

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

ZTEX CONSTRUCTION, INC.

Plaintiff,

v.

CITY OF EL PASO,

Defendant.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

Cause No. \_\_\_\_\_

---

**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, 1<sup>st</sup> 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 Residential 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.

#### **Residential Street Resurfacing 2023**

Plaintiff attaches as Exhibit A the City’s Competitive Sealed Proposal (“CSP”) ranking sheet (the “Ranking”) and related correspondence for the Residential 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. 2023-0258) for the Collector and Above 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**

Plaintiff would show the City made the following errors in evaluating ZTEX's CSP.

**Factor C.** The City failed to properly award ZTEX points for Factor C<sup>1</sup> Experience of Key Personnel (ZTEX Package at pp. 14-15; Appendix I), because each of the Key Personnel hold university degrees in Civil Engineering and have vast experience in not only similar projects, but on the very same project on prior occasions. It should be noted that in the CSP Evaluation for Solicitation No. 2023-0258 (Exhibit "C"), ZTEX was ranked higher than Jordan Foster. However, in the Ranking (Exhibit "A"), Jordan Foster is ranked higher than ZTEX. 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.

**Factor E.** The City also failed to properly award ZTEX points for Factor E, which relates to Quality Control. In the Ranking (Exhibit "A"), there is a 1.25 point difference between ZTEX and Jordan Foster. However, in the ranking for the CSP Evaluation for Solicitation No. 2023-0258 (Exhibit "C"), there is only a half point difference between ZTEX and Jordan Foster. Again, there is a clear inconsistency with regard to the evaluation process utilized by the City of El Paso. Additionally, it should also be noted that just last year (Exhibit "D"), the City awarded ZTEX 4.3 points out of 5 points in this category and awarded Allied Paving Company 3.67 points and Allen Concrete, LLC 3.93 points. There is no evidence ZTEX's quality control measures have declined in a manner that would justify the lower evaluation (after adjusting for available points). Factor E should be recalculated to consistently and appropriately measure ZTEX's Quality Control processes.

---

<sup>1</sup> ZTEX would note that the ranking sheet contains a typographical error in the Evaluation Factors. There are two Factor D's listed. The first Factor D – Experience of Key Personnel – should be labeled Factor C.

**Factor F.** ZTEX was appropriately ranked by far the highest for this factor (12.63 out of 15 compared to 3.76, 9.33 and 0.00 for the other bidders). However, Factor F, which relates to Offeror's Experience and Knowledge of Local Conditions, had ZTEX ranked last (3.55 out of 5 compared to 3.93, 4.55 and 4.25 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 impossible for any other entity to have more experience and knowledge of local conditions based upon 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 12.22 points. There can be no justification for the 3.44 points awarded to ZTEX here, particularly in comparison to the other bidders. The Ranking for Factor B was correct, and Factor F should be recalculated to consistently and appropriately measure ZTEX's Experience and Knowledge of Local Conditions.

## V. CAUSES OF ACTION

Pursuant to the Texas Declaratory Judgments Act, Plaintiff seeks a judicial declaration that the City's ranking of ZTEX's proposal for the Residential Contract is incorrect and that the number of points the City must award to ZTEX for factors C, E and F are 9.5, 9 and 4.5, respectively. Pleading in the alternative, as permitted by Texas law, Plaintiff seeks an injunction requiring the City to reject all proposals for the 2023 Residential Contract and issue a new request for proposals for it.

## VI.

Plaintiff would show it will suffer irreparable harm if Defendant awards the 2023 Residential Contract (City of El Paso Solicitation No. 2023-0267) to Allied Paving (“Allied”). 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 it would therefore receive the highest ranking from the City. ZTEX therefore anticipated being awarded the Residential 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 it. 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 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 the 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 ZTEX's proposal for the Residential Contract is incorrect; and

2. a judicial declaration that the number of points the City must award to ZTEX for factors C, E and F for the Residential Contract are 9.5, 9 and 4.5, respectively, and an injunction requiring the City to award these points for the Residential Contract; and
  3. in the alternative, a judicial declaration that the City's rankings of all proposals for the 2023 Residential Contract are invalid; and
  4. an injunction preventing Defendant from awarding the 2023 Residential Contract to Allied; and
  5. in the alternative, an injunction requiring the City to reject all proposals for the Residential 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](mailto:martinezja@jmeplaw.com)  
**Bruce A. Koehler**  
State Bar No. 11649300  
[koehler@mgmsg.com](mailto:koehler@mgmsg.com)  
**Nicklaus Jimenez**  
State Bar No. 24132918  
[jimenez@mgmsg.com](mailto:jimenez@mgmsg.com)

*Attorneys for Plaintiff*





### 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: 76671683

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 6/15/2023 4:09 PM MST

Associated Case Party: ZTEX CONSTRUCTION, INC.

Name	BarNumber	Email	TimestampSubmitted	Status
Bruce AKoehler		koehler@mgmsg.com	6/15/2023 3:11:05 PM	SENT
James A.Martinez		martinezja@jmeplaw.com	6/15/2023 3:11:05 PM	SENT
James Martinez		eservice@jmeplaw.com	6/15/2023 3:11:05 PM	SENT
Nicklaus Jimenez		jimenez@mgmsg.com	6/15/2023 3:11:05 PM	SENT

#### Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Barbara Divis		bdivis@mgmsg.com	6/15/2023 3:11:05 PM	SENT
Michele Haddad		mhad@mgmsg.com	6/15/2023 3:11:05 PM	SENT
Monica Lara		mlara@mgmsg.com	6/15/2023 3:11:05 PM	SENT