

**IN THE _____ JUDICIAL DISTRICT COURT
COUNTY COURT AT LAW NUMBER _____
OF EL PASO COUNTY, TEXAS**

ZTEX CONSTRUCTION, INC.	§	
	§	
Plaintiff,	§	
	§	
v.	§	Cause No. _____
	§	
CITY OF EL PASO,	§	
	§	
Defendant.	§	

**PLAINTIFF’S ORIGINAL PETITION AND APPLICATION FOR TEMPORARY
RESTRAINING ORDER, TEMPORARY INJUNCTION AND PERMANENT
INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW ZTEX CONSTRUCTION INC. (hereafter, “Plaintiff”) and files this Original Petition against the City of El Paso, Texas (“Defendant” or the “City”), and for cause of action says:

I.

This is a level III discovery case. Plaintiff seeks injunctive and other non-monetary relief.

II.

Plaintiff is a Texas Corporation. It does business in El Paso County, Texas.

Defendant is a home rule city in the State of Texas. It can be served by serving its Municipal Clerk, Laura Prine, at 300 N. Campbell, 1st Floor, El Paso, Texas 79901, or wherever she may be found.

III.

The events made the basis of this suit occurred in El Paso County, Texas. Venue is therefore proper in this court. The Court has jurisdiction over the claims and parties.

IV. FACTUAL BACKGROUND

ZTEX CONSTRUCTION INC. is a public works and paving contractor. It has been in business for over 15 years and has constructed dozens of projects for the City of El Paso. For many years, the City has issued a large, city-wide paving contract roughly annually. For 2023, the City divided the work into two separate contracts. One is the Collector and Above Street Resurfacing Contract (the “Collector Contract”), and the other is the Residential Street Resurfacing Contract (the “Residential Contract”). The City previously published a request for proposals for each contract for the year 2023. ZTEX submitted a proposal in response to each request. The City published its rankings of the proposals it received for each contract on or about March 3, 2023. For unknown reasons, the City’s ranking of ZTEX’s proposal for the Collector Contract reflects a number of errors and arbitrarily deprived it of points it should have received. Plaintiff therefore files this lawsuit to address those errors.

Collector and Above Resurfacing 2023

Plaintiff attaches as Exhibit “A” the City’s CSP Ranking Sheet (the “Ranking”) and related correspondence for the Collector and Above Street Resurfacing 2023 Contract. Attached as Exhibit “B” are relevant portions of ZTEX’s bidding package previously submitted (“ZTEX Package”). Attached as Exhibit “C” is correspondence related to another recent CSP Evaluation (Solicitation No. 2023-0267) for the Residential Street Resurfacing 2023. Finally, Plaintiff attaches as Exhibit “D” a CSP Evaluation for the City’s Street Resurfacing Project in 2022 (Solicitation No. 2022-0391).

Errors in Ranking

The entirety of the Ranking is improper in that International Eagle Enterprises, Inc., consistently ranked higher than both ZTEX and Jordan Foster Construction, LLC (“Jordan Foster”). ZTEX and Jordan Foster are two large, well-known construction companies with excellent reputations. IE, on the other hand, is comparatively new to the marketplace and the projects it has been performed for the City have been smaller (primarily bridge and individual street projects). Plaintiff would show the City made the following errors in evaluating the CSP’s.

Factor B. The City failed to properly award ZTEX points for Factor B, which relates to the Offerer’s Experience and Reputation. There simply can be no comparison between ZTEX and IE. To rank International higher than ZTEX is without any logical or factual basis.

Factor D. The City failed to properly award ZTEX points for Factor D, which is intended to analyze Production Capability. It is inconceivable that a newer and much smaller operation could be awarded more points for production capability in comparison to ZTEX and Jordan Foster.

Factor E. The City failed to properly award ZTEX points for Factor E, which relates to Quality Control. ZTEX has a robust Quality Control program, and there is no basis to award IE over one-half point more than ZTEX. Just last year (Exhibit “D”), the City awarded ZTEX 4.3 points out of 5 points in this same category. Factor E should be recalculated to consistently and appropriately measure ZTEX’s Quality Control processes.

Factor F. Similarly, the City failed to properly award ZTEX points for Factor F, which relates to Offeror’s Experience and Knowledge of Local Conditions. A comparison should be made between Factor F and Factor B. Factor B of the ranking relates to the Offerer’s Experience and Reputation. Factor F, which relates to Offeror’s Experience and Knowledge of Local

Conditions, had ZTEX ranked last (3.13 out of 5 compared to 3.88 and 4.13 for the other bidders). Clearly, an error was made with regard to the calculation of Factor F. **Significantly, of the last eight street resurfacing contracts the City issued, ZTEX has actually performed the contract four times.** It is therefore impossible for any other entity to have more experience and knowledge of local conditions based on its history in the community and specifically with the City of El Paso. *See* ZTEX Package at pp. 7-13, 27-29 and I-E-14 – I-E-16. Similarly, it should also be noted that in last year’s ranking (Exhibit “D”), the City awarded ZTEX 17.17 points out of 20 points in this category and awarded Allied Paving Company 15 points and Allen Concrete, LLC only 12.33 points. There can be no justification for the 3.44 points awarded to ZTEX here, particularly in comparison to the other bidders. Further, the CSP Evaluation (Solicitation No. 2023-0267) for Residential Street Resurfacing 2023 (Exhibit “C”) awarded 3.55 points to ZTEX for the exact same factor. Considering that these evaluations took place at the same time and would have considered the same materials, there is a clear inconsistency with regard to the evaluation process utilized by the City of El Paso. The result is an arbitrary process that permits the City to award the contract to the bidder it selects, rather than a neutral ranking system that objectively identifies the best proposal. The Ranking for Factor F should be recalculated to consistently and appropriately measure ZTEX’s Experience and Knowledge of Local Conditions.

Factor G. The City failed to properly award ZTEX points for Factor G, which relates to Project Planning, Scheduling and Completion Methodology. ZTEX’s methodology on these issues is second to none. There is no basis to award a largely unknown company more points than ZTEX and Jordan Foster.

V.
CAUSES OF ACTION

Pursuant to the Texas Declaratory Judgments Act, Plaintiff seeks a judicial declaration that the City's ranking of proposals from ZTEX and International Eagle Enterprises, Inc. ("IE") for the Collector Contract is incorrect and an injunction requiring that the proposals from ZTEX and International Eagle for the Collector Contract be re-rated. Pleading in the alternative, as permitted by Texas law, Plaintiff seeks an injunction requiring the City to reject all proposals for the 2023 Collector Contract and issue a new request for proposals for the contract.

VI.

Plaintiff would show it will suffer irreparable harm if Defendant awards the 2023 Collector Contract (City of El Paso Solicitation No. 2023-0258) to International Eagle Enterprises, Inc. ZTEX has passed up opportunities to pursue other work because it had a reasonable expectation that the City would correctly evaluate the proposal it submitted and that its proposal would therefore receive the highest ranking from the City. ZTEX therefore anticipated being awarded the Collector Contract. If it loses the contract, it will not be able to get back the foregone work opportunities. There is no kind of specific performance available that would require the owners of the projects on which ZTEX did not bid to rescind their contract awards and start their bidding processes anew. Thus, ZTEX will be harmed not only by losing the value of the instant contract but by losing the profits it would have earned on the work it passed up in reliance on these contracts. This harm is irreparable because it may well drive ZTEX out of business. If Defendant is permitted to award these contracts to other bidders, Plaintiff will be financially harmed in a way from which it cannot recover. Defendant's award of this contract to other bidders is essentially the bell that, once rung, cannot be unrung. Although Plaintiff can sue Defendant for monetary damages, Defendant is likely immune from this claim

because this is not a breach of contract case. Thus, Plaintiff will never be able to recover monetary damages. These damages therefore constitute irreparable harm.

VII.

Pursuant to Section 65.001 of the Texas Civil Practice and Remedies Code and Texas Rules of Civil Procedure 680 and 681, Plaintiff would show it has pled a proper cause of action for declaratory relief. Plaintiff now seeks a Temporary Restraining Order and Temporary Injunction. Plaintiff would show it has a probable right to the relief it seeks because had the City correctly evaluated ZTEX's proposal in a manner that is consistent with the way the City evaluated and scored its similar proposals in prior years, it would have been awarded the Collector Contract. In the absence of a Temporary Restraining Order prohibiting the award of the contract to other contractors, Plaintiff would show it will suffer irreparable injury because it will not have sufficient work to occupy the employees it has hired and the equipment it has purchased to service the contract and because it has passed up opportunities to bid on and otherwise pursue other work in reliance on being awarded the contract. It may therefore be forced to lay off employees. If Plaintiff loses employees, its very existence will be jeopardized. Further, once a contract for a project on which Plaintiff did not bid is awarded to one of ZTEX's competitors, it cannot be rebid or regained by Plaintiff. Moreover, any losses incurred by Plaintiff may not be recovered because Defendant enjoys sovereign immunity. Plaintiff therefore will not be able to secure a money judgment against Defendant to recover for those losses. Plaintiff therefore does not have an adequate remedy at law.

Plaintiff attaches as Exhibit "E" and incorporates by reference herein the Affidavit of Joaquin Royo.

VIII.

Plaintiff would show it is ready and willing to post a bond.

WHEREFORE, PREMIES CONSIDERED, Plaintiff prays that Defendant be served and required to appear and answer herein, that the Court grant Plaintiff judgment against Defendants as follows:

1. a judicial declaration that the City's ranking of CSP's from ZTEX and IE for the Collector Contract is incorrect; and
2. an injunction requiring that the proposals from ZTEX and IE for the Collector Contract be re-rated; and
3. an injunction preventing Defendant from awarding the 2023 Collector Contract to IE; and
4. in the alternative, an injunction requiring the City to reject all proposals for the Collector Contract and issue a new request for proposals for it;

a Temporary Restraining Order, Temporary Injunction and Permanent Injunction as described above, and for such other and further relief, general or special, legal or equitable, to which Plaintiff may be justly entitled.

Respectfully submitted,

**MOUNCE, GREEN, MYERS,
SAFI, PAXSON & GALATZAN**

A Professional Corporation

P.O. Box 1977

El Paso, Texas 79999-1977

(915) 532-2000

(915) 541-1597 (fax)

by: /s/ James A. Martinez

James A. Martinez

State Bar No. 00791192

martinezja@jmeplaw.com

Bruce A. Koehler

State Bar No. 11649300

koehler@mgmsg.com

Nicklaus Jimenez

State Bar No. 24132918

jimenez@mgmsg.com

Attorneys for Plaintiff

**THE STATE OF TEXAS }
 }
COUNTY OF EL PASO }**

Before me, the undersigned authority, on this day personally appeared the person known to me to be JOAQUIN ROYO, who after being by me first duly sworn, upon his oath stated that he is over the age of 18 years, is competent to make an oath, has read the foregoing instrument and that the factual statements contained therein are within his personal knowledge and are true and correct.

JOAQUIN ROYO

SUBSCRIBED AND SWORN TO BEFORE ME, this ____ day of _____,
2023.

My commission expires:

NOTARY PUBLIC in and for
THE STATE OF TEXAS

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Barbara Divis on behalf of James Martinez

Bar No. 791192

BDivis@mgmsg.com

Envelope ID: 76690268

Filing Code Description: Application

Filing Description: Plaintiff's Original Petition and Application for Temporary Restraining Order, Temporary Injunction and Permanent Injunction / NC

Status as of 6/16/2023 9:20 AM MST

Associated Case Party: CITY OF EL PASO

Name	BarNumber	Email	TimestampSubmitted	Status
Barbara Divis		bdivis@mgmsg.com	6/16/2023 9:05:48 AM	SENT
Michele Haddad		mhad@mgmsg.com	6/16/2023 9:05:48 AM	SENT
Monica Lara		mlara@mgmsg.com	6/16/2023 9:05:48 AM	SENT

Associated Case Party: ZTEX CONSTRUCTION, INC.

Name	BarNumber	Email	TimestampSubmitted	Status
James Martinez		martinezja@jmeplaw.com	6/16/2023 9:05:48 AM	SENT
James Martinez		eservice@jmeplaw.com	6/16/2023 9:05:48 AM	SENT
Bruce AKoehler		koehler@mgmsg.com	6/16/2023 9:05:48 AM	SENT
Nicklaus Jimenez		jimenez@mgmsg.com	6/16/2023 9:05:48 AM	SENT