. Vail Associates, Inc., 909 P.2d 514 (Colo. 1995). Each provision of the statute must be construed in harmony with the overall statutory scheme, so as to accomplish the purpose for which it was enacted. People v. Johnson, 797 P.2d 1296, 1298 (Colo. 1990). Further, it is presumed that the General Assembly intended a just and reasonable result and that the public interest will be favored over any private interest. § 2-4-201(e), C.R.S.; Water Rights of Park County Sportsmen's Ranch LLP v. Bargas, 986 P.2d 262, 268 (Colo. 1999). Awarding special damages for lost future profits would favor private interest and would be contrary to the purpose of the statute and the well-established rules of statutory construction.

B. A decision to permit award of lost future profits should be left to the General Assembly.

As the Court of Appeals concluded, and as fully developed in the Answer Brief of Denver Water, an award of alleged lost future profits involves considerable uncertainty and speculation. Additionally, as set forth above, such an award could materially frustrate the legislative purpose behind the bonding statute, which is intended to protect the public utility, and thus its taxpayers or ratepayers, from unforeseen costs associated with a public project.

“Except where liability is imposed by written law, or by negligence, by want of skill, or by active wrongdoing, no municipal liability arises for consequential damages resulting from the construction of public improvements.” 13 McQuillin Mun. Corp. § 37.211 (3rd ed.); Lowell v. Buffalo County, 119 Neb. 776, 230 N.W. 842 (Neb. 1930); Holmquist v. Queen City Const. Co., 175 Wash. 681, 27 P.2d 1066 (Wash. 1934); City of McAlester v. King, 317 P.2d 265 (Okl. 1957). No Colorado statute awards consequential damages for lost future profits arising from loss of bonding capacity.

Because of the speculative nature of this sort of claim, and because of the danger of undercutting the purpose of the bonding statute, any decision to allow recovery on this basis should be made by the General Assembly. The General Assembly is particularly suited to determine what sort of documentation should be required to support such a claim and what, if any, limits, temporal or monetary, ought to be placed on such recovery in order to balance the interests of private contractors with those of taxpayers or ratepayers. *See, e.g. Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 38 (Colo. 2000) (“courts must avoid making decisions that are intrinsically legislative. It is not up to the court to make policy or to weigh policy.”)

CONCLUSION

WHEREFORE, for the reasons set forth above, the League respectfully urges that the decision of the Court of Appeals in the case at bar be affirmed.

Respectfully submitted this 7th day of March 2008.

COLORADO MUNICIPAL LEAGUE

Rachel L. Allen, #37819
Colorado Municipal League
1144 Sherman Street
Denver, CO 80203

CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of March 2008, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE AND ATTORNEY GENERAL** was placed in the United States mail, first class postage prepaid and addressed to the following:

David D. Schlachter, Esq.
Douglas W. Colville, Esq.
Peterson, Dymond & Reagor, LLP
8400 E. Prentiss Avenue, Suite 1040
Greenwood Village, CO 80111-2922

Kristi K. Riegle, Esq.
Denver Water Legal Division
1600 W. 12th Avenue
Denver, CO 80204

John W. Suthers, Attorney General
Friedrick C. Haines, 1st Asst. Atty. Gen.
William V. Allen, Asst. Atty. General
Skippere S. Spear, Asst. Atty. General
1525 Sherman Street, 7th Floor
Denver, CO 80203