

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 31152

BUTTE-MEADE SANITARY WATER DISTRICT, a governmental subdivision of the
State of South Dakota

Plaintiff and Appellees,
vs.

NATIONWIDE MUTUAL INSURANCE COMPANY, an Ohio corporation for non-
profit, and MJ DRILLING, INC., a Wyoming Corporation,

Defendants and Appellants

Appeal from the

Fourth Judicial Circuit

Butte County, South Dakota

The Honorable Michael Day, Circuit Court Judge

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

For the convenience of the Court, Appellant-Defendant, MJ Drilling, Inc. will be referred to as "MJ Drilling;" Appellees, Butte-Meade Sanitary Water District will be referred to as "Butte-Meade"; reference to the hearing transcript will be cited as "HT" followed by the appropriate page(s); and Documents from the Appendix are cited as "APP _____;" The portion of the judgment rendered against Nationwide Mutual Insurance has been satisfied, sans the final calculation of post-judgment interest.

JURISDICTIONAL STATEMENT

This is an appeal from an Order and Judgment signed by the Court on June 17, 2025 with the Notice of Entry of Judgment filed on June 18, 2025. There were no Findings and/or Conclusions of Law and the Order and Judgment were dispositive as to all claims and were final orders pursuant to SDCL § 15-26A-3(2). Notice of Appeal was filed in the Circuit Court on July 15, 2025. The referenced rulings are appealable and the present appeal is timely.

STATEMENT OF THE LEGAL ISSUE

Whether the trial court erred by granting plaintiff's motion for summary judgment on the issue of statutory damages, in light of the language of the written contract?

1. SDCL §5-18A-15
2. *JAS Enters., Inc. v. BBS Enters., Inc.*, 2013 SD 54
3. *Lindblom v. Sun Aviation*, 2015 S.D. 20, 862 N.W.2d. 549
4. *Walther v. KPKA Meadowlands Ltd. Pshp.*, 1998 SD 78

STATEMENT OF THE CASE

This is an appeal of rulings from the Fourth Judicial Circuit, the Honorable Michael Day. The case is a civil action brought by Appellees arising out of a contract to dig a water well which was awarded to MJ Drilling who, subsequently failed to sign the

construction contract or perform the work. Appellees, as project owners, contracted with the next lowest bidder and sought collection of the increase in project cost from MJ Drilling, despite contractual language limiting the liability of MJ Contracting.

STATEMENT OF THE FACTS

Butte-Meade is an unincorporated Sanitary District and is a governmental subdivision of the State of South Dakota. *See*, Butte-Meade Statement of Undisputed Material Facts dated May 16, 2025 attached as APP 3 - 6. Butte-Meade owns and operates a public water distribution system in Butte County and part of Meade County, South Dakota. Butte-Meade provides water service to over 900 service locations. *Id.*

At some point it became evident that Butte-Meade need needed an additional source of water for its citizens. *See*, Butte-Meade Statement of Undisputed Material Facts dated May 16, 2025 attached as APP 3 - 6. Butte-Meade hired FMG Engineering helped evaluate Butte-Meade's system and then designed a new Madison formation water well to supply Butte-Meade's water system. *Id.* In November 2023, FMG Engineering assemble a Project Manual with Instructions to Bidders for Water System Improvements 2024 New Madison Well ("New Madison Well Project") for Butte-Meade. *See*, APP 3 – 6.

As it relates to potential bidders, Section 8.02 of the project manual specifically provided:

“... If the Successful Bidder fails to execute and deliver the Contract Documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and Bid security of that Bidder will be forfeited. *Such forfeiture shall be Owner's exclusive remedy if Bidder defaults...*” (emphasis added)

Section 8 of the Project Manual further defines the “Bid security” as being “... A Bid bond in the amount of 10% ...,” in lieu of a cashier’s check equal to 5% of the bid.

Butte-Meade advertise for bids for the New Madison Well Project in December, 2023 and January, 2024. On February 1, 2024, Butte-Meade opened three (3) bids for the New Madison Well Project. MJ Drilling, Inc. (MJ Drilling), of Buffalo, Wyoming, submitted the lowest bid in the amount of \$881,829.31. *See*, Butte-Meade Statement of Undisputed Material Facts dated May 16, 2025 attached as APP 3 – 6.

MJ Drilling’s Bid included a bid bond from Nationwide Mutual Insurance Company with a penal sum of 10% of the bid amount. However, after being notified of being the successful bidder, MJ Drilling attempted to rescind the bid, which attempt was denied.

Section 21.01 of the Project Manual requires the Successful Bidder to sign and return the contract documents within 15 days after the contract is awarded. Since Butte-Meade awarded this contract to MJ Drilling on February 29, the deadline for signing the contract was marked 15, 2024. *See*, Butte-Meade Statement of Undisputed Material Facts dated May 16, 2025 attached as APP 3 - 6. MJ Drilling never sign and return the contract documents for the New Madison Well Project. *Id.*

Section 8.02 also provides, in part, “If the Successful Bidder fails to execute and deliver the contract documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and the Bid security of that Bidder will be forfeited. MJ Drilling’s Bid Bond provides; Default of Bidder shall occur upon the failure of Bidder to deliver within the time required by the bidding documents (or any extension thereof agreed to in writing by

Owner) the executed agreement required by the bidding documents in any performance and payment bonds required by the bidding documents.” *See*, Butte-Meade Statement of Undisputed Material Facts dated May 16, 2025 attached as APP 3 - 6.

On March 20, 2024, Butte-Meade’s Board of Trustees declared MJ Drilling in default for failing to enter the contract documents and awarded the contract to the next lowest bidder, Water System Drilling, Inc. Butte-Meade served a written Notice of Default upon MJ Drilling and Nationwide on April 12, 2024. *See*, Butte-Meade Statement of Undisputed Material Facts dated May 16, 2025 attached as APP 3 - 6.

On or about May 16, 2025, Butte-Meade filed a Motion for Summary Judgment. The portion of the motion, at issue here is the Court granting of the relief requested by Butte-Meade based on SDCL § 5-18A-15 which provides:

After receiving notice of the contract award, the successful bidder or offeror shall enter into a contract with the purchasing agency within the time specified in the invitation for bids or request for proposals. If any bidder or offeror fails to enter into a contract within the time specified, the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, less all bids or proposals are rejected. The defaulting bidder or offeror shall be responsible for the difference in the price.

In their opposition to summary judgment, MJ Drilling argued that the Project Manual issued by Butte-Meade had specific language which capped the damages available to Butte-Meade in situations where the successful bidder failed to execute the requisite contracts. Specifically, as set out above, the Project Manual states that the “Bid security” (defined as a bid bond in the amount of 10% of the bid), “... *shall be Owner’s exclusive remedy if Bidder defaults...*” (Emphasis added). *See* APP 13 - 19.

During the hearing on the motion, counsel for MJ asked the Court to expound or explain why the above language was not applicable, pointing out that Butte-Meade never

even responded to this argument or acknowledged that their own contract had limited their remedies against a successful bidder who subsequently defaulted. HT 8-9, 15-16. Counsel specifically noted that it would not be allowable to let Butte-Meade to rely on the Project Manual to bid MJ Drilling to performance but then ignore the Project Manual as it applies to the exclusive remedy. *Id.*

Without explanation, the Court proceeded to find MJ responsible for the bid security and the statutory penalty of the difference between the MJ Drilling bid and the next lowest bidder. HT19. In a last attempt, the following took place:

Q: (By Clayborne) Will the Court be addressing, specifically, the issue on forfeiture and exclusive remedy or can we submit findings and conclusions on that?

A: (By Judge Day) Well, in summary judgment, there's really no findings and conclusion." HT 20.

With that, judgment was passed.

ARGUMENT AND AUTHORITIES

A. Standard of Review

On appeal, the court's task is to determine whether a genuine issue of material fact exists and whether the law was correctly applied. *Walther v. KPKA Meadowlands Ltd. Pshp.*, 1998 SD 78, *Petersen v. Dacy*, 1996 SD 72. Appellate courts review grants or denials of summary judgment de novo, giving no deference to the trial court's conclusions of law *Lapin v. Zeetogroup, LLC*, 2025 SD 36, *Uhre Realty Corp. v. Trommes*, 2024 SD 10, *Healy Ranch, Inc. v. Healy*, 2022 SD 43, *MacKaben*, 2015 S.D. 86, 871 N.W.2d 617. Having said this, even if reviewed under the clearly erroneous standard, this matter should be reversed or remanded for the reasons that, after a review

of the evidence, it is clear that a mistake has been made. *Lindblom v. Sun Aviation*, 2015 S.D. 20, 862 N.W.2d. 549.

The standard of review for granting summary judgment by the lower court in South Dakota is well established and governed by S.D. Codified Laws § 15-6-56(c). The following principles apply:

- **Absence of Genuine Issue of Material Fact:** The moving party must demonstrate the absence of any genuine issue of material fact and show entitlement to judgment as a matter of law. *Burgi v. E. Winds Ct., Inc.*, 2022 SD 6.
- **Viewing Evidence Favorably to the Nonmoving Party:** The evidence must be viewed in the light most favorable to the nonmoving party, and reasonable doubts should be resolved against the moving party. *Id.*
- **Burden on the Nonmoving Party:** The nonmoving party must present specific facts showing that a genuine, material issue for trial exists. Mere allegations or denials in pleadings are insufficient. *Walther v. KPKA Meadowlands Ltd. Pshp.*, 1998 SD 78.
- **Extreme Remedy:** Summary judgment is considered an extreme remedy and is only appropriate when the truth is clear. It is not intended as a substitute for a trial by jury where genuine issues of material fact exist. *Jerauld County v. Huron Reg'l Med. Ctr., Inc.*, 2004 SD 89, *Heib v. Lehrkamp*, 2005 SD 98, *Continental Grain Co. v. Heritage Bank*, 1996 SD 61.

B. Law Applicable to the Construction of Contracts.

The construction of contracts in South Dakota is governed by principles that aim to ascertain and give effect to the intention of the parties, relying on the plain meaning of

the contract language unless ambiguity exists. Courts in South Dakota interpret contracts as a matter of law, often considering the entire contract and related documents to ensure all provisions are given reasonable and effective meaning.

In *JAS Enters., Inc. v. BBS Enters., Inc.*, 2013 SD 54, the South Dakota Supreme Court emphasized that the primary rule in contract construction is to ascertain and give effect to the mutual intention of the parties. The court also noted that the interpretation of an unambiguous contract is a matter for the judge, not witnesses, and that parol evidence is inadmissible unless fraud in the inducement is claimed.

In *S.D. Life & Health Guar. Ass'n v. S.D. Bankers Ben. Plan Trust*, 2023 SD 31, the Court reiterated that where contract terms are plain and unambiguous, courts must construe them as they stand, giving effect to their plain meaning.

Similarly, in *Carstensen Contr. v. Mid-Dakota Rural Water Sys.*, 2002 SD 136, the court stated that the intention of the parties is determined by the contract language they used, and that all documents comprising a contract must be read together. The court highlighted that specific clauses reflect the parties' intentions more accurately than general ones when provisions conflict. The plain meaning of the contract language is followed unless ambiguity or a different intent is evident. *Id.*

Finally, In South Dakota, courts may use dictionary definitions to determine the plain and ordinary meaning of undefined terms. This principle is well-established in South Dakota case law. For example, in *Wilson v. Maynard*, 2021 SD 37, this Court stated that an undefined term in a restrictive covenant is not ambiguous if it has a plain and ordinary meaning that can be defined. Courts may rely on statutes and dictionary definitions to ascertain this meaning. *Id.* Similarly, in *Jackson v. Canyon Place*

Homeowner's Ass'n, 2007 SD 37, the court reiterated that failing to define terms does not automatically result in ambiguity, and dictionary definitions can be consulted to determine the plain and ordinary meaning of undefined words.

C. The Circuit Court Erred by Finding Butte-Meade was entitled to both Contractual and Statutory Damages.

The issue brought before this court is a simple one, i.e. should this decision be reversed or remanded for the reasons that, after a review of the evidence, it is clear that a mistake has been made. *Lindblom v. Sun Aviation*, 2015 S.D. 20, 862 N.W.2d. 549. The answer is clear that it should.

The parties here are not arguing that the Project Manual drafted and issued by Butte-Meade is ambiguous by any means. In fact, Butte-Meade has used the same document to show their entitlement to have judgment entered in their favor for the amount of the bid bond posted. In order to make this argument, they rely on the first portion of Section 8.02 of the Project Manual which states:

“... If the Successful Bidder fails to execute and deliver the Contract Documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and Bid security of that Bidder will be forfeited...”

They conveniently ignore, however, the remainder of the section, which states

“Such forfeiture shall be Owner’s exclusive remedy if Bidder defaults...”
(emphasis added).

Butte-Meade then doubles down by arguing that, despite their being contractually limited to a certain recovery, that SDCL §5-18A-15 allows them to also require the defaulting bidder to pay the difference between their bid and that

of the next lowest bidder. Again, they do so without advancing any argument that the Project Manual is unclear or ambiguous.

All parties agree that the Project Manual control and it was introduced as part of the court record. All also agree that the above language is contained within the Project Manual and establishes the Owner's exclusive remedy if a Bidder Defaults. There is additional consensus that MJ Drilling is the Defaulting bidder based on their failure to sign the requisite contracts and accept the project. Given this, the only remaining issue is what does "exclusive" mean.

Based on the above authority, this court may use the dictionary to define terms of the contract. Merriam Webster defines "exclusive" to mean "single" or "sole." Using those terms would have Section 8.02 state that Butte-Meade's sole or single remedy against MJ Drilling, for their default would be the retention of the bid bond amount, which excludes additional statutory relief. As such the Judgment of the trial court, awarding statutory relief was in error.

CONCLUSION

For the reasons stated, Appellants respectfully request this Court reverse or remand this matter consistent with the arguments set forth herein.

REQUEST FOR ORAL ARGUMENT

Appellants hereby request oral argument.

[Signature Page to Follow]

Dated this 3rd day of October, 2025.

LOOS, SABERS & SMITH, LLP

/s/ Courtney R Clayborne
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(605) 721-1517
Attorneys for the Appellant/Defendant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of October, 2025 before, he electronically filed the foregoing documents with the Clerk of the Supreme Court Odyssey File and Serve portal, and further certifies that the foregoing document was also mailed via U.S. Mail, postage prepaid thereon, to:

Dwight Gubbrud
Bennett Main Gubbrud & Willert, P.C.
618 State Street
Belle Fourche, SD 57717

Ms. Shirley A. Jameson-Fergel
Clerk of the Supreme Court
State Capitol
500 East Capitol
Pierre, SD 57501

/s/ Courtney R Clayborne
COURTNEY R. CLAYBORNE

[Certificate of Compliance to Follow]

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Courtney R Clayborne, counsel for the Appellants, does hereby submit the following:

The foregoing brief is 9 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 2,287 words, and 11,646 characters (no spaces) in the body of the Brief.

/s/ Courtney R Clayborne
COURTNEY R CLAYBORNE

APPELLANT APPENDIX

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SDCL § 15-26A-3(2).....	20.
SDCL § 5-18A-15	21.

jointly and severally, for the penal sum of the Bid Bond in the amount of Eighty-Eight Thousand One Hundred Eighty-Two Dollars and Ninety-Three Cents (\$88,182.93) plus prejudgment interest on that amount from May 12, 2024 (30 days after written notice of default) until the entry of Judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to SDCL 5-18A-15, Judgment is granted in favor of Plaintiff Butte-Meade Sanitary Water District and against Defendant MJ Drilling, Inc. for the difference in price between the bid of MJ Drilling, Inc. and the next lowest responsive and responsible bidder. In total, Judgment shall be entered against MJ Drilling, Inc. for Three Hundred Three Thousand Eight Hundred Eighty-Five Dollars and Sixty-Nine Cents (\$303,885.69). This Judgment amount shall be reduced by payment of the penal sum of the Bid Bond by either MJ Drilling, Inc. or Nationwide Mutual Insurance Company.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Butte-Meade Sanitary Water District, as prevailing party, shall have Judgment against Defendants Nationwide Mutual Insurance Company and MJ Drilling, Inc., jointly and severally, for costs and disbursements in the amount of _____ (\$_____). The Clerk shall enter the amount of costs and disbursements awarded pursuant to SDCL 15-6-54(d).

6/17/2025 9:26:14 AM

Albert
Jensen, Alana
Clerk/Deputy




HONORABLE MICHAEL W. DAY,
Circuit Court Judge

Instructions to Bidders for Water System Improvements 2024 New Madison Well ("New Madison Well Project") for Butte-Meade. Attached to this Affidavit marked Exhibit "1" is a copy of this Project Manual. *Id.*, ¶ 7.

6. Butte-Meade advertised for bids for the New Madison Well Project in December, 2023 and January, 2024. *Id.*, ¶ 9.

7. On February 1, 2024, Butte-Meade opened three (3) bids for the New Madison Well Project. A summary of the bids is shown on attached Exhibit "2". MJ Drilling Inc. ("MJ Drilling"), of Buffalo, Wyoming, submitted the lowest bid in the amount of Eight Hundred Eighty One Thousand Eight Hundred Twenty-Nine Dollars and Thirty-One Cents (\$881,829.31). *Id.*, ¶ 10.

8. MJ Drilling's Bid included a Bid Bond from Nationwide Mutual Insurance Company with a penal sum of ten percent (10%) of the amount bid by MJ Drilling. Exhibit "3". *Id.*, ¶ 13.

9. Marvin P. Scoggin, President of MJ Drilling attended the bid opening in Newell, South Dakota. *Id.*, ¶ 11.

10. On Friday, February 2, 2024, MJ Drilling and the other bidders were notified of the results of the bid opening. *Id.*, ¶ 14.

11. Section 16.02 of the Instructions to Bidders provided:

If within 24 hours after Bids are opened any Bidder files a duly signed written notice with Owner and promptly thereafter demonstrates to the reasonable satisfaction of Owner that there was a material and substantial mistake in the preparation of its Bid, that Bidder may withdraw its Bid, and the Bid security will be returned.

Id., ¶ 15, Bates numbered BMSWD000295.

12. None of the bidders provided notice of any mistakes within twenty-four (24) hours of the bid opening. *Id.*, ¶ 16.

13. SDCL 5-18A-5 requires a contract for public improvement to be awarded to the lowest responsible and responsive bidder. *Id.*, ¶ 17.

14. On February 29, 2024, Butte-Meade's Board of Trustees awarded the New Madison Well Project to MJ Drilling. That same day, I notified MJ Drilling of the

contract award. *Id.*, ¶ 20.

15. The next day, MJ Drilling emailed, "Thank you again for the opportunity to drill this water well." Exhibit "5". *Id.*, ¶ 21.

16. Section 21.01 of the Project Manual required the Successful Bidder to sign and return the contract documents within fifteen (15) days after the contract is awarded. Exhibit "1", Bates numbered BMSWD000296. Since Butte-Meade awarded this contract to MJ Drilling on February 29th, the deadline for signing the contract was March 15, 2024. *Id.*, ¶ 30.

17. MJ Drilling never signed and returned the contract documents for the New Madison Well Project.

18. MJ Drilling never demonstrated that there is a material and substantial mistake in its bid for the New Madison Well Project. *Id.*, ¶ 27.

19. SDCL 5-18A-15 provides:

After receiving notice of a contract award, the successful bidder or offeror shall enter into a contract with the purchasing agency within the time specified in the invitation for bids or request for proposals. If any bidder or offeror fails to enter into a contract within the time specified, the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. The defaulting bidder or offeror shall be responsible for the difference in price.

20. Section 8.02 provides, in part, "If the Successful Bidder fails to execute and deliver the Contract Documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and the Bid security of that Bidder will be forfeited." Exhibit "1", Bates numbered BMSWD000292. *Id.*, ¶ 31.

21. MJ Drilling's Bid Bond provides, "Default of Bidder shall occur upon the failure of Bidder to deliver within the time required by the bidding documents (or any extension thereof agreed to in writing by Owner) the executed agreement required by the bidding documents and any performance and payment bonds required by the bidding documents". Exhibit "3", Bates numbered BMSWD000060.

22. On March 20, 2024, Butte-Meade's Board of Trustees declared MJ

Drilling in default for failing to enter the contract documents and awarded the contract to the next lowest bidder, Water System Drilling, Inc. *Id.*, ¶ 33.

23. The next lowest bid submitted by Water System Drilling Inc. was for a total of One Million One Hundred Eighty-Five Thousand Seven Hundred Fifteen Dollars (\$1,185,715). *Id.*, Exhibit "2", Bates numbered BMSWD000010.

24. The Bid Bond issued by Nationwide Mutual Insurance Company provides, in pertinent part, "Bidder and Surety, jointly and severally, bind themselves, their heirs, executors, and administrators, successors, and assigns to pay to Owner [Butte Meade Sanitary Water District] upon default of Bidder the penal sum set forth on the face of this Bond." Exhibit "3", Bates numbered BMSWD000060. *Id.*, ¶ 32.

25. The Bid Bond provides, "Payment under this Bond will be due and payable upon Default of Bidder and within 30 calendar days after receipt by Bidder and surety of written notice of default from Owner..." *Id.*

26. Butte-Meade served a written Notice of Default upon MJ Drilling and Nationwide on April 12, 2024. *Complaint*, ¶ 19, Exhibit "2" *Answer*, ¶ 2.

27. Nevertheless, MJ Drilling and Nationwide refused to pay the penal sum of the Bid Bond to Butte-Meade. *Complaint*, ¶ 20, *Answer and Counterclaim*, ¶ 2.

Dated this 16th day of May, 2025.

BENNETT MAIN GUBBRUD & WILLERT,
P.C.
Attorneys for the Plaintiff

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1 STATE OF SOUTH DAKOTA)
2 COUNTY OF BUTTE)

IN CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT

3
4
5 BUTTE-MEADE SANITARY WATER)
6 DISTRICT, a governmental)
7 subdivision of the State of)
8 South Dakota,)

Plaintiff,)

Motions Hearing

9 vs.)

09CIV24-184

10 NATIONWIDE MUTUAL INSURANCE)
11 COMPANY, an Ohio corporation)
12 for non-profit, and MJ)
13 DRILLING, INC., a Wyoming)
14 Corporation,)

Defendants.)

15 BEFORE: **THE HONORABLE MICHAEL DAY**
16 Circuit Court Judge
17 Belle Fourche, South Dakota
18 June 17, 2025, at 8:45 a.m.

19 APPEARANCES:

20
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22
23
24 For Defendants:

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1 time hearing of that, if it wasn't accepted.

2 But to work backwards from the argument of the
3 Plaintiffs, for some reason, and I'm not sure why, it is
4 never mentioned to this Court that the actual contract
5 language, which applies to the -- any default in the
6 bidding, specifically says, basically, if the successful
7 bidder fails to execute the documents, the owner may
8 consider the bidder to be in default, annul the notice of
9 award, and the bid security of that bidder will be
10 forfeited. Such forfeiture shall be the owner's exclusive
11 remedy if the bidder defaults.

12 So that is the contractual language that was put out
13 in the bids. And that would, at least, raise an issue of
14 material fact as to the issue of the totality of the
15 damages being the difference between the bid submitted and
16 accepted in the next-lowest bidder.

17 Now, to go back to the beginning, there is no dispute
18 that MJ was in default by not signing the documents. And
19 that is not the technical issue before the Court.

20 The issue before this Court is whether they should be
21 entitled to equitable relief, based on the totality of the
22 circumstances.

23 In our brief, we submitted to the Court -- we pointed
24 out specifically the *Arcon Construction Company* case. I
25 think that actually checks all of the boxes of what is

1 needed for equitable relief. And it provides that the
2 Court will grant equitable relief to a bidder -- if that
3 bidder submits a bid and, upon discovery of mistake, acts
4 promptly in informing the appropriate public authorities.

5 As indicated by Plaintiffs, once the bids were open
6 and on that day, and as set forth in the Affidavit of
7 Marvin Scoggin, he says he informed the engineer of the
8 mistake and his desire to withdraw. He had always treated
9 the engineer as the owner's representative.

10 And when the engineer told him that he couldn't, he
11 took that as his final word and proceeded as best he
12 could.

13 So that satisfies the first requirement set forth,
14 which is that he acted promptly to inform them of the
15 mistake and his intention to withdraw.

16 Then the Court needs to also consider the other
17 mandates from the Supreme Court concerning the equitable
18 nature of the relief. And that is, if making -- if the
19 error was plainly -- or was or should have been recognized
20 as an error by the owner, and if all of these things
21 exist, the Court can grant equitable relief.

22 In front of the Court today is only if there is a
23 genuine issue as to those facts. And we would present
24 that the Affidavit of Marvin Scoggin does create that
25 genuine issue by showing there was prompt notice.

1 immediately. And that was known before the bidding.

2 It also would be known and has to be construed in his
3 favor that a bid that is less than 75 percent of the
4 engineer's estimate and less than 70 percent of everybody
5 else's, that is something that should have been known.
6 Those are issues raised by the pleadings, Your Honor.

7 We don't get -- we have trials to go through the math.
8 Those sorts of things.

9 Today is just if there are issues raised. Not the
10 specifics of the issues or the ultimate facts to be
11 determined.

12 On the other part, I am still confused of how the
13 owner would stand before this Court and say, "Even though"
14 -- and it's never been addressed -- "Even though our
15 contract specifically says such forfeiture shall be the
16 owner's exclusive remedy if the bidder defaults, that is
17 we get your bond if you default." But now say, "We don't
18 have to abide by the contract. And we can get those
19 excess damages. But you, Mr. Scoggin, you have to abide
20 by the contract. Hook, line, sinker. No exclusions. But
21 we don't have to look at our own contract and live with
22 what it says."

23 So either this contract is void or it's voidable by
24 their argument. And under either of those scenarios, if
25 they don't have to live by the contract and say it's an

1 error, or it's a contradiction of state law, then that
2 takes us down that path.

3 And for today's purposes, there is a huge issue being
4 raised. Because if they don't have to live up to the
5 contract, they certainly can't enforce it.

6 We have asked this Court for equitable relief.

7 **THE COURT:** Mr. Clayborne, I have a question. In your
8 first argument this morning, you made the comment that
9 this is the first time that you heard that your statement
10 of facts had not been filed. But in Mr. Gubbrud's reply
11 brief of June 9th, he specifically addresses that issue.

12 Certainly, you would have read that and said, "Well,
13 if I -- if I had my statement of facts and it didn't get
14 filed, I better figure out why it didn't get filed."

15 **MR. CLAYBORNE:** Well, and I had -- when we filed the
16 documents, they all were filed, boom, boom, boom. And I
17 didn't see a rejection of that. So if that's an oversight
18 on my part, I apologize, Your Honor.

19 They were done and submitted. As I sit here -- and,
20 specifically, I don't recall specifically looking for
21 every one. But all of them were filed as a packet.

22 And we did see that Marvin's affidavit got kicked
23 back. But that got subsequently refiled and, certainly, I
24 would have -- had I noticed the other one was rejected, I
25 would have made that.

1 **MR. GUBBRUD:** Thank you, Your Honor.

2 I filed a proposed judgment with the Court. And if
3 the Court has it, it should be under proposed documents.
4 And if you would like that in Word, because you would like
5 to make any amendments to it, we can email that to the
6 Court.

7 **THE COURT:** I'll have the Clerk put it in my queue for
8 signature.

9 **MR. CLAYBORNE:** Your Honor?

10 **THE COURT:** Yes?

11 **MR. CLAYBORNE:** Will the Court be addressing,
12 specifically, the issue on the forfeiture and exclusive
13 remedy or can we submit findings and conclusions on that?

14 **THE COURT:** Well, in summary judgment, there's no, really,
15 findings and conclusions.

16 **MR. GUBBRUD:** I agree, Your Honor. No provision for such.

17 **THE COURT:** Right.

18 **MR. CLAYBORNE:** And the Court will not be addressing that
19 specific language then?

20 **THE COURT:** Correct.

21 **MR. CLAYBORNE:** Thank you.

22 **MR. GUBBRUD:** Thank you, Your Honor.
23
24
25

STATE OF SOUTH DAKOTA)
)SS
COUNTY OF BUTTE)

IN CIRCUIT COURT

FOURTH JUDICIAL CIRCUIT

BUTTE-MEADE SANITARY WATER
DISTRICT, a governmental subdivision of the
State of South Dakota

09CIV24-000184

Plaintiff,

vs.

NATIONWIDE MUTUAL INSURANCE
COMPANY, an Ohio corporation for non-
profit, and MJ DRILLING, INC., a Wyoming
Corporation,

Defendants.

**DEFENDANTS' REPLY TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT**

COMES NOW DEFENDANTS, and for their response to Plaintiff's Motion for

Summary Judgment and state:

FACTS

The facts of this case are relatively straightforward. The Owners, Butte-Meade Sanitary Water District sought bids for the construction of a new well for customers in Butte and Meade County. To that end, they hired FMG Engineering to assemble a Project Manual and solicit bids. Defendant, MJ Drilling, Inc. obtained a project manual and submitted a bid to complete the work for the sum of \$881,929.31. This bid was submitted to FMG together with a bond for 10% of the bid amount. The bond was issued by Nationwide Mutual Insurance Company.

MJ's owner, Marvin Scoggin, attended the opening of the bids, which took place on February 1, 2024. It was at this point that Scoggin was made aware of the engineer's estimate for the project, as well as the bids submitted by two additional bidders. The engineer's estimate for the project was \$1,223,000. The remaining two bidders bid \$1,185,715 and \$1,309,100, respectively.

Upon seeing the bids, Scroggin realized that he had made a mistake and verbally asked Jason Pettyjohn, the architect of the Project Manual and Owner's representative, if MJ could withdraw its bid. Pettyjohn rejected this request. After the formal award of the bid, Scroggin made a similar request to Mike Wolf, a member of the owner's Board of Trustees.

Scoggin explained to both Pettyjohn and Wolf that his error was due to the fact that he was unaware of the requirement to use the Bacon Davis wage scale which would increase the labor cost on the project. Additionally, Scoggin through counsel contacted the attorney for the Board of Trustees, also requesting that the bid be rescinded.

In addition to the request to rescind the bid, Scoggin also made known, through counsel, that the Project Manual specifically capped the damages available to the Owner in situations where the successful bidder fails to execute the necessary contract by language stating:

"... If the Successful Bidder fails to execute and deliver the Contract Documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and Bid security of that Bidder will be forfeited. *Such forfeiture shall be Owner's exclusive remedy if Bidder defaults...*" (emphasis added)

Section 8 of the Project Manual further defines the "Bid security" as being "... A Bid bond in the amount of 10% ...," in lieu of a cashier's check equal to 5% of the bid.

With this, Scoggins was hoping to at least condense the issues to be resolved by an agreement that, if enforceable, the owner's recovery is limited, by contract, to the forfeiture of the bid security.

In their filings and making their request for judgment, the plaintiffs have completely ignored the contractual cap on damages.

LAW APPLICABLE TO SUMMARY JUDGMENT

The law applicable to summary judgment is very well-founded in South Dakota and provides: "... [S]ummary judgment is appropriate when there is no genuine issue of material fact, [and] ... there must be no genuine issue on the inferences to be drawn from those facts." *A-G-E Corp. v. State*, 2006 S.D. 66, ¶ 17, 719 N.W.2d 780, 786.

"[S]ummary judgment is not a substitute for trial; a belief that the non-moving party will not prevail at trial is not an appropriate basis for granting the motion on issues not shown to be a sham, frivolous or unsubstantiated" *Toben v. Jeske*, 2006 S.D. 57, ¶ 16, 718 N.W.2d 32, 37 (citation omitted). "We view all reasonable inferences drawn from the facts in the light most favorable to the non-moving party." *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343 (citation omitted).

ARGUMENTS AND AUTHORITY

The plaintiff seeks summary judgment on the theory that MJ is in default and that South Dakota statute sets the damages for the same at the difference between the defaulting bidders bid and next lowest responsive and responsible bidder accepted by the owner. Citing SDCL 5-18A-15. While there is no argument that MJ failed to sign the notice of contract award, genuine issues of material fact existed as to whether they are entitled to withdraw the bid.

The issue of bid withdrawal were the contractor has made errors in the bid, is not new in the state of South Dakota. In the case of *Arcon Construction Company v. State of South Dakota, et.al.* 314 N.W.2d 303 (SD 1982), the court was faced with determining whether the contractor was entitled to equitable relief where they had made a material mistake of fact in the submission of a bid. There, like here, the contractor promptly informed the owner of the mistake and requested that they be allowed to withdraw the bid. In that action, and due to a mathematical

error, the contractor submitted a bid which was approximately \$170,000 below the intended bid. Also as here, the owner in that case, the state of South Dakota, insisted that Arcon be held to their original bid.

In granting the contractor's relief, the court noted that:

"...Courts will grant equitable relief to a bidder on a public contract in the submitted bid and, upon discovery of that mistake, acts promptly in informing the appropriate public authorities of the mistake and of its intention to withdraw [the bid] ..." citing *State Highway Commission v. State Construction Company*, 203 Or 414, 280 P.2d 370 (OR 1955) and 64 Am.Jur.2d, Public Works and Contracts, 84 (1972).

The court continued, stating that in order to receive such equitable relief certain conditions need to be established, to-wit: the mistake must be of such consequence that enforcement would be unconscionable; the mistake must relate to the substance of the consideration, that is, a material feature; the mistake must have occurred regardless of exercise of ordinary care; and upon relief, it must be possible to place the other party in status quo. Citing, *State Board of Control v. Clutter Construction Company*, 139 So.2d 153 (Fla.App. 1962); See SDCL § 21-12-1; SDCL § 53-11-2; and SDCL § 21-12-2.

In examining the factors set forth above, the court in *Arcon*, noted that the amount of the mistake, \$170,000, was more than "technical" in nature, even though the total contract was over \$4.5 million. The court would further note that a mistake of approximately 4% of the contract "...relates directly to the substance of the consideration ..." *Arcon*, supra

In the current case, the mistake made by the bidder is directly related to the substance of the consideration inasmuch as the mistake resulted in a bid which is approximately 25% less than it would have been had a proper application of the specifications been made.

The *Arcon* court also address the issue of "good faith mistake" noting, specifically, that "...any mistake indicates some degree of negligence ..." however, "...absent gross negligence,

... equitable relief will not be denied..." The court specifically considered the fact that the owner would not suffer actual damages by allowing withdrawal of the bid since they had only lost what they sought to gain by taking advantage of the mistake.

In the current matter, it would also be argued that the owner has not suffer any loss based upon the same rationale and a balancing of the equities. Here, equitable considerations would include the fact that the next low bidder was still less than the engineer's estimate for the project.

Additionally, the *Arcon* court reviewed the provisions of the specifications which included provisions allowing a bidder to withdraw or revise their proposal, provided that the same was done in writing, before the time set for opening the proposals. That contract, as here, also set forth the remedies available to the owner for failure to execute a contract within the time set forth by the specifications.

In finding that Arcon was entitled to rescind their bid, notwithstanding the fact that the bids had been opened, the court noted "...Provision of a like nature have been considered in similar cases and have generally been held as ineffective were equitable considerations dictate otherwise..."

The Arcon Court also cited with favor the holding of other jurisdictions which:

"... allow relief from forfeiture in bid bond cases where the accepting party knew or should have known of the error before acceptance, as when the party has been specifically notified or the price disparity indicates probable error..." *Id.*

In this matter, and as set forth in the undisputed material facts, it cannot be disputed that the Owner: 1) knew of the error *before* awarding the bid as they had been specifically told by MJ's owner, Marvin Scoggin, of the error and his desire to withdraw the bid; and 2) would also have been aware, or should have been aware, that a bid of less than 75% of the engineer's

estimate was indicative of a probable error. Again, both of these would have been known prior to their sending out the bid acceptance letter.

The final factor for this court's consideration would be the application of the language contained within the project manual which clearly and unequivocally states:

"... If the Successful Bidder fails to execute and deliver the Contract Documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and Bid security of that Bidder will be forfeited. *Such forfeiture shall be Owner's exclusive remedy if Bidder defaults...*" (emphasis added).

While the plaintiff seeks to enforce other provisions of the agreement, they do not even make mention of this provision which, at a minimum, caps the defaulting bidder's liability at the amount of the contract security. MJ has raised this as a counterclaim in their pleadings. This fact notwithstanding, there still is a genuine issue of material fact as to MJ's right to rescind the bid and that issue would need to be resolved prior to proceeding to damages.

The application to the foregoing raises issues of material fact which would preclude summary judgment. In their pleadings, MJ has raised the equitable issues set forth herein. In reviewing the facts most favorable to MJ, as must be done in summary judgment, this would mean this court must error in favor of MJ on the fact that the owners knew or should have known that a bid which was less than 75% of the engineer's estimate and the next lowest bid, was the result of an obvious error and the contractor should therefore be allowed to rescind the bid. Rescinding the bid for therefore eliminate any claim of damages on behalf of plaintiff.

While defendants feel that they should be the ultimate ruling of the court, for purposes of summary judgment, this is sufficient to preclude the granting of the same and that is request of the defendants.

Respectfully submitted this this 3rd day of June, 2025.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served true and correct copies of the foregoing **DEFENDANTS' REPLY TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** upon the persons herein next named, on the date shown below, by serving the same through Odyssey File and Serve, to:

Dwight Gubbrud
618 State Street
Belle Fourche, SD 57717
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and that such address is the last address of the addressees known to the subscriber.

Dated this 3rd day of June, 2025.

/s/Courtney R. Clayborne
COURTNEY R. CLAYBORNE

15-28A-3. Judgments and orders of circuit courts from which appeal may be taken.

Appeals to the Supreme Court from the circuit court may be taken as provided in this title if one:

- (1) A judgment;
- (2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;
- (3) An order granting a new trial;
- (4) Any final order affecting a substantial right, made in special proceedings, or upon a summary application in an action after judgment;
- (5) An order which grants, refuses, continues, dissolves, or modifies any of the remedies of arrest and bail, chain and delivery, attachment, garnishment, replevin, or deposit in court;
- (6) Any other intermediate order made before trial, any appeal under this subdivision, however, being not a matter of right but of sound judicial discretion, and to be allowed by the Supreme Court in the manner provided by rules of each court only when the court considers that the ends of justice will be served by determination of the questions involved without awaiting the final determination of the action or proceeding; or
- (7) An order entered on a motion pursuant to § 15-2-11.

Source: SDC 1939 & Supp. 1965, § 33.0701; SDCI, § 15-28-1; SL 1971, ch 151, § 2; SL 1985, ch 166, § 2.

6-18A-15. Time for entering into contract.

After receiving notice of a contract award, the successful bidder or offeror shall enter into a contract with the procuring agency within the time specified in the invitation for bids or request for proposals. If any bidder or offeror fails to enter into a contract within the time specified, the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. The defaulting bidder or offeror shall be responsible for the difference in price.

Source: SL 2010, ch 31, § 16.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 31152

BUTTE-MEADE SANITARY WATER DISTRICT,
a governmental subdivision of the State of South Dakota,
Plaintiff/Appellee,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY,
an Ohio corporation for non-profit, and
MJ DRILLING, INC., a Wyoming corporation,
Defendants/Appellants.

APPEAL FROM THE CIRCUIT COURT OF
THE FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHAEL W. DAY
Circuit Court Judge

APPELLEE'S BRIEF

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NOTICE OF APPEAL WAS FILED JULY 15, 2025.

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PRELIMINARY STATEMENT

Throughout this brief, the appellants, Nationwide Mutual Insurance Company and MJ Drilling Inc., will collectively be referred to as "Appellants" or individually by their respective names, "Nationwide" or "MJ Drilling". Appellee, Butte-Meade Sanitary Water District, will be referred to as "Appellee" or "Butte-Meade".

References to the Clerk of Court's Indices shall be designated "C.I." followed by the appropriate page number. The Summary Judgment Hearing Transcript will be cited as "HT" followed by the appropriate page number and line number. References to the Appendix in this brief will be abbreviated "App." followed by the appendix number.

References to Butte-Meade's Statement of Undisputed Material Facts will be identified as "SUMF" followed by the appropriate paragraph number.

JURISDICTIONAL STATEMENT

This is an appeal from Summary Judgment issued by the Honorable Michael W. Day of the Fourth Judicial Circuit Court, Butte County, South Dakota on June 17, 2025. C.I. 301; App. 1. Notice of Entry of Summary Judgment was served on June 18, 2025. C.I. 303. Notice of Appeal was filed on July 15, 2025. C.I. 311.

LEGAL ISSUE

1. Butte-Meade awarded the contract for its New Madison Well Project to the lowest responsible and responsive bidder, MJ Drilling. Thereafter MJ Drilling failed to enter into the contract with Butte-Meade. As a defaulting bidder, is MJ Drilling responsible for the difference in the price between its bid and the next lowest bid under SDCL § 5-18A-15?

The Circuit Court ruled that MJ Drilling is a defaulting bidder responsible for the difference in price between its bid and the bid of the next lowest bidder.

1. SDCL § 5-18A-15.

2. SDCL § 5-18A-16.
3. SDCL § 53-9-1.
4. *Sturzenbecher v. Sioux Country Ranch LLC*, 2025 S.D. 24.
5. *Bartron v. Codrington County*, 2 N.W.2d 337, 68 S.D. 309 (1942).

STATEMENT OF THE CASE

In December 2024, Butte-Meade Sanitary Water District commenced this action against Nationwide and MJ Drilling to recover damages because MJ Drilling defaulted on its bid to drill a Madison aquifer water well. C.I. 2. In its Complaint, Butte-Meade alleged that MJ Drilling is a defaulting bidder and is responsible for the difference in price between its bid and the next lowest bid as provided by SDCL § 5-18A-15. *Id.* Butte-Meade also alleged that Nationwide breached its obligation as surety under the Bid Bond posted with MJ Drilling's bid. *Id.* Nationwide and MJ Drilling denied the claims and alleged a counterclaim for barratry. C.I. 14.

On June 17, 2025, the Honorable Michael W. Day considered Butte-Meade's Motion for Summary Judgment. C.I. 301; App. 1. Judge Day ruled from the bench and granted Summary Judgment. HT 17-19. Summary Judgment was signed and filed on June 17, 2025. C.I. 301; App. 1.

STATEMENT OF FACTS

Butte-Meade Sanitary Water District

Butte-Meade is an incorporated Sanitary District and a governmental subdivision of the State of South Dakota. SUMF at ¶ 1; App. 2.

Butte-Meade owns and operates a public water distribution system in eastern Butte County and part of Meade County, South Dakota. SUMF at ¶ 2; App. 2. Butte-

Meade provides water service to over 900 service locations. *Id.*

The New Madison Well Project Bidding

Butte-Meade needed an additional source of water for its system. *Id.* at ¶ 3. FMG Engineering designed a new Madison formation water well to supply Butte-Meade's water system. *Id.* at ¶ 4.

In November 2023, FMG Engineering assembled a Project Manual with Instructions to Bidders for Butte-Meade's Water System Improvements 2024 New Madison Well ("New Madison Well Project"). *Id.* at SUMF at ¶ 5; App. 2.

Because Butte-Meade is a governmental subdivision of the State, public agency procurement laws apply to all contracts. SDCL § 5-18A-2.

SDCL 5-18A-5(7) requires contracts for public improvements to be awarded "to the lowest responsive and responsible bidder whose bid meets the requirements and criteria set forth within the invitation for bids." "The requirement that contracts shall be let to the lowest responsive bidder is intended for the protection of the public rather than that of the bidders." *Winter Brothers Underground Inc. v. City of Beresford*, 2002 S.D. 117, ¶ 15, 652 N.W.2d 99, 103 (quoting *Tri-State Milling Company v. Bd. of County Comm'rs.*, 75 S.D. 466, 468, 68 N.W.2d 104, 105 (1955)).

On February 1, 2024, Butte-Meade opened three (3) bids for the New Madison Well Project. SUMF at ¶ 7; App. 2.

MJ Drilling of Buffalo, Wyoming, submitted the lowest bid in the amount of Eight Hundred Eighty-one Thousand Eight Hundred Twenty-nine Dollars and Thirty-one Cents (\$881,829.31). SUMF at ¶ 7; App. 2.

MJ Drilling's bid included a Bid Bond from Nationwide with a penal sum of ten

percent (10%) of the amount bid. *Id.* at ¶8. This Bid Bond is required by state law “as a guaranty that the bidder will enter into a contract . . . in case the bidder be awarded the contract”. SDCL § 5-18B-2.

Award of Contract

On February 29, 2024, Butte-Meade’s Board of Trustees awarded the New Madison Well Project to MJ Drilling. SUMF at ¶ 14; App. 2. That same day, MJ Drilling received notice of the contract award. *Id.*

The next day, MJ Drilling acknowledged the contract award by emailing, “Thank you again for the opportunity to drill this water well.” SUMF at ¶ 15; App. 2. Affidavit of Jason Pettyjohn at ¶ 21; App. 3.

Section 21.01 of the Instructions to Bidders in the Project Manual required the Successful Bidder to sign the contract documents within fifteen (15) days after the contract is awarded. *Id.* at ¶ 16. The deadline for MJ Drilling to sign the contract was March 15, 2024. *Id.* at ¶ 16.

Default by MJ Drilling

MJ Drilling never signed and returned the contract documents for the New Madison Well Project. SUMF at ¶ 17; App. 2.

On March 20, 2024, Butte-Meade’s Board of Trustees declared MJ Drilling in default for failing to sign the contract documents. SUMF at ¶ 22; App. 2. The Board then awarded the contract to the next lowest bidder, Water System Drilling Inc., for a total bid price of One Million One Hundred Eighty-five Thousand Seven Hundred Fifteen Dollars (\$1,185,715). SUMF at ¶ 23; App. 2.

Bid Bond Claim

Section 8.02 of the Instructions to Bidders provides, in part, “[i]f the Successful Bidder fails to execute and deliver the Contract Documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and the Bid security of that Bidder will be forfeited.” SUMF at ¶ 20; App. 2.

The Bid Bond issued by Nationwide Mutual provides, in pertinent part, “Bidder and Surety, jointly and severally, bind themselves, their heirs, executors, and administrators, successors, and assigns to pay to Owner [Butte-Meade Sanitary Water District] upon default of Bidder the penal sum set forth on the face of this Bond.” SUMF at ¶ 24; App. 2.

The Bid Bond also provides, “Payment under this Bond will be due and payable upon Default of Bidder and within 30 calendar days after receipt by Bidder and surety of written notice of default from Owner” SUMF at ¶ 25; App. 2.

On April 12, 2024, Butte-Meade served a written Notice of Default upon MJ Drilling and Nationwide. SUMF at ¶ 26; App. 2; Complaint Ex. 2.

MJ Drilling and Nationwide refused to pay the penal sum of the Bid Bond to Butte-Meade. SUMF at ¶ 27; App. 2; C.I. 14.

Butte-Meade filed this action to recover the penal sum of the Bid Bond. C.I. 2.

Claim for Damages under State Statute

Butte-Meade also brought a claim against MJ Drilling for damages under SDCL § 5-18A-15. *Id.* This statute provides:

After receiving notice of a contract award, the successful bidder or offeror shall enter into a contract with the purchasing agency within the time specified in the initiation for bids or request for proposals. If any bidder or offeror fails to enter into a contract within the time specified, the contract may be awarded to the next

lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. *The defaulting bidder or offeror shall be responsible for the difference in price.*

Id. (emphasis added).

Butte-Meade's claim for damages under both the Bid Bond and state law are authorized by SDCL § 5-18A-16.¹

If any successful bidder or offeror fails to fulfill the conditions of an awarded contract, the purchasing agency may proceed to recover from the defaulting party whatever damages may have been sustained as a result of the default. *The purchasing agency shall have all remedies provided in the contract and provided by law.*

SDCL § 5-18A-16 (emphasis added).

Nationwide and MJ Drilling denied both claims and brought a counterclaim against Butte-Meade for barratry. C.I. 14.

Motion for Summary Judgment

On May 16, 2025, Butte-Meade filed a Motion for Summary Judgment on the following issues:

- (1) whether MJ Drilling defaulted by failing to sign contract documents for the New Madison Well Project;
- (2) whether Butte-Meade is entitled to Judgment against Nationwide and MJ Drilling, jointly and severally, for payment of the penal sum of the Bid Bond; and
- (3) whether Butte-Meade is entitled to Judgment against MJ Drilling for the difference in price between its bid and the next lowest bid.

C.I. 51.

¹ Butte-Meade asked for the Bid Bond to be awarded as a contribution towards the damages authorized by SDCL § 5-18A-15.

Butte-Meade did not seek double recovery for payment of both the Bid Bond *and* the difference in price between MJ Drilling's bid and the next lowest bid. *Id.* In its Motion for Summary Judgment, Butte-Meade asked that any amount recovered under the Bid Bond be contributed to reduce the judgment awarded under SDCL § 5-18A-15. *Id.*

Butte Meade's Motion for Summary Judgment was supported by a Brief, an Affidavit, and a Statement of Undisputed Material Facts. C.I. 51, 53, 64 & 68; App. 2, 3, 5, & 6.

MJ Drilling did not file a Statement of Material Facts or respond to Butte-Meade's Statement of Undisputed Material Facts as required by SDCL § 15-6-56(c)(2). App. 6. Consequently, the Circuit Court ruled that Butte-Meade's Statement of Undisputed Material Facts is undisputed and is admitted as a matter of law. HT p.18, 8-10. SDCL § 15-6-56(c)(3).

The Circuit Court granted Butte-Meade's Motion for Summary Judgment and ruled that (1) MJ Drilling defaulted by failing to enter into a contract for the New Madison Well Project, (2) Butte-Meade was entitled to judgment against Nationwide and MJ Drilling, jointly and severally, for the penal sum of the Bid Bond, and (3) Butte-Meade was entitled to judgment against MJ Drilling for the difference between its bid and the next lowest bid.² C.I. 301; App. 1.

Nationwide and MJ Drilling appealed the Circuit Court's award of damages under SDCL § 5-18A-15. C.I. 311.

² The Summary Judgment provides that payment of the Bid Bond will reduce the total judgment against MJ Drilling.

STANDARD OF REVIEW

The Court's standard of review for summary judgment is well settled:

We must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

Velocity Invs., LLC v. Dybvig Installations, Inc., 2013 S.D. 41, ¶ 10, 833 N.W.2d 41 (internal citations omitted).

ARGUMENT

An issue initially asserted by an appellant is deemed abandoned when the appellant fails to brief the issue. *Giesen v. Giesen*, 2018 S.D. 36, ¶ 23 (citations omitted).

The Circuit Court's Summary Judgment ruled on the following three issues:

- (1) MJ Drilling, Inc. defaulted by failing to enter into the contract for the New Madison Well Project;
- (2) Nationwide and MJ Drilling were jointly and severally liable for the penal sum of the Bid Bond; and,
- (3) pursuant to SDCL § 5-18A-15, MJ Drilling was responsible for the difference in price between its bid and the next lowest bid. C.I. 301; App. 1.

Nationwide and MJ Drilling contested each of these issues in Circuit Court. C.I. 294. However, the Appellants' Brief does not contest the Circuit Court's ruling that MJ Drilling is a defaulting bidder or the judgment for the penal sum of the Bid Bond. Appellants' Brief p. 1.

Because the Appellants did not ask for this Court to review the Circuit Court's determination that MJ Drilling is a defaulting bidder or the Circuit Court's judgment for the penal sum of the Bid Bond, Butte-Meade will not address those issues within this Appellee's Brief.³

This Court has long held that "[a]n assignment of error not briefed and argued is deemed abandoned." *Giesen, supra* (quoting *Sabhari v. Sapari*, 1998 S.D. 35, ¶ 1, 576 N.W.2d 886, 888 n.3). "In exercising our appellate function, it is elemental that [the Supreme Court] should limit [its] review to the arguments that are raised and briefed. *State v. Mulligan*, 2007 S.D. 67, ¶25, 736 N.W.2d 808.

1. Whether Butte-Meade is entitled to Judgment against MJ Drilling for the difference in price between MJ Drilling's bid and the next lowest bid?

Butte-Meade's claim for the difference in price between the amount of MJ Drilling's bid and the bid of the next lowest bidder is rooted in state law.

SDCL § 5-18A-15 provides, in part:

... If any bidder or offeror fails to enter into a contract within the time specified, the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. *The defaulting bidder or offeror shall be responsible for the difference in price.* (Emphasis added).

This remedy is required when a successful bidder "fails to enter into a contract . . .". *Id.* The statute provides, "[t]he defaulting bidder [MJ Drilling] *shall* be responsible for the difference in price" between its bid and the next lowest bidder. *Id.* (Emphasis added).

³ For discussion of these issues Butte-Meade invites the Court to review its Brief in Support of Motion for Summary Judgment and its Reply Brief which are attached as App. 5 & 6; C.I. 53 & 294.

“As a rule of statutory construction, we have determined that “[w]hen ‘shall’ is the operative verb in a statute, it is given ‘obligatory or mandatory’ meaning.” *Discover Bank v. Stanley*, 757 N.W.2d 756, 762, 2008 S.D. 111, ¶ 21 (quoting *In re J.H.*, 1999 SD 36, ¶ 31, 590 N.W. 2d 473, 479). SDCL § 2-14-2.1(2) states: “. . . The term “shall” manifests a mandatory directive and does not confer any discretion in carrying out the action so directed.”

To be candid, the remedy provided by state statute is more generous than the remedy provided within the Instructions to Bidders for the New Madison Well Project. C.I. 68

Section 8.02 of the Instructions to Bidders provided for the penal sum of the Bid Bond to be forfeited upon default of the Successful Bidder. Affidavit of Jason Pettyjohn Ex. 1; App. 3; C.I. 68. This Section also stated, “[s]uch forfeiture shall be Owner’s exclusive remedy if Bidder defaults.” *Id.*

The Appellants’ Brief represents that Butte-Meade “never even responded” to their argument that recovery is limited to the Bid Bond. Appellants’ Brief p. 4. The Appellants also argue that Butte-Meade “conveniently ignore(s)” this section of the Instructions to Bidders. *Id.* at 8.

These arguments misrepresent the Circuit Court record. *See, for example* p. 8-11 of Butte-Meade’s Brief in Support of Motion for Summary Judgment. App. 5. Butte-Meade squarely addressed the Instructions to Bidders in its Brief in Support of Motion for Summary Judgment. *Id.* The Instructions to Bidders were never overlooked or ignored. However, this part of the Instructions to Bidders must be disregarded because it is contrary to law and public policy.

South Dakota law requires all contracts to comply with State law.

“A contract provision contrary to an express provision of law or to the policy of express law . . . is unlawful.” SDCL § 53-9-1. App. 7.

Very recently this Court wrote:

Among the requirements for all valid contracts is conformity with the public policy of our State, as expressed in our published decisions, statutes enacted by the Legislature, and our constitution. *See Two Eagle v. Avel eCare, LLC*, 2025 S.D. 3, ¶ 24, 17 NW.3d 242, 249 (quoting *Oesterreich v. Canton-Inwood Hosp.*, 511 N.W.2d 824, 827 (S.D. 1994)) (“The primary sources for declarations of public policy in South Dakota are the constitution, statutes, and judicial decisions.”); *see also* SDCL 53-9-1 (stating in a contract whose provisions are “contrary to an express provision of law . . . is unlawful”). This restriction applies immutably to all contracts, including those which are unambiguous.

Sturzenbecher v. Sioux Country Ranch, LLC, 2025 S.D. 24, ¶ 28.

Whether an act or provision violates public policy is a question of law. *Niesent v. Homestake Mining Co.*, 505 N.W.2d 781, 783 (SD 1993). “Public policy is found in the letter or purpose of a constitutional or statutory provision or scheme . . .” *Id.*

Public policy allows Butte-Meade to recover both the Bid Bond *and* statutory damages.

SDCL § 5-18A-16 provides:

If any successful bidder or offeror fails to fulfill the conditions of an awarded contract, the purchasing agency may proceed to recover from the defaulting party whatever damages may have been sustained as a result of the default. The purchasing agency shall have all remedies provided in the contract *and* provided by law. (Emphasis added).

Restricting Butte-Meade’s remedy to only the Bid Bond would be contrary to this statute.

It is noteworthy that the Legislature adopted this statute when South Dakota law already required all public contract bidders to post a bid bond as “a guarantee that the

bidder will enter into a contract . . . in case the bidder be awarded the contract". SDCL § 5-18B-2.

Furthermore, this statute was adopted within the same act that adopted SDCL § 5-18A-15 which provides an absolute remedy when a successful bidder fails to enter into a contract. S.L. 2010, ch. 31.

SDCL § 5-18A-15 provides, in pertinent part:

. . . If any bidder or offeror fails to enter into a contract within the time specified the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. *The defaulting bidder or offeror shall be responsible for the difference in price.*

SDCL § 5-18A-15, (emphasis added).⁴

This is crystal clear public policy. Regardless of the limitations shown in the Instructions to Bidders, the Legislature intentionally provided that purchasing agencies, like Butte-Meade, are entitled to "all remedies provided in the contract *and* provided by law." SDCL § 5-18A-16 (emphasis added). This Court must follow state law.

The Bid Bond itself recognizes the supremacy of state law. Page 2 of the Bid Bond provides:

This Bond is intended to conform to all applicable statutory requirements. Any applicable requirement of any applicable statute that has been omitted from this Bond shall be deemed to be included herein as if set forth at length. *If any provision of this Bond conflicts with any applicable statute, then the provision of said statute shall govern* and the remainder of this Bond that is not in conflict therewith shall continue in full force and effect. (Emphasis added).

See Complaint Ex. 1; C.I. 2.

⁴ The Appellants have not cited any authority to support their argument that SDCL § 5-18A-15 should be disregarded. Failure to cite authority violates SDCL § 15-6-60(6) and waives the issue upon appeal. *Kostel v. Schwartz*, 2008 S.D. 85, ¶ 34, 756 N.W.2d 363.

“Public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good.”

Bartron v. Codington County, 2 N.W.2d 337 (SD 1942). To protect a defaulting bidder at the expense of taxpayers is injurious to the public and against the public good.⁵

“When conduct opposed to the public interest is made the subject of a bargain the courts ordinarily refuse to accord a party thereto a remedy predicted thereon.” *Id.* (citing Restatement of the Law of Contracts § 598; Williston on Contracts, Rev. Ed., § 1630).

The South Dakota Legislature mandated the remedy provided by SDCL 5-18A-15 when a successful bidder “fails to enter into a contract . . .”. This statute provides, “The defaulting bidder [MJ Drilling] *shall* be responsible for the difference in price” between its bid and the next lowest bidder. *Id.* (Emphasis added).

Finally, MJ Drilling cannot take advantage of the limited remedy provided in the Instructions to Bidders when it refused to do the one thing that was required to invoke that limitation – voluntarily forfeit the Bid Bond. After all, Butte-Meade was forced to commence this litigation. MJ Drilling should not be rewarded for its own defiance.

The Circuit Court ruled correctly by holding MJ Drilling responsible for the difference between its bid and the next lowest bid. SDCL § 5-18A-15.

CONCLUSION

SDCL § 5-18A-15 specifies that a defaulting bidder *shall* be responsible for the difference between the price of its bid and the next lowest bidder. And, SDCL § 5-18A-16 allows Butte-Meade, to recover the penal sum of the Bid Bond as provided in the

⁵ Butte-Meade is a governmental subdivision of the State which is authorized to levy taxes. SDCL § 34A-5-14 and § 34A-5-30.

contract documents *and* the damages provided by SDCL § 5-18A-15. The Circuit Court should be affirmed.

Dated this 29th day of October, 2025.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for Butte-Meade Sanitary Water District

By: 

Dwight A. Gubbrud
618 State Street
Belle Fourche, SD 57717
Telephone: (605) 892-2011
Email: dwight@bellelaw.com

CERTIFICATE OF COMPLIANCE

COME NOW, the Appellee, Butte-Meade Sanitary Water District, by and through their attorney of record, Dwight A. Gubbrud, of Bennett Main Gubbrud & Willert, P.C., 618 State Street, Belle Fourche, South Dakota 57717, and pursuant to SDCL § 15-26A-66(4), hereby certifies that he has complied with the type volume limitation of SDCL § 15-26A-66(4) in that Appellee's Brief is double-spaced and proportionally spaced in Times New Roman, 12-point, with a total word count of 3,501 and a total character count of 20,774. The Appellee's Brief and all copies are in compliance with this rule.

Dated this 29th day of October, 2025.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for Butte-Meade Sanitary Water District

By: 

Dwight A. Gubbrud
618 State Street
Belle Fourche, SD 57717
Telephone: (605) 892-2011
Email: dwight@bellelaw.com

CERTIFICATE OF SERVICE AND FILING

I, Dwight A. Gubbrud, attorney for Butte-Meade Sanitary Water District, do hereby certify that on the 29th day of October, 2025, I caused a full, true, and complete copy of APPELLEE'S BRIEF to be served *electronically* through the eFileSD electronic filing system upon:

Courtney R. Clayborne
Clayborne, Loos & Sabers, LLP
P.O. Box 9129
Rapid City, SD 57709
Telephone: (605) 721-1517
Email: courtney@clslawyers.net

I further certify that on the same day I caused the APPELLEE'S BRIEF to be filed *electronically* through the eFileSD electronic filing system and the original APPELLEE'S BRIEF to be filed by U.S. Mail with:

Shirley Jameson-Fergel
Clerk of the Supreme Court
State of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

by depositing said copy in an envelope securely sealed with first class postage thereon fully prepaid in the U.S. Mail in Belle Fourche, South Dakota, and addressed as shown above.

Dated this 29th day of October, 2025.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for Butte-Meade Sanitary Water District

By: 

Dwight A. Gubbrud

APPENDIX

1. Summary Judgment	App. 1
2. Butte-Meade Sanitary Water District's Statement of Undisputed Material Facts	App. 2
3. Affidavit of Jason Pettyjohn without Exhibits.....	App. 3
4. SDCL § 5-18A-15	App. 4
5. Butte-Meade Sanitary Water District's Brief in Support of Motion for Summary Judgment	App. 5
6. Butte-Meade Sanitary Water District's Reply Brief.....	App. 6
7. SDCL § 53-9-1.....	App. 7

jointly and severally, for the penal sum of the Bid Bond in the amount of Eighty-Eight Thousand One Hundred Eighty-Two Dollars and Ninety-Three Cents (\$88,182.93) plus prejudgment interest on that amount from May 12, 2024 (30 days after written notice of default) until the entry of Judgment.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to SDCL 5-18A-15, Judgment is granted in favor of Plaintiff Butte-Meade Sanitary Water District and against Defendant MJ Drilling, Inc. for the difference in price between the bid of MJ Drilling, Inc. and the next lowest responsive and responsible bidder. In total, Judgment shall be entered against MJ Drilling, Inc. for Three Hundred Three Thousand Eight Hundred Eighty-Five Dollars and Sixty-Nine Cents (\$303,885.69). This Judgment amount shall be reduced by payment of the penal sum of the Bid Bond by either MJ Drilling, Inc. or Nationwide Mutual Insurance Company.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Butte-Meade Sanitary Water District, as prevailing party, shall have Judgment against Defendants Nationwide Mutual Insurance Company and MJ Drilling, Inc., jointly and severally, for costs and disbursements in the amount of _____ (\$_____). The Clerk shall enter the amount of costs and disbursements awarded pursuant to SDCL 15-6-54(d).

6/17/2025 9:26:14 AM

Attest:
Jensen, Alana
Clerk/Deputy




HONORABLE MICHAEL W. DAY,
Circuit Court Judge

STATE OF SOUTH DAKOTA)
)ss.
COUNTY OF BUTTE) IN CIRCUIT COURT
) FOURTH JUDICIAL CIRCUIT

BUTTE-MEADE SANITARY WATER DISTRICT , a governmental subdivision of the State of South Dakota, Plaintiff, vs. NATIONWIDE MUTUAL INSURANCE COMPANY , an Ohio corporation for non-profit, and MJ DRILLING INC. , a Wyoming Corporation, Defendants.	09CIV24-184 BUTTE-MEADE SANITARY WATER DISTRICT'S STATEMENT OF UNDISPUTED MATERIAL FACTS
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Plaintiff **BUTTE-MEADE SANITARY WATER DISTRICT** ("Butte-Meade"), by and through its attorney of record, Dwight A. Gubbrud of Bennett Main Gubbrud & Willert, P.C., sets forth Butte-Meade's Statement of Undisputed Material Facts in support of Plaintiff's Motion for Summary Judgment, to-wit:

1. Butte-Meade is an incorporated Sanitary District and is a governmental subdivision of the State of South Dakota. SDCL 34A-5-14.
2. Butte-Meade owns and operates a public water distribution system in eastern Butte County and part of Meade County, South Dakota. Butte-Meade provides water service to over nine hundred (900) service locations. Butte-Meade is a governmental subdivision of the State of South Dakota. *Affidavit of Jason Pettyjohn*, ¶ 4.
3. During the past few years it has become evident that Butte-Meade needed an additional source of water for its citizens. *Id.*, ¶ 5.
4. FMG Engineering helped evaluate Butte-Meade's system and then designed a new Madison formation water well to supply Butte-Meade's water system. *Id.*, ¶ 6.
5. In November 2023, FMG Engineering assembled a Project Manual with

Instructions to Bidders for Water System Improvements 2024 New Madison Well ("New Madison Well Project") for Butte-Meade. Attached to this Affidavit marked Exhibit "1" is a copy of this Project Manual. *Id.*, ¶ 7.

6. Butte-Meade advertised for bids for the New Madison Well Project in December, 2023 and January, 2024. *Id.*, ¶ 9.

7. On February 1, 2024, Butte-Meade opened three (3) bids for the New Madison Well Project. A summary of the bids is shown on attached Exhibit "2". MJ Drilling Inc. ("MJ Drilling"), of Buffalo, Wyoming, submitted the lowest bid in the amount of Eight Hundred Eighty One Thousand Eight Hundred Twenty-Nine Dollars and Thirty-One Cents (\$881,829.31). *Id.*, ¶ 10.

8. MJ Drilling's Bid included a Bid Bond from Nationwide Mutual Insurance Company with a penal sum of ten percent (10%) of the amount bid by MJ Drilling. Exhibit "3". *Id.*, ¶ 13.

9. Marvin P. Scoggin, President of MJ Drilling attended the bid opening in Newell, South Dakota. *Id.*, ¶ 11.

10. On Friday, February 2, 2024, MJ Drilling and the other bidders were notified of the results of the bid opening. *Id.*, ¶ 14.

11. Section 16.02 of the Instructions to Bidders provided:

If within 24 hours after Bids are opened any Bidder files a duly signed written notice with Owner and promptly thereafter demonstrates to the reasonable satisfaction of Owner that there was a material and substantial mistake in the preparation of its Bid, that Bidder may withdraw its Bid, and the Bid security will be returned.

Id., ¶ 15, Bates numbered BMSWD000295.

12. None of the bidders provided notice of any mistakes within twenty-four (24) hours of the bid opening. *Id.*, ¶ 16.

13. SDCL 5-18A-5 requires a contract for public improvement to be awarded to the lowest responsible and responsive bidder. *Id.*, ¶ 17.

14. On February 29, 2024, Butte-Meade's Board of Trustees awarded the New Madison Well Project to MJ Drilling. That same day, I notified MJ Drilling of the

contract award. *Id.*, ¶ 20.

15. The next day, MJ Drilling emailed, "Thank you again for the opportunity to drill this water well." Exhibit "5". *Id.*, ¶ 21.

16. Section 21.01 of the Project Manual required the Successful Bidder to sign and return the contract documents within fifteen (15) days after the contract is awarded. Exhibit "1", Bates numbered BMSWD000296. Since Butte-Meade awarded this contract to MJ Drilling on February 29th, the deadline for signing the contract was March 15, 2024. *Id.*, ¶ 30.

17. MJ Drilling never signed and returned the contract documents for the New Madison Well Project.

18. MJ Drilling never demonstrated that there is a material and substantial mistake in its bid for the New Madison Well Project. *Id.*, ¶ 27.

19. SDCL 5-18A-15 provides:

After receiving notice of a contract award, the successful bidder or offeror shall enter into a contract with the purchasing agency within the time specified in the invitation for bids or request for proposals. If any bidder or offeror fails to enter into a contract within the time specified, the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. The defaulting bidder or offeror shall be responsible for the difference in price.

20. Section 8.02 provides, in part, "If the Successful Bidder fails to execute and deliver the Contract Documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and the Bid security of that Bidder will be forfeited." Exhibit "1", Bates numbered BMSWD000292. *Id.*, ¶ 31.

21. MJ Drilling's Bid Bond provides, "Default of Bidder shall occur upon the failure of Bidder to deliver within the time required by the bidding documents (or any extension thereof agreed to in writing by Owner) the executed agreement required by the bidding documents and any performance and payment bonds required by the bidding documents". Exhibit "3", Bates numbered BMSWD000060.

22. On March 20, 2024, Butte-Meade's Board of Trustees declared MJ

Drilling in default for failing to enter the contract documents and awarded the contract to the next lowest bidder, Water System Drilling, Inc. *Id.*, ¶ 33.

23. The next lowest bid submitted by Water System Drilling Inc. was for a total of One Million One Hundred Eighty-Five Thousand Seven Hundred Fifteen Dollars (\$1,185,715). *Id.*, Exhibit "2", Bates numbered BMSWD000010.

24. The Bid Bond issued by Nationwide Mutual Insurance Company provides, in pertinent part, "Bidder and Surety, jointly and severally, bind themselves, their heirs, executors, and administrators, successors, and assigns to pay to Owner [Butte Meade Sanitary Water District] upon default of Bidder the penal sum set forth on the face of this Bond." Exhibit "3", Bates numbered BMSWD000060. *Id.*, ¶ 32.

25. The Bid Bond provides, "Payment under this Bond will be due and payable upon Default of Bidder and within 30 calendar days after receipt by Bidder and surety of written notice of default from Owner..." *Id.*

26. Butte-Meade served a written Notice of Default upon MJ Drilling and Nationwide on April 12, 2024. *Complaint*, ¶ 19, Exhibit "2" *Answer*, ¶ 2.

27. Nevertheless, MJ Drilling and Nationwide refused to pay the penal sum of the Bid Bond to Butte-Meade. *Complaint*, ¶ 20, *Answer and Counterclaim*, ¶ 2.

Dated this 16th day of May, 2025.

BENNETT MAIN GUBBRUD & WILLERT,
P.C.
Attorneys for the Plaintiff

By: /s/ Dwight A. Gubbrud

DWIGHT A. GUBBRUD
618 State Street
Belle Fourche, SD 57717
(605)892-2011

5. For the past few years it has become evident that Butte-Meade needed an additional source of water for its citizens.

6. FMG Engineering helped evaluate Butte-Meade's system and then designed a new Madison formation water well to supply Butte-Meade's water system.

7. In November 2023, FMG Engineering assembled a Project Manual for Water System Improvements 2024 New Madison Well ("New Madison Well Project") for Butte-Meade. Attached to this Affidavit marked Exhibit "1" is a copy of this Project Manual.

8. This Project Manual provided the Instructions to Bidders and the terms and conditions for completing the New Madison Well Project.

9. Butte-Meade advertised for bids in December, 2023 and January, 2024.

10. On February 1, 2024, Butte-Meade opened three (3) bids for the New Madison Well Project. A summary of the bids is shown on attached Exhibit "2". MJ Drilling Inc. ("MJ Drilling"), of Buffalo, Wyoming, submitted the lowest bid in the amount of Eight Hundred Eighty-One Thousand Eight Hundred Twenty-Nine Dollars and Thirty-One Cents (\$881,829.31).

11. Marvin P. Scoggin, President of MJ Drilling attended the bid opening in Newell, South Dakota.

12. Section 8.01 of the Instructions to Bidders required all bids to include Bid security in the form of either a cashier's check or Bid Bond.

13. MJ Drilling's Bid included a Bid Bond from Nationwide Mutual Insurance Company with a penal sum of ten percent (10%) of the amount bid by MJ Drilling. Exhibit "3".

14. On Friday, February 2, 2024, I notified MJ Drilling and the other bidders of the results of the bid opening. All bidders were advised "bid award has not been decided pending verification of all submitted bid documents".

15. Section 16.02 of the Instructions to Bidders provided:

If within 24 hours after Bids are opened any Bidder files a duly signed written notice with Owner and promptly thereafter demonstrates to the reasonable satisfaction of Owner that there was a material and substantial

mistake in the preparation of its Bid, that Bidder may withdraw its Bid, and the Bid security will be returned.

Exhibit 1, Bates numbered BMSWD000295.

16. None of the bidders provided notice of any mistakes within twenty-four (24) hours of the bid opening.

17. SDCL 5-18A-5 requires a contract for public improvement to be awarded to the lowest responsible and responsive bidder.

18. Over the next three and one-half (3 ½) weeks, I evaluated MJ Drilling's bid, its qualifications, and communicated with MJ Drilling about the New Madison Well Project. For example, on Monday, February 5, 2024, I emailed the President of MJ Drilling: "At this time it does not appear that there is anything wrong with the bid documents that were submitted."

19. On February 23, 2024, twenty-two (22) days after bids were opened, MJ Drilling sent an email that stated: "[W]e would like to accept the contract for Butte-Meade Sanitary Water District Madison Water Well in Newell, SD, and we are confident, with our Madison water well experience that we can provide you and your client excellent service and we are looking forward to working with you." Exhibit "4".

20. On February 29, 2024, Butte-Meade's Board of Trustees awarded the New Madison Well Project to MJ Drilling. That same day, I notified MJ Drilling of the contract award.

21. The next day, MJ Drilling emailed, "Thank you again for the opportunity to drill this water well." Exhibit "5".

22. On March 5, 2024, the President of MJ Drilling, Marvin Scoggin, emailed: "For personal health reasons, I would like to back out of the above-mentioned water well." This was thirty-three (33) days after bids were opened. No explanation of the health conditions was provided. Exhibit "6".

23. The next morning, Marvin Scoggin emailed: "I want to do that job. I will do you a good job. Sorry for the inconvenience". Exhibit "7". That same day, Marvin Scoggin called to say that he intended to complete the contract.

24. A week later, on March 11, 2024, Marvin Scoggin emailed a letter requesting "another chance for us to withdraw, without penalty." Exhibit "8". With no

explanation, Marvin Scoggin wrote: "we have looked further into our bid and feel we are in error in our calculations". He also wrote: "recent health concerns of key personnel" caused concern about "support to the project". *Id.* No other explanation was provided.

25. The next day, Marvin Scoggin called to rescind the previous day's letter. He assured me that MJ Drilling would like to proceed with the project.

26. Two days later, Marvin Scoggin emailed a new letter dated March 14, 2024, which read: "The letter I sent you on March 11, 2024 shall remain valid." Exhibit "9". This letter was sent forty-two (42) days after bids were opened.

27. MJ Drilling never demonstrated a "material and substantial mistake" in its bid for the New Madison Well Project.

28. I passed Marvin Scoggin's letters on to Butte-Meade's Board of Trustees. Exhibit "10".

29. Section 21.01 of the Instructions to Bidders required the Successful Bidder to sign the contract documents within fifteen (15) days after the contract is awarded. Exhibit "1", Bates numbered BMSWD000296. Butte-Meade awarded this contract to MJ Drilling on February 29, 2024. Therefore, the deadline for signing the contract was March 15, 2024.

30. MJ Drilling did not sign and return the contract documents.


31. Section 8.02 of the Instructions to Bidders provides, in part, "If the Successful Bidder fails to execute and deliver the Contract Documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and the Bid security of that Bidder will be forfeited." Exhibit "1", Bates numbered BMSWD000292.

32. The Bid Bond issued by Nationwide Mutual Insurance Company provides, in pertinent part, "Bidder and Surety, jointly and severally, bind themselves, their heirs, executors, and administrators, successors, and assigns to pay to Owner [Butte Meade Sanitary Water District] upon default of Bidder the penal sum set forth on the face of this Bond." Exhibit "3", Bates numbered BMSWD000060.

33. On March 20, 2024, Butte-Meade's Board of Trustees declared MJ Drilling in default for failing to enter the contract documents and awarded the contract to the next lowest bidder, Water System Drilling Inc. Water System Drilling's bid was

in the amount of One Million One Hundred Eighty-Five Thousand Seven Hundred Fifteen Dollars (\$1,185,715).

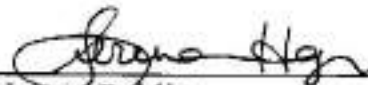
Dated this 27TH day of March, 2025.



JASON PETTYJOHN, Professional Engineer
FMG Engineering
3700 Sturgis Road
Rapid City, SD 57702

Subscribed and sworn to before me this 27th day of March, 2025.





Notary Public
My Commission Expires: 2-24-26

5-18A-15. Time for entering into contract.

After receiving notice of a contract award, the successful bidder or offeror shall enter into a contract with the purchasing agency within the time specified in the invitation for bids or request for proposals. If any bidder or offeror fails to enter into a contract within the time specified, the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. The defaulting bidder or offeror shall be responsible for the difference in price.

Source: SL 2010, ch 31, § 16.

STATE OF SOUTH DAKOTA)
)ss.
COUNTY OF BUTTE) IN CIRCUIT COURT
) FOURTH JUDICIAL CIRCUIT

BUTTE-MEADE SANITARY WATER DISTRICT, a governmental subdivision of the State of South Dakota,

Plaintiff,

vs.

NATIONWIDE MUTUAL INSURANCE COMPANY, an Ohio corporation for non-profit, and **MJ DRILLING INC.**, a Wyoming Corporation,

Defendants.

09CIV24-184

BUTTE-MEADE SANITARY WATER DISTRICT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This Brief is submitted by Plaintiff **BUTTE-MEADE SANITARY WATER DISTRICT** ("Butte-Meade") in support of its Motion for Summary Judgment. References to Butte-Meade Sanitary Water District's Statement of Undisputed Material Facts will be abbreviated "SUMF" followed by the applicable paragraph number.

FACTS

Butte-Meade Sanitary Water District.

Butte-Meade is an incorporated Sanitary District and a governmental subdivision of the State of South Dakota. SUMF, ¶ 1.

Butte-Meade owns and operates a public water distribution system in eastern Butte County and part of Meade County, South Dakota. Butte-Meade provides water service to over nine hundred (900) service locations. SUMF, ¶ 2.

The New Madison Well Project Bidding.

FMG Engineering of Rapid City helped evaluate Butte-Meade's system and determined that Butte-Meade needed an additional source of water for its system. *Id.*, ¶ 4. FMG Engineering then designed a new Madison formation water well to supply Butte-Meade's water system. *Id.*, ¶ 6.

In November 2023, FMG Engineering assembled a Project Manual with Instructions to Bidders for Water System Improvements 2024 New Madison Well (“New Madison Well Project”) for Butte-Meade. *Id.*, SUMF, ¶ 5.

Because Butte-Meade is a governmental subdivision of the State, public agency procurement laws apply to all contracts. SDCL 5-18A-2.

SDCL 5-18A-5(7) requires contracts for public improvements to be awarded “to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth within the invitation for bids.” “The requirement that contracts shall be let to the lowest responsible bidder is intended for the protection of the public rather than that of the bidders.” *Winter Brothers Underground Inc. v. City of Beresford*, 652 N.W.2d 99, 103, 2002 S.D. 117, ¶ 15 (quoting *Tri-State Milling Company v. Bd. of County Comm’rs.*, 75 S.D. 466, 468, 68 N.W.2d 104, 105 (1955). “The purpose of public bidding is to obtain the lowest bid for the work to be done.” *Id.* at 105, ¶ 28.

On February 1, 2024, Butte-Meade opened three (3) bids for the New Madison Well Project. SUMF, ¶ 7.

MJ Drilling Inc. (“MJ Drilling”), of Buffalo, Wyoming, submitted the lowest bid in the amount of Eight Hundred Eighty-One Thousand Eight Hundred Twenty-Nine Dollars and Thirty-One Cents (\$881,829.31). SUMF, ¶ 7.

MJ Drilling’s bid included a Bid Bond from Nationwide Mutual Insurance Company (“Nationwide”) with a penal sum of ten percent (10%) of the amount bid. *Id.*, ¶8. This Bid Bond is required by State law “as a guaranty that the bidder will enter into a contract... in case the bidder be awarded the contract”. SDCL 5-18B-2.

Award of Contract.

On February 29, 2024, Butte-Meade’s Board of Trustees awarded the New Madison Well Project to MJ Drilling. That same day, MJ Drilling received notice of the contract award. SUMF, ¶ 14.

The next day, MJ Drilling acknowledged the contract award by emailing, “Thank you again for the opportunity to drill this water well.” SUMF, ¶ 15.

Section 21.01 of the Instructions to Bidders in the Project Manual required the Successful Bidder to sign the contract documents within fifteen (15) days after the contract is awarded. *Id.*, ¶ 16. Since Butte-Meade awarded this contract to MJ Drilling on February 29th, the deadline for signing the contract was March 15, 2024. *Id.*, ¶ 16.

Default by MJ Drilling.

MJ Drilling never signed and returned the contract documents for the New Madison Well Project. SUMF, ¶ 17.

Section 8.02 of the Instructions to Bidders provides, in part, “[i]f the Successful Bidder fails to execute and deliver the Contract Documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and the Bid security of that Bidder will be forfeited.” SUMF, ¶ 20.

MJ Drilling’s Bid Bond also provides, “Default of Bidder shall occur upon the failure of Bidder to deliver within the time required by the bidding documents (or any extension thereof agreed to in writing by Owner) the executed agreement required by the bidding documents and any performance and payment bonds required by the bidding documents”. SUMF, ¶ 21.

On March 20, 2024, Butte-Meade’s Board of Trustees declared MJ Drilling in default for failing to sign the contract documents. The Board then awarded the contract to the next lowest bidder, Water System Drilling, for a total bid price of One Million One Hundred Eighty-Five Thousand Seven Hundred Fifteen Dollars (\$1,185,715). SUMF, ¶ 22.

Bid Bond Claim.

The Bid Bond issued by Nationwide Mutual Insurance Company provides, in pertinent part, “Bidder and Surety, jointly and severally, bind themselves, their heirs, executors, and administrators, successors, and assigns to pay to Owner [Butte-Meade Sanitary Water District] upon default of Bidder the penal sum set forth on the face of this Bond.” SUMF, ¶ 24.

The Bid Bond also provides, “Payment under this Bond will be due and payable upon Default of Bidder and within 30 calendar days after receipt by Bidder and surety of written notice of default from Owner...”. SUMF, ¶ 25.

On April 12, 2024, Butte-Meade served a written Notice of Default upon MJ Drilling and Nationwide. SUMF, ¶ 26. Exhibit 2 to Complaint.

Despite this Notice, MJ Drilling and Nationwide refuse to pay the penal sum of the Bid Bond to Butte-Meade. SUMF, ¶ 27.

Butte-Meade seeks Judgment against both Nationwide and MJ Drilling, jointly and severally, for the penal sum of the Bid Bond.

Claim for Damages Under State Statute.

Butte-Meade also seeks Judgment against MJ Drilling under SDCL § 5-18A-15 which provides:

After receiving notice of a contract award, the successful bidder or offeror shall enter into a contract with the purchasing agency within the time specified in the initiation for bids or request for proposals. If any bidder or offeror fails to enter into a contract within the time specified, the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. **The defaulting bidder or offeror shall be responsible for the difference in price.** (Emphasis added).

Butte-Meade's claim under this statute is in addition to the claim made under the Bid Bond. However, any amount recovered under the Bid Bond should reduce any judgment awarded under this statute. Butte-Meade is not seeking double recovery for payment of both the Bid Bond and the difference in price between the lowest and next lowest bid.

ARGUMENT

Butte-Meade filed a Motion for Summary Judgment asking the Court to enter summary judgment as follows:

1. Rule that MJ Drilling defaulted by failing to sign and return the contract documents;
2. Award summary judgment in favor of Butte-Meade and against MJ Drilling and Nationwide, jointly and severally, for the penal sum of the Bid Bond, plus prejudgment interest; and
3. Award summary judgment in favor of Butte-Meade and against MJ Drilling for the difference in price between its bid and the next lowest bidder.

ISSUE #1 – Whether MJ Drilling’s failure to sign and return the Contract Documents constitutes a default?

Failure to sign and deliver the Contract Documents constitutes a default under State law, the Instructions to Bidders, and the Bid Bond.

State Law.

SDCL 5-18A-15 provides,

After receiving notice of a contract award, the successful bidder or offeror shall enter into a contract with the purchasing agency within the time specified in the invitation for bids or request for proposals. If any bidder or offeror fails to enter into a contract within the time specified, the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. The defaulting bidder or offeror shall be responsible for the difference in price. (Emphasis added).

Instructions to Bidders.

Section 8.02 of the Instructions to Bidders provides, in part, “[i]f the Successful Bidder fails to execute and deliver the Contract Documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and the Bid security of that Bidder will be forfeited.” SUMF, ¶ 20, (emphasis added).

Bid Bond.

MJ Drilling’s Bid Bond provides, “[d]efault of Bidder shall occur upon the failure of Bidder to deliver within the time required by the bidding documents (or any extension thereof agreed to in writing by Owner) the executed agreement required by the bidding documents and any performance and payment bonds required by the bidding documents”. SUMF ¶ 21, (emphasis added.)

There is no material dispute in the facts. MJ Drilling defaulted by failing to sign and return the Contract Documents within 15 days after it was notified that the Contract had been awarded.

In an effort to justify this default, the Defendants’ Answer and Counterclaim alleges that MJ Drilling’s bid was “the result of an obvious error, known to Plaintiff

[Butte-Meade] and Plaintiffs [sic] are [sic] estopped from relying on the same...”. *Answer and Counterclaim*, ¶ 4.

This defense has no merit.

State law does not permit bidders to withdraw bids after bid opening. SDCL 5-15A-5(6) provides, in part, “After bid opening, no withdrawal of a bid, or change in bid prices or other provisions of bids prejudicial to the interest of the purchasing agency or fair competition is permitted.”

Nevertheless, Article 16 of the Instructions to Bidders provided bidders with an opportunity to withdraw an erroneous bid for the New Madison Well Project:

ARTICLE 16 – MODIFICATION AND WITHDRAWAL OF BID

- 16.01 A bid may be modified or withdrawn by an appropriate document duly executed in the same manner that Bid must be executed and delivered to the place where Bids are to be submitted *prior to the date and time for the opening of Bids*.
- 16.02 If *within 24 hours after Bids are opened* any Bidder files a duly signed written notice with Owner and promptly thereafter demonstrates to the reasonable satisfaction of Owner that there was a material and substantial mistake in the preparation of its Bid, that Bidder may withdraw its Bid, and the Bid security will be returned.

SUMF, ¶ 11, *see also*, *Affidavit of Jason Pettyjohn*, ¶ 15, Exhibit “1”, Bates numbered BMSWD000295, (emphasis added).

MJ Drilling did not invoke either Section 16.01 or 16.02. SUMF, ¶ 12.

Section 16.01 is not applicable because MJ Drilling did not modify or withdraw its bid “prior to the date and time for the opening of Bids.”

Likewise, Section 16.02 does not apply because MJ Drilling never provided written notice of any mistake “within 24 hours after Bids are opened...”. SUMF, ¶ 12.

MJ Drilling not only failed to withdraw its bid in a timely manner, but it has never demonstrated a material and substantial mistake in its bid for the New Madison Well Project. SUMF, ¶ 18, *Affidavit of Jason Pettyjohn*, ¶ 27.

Twenty-two days after bids were opened the President of MJ Drilling wrote “[W]e would like to accept the contract for Butte-Meade Sanitary Water District Madison Water Well in Newell, SD, and we are confident, with our Madison water well experience that we can provide you and your client excellent service and we are looking forward to working with you.” SUMF, ¶ 19, *Affidavit of Jason Pettyjohn*, ¶ 19, Exhibit 4.

This Court should grant summary judgment in favor of Butte-Meade by ruling that MJ Drilling defaulted by failing to sign and return the contract documents for the New Madison Well Project.

ISSUE #2- Whether Butte-Meade is entitled to payment of the penal sum of the Bid Bond?

State law, the Instructions to Bidders, and the Bid Bond all provide a remedy for MJ Drilling’s default.

State Law.

SDCL 5-18A-15 provides:

After receiving notice of a contract award, the successful bidder or offeror shall enter into a contract with the purchasing agency within the time specified in the invitation for bids or request for proposals. **If any bidder or offeror fails to enter into a contract within the time specified**, the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. **The defaulting bidder or offeror shall be responsible for the difference in price.** (Emphasis added.)

Instructions to Bidders.

Section 8.02 of the Instructions to Bidders provides, in part, “[i]f the Successful Bidder fails to execute and deliver the Contract Documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and **the Bid security of that Bidder will be forfeited.**” SUMF, ¶ 20, (emphasis added.)

Bid Bond.

The Bid Bond also provides, in pertinent part, “**Bidder and Surety, jointly and**

severally, bind themselves, their heirs, executors, and administrators, successors, and assigns **to pay to Owner** [Butte Meade Sanitary Water District] **upon default of Bidder the penal sum set forth on the face of this Bond.**" SUMF, ¶ 24, (emphasis added).

MJ Drilling Inc. ("MJ Drilling") submitted the lowest bid in the amount of Eight Hundred Eighty-One Thousand Eight Hundred Twenty-Nine Dollars and Thirty-One Cents (\$881,829.31). SUMF, ¶ 7. The Bid Bond is written for "ten percent (10%) of the amount bid." SUMF, ¶ 8. Accordingly, the penal sum of the Bid Bond is Eighty-Eight Thousand One Hundred Eighty-Two Dollars and Ninety-Three Cents (\$88,182.93).

Butte-Meade served a written Notice of Default upon MJ Drilling and Nationwide on April 12, 2024. SUMF, ¶ 26.

The Bid Bond provides that "payment under this Bond will be due and payable upon default of Bidder and within 30 calendar days after receipt by Bidder and Surety of written notice of default from Owner...". SUMF, ¶ 25.

Nevertheless, MJ Drilling and Nationwide refuse to pay the penal sum of the Bid Bond to Butte-Meade. SUMF, ¶ 27.

Butte-Meade is entitled to summary judgment against MJ Drilling and Nationwide, jointly and severally, for the penal sum of the Bid Bond.

ISSUE #3 – Whether Butte-Meade is entitled to Judgment against MJ Drilling for the difference in price between MJ Drilling's bid and the bid of the next lowest bidder?

Butte-Meade's claim against MJ Drilling for the difference in price between the amount of its bid and the bid of the next lowest bidder is rooted in State law.

SDCL 5-18A-15 provides, in part:

If any bidder or offeror fails to enter into a contract within the time specified, the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. **The defaulting bidder or offeror shall be responsible for the difference in price.** (Emphasis added).

To be candid, the remedy provided by this statute is more generous than the remedy provided within the Instructions to Bidders and the Bid Bond.

Section 8.02 of the Instructions to Bidders provides for the penal sum of the Bid Bond to be forfeited upon default of the Successful Bidder. This Section also states, “Such forfeiture shall be Owner’s exclusive remedy if Bidder defaults.” *Affidavit of Jason Pettyjohn*, Exhibit “1”.

Likewise, the Bid Bond provides that recovery of the penal sum of the Bond will be the Owner’s sole remedy. *Affidavit of Jason Pettyjohn*, Exhibit “3”.

These limitations should be disregarded because they are contrary to public policy. South Dakota law requires all contracts to comply with state law.

“A contract provision contrary to an express provision of law or to the policy of express law . . . is unlawful.” SDCL 53-9-1.

Just last month, the South Dakota Supreme Court wrote:

Among the requirements for all valid contracts is conformity with the public policy of our State, as expressed in our published decisions, statutes enacted by the Legislature, and our constitution. *See, Two Eagle v. Avel eCare, LLC*, 2025 S.D. 3, ¶ 24, 17 NW.3d 242, 249 (quoting *Oesterreich v. Canton-Inwood Hosp.*, 511 N.W.2d 824, 827 (S.D. 1994)) (“The primary sources for declarations of public policy in South Dakota are the constitution, statutes, and judicial decisions.”); see also SDCL 53-9-1 (stating in a contract whose provisions are “contrary to an express -10-#30190 provision of law . . . is unlawful”). This restriction applies immutably to all contracts, including those which are unambiguous.

Sturzenbecher v. Sioux Country Ranch, LLC, 2025 S.D. 24 ¶ 28.

Whether an act or provision violates a public policy is a question of law. *Niesent v. Homestake Mining Co.*, 505 N.W.2d 781, 783 (S.D. 1993), at 783. “Public policy is found in the letter or purpose of a constitutional or statutory provision or scheme . . .”. *Id.*

In 2010 the South Dakota Legislature established public policy by adopting SDCL 5-18A-15. This statute provides an absolute remedy when a successful bidder fails to enter into a contract.

SDCL 5-18A-15 provides in pertinent part:

...If any bidder or offeror fails to enter into a contract within the time

specified the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. **The defaulting bidder or offeror shall be responsible for the difference in price.**"

SDCL 5-18A-15, (emphasis added).

This is crystal clear public policy. Regardless of the limitations shown in the Instructions to Bidders and the Bid Bond, this Court must follow state law.

The Bid Bond itself recognizes the supremacy of State law over the Bond terms. Page 2 of the Bid Bond provides:

This Bond is intended to conform to all applicable statutory requirements. Any applicable requirement of any applicable statute that has been omitted from this Bond shall be deemed to be included herein as if set forth at length. **If any provision of this Bond conflicts with any applicable statute, then the provision of said statute shall govern** and the remainder of this Bond that is not in conflict therewith shall continue in full force and effect. (Emphasis added).

"Public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good." *Barton v. Codington County*, 2 N.W.2d 337 (S.D. 1942).

"When conduct opposed to the public interest is made the subject of a bargain the courts ordinarily refuse to accord a party thereto a remedy predicted thereon." *Id.* (citing Restatement of the Law of Contracts § 598; Williston on Contracts, Rev. Ed., § 1630).

The South Dakota legislature mandated the remedy provided by SDCL 5-18A-15 when a successful bidder "fails to enter into a contract...". This statute provides, "The defaulting bidder [MJ Drilling] **shall** be responsible for the difference in price between its bid and the next lowest bidder." (Emphasis added).

"As a rule of statutory construction, we have determined that "[w]hen 'shall' is the operative verb in a statute, it is given 'obligatory or mandatory' meaning." *Discover Bank v. Stanley*, 757 N.W.2d 756, 762, 2008 S.D. 111, ¶ 21 (quoting *In re J.H.*, 1999 SD 36, ¶ 31, 590 N.W. 2d 473, 479).¹

¹ SDCL 2-14-2.1(2) states: "The term 'shall' manifests a mandatory directive and does not confer any discretion in carrying out the action so directed."

This Court must follow the law by granting summary judgment against MJ Drilling for the difference in price between its bid of Eight Hundred Eighty-One Thousand Eight Hundred Twenty-Nine Dollars and Thirty-One Cents (\$881,829.31) and the next lowest bid of One Million One Hundred Eighty-Five Thousand Seven Hundred Fifteen Dollars (\$1,185,715.00). SDCL 5-18A-15. The difference in these prices is Three Hundred Three Thousand Eight Hundred Eighty-Five Dollars and Sixty-Nine Cents (\$303,885.69).²

CONCLUSION

The Court should rule, as a matter of law, that MJ Drilling defaulted by failing to sign and deliver the contract documents for the New Madison Well Project.

The Court should also grant Butte-Meade Summary Judgment against MJ Drilling and Nationwide, jointly and severally, for the full penal sum of the Bid Bond.

Finally, the Court should grant Summary Judgment against MJ Drilling for the difference in price between its bid and the next lowest responsive and responsible bidder in the amount of Three Hundred Three Thousand Eight Hundred Eighty-Five Dollars and Sixty-Nine Cents (\$303,885.69) as required by SDCL 5-18A-15. This Judgment may also provide that payment of the penal sum of the Bid Bond shall reduce the total amount of the Judgment against MJ Drilling.

Dated this 16th day of May, 2025.

**BENNETT MAIN GUBBRUD & WILLERT,
P.C.**

Attorneys for the Plaintiff

By: /s/ Dwight A. Gubbrud

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² The penal sum of the Bid Bond shall be contributory towards the remedy provided by State law. Double recovery of the Bid Bond and the difference in price between MJ Drilling's bid and the lowest bidder is neither requested nor appropriate. Payment of the penal sum of the Bid Bond will reduce the total Judgment against MJ Drilling.

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
)ss.
COUNTY OF BUTTE) FOURTH JUDICIAL CIRCUIT

BUTTE-MEADE SANITARY WATER DISTRICT, a governmental subdivision of the State of South Dakota, Plaintiff, vs. NATIONWIDE MUTUAL INSURANCE COMPANY, an Ohio corporation for non-profit, and MJ DRILLING INC., a Wyoming Corporation, Defendants.	09CIV24-184 BUTTE-MEADE SANITARY WATER DISTRICT'S REPLY BRIEF
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This Reply Brief is submitted by Plaintiff **BUTTE-MEADE SANITARY WATER DISTRICT** ("Butte-Meade") in support of its Motion for Summary Judgment.

REPLY ARGUMENT

The material facts within Butte-Meade's Statement of Undisputed Material Facts have been admitted.

Butte-Meade filed its Motion for Summary Judgment, the Affidavit of Jason Pettyjohn, and a Statement of Undisputed Material Facts as required by SDCL 15-6-56(c)(1).

In response, the Defendants filed the Defendants' Reply to Plaintiff's Motion for Summary Judgment. The Affidavit of Marvin Scoggin was signed and filed after the statutory deadline for the Defendants' Response. SDCL 15-6-56(c).¹

The Defendants did not file a Statement of Material Facts or a Response to Butte-Meade's Statement of Undisputed Material Facts.

SDCL 15-6-56(c)(2) provides:

A party opposing a motion for summary judgment **shall** include a separate,

¹ Butte-Meade objects to the late Affidavit and requests that it be disregarded and struck from the record.

short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried. The opposing party **must respond** to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record. (Emphasis added).

SDCL 15-6-56(c)(3) then provides: "All material facts set forth in the statement that the moving party is required to serve **shall be admitted** unless controverted by the statement required to be served by the opposing party." (Emphasis added).

Accordingly, the facts set forth in Butte-Meade's Statement of Undisputed Material Facts are undisputed and have been admitted, as a matter of law.

MJ Drilling Defaulted by Failing to Sign the New Madison Well Contract.

It is undisputed that MJ Drilling submitted the lowest bid for Butte-Meade's New Madison Well Project. SUMF, ¶ 7.

It is also undisputed that MJ Drilling never signed the contract documents after it was awarded the contract. SUMF, ¶ 17.

Butte-Meade will address the allegations contained in the late-filed Affidavit of Marvin Scoggin in case the Court chooses to permit the late filing over Butte-Meade's objections.

MJ Drilling argues that it should be excused from its default because Marvin Scoggin made a "verbal request" to withdraw its bid after bids were opened. *Scoggin Affidavit*. According to Scoggin's Affidavit, the project engineer "refused" his request. *Id.*²

If Scoggin's Affidavit is accurate, the project engineer's response was appropriate. The project engineer did not have authority to allow the bid to be withdrawn upon a simple verbal request. The New Madison Well Project's Instructions to Bidders sets forth a very simple process for bidders to withdraw mistaken bids.

² Page 2 of the Defendant's Reply deceptively states, "Additionally, Scoggin through counsel contacted the attorney for the Board of Trustees, also requesting that the bid be rescinded." This letter is attached to Scoggin's affidavit as Exhibit B. The letter is dated July 16, 2024. It was not sent shortly after bids were opened. Instead, this was sent 165 days after bids were opened and 136 days after Butte-Meade had already awarded the contract to MJ Drilling.

Butte Meade objects to the use of this letter for any purpose other than as a judicial admission to default by MJ Drilling's counsel. The letter constitutes an offer of compromise and settlement and should not be admitted as substantive evidence. SDCL 19-19-408.

Section 16.02 of the Instructions to Bidders provides that bidders can withdraw a bid within 24 hours after bids were opened by filing a signed, written notice and demonstrating to “the reasonable satisfaction of Owner that there was a material and substantial mistake in the preparation of its bid...” SUMF, ¶ 11.

This is an important procedural requirement for withdrawing a mistaken bid and is consistent with State law.

South Dakota law does not allow a bid to be withdrawn unless the purchasing agency makes a “written determination” that an award or contract is based upon a bid mistake. SDCL 5-18A-5(6).

SDCL 5-18A-5(6) provides, in part:

After bid opening, no withdrawal of a bid or change in bid prices or other provisions of bids prejudicial to the interest of the purchasing agency or fair competition is permitted. The purchasing agency may waive technical irregularities in the bid or proposal of the low bidder or offeror that do not alter the price, quality, or quantity of the services, or items of tangible personal property bid or offered. *Any decision to permit the correction or withdrawal of a bid, or to cancel an award or a contract based on a bid mistake, shall be supported by a written determination made by the purchasing agency, and included in the bid file.* (Emphasis added.)

It is undisputed that Project Engineer Jason Pettyjohn evaluated MJ Drilling's bid, its qualifications, and communicated with MJ Drilling about the New Madison Well Project for three and one-half weeks after bids were opened. *Pettyjohn Affidavit*, ¶10.

On Monday, February 5, 2024, Pettyjohn emailed Marvin Scoggin, “At this time it does not appear that there is anything wrong with the bid documents that were submitted.” *Pettyjohn Affidavit*, ¶18.

MJ Drilling then confirmed its bid by emailing, “**we would like to accept the contract for Butte-Meade Sanitary Water District Madison Water Well** in Newell, SD, and we are confident, with our Madison water well experience that we can provide you and your client excellent service and we are looking forward to working with you”. *Pettyjohn Affidavit*, ¶ 19 – Exhibit 4 (emphasis added).

MJ Drilling sent this email long after bids were opened and just six (6) days before it was awarded the contract. *Id.*

South Dakota law required Butte-Meade to award the contract to “the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth

within the invitation for bids.” SDCL 5-18A-5(7). In reliance upon MJ Drilling’s confirmation, Butte-Meade awarded the contract for the New Madison Well project to MJ Drilling. SUMF, ¶ 14.

It is also undisputed that MJ Drilling never “demonstrated to the reasonable satisfaction of Owner that there was a material and substantial mistake in the preparation of its Bid...” as required in Section 16.02 of the Instructions to Bidders. *Pettyjohn Affidavit, Exhibit 1*.

The Defendants argue that MJ Drilling’s bid was low because it didn’t use the Davis-Bacon wage rates. *Scoggin Affidavit* ¶6. Nothing in the record demonstrates that this was a mistake or that this was a material and substantial mistake.

State law requires a “decision to permit the correction or withdrawal of a bid” to be “supported by a written determination made by the purchasing agency” that the bid is “based on a bid mistake”. SDCL 5-18A-5(6).

The Defendants never requested such a determination. And Butte-Meade’s Board of Trustees never made this determination.

Instead, Butte-Meade justifiably relied upon MJ Drilling’s representations and awarded it the contract. *Pettyjohn Affidavit*, ¶¶ 18, 19, 20, 21, and 23.

After Butte-Meade awarded the contract, MJ Drilling once again confirmed its bid by emailing “**Thank you again for the opportunity to drill this water well.**” SUMF, ¶ 15; *Pettyjohn Affidavit*, ¶ 21 – Exhibit 5 (emphasis added).

Even if MJ Drilling asked to withdraw its bid when bids were opened, these subsequent written affirmations confirmed that it stood behind its bid. Butte-Meade was justified in relying upon these representations when it concluded that MJ Drilling was a responsible bidder and awarded the contract. SDCL 5-18A-5(7).

The Court should remember that Butte-Meade awarded this contract a month after bids were opened and after the project engineer asked MJ Drilling to confirm that its bid had no mistakes. *Pettyjohn Affidavit*, ¶18.

In response, MJ Drilling wrote, “**we would like to accept the contract for Butte-Meade Sanitary Water District Madison Water Well in Newell, SD,** and we are confident, with our Madison water well experience that we can provide you and your client excellent service and we are looking forward to working with you”. *Pettyjohn Affidavit*, ¶ 19 – Exhibit 4.

This Court should rule, as a matter of law, that MJ Drilling defaulted by failing to sign the contract documents.

Summary Judgment Should Be Granted Against the Defendants, Jointly and Severally, for the Penal Sum of the Bid Bond.

The undisputed facts demonstrate that MJ Drilling did not provide written notice of a reasonable basis for withdrawing its bid. Consequently, Butte-Meade appropriately determined that MJ Drilling defaulted by failing to sign the contract documents. SUMF, ¶17.

The Defendants admit that Butte-Meade is entitled to recover the penal sum of the bid bond as a consequence of MJ Drilling's default. Defendants' Reply, p. 2.

Accordingly, the Court should enter Judgment in favor of Butte-Meade and against the Defendants, jointly and severally, for payment of the penal sum of the bid bond.

State Law Provides a Mandatory Remedy.

In defense of the Motion for Summary Judgment, the Defendants' Reply relies upon a 70-year old case from the State of Oregon, a 63-year old case from a mid-level Appellate Court in Florida, and a 43-year old South Dakota case. *See, State Highway Commission v. State Construction Company*, 203 Or. 414, 280 P.2d 370 (Or. 1955); *State Board of Control v. Clutter Construction Company*, 139 So.2d 153 (Fla.App. 1962); and *Arcon Construction Company v. State of South Dakota*, 314 N.W.2d 303 (S.D. 1982).

Fortunately, current South Dakota law is very clear.

The Defendants' reliance on the old *Arcon Construction* Supreme Court opinion is misplaced. *Id.*³ This case was decided under laws that have since been rewritten.

Nearly thirty (30) years after *Arcon Construction*, the South Dakota Legislature changed public policy. In 2010, the South Dakota legislature adopted SDCL 5-18A-15 which provides:

After receiving notice of a contract award, the successful bidder or offeror shall enter into a contract with the purchasing agency within the time

³ *Arcon Construction* is clearly distinguishable from this case. In *Arcon*, the mistaken bidder called and sent a letter to the purchasing agency explaining the error in its bid and requesting to be relieved of its bid the very next day after bids were opened. *Arcon Construction v. State of South Dakota*, 314 NW2d 303, 305 (SD 1982). The bidder in *Arcon* acted substantially different than MJ Drilling by promptly demonstrating the error in its bid before the contract was awarded. In contrast, MJ Drilling never demonstrated how its bid was based upon a mistake, expressed interest in accepting the bid just 6 days before the contract was awarded, and then thanked the engineer for awarding the contract 5 days after it was notified of the contract award. *Pettyjohn Affidavit*, ¶16, 19, & 21.

specified in the invitation for bids or request for proposals. If any bidder or offeror fails to enter into a contract within the time specified, the contract may be awarded to the next lowest responsive and responsible bidder or offeror for the same kind of work and material, unless all bids or proposals are rejected. **The defaulting bidder or offeror shall be responsible for the difference in price.** (Emphasis added).

This statute establishes public policy in South Dakota. "Public policy is found in the letter or purpose of a constitutional or statutory provision or scheme...". *Niesent v. Homestake Mining Company*, 505 N.W.2d 781, 783 (S.D. 1993).

Among the requirements for all valid contracts is conformity with the public policy of our State, as expressed in our published decisions, statutes enacted by the Legislature, and our constitution. *See, Two Eagle v. Avel eCare, LLC*, 2025 S.D. 3, ¶ 24, 17 NW.3d 242, 249 (quoting *Oesterreich v. Canton-Inwood Hosp.*, 511 N.W.2d 824, 827 (S.D. 1994)) ("The primary sources for declarations of public policy in South Dakota are the constitution, statutes, and judicial decisions."); see also SDCL 53-9-1 (stating in a contract whose provisions are "contrary to an express provision of law . . . is unlawful"). This restriction applies immutably to all contracts, including those which are unambiguous.

Sturzenbecher v. Sioux Country Ranch, LLC, 2025 S.D. 24 ¶ 28.

By adopting SDCL 5-18A-15, the Legislature established a mandatory remedy for successful bidders who fail to enter into competitively bid public contracts. This Court should rule, as a matter of law, that MJ Drilling is responsible for the difference in price between its bid and the next lowest bidder.

CONCLUSION

The facts are not in dispute. The Defendants have admitted the material facts set forth in Butte-Meade's Statement of Undisputed Material Facts. SDCL 15-6-56(c)(3).

The Court should rule, as a matter of law, that MJ Drilling defaulted by failing to sign and deliver the contract documents for the New Madison Well project.

The Court should also grant Butte-Meade Summary Judgment against MJ Drilling and Nationwide, jointly and severally, for the penal sum of the Bid Bond.

Finally, the Court should grant Summary Judgment against MJ Drilling for the difference in price between its bid and the next lowest responsive and responsible bidder

as required by SDCL 5-18A-15.⁴

Dated this 9th day of June, 2025.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for the Plaintiff

By: /s/ Dwight A. Gubbrud
DWIGHT A. GUBBRUD
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CERTIFICATE OF SERVICE

I, **DWIGHT A. GUBBRUD**, attorney for the above-named Plaintiff, hereby certify that on the 9th day of June, 2025, I caused a full, true, and complete copy of **BUTTE-MEADE SANITARY WATER DISTRICT'S REPLY BRIEF** and this **Certificate of Service** to be served electronically through eFileSD:

Courtney R. Clayborne
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Dated this 9th day of June, 2025.

BENNETT MAIN GUBBRUD & WILLERT, P.C.
Attorneys for the Plaintiff

By: /s/ Dwight A. Gubbrud
DWIGHT A. GUBBRUD

⁴ This Judgment should also provide that payment of the penal sum of the Bid Bond shall reduce the total amount of the Judgment against MJ Drilling.

53-9-1. Contract provisions contrary to law, unlawful.

A contract provision contrary to an express provision of law or to the policy of express law, though not expressly prohibited or otherwise contrary to good morals, is unlawful.

Source: CivC 1877, § 953; CL 1887, § 3577; RCivC 1903, § 1271; RC 1919, § 892; SDC 1939, § 10.0701.

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA
APPEAL NO. 31152

BUTTE-MEADE SANITARY WATER DISTRICT, a governmental subdivision of the
State of South Dakota

Plaintiff and Appellees,
vs.

NATIONWIDE MUTUAL INSURANCE COMPANY, an Ohio corporation for non-
profit, and MJ DRILLING, INC., a Wyoming Corporation,

Defendants and Appellants

Appeal from the
Fourth Judicial Circuit
Butte County, South Dakota

The Honorable Michael Day, Circuit Court Judge

APPELLANTS' REPLY BRIEF

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South Dakota Statutes:

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South Dakota Cases:

<i>Two Eagle v. Avel eCare, LLC</i> , 2025 S.D. 3, 17 N.W.3d 242	2, 3
<i>Waara v. Kane</i> , 269 N.W.2d 395 (SD 1977)	3

STATEMENT OF THE CASE

The respective parties have set forth the statement of the case in the previous briefing. However, what has been left out is the fact that there was no memorandum opinion by the trial court nor any Findings of Fact or Conclusions of Law. Of note is that at the time of the hearing counsel for MJ Drilling asked the Court to clarify its ruling as it pertains to the contractual provision so that there would be a better (or at least more reasoned) record on appeal. APP 22-27, pp 20:11-15.

ISSUES RAISED IN APPELLEE'S BRIEF

The singular issue raised on appeal is whether the trial court erred in finding that MJ was responsible for damages in excess of those set forth in the contract. The parties do not dispute that the contract contains the specific provision stating:

“... If the Successful Bidder fails to execute and deliver the Contract Documents and furnish the required contract security within 15 days after the Notice of Award, Owner may consider Bidder to be in default, annul the Notice of Award, and Bid security of that Bidder will be forfeited. *Such forfeiture shall be Owner's exclusive remedy if Bidder defaults...*” (emphasis added).

Here MJ specifically argued that there was a genuine issue of material fact created by Butte-Meade's desire to have remedies under SDCL §5-18A-15 and 16 despite the limitation of damages contained within the contract and, specifically the foregoing provision.

In the underlying proceedings, and as cited by Butte-Meade, the trial court was made aware of the fact that SDCL §5-18A-16 would allow the purchasing agency “...to have all remedies provided in the contract and provided by law...” It was argued by MJ Drilling that the remedies provided in the contract were unambiguous and set the owner's

exclusive remedy as the retention of the bond. With that, the contract limited any other remedies available to Butte-Meade.

In turn, Butte-Meade made the argument that this portion of the contract must be disregarded because it's contrary to law and public policy. The court did not make any findings specific to which law or policy was violated. This is important.

As correctly pointed out by Butte-Meade, this court recently held that "... Among the requirement for *all valid contracts* is the conformity with the public policy of our state..." (Emphasis added) citing *Two Eagle v. Avel eCare, LLC*, 2025 S.D. 3, 24, 17 N.W.3d 242, 249. Contrary to the argument of Butte-Meade, however, this holding does not allow them to recover the difference between the MJ Drilling and that of the next lowest bidder, because of the express language contained within the contract and specifically limiting the owner's recovery to the bond posted, should be binding.

It was specifically argued at the trial court level, that to hold MJ Drilling to the letter of the agreement but not require that the owner abide by the same would be inequitable. Counsel for MJ Drilling specifically pointed out to the court that there was an inherent unfairness to allow the owners not to abide by the terms of the contract but required that the bidder abide by the contract, "... Hook, line, sinker..." APP 22-27 pp. 15:12-22. It was further argued that the argument put forth by Butte-Meade, based on the cited cases, made the contract void or voidable and under either scenario the contract would not be enforceable. APP 22-27, pp 15:22-25; pp. 16:1-2. Whether the contract being void or voidable, was not addressed by the court but would negate Butte-Meade's right to any remedy, including those remedies provided by state law as the contract would be deemed to not have existed.

It should be noted that the position of MJ Drilling, that the trial court should not have allowed statutory damages in addition to retention of the bond, is supported by the statutes and cases quoted by Butte-Meade. As noted above, SDCL §5-18A-16 specifically allows the project owner to have remedies provided in the contract and provided by law. Here, the contract limits those remedies and Butte-Meade offers no public policy which is violated by their limiting the remedies available to them. In fact, one would argue that the limitation of remedies would favor the owner as it is likely to invite more bidders. Here, again, despite the request of MJ Drilling to do so, the trial court made no findings of what laws or public policies were violated however it is believed that none exist.

Additionally, if Butte-Meade wants to take the position that the contract is unlawful, due to the fact that it does not conform to public policy, as set forth in *Two Eagle v. Avel eCare, LLC*, 2025 S.D. 3, ¶24, 17 N.W.3d 242, 249, then they cannot avail themselves to the statutory remedies as under South Dakota law, an illegal contract is wholly void and cannot be enforced, either on the basis of the express contract, an implied contract, or quantum meruit. *Waara v. Kane*, 269 N.W.2d 395 (SD 1977).

CONCLUSION

For the reasons stated, Appellants respectfully request this Court reverse or remand this matter consistent with the arguments set forth herein.

REQUEST FOR ORAL ARGUMENT

Appellants hereby request oral argument.

[Signature Page to Follow]

Dated this 25th day of November, 2025.

LOOS, SABERS & SMITH, LLP

/s/ Courtney R Clayborne

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 25th day of November, 2025 before, he electronically filed the foregoing documents with the Clerk of the Supreme Court Odyssey File and Serve portal, and further certifies that the foregoing document was also mailed via U.S. Mail, postage prepaid thereon, to:

Dwight Gubbrud
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/s/ Courtney R Clayborne

COURTNEY R. CLAYBORNE

[Certificate of Compliance to Follow]

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), Courtney R Clayborne, counsel for the Appellants, does hereby submit the following:

The foregoing brief is 3 total pages in length. It is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 772 words, and 3,854 characters (no spaces) in the body of the Brief.

/s/ Courtney R Clayborne
COURTNEY R CLAYBORNE

APPELLANT APPENDIX

<u>Description</u>	<u>Page Number:</u>
Relevant Portions of the Motions Hearing Transcript (June 17, 2025)	22-27.
SDCL § 15-18A-16	28.

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 2 COUNTY OF BUTTE) FOURTH JUDICIAL CIRCUIT
 3

4

5

6 BUTTE-MEADE SANITARY WATER)
 DISTRICT, a governmental)
 7 subdivision of the State of)
 South Dakota,)
 Plaintiff,) Motions Hearing

8

vs.

09CIV24-184

9

10 NATIONWIDE MUTUAL INSURANCE)
 COMPANY, an Ohio corporation)
 for non-profit, and MJ)
 11 DRILLING, INC., a Wyoming)
 Corporation,)
 12 Defendants.)
 13

14

15

BEFORE: **THE HONORABLE MICHAEL DAY**
 Circuit Court Judge
 Belle Fourche, South Dakota
 June 17, 2025, at 8:45 a.m.

16

17

18

19 APPEARANCES:

20

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25

1 time hearing of that, if it wasn't accepted.

2 But to work backwards from the argument of the
3 Plaintiffs, for some reason, and I'm not sure why, it is
4 never mentioned to this Court that the actual contract
5 language, which applies to the -- any default in the
6 bidding, specifically says, basically, if the successful
7 bidder fails to execute the documents, the owner may
8 consider the bidder to be in default, annul the notice of
9 award, and the bid security of that bidder will be
10 forfeited. Such forfeiture shall be the owner's exclusive
11 remedy if the bidder defaults.

12 So that is the contractual language that was put out
13 in the bids. And that would, at least, raise an issue of
14 material fact as to the issue of the totality of the
15 damages being the difference between the bid submitted and
16 accepted in the next-lowest bidder.

17 Now, to go back to the beginning, there is no dispute
18 that MJ was in default by not signing the documents. And
19 that is not the technical issue before the Court.

20 The issue before this Court is whether they should be
21 entitled to equitable relief, based on the totality of the
22 circumstances.

23 In our brief, we submitted to the Court -- we pointed
24 out specifically the *Arcon Construction Company* case. I
25 think that actually checks all of the boxes of what is

1 needed for equitable relief. And it provides that the
2 Court will grant equitable relief to a bidder -- if that
3 bidder submits a bid and, upon discovery of mistake, acts
4 promptly in informing the appropriate public authorities.

5 As indicated by Plaintiffs, once the bids were open
6 and on that day, and as set forth in the Affidavit of
7 Marvin Scoggin, he says he informed the engineer of the
8 mistake and his desire to withdraw. He had always treated
9 the engineer as the owner's representative.

10 And when the engineer told him that he couldn't, he
11 took that as his final word and proceeded as best he
12 could.

13 So that satisfies the first requirement set forth,
14 which is that he acted promptly to inform them of the
15 mistake and his intention to withdraw.

16 Then the Court needs to also consider the other
17 mandates from the Supreme Court concerning the equitable
18 nature of the relief. And that is, if making -- if the
19 error was plainly -- or was or should have been recognized
20 as an error by the owner, and if all of these things
21 exist, the Court can grant equitable relief.

22 In front of the Court today is only if there is a
23 genuine issue as to those facts. And we would present
24 that the Affidavit of Marvin Scoggin does create that
25 genuine issue by showing there was prompt notice.

1 immediately. And that was known before the bidding.

2 It also would be known and has to be construed in his
3 favor that a bid that is less than 75 percent of the
4 engineer's estimate and less than 70 percent of everybody
5 else's, that is something that should have been known.
6 Those are issues raised by the pleadings, Your Honor.

7 We don't get -- we have trials to go through the math.
8 Those sorts of things.

9 Today is just if there are issues raised. Not the
10 specifics of the issues or the ultimate facts to be
11 determined.

12 On the other part, I am still confused of how the
13 owner would stand before this Court and say, "Even though"
14 -- and it's never been addressed -- "Even though our
15 contract specifically says such forfeiture shall be the
16 owner's exclusive remedy if the bidder defaults, that is
17 we get your bond if you default." But now say, "We don't
18 have to abide by the contract. And we can get those
19 excess damages. But you, Mr. Scoggin, you have to abide
20 by the contract. Hook, line, sinker. No exclusions. But
21 we don't have to look at our own contract and live with
22 what it says."

23 So either this contract is void or it's voidable by
24 their argument. And under either of those scenarios, if
25 they don't have to live by the contract and say it's an

1 error, or it's a contradiction of state law, then that
2 takes us down that path.

3 And for today's purposes, there is a huge issue being
4 raised. Because if they don't have to live up to the
5 contract, they certainly can't enforce it.

6 We have asked this Court for equitable relief.

7 **THE COURT:** Mr. Clayborne, I have a question. In your
8 first argument this morning, you made the comment that
9 this is the first time that you heard that your statement
10 of facts had not been filed. But in Mr. Gubbrud's reply
11 brief of June 9th, he specifically addresses that issue.

12 Certainly, you would have read that and said, "Well,
13 if I -- if I had my statement of facts and it didn't get
14 filed, I better figure out why it didn't get filed."

15 **MR. CLAYBORNE:** Well, and I had -- when we filed the
16 documents, they all were filed, boom, boom, boom. And I
17 didn't see a rejection of that. So if that's an oversight
18 on my part, I apologize, Your Honor.

19 They were done and submitted. As I sit here -- and,
20 specifically, I don't recall specifically looking for
21 every one. But all of them were filed as a packet.

22 And we did see that Marvin's affidavit got kicked
23 back. But that got subsequently refiled and, certainly, I
24 would have -- had I noticed the other one was rejected, I
25 would have made that.

1 **MR. GUBBRUD:** Thank you, Your Honor.

2 I filed a proposed judgment with the Court. And if
3 the Court has it, it should be under proposed documents.
4 And if you would like that in Word, because you would like
5 to make any amendments to it, we can email that to the
6 Court.

7 **THE COURT:** I'll have the Clerk put it in my queue for
8 signature.

9 **MR. CLAYBORNE:** Your Honor?

10 **THE COURT:** Yes?

11 **MR. CLAYBORNE:** Will the Court be addressing,
12 specifically, the issue on the forfeiture and exclusive
13 remedy or can we submit findings and conclusions on that?

14 **THE COURT:** Well, in summary judgment, there's no, really,
15 findings and conclusions.

16 **MR. GUBBRUD:** I agree, Your Honor. No provision for such.

17 **THE COURT:** Right.

18 **MR. CLAYBORNE:** And the Court will not be addressing that
19 specific language then?

20 **THE COURT:** Correct.

21 **MR. CLAYBORNE:** Thank you.

22 **MR. GUBBRUD:** Thank you, Your Honor.

23
24
25

S-18A-16. Recovery from defaulting bidder or offeror.

If any successful bidder or offeror fails to fulfill the conditions of an awarded contract, the purchasing agency may proceed to recover from the defaulting party whatever damages may have been sustained as a result of the default. The purchasing agency shall have all remedies provided in the contract and provided by law.

Source: SL 2010, ch 31, § 17.