STATE OF IDAHO)
County of KOOTENAI)ss
FILED March 5, 2019
AT 2:00 O'Clock P M
CLERK OF DISTRICT COURT
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JOHN SWALLOW and TYLER ALVARADO,

Plaintiffs,

vs.

COEUR D' ALENE URBAN RENEWAL AGENCY dba IGNITE CDA, an independent public body, corporate and politic; and DANIEL W. CLARK, an individual,

Defendants.

Case No. **CV28-18-6664**

MEMORANDUM DECISION AND ORDER ON SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

Both plaintiffs John Swallow (Swallow) and Tyler Alvarado (Alvarado) on one hand, and defendant Daniel W. Clark (Clark) on the other hand, believe that they were the highest bidder at a real estate auction held by defendant Coeur d'Alene Urban Renewal Agency, dba Ignite CDA (Ignite). Thus, both Swallow/Alvarado and Clark request this Court to enter an order requiring Ignite to convey the Property to them.

On June 20, 2018, the Board of Commissioners (the Board) for Ignite, declared a certain parcel of real property as surplus property under Idaho Code Section 50-1401. Def. Ignite's Answer to Am. Compl., Countercl., Cross-cl. and Demand for Jury Trial (Def. Ignite's Answer), 15, ¶ 3. The property is located at, and described as, 311 E. Lakeside Avenue in Coeur d'Alene, Idaho (the Property).[1] *Id.* The Property is currently owned by Ignite. Pls.' Statement of Undisputed Material Facts in Supp. of Mot. for Summ. J., ¶ 2.

[1] The property is legally described as CDA & Kings ADD, Lot 9, Block H, URD LAKE

Clark has been leasing the Property from Ignite since July of 2004. *Id.* at ¶ 3.

Ignite published notice of a sealed bid auction for the sale of the Property in the *Coeur d'Alene Press*, and posted the notice on its website. Am. Compl., ¶¶ 8–9; Def. Ignite's Answer, 16, ¶ 8. On its website, Ignite also posted the Sealed Bid Auction Packet (the Bid Packet) outlining the terms and conditions of the sealed bid process. Am. Compl., ¶ 9; *see id.* at Ex. 1. Pursuant to the terms of the Bid Packet, sealed bids would be accepted until August 15, 2018 at 3:00 p.m., and the bids would be opened at a public meeting at 4:00 p.m. that same day. *Id.* at ¶ 10; Def. Ignite's Answer, 16, ¶ 10. The Bid Packet provided that the minimum bid for the Property could not be less than $220,000 – the appraised value of the Property. Am. Compl., ¶ 11. The Bid Packet required bidders to provide a total bid amount, as well as an additional "tiebreaker" amount should there be a tie for the highest bid. *Id.* at ¶¶ 11, 13. The Bid Packet made no mention of allowing escalation clauses, but did not expressly prohibit the use of them, either; the Bid Packet also did not expressly prohibit modifications to the forms contained in the Bid Packet. Def. Ignite's Answer, 17, ¶ 19.

The Court has reviewed the Bid Packet and finds there is no language indicating that the auction would be a "no reserve" auction, or a "without reserve" auction. As set forth below, this Court finds the absence of such language to be dispositive.

Prior to submitting his Bid Packet, Clark asked Ignite's Executive Director, Tony Berns (Berns), if it was acceptable to include an escalation clause in his bid for the Property. Mem. in Supp. of Def. Clark's Mot. for Summ. J., 4, ¶ 11. Clark was advised by Berns that escalation clauses were permitted, as Ignite has historically accepted escalation clauses in the past in similar sealed bid procedures. *Id.*; Def. Ignite's Answer,

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DISTRICT 1997 Section 13, Township 50 N., Range 04W, Parcel C180000H0090.

17, ¶ 19. Clark informed Berns that he intended to include an escalation clause in his bid. Mem. in Supp. of Def. Clark's Mot. for Summ. J., 4, ¶ 11.

Three bidders responded to the sealed bid offer: Plaintiffs Swallow and Alvarado, Defendant Clark, and GVD Partners. Am. Compl., ¶ 15. GVD Partners submitted a total bid amount of $221,000; there is no dispute that it is not the highest bidder for the Property. *Id.* at ¶ 19; *id.* at Ex. 2. Swallow/Alvarado submitted a total bid amount of $266,000. *Id.* at ¶ 23; *id.* at Ex. 2. Clark submitted a total bid amount of $226,000 and included the following escalation clause in both the Total Bid Amount section and the Bid Tiebreaker section:

> Escalation Increase to bid: If seller receives a competing offer for this property in a net amount greater than the amount of this offer, the purchase price of this offer will be increased to an amount $500 (Five Hundred dollars) more than the net amount of any other competing offer up to a maximum purchase price of $326,000 (Three Hundred and twenty six Thousand dollars).

Am. Compl., ¶ 27. With the escalation clause, Ignite initially determined that Clark's bid became $266,500 – now the highest bid for the Property. Mem. in Supp. of Def. Clark's Mot. for Summ. J., 4, ¶ 17; Def. Ignite's Answer, 17, ¶ 18. Ignite's attorney recommended that the Board accept Clark's bid as the highest bid in the amount of $266,500. Am. Compl., ¶ 32. Swallow/Alvarado challenged Clark's use of an escalation clause, causing the Board to take the matter under advisement. Mem. in Supp. of Def. Clark's Mot. for Summ. J., 5, ¶ 18. On August 17, 2018, the Board approved a motion to revise the Bid Packet for the Property to prohibit the use of an escalation clause, and to re-issue the revised Bid Packet to Swallow/Alvarado and Clark. *Id.* at ¶ 19. On August 22, 2018, the Board held another meeting to allow counsel for Swallow/Alvarado and Clark to address the Board regarding its decision to revise and re-issue the Bid Packet. *Id.* at ¶ 20. Swallow/Alvarado objected to the Board's decision and asserted they were the highest

bidders. Mem. in Supp. of Pls.'/Counterdefs.' Mot. for Summ. J., 2.

Since both Swallow/Alvarado and Clark claim to be the highest bidder, and because Ignite was unable to determine which party is rightfully entitled to the Property, Ignite requested that the determination be made by the courts. Mem. in Supp. of Def. Clark's Mot. for Summ. J., 5, ¶ 21. However, it was not Ignite that sought the determination by the courts. On August 22, 2018, Swallow/Alvarado filed their Complaint for Injunctive and Declaratory Relief against defendants Ignite and Clark. An Amended Complaint for Declaratory Relief was filed on September 10, 2018, prior to any party answering the initial complaint.

It is important to note that at no time did Ignite accept Clark's bid as the high bidder. This Court finds that at no time did Ignite accept either Clark's bid or Swallow/Alvarado's bid as the high bid. As set forth below, that fact is dispositive.

On September 17, 2018, Ignite filed an Answer to Amended Complaint, Counterclaim, Crossclaim and Demand for Jury Trial. On October 9, 2018, Clark filed Defendant Clark's Answer to Plaintiffs' Amended Complaint. On December 17, 2018, Clark filed Defendant Clark's Answer and Counterclaim to Crossclaim. On December 18, 2018, this Court held a scheduling conference and set this matter for trial on July 15, 2019. On December 21, 2018, the parties filed a Stipulation to a Nonjury Trial, and an Order granting such was filed on December 27, 2018. On January 7, 2019, Ignited filed an Answer to Crossclaim Defendant's Counterclaim.

On January 31, 2019, Clark filed a Motion for Summary Judgment, Memorandum in Support of Summary Judgment, Affidavit of Daniel Clark in Support of Motion for Summary Judgment, and Affidavit of Scott Poorman in Support of Motion for Summary Judgment. That same day, Swallow/Alvarado filed a Motion for Summary Judgment, Memorandum in Support of Summary Judgment, Declaration of Megan O'Dowd in

Support of Motion for Summary Judgment, and Plaintiffs' Statement of Undisputed Facts in Support of Motion for Summary Judgment. On February 14, 2019, Ignite filed Defendant Ignite CDA's Response to Plaintiffs' Motion for Summary Judgment, Crossclaim Plaintiff Ignite CDA's Response to Crossclaim Defendant's Motion for Summary Judgment, Affidavit of Tony Berns in Support of Defendant/Crossclaim Plaintiff Ignite CDA's Responses to Motions for Summary Judgment. On February 14, 2019, Swallow/Alvarado filed Plaintiffs/Counterdefendants' Memorandum in Opposition to Defendant Daniel W. Clark's Motion for Summary Judgment. On February 21, 2019, Swallow/Alvarado filed Plaintiffs/Counterdefendants' Memorandum in Support of their Motion for Summary Judgment.

A hearing on both motions was held February 28, 2019. At the conclusion of that hearing, the Court asked if there was any dispute that Ignite had not accepted any bid. There was no claim by any party that Ignite had accepted any bid. Given that undisputed fact, the Court announced that it would likely find this matter was filed prematurely, because Ignite had not "accepted" any bid. The Court gave counsel for the parties the basis of its likely decision, explained the two cases the Court had found (*Pitchfork Ranch Company v. Bar TL Corp.*, 615 P.2d 541 (Wyo. 1980), and *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964)) and made it clear that it would not issue a decision until counsel for the parties could file any briefing relative to those two cases. The deadline for filing any briefing was March 4, 2019. On March 4, 2019, Swallow/Alvarado filed Plaintiffs/Counterdefendants' Supplemental Memorandum in Support of Their Motion for Summary Judgment, and Clark responded with an email (which was filed by the Court) explaining that Clark agreed with Swallow/Alvarado's memorandum; and Ignite filed its Ignite CDA's Supplemental Memorandum of Law. The Court has reviewed those submissions.

As set forth below, the Court finds this case is prematurely filed because Ignite has not accepted any bid. Accordingly, neither party's summary judgment motion will be addressed.

II. STANDARD OF REVIEW

The summary judgment standard will not be reiterated here because the Court finds that it cannot grant summary judgment to either moving party. The Court does note that there are no material facts in dispute.

This is a declaratory judgment action. Complaint for Injunctive and Declaratory Relief, 1-13. "The authority to render a declaratory judgment is bestowed by statute." *State v. Rhoades*, 121 Idaho 63, 69, 822 P.2d 960, 966 (1991), *on reh'g* (Nov. 14, 1991). "The Declaratory Judgment Act, contained in Idaho Code Title 10, chapter 12, confers jurisdiction upon the courts with the option to 'declare rights, status, and other legal relations, whether or not further relief is or could be claimed.'" *Id.*; I.C. § 10–1201. One important limitation on this jurisdiction is that, "a declaratory judgment can only be rendered in a case where an actual or justiciable controversy exists." *Id.* (quoting *Harris v. Cassia County,* 106 Idaho 513, 516, 681 P.2d 988, 991 (1984)). "This concept precludes courts from deciding cases which are purely hypothetical or advisory in nature." *Id.*

"Declaratory judgments by their very nature ride a fine line between purely hypothetical or academic questions and actually justiciable cases." *Rhoades* at 69, 822 P.2d at 966. "Many courts have noted that the test of justiciability is not susceptible of any mechanistic formulation, but must be grappled with according to the specific facts of each case." *Id.* (quoting *Harris* at 516, 681 P.2d at 991); *see also* 22 Am.Jur.2d Declaratory Judgments § 33, at 697. This Court adopted the following language from the

United States Supreme Court's definition of justiciability as a guiding standard in the context of declaratory judgment actions:

> [A] controversy in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages.

Rhoades at 69, 822 P.2d at 966 (quoting *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240–41, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937)) (citations omitted); *see Harris* at 516, 681 P.2d at 991. Idaho has adopted the constitutionally based federal justiciability standard. *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002). "Idaho courts are authorized under I.C. § 10–1201 to render declaratory judgments under certain circumstances, but even actions filed pursuant to that statute must present an actual or justiciable controversy in order to satisfy federal constitutional justiciability requirements." *Noh* at 801, 53 P.3d at 1220. "Ripeness is that part of justiciability that 'asks whether there is any need for court action at the present time.'" *Davidson v. Wright*, 143 Idaho 616, 620, 151 P.3d 812, 816 (2006) (quoting *Gibbons v. Cenarrusa*, 140 Idaho 316, 317, 92 P.3d 1063, 1064 (2002)).

III. ANALYSIS

Clark first asserts that he is the highest bidder for the Property because his use of an escalation clause was approved by Ignite. Mem. in Supp. of Def. Clark's Mot. for Summ. J., 9. The Bid Packet did not expressly allow or prohibit the use of escalation

clauses, but it did state that bidders with questions should contact Tony Berns, the Executive Director of Ignite, for further information. *Id.* Clark reached out to Berns and asked about the use of escalation clauses on the bid forms. *Id.* Berns confirmed to Clark that Ignite had previously received bids that included escalation clauses, and that Clark's use of an escalation clause was permitted. *Id.* at 10. Clark asserts that "[t]his information was readily available to any bidder and would have been provided to the plaintiffs had they bothered to ask." *Id.* Additionally, in support of his position that he is the highest bidder, Clark provides that he submitted a bid deposit in the amount of $3,260, which is 1% of his maximum purchase price of $326,000 (as opposed to a bid deposit that reflected his starting bid price of $226,000).[2] *Id.* Lastly, Clark asserts that he did not cheat or rely on inside information when choosing to include an escalation clause; "he simply asked the question that all bidders were invited to ask: 'Can I include an escalation clause?'" *Id.* Though it is undeniable that Clark had an advantage over Swallow/Alvarado in this particular bid, Clark argues that he obtained that advantage by simply requesting additional information from Ignite – information that was readily available to anyone who asked. *Id.* at 11. Clark claims, "The plaintiffs' disadvantage was the direct result of the plaintiffs' lack of due diligence." *Id.* at 11.

Swallow/Alvarado argue that Clark did not comply with the unambiguous instructions of the Bid Packet, which asked only for a total bid amount and tiebreaker amount. Mem. in Supp. of Pls.' Mot. for Summ. J., 5–6. Swallow/Alvarado assert that by including an escalation clause where the Bid Form does not provide a place for one, Clark failed to comply with the instructions. *Id.* at 6. In support of their position, Swallow/Alvarado state, "[t]o the extent that Clark's subjective interpretation of these

[2] The Bid Packet included a provision that stated, "A 1% deposit is required for each bid

instructions differed, there is no room for such an erroneous interpretation in contract law, particularly with respect to the sale of public property where equal footing and fairness are the cornerstones." *Id.* Additionally, Swallow/Alvarado point to specific language in the Bid Packet instructions which state, "[n]o additions or changes to original Bids will be allowed after submittal. While changes are not permitted, the Agency may request clarification from bidders." Am. Compl., Ex. 1.

Addressing Swallow/Alvarado's latter argument first, Clark did not add or change his original bid after it was submitted. Clark submitted one bid – the bid at issue in this matter that contained the escalation clause – and made no attempt to add or change any portion of it after it was submitted to the Board. Therefore, the provision in the Bid Packet instructions addressing changes made after bid submission, identified above by Swallow/Alvarado, does not apply in this case.

Next, Swallow/Alvarado argue that Clark failed to follow the instructions contained in the Bid Packet by including an escalation clause. The facts make clear that the instructions contained in the Bid Packet, as well as the Bid Form itself, did not expressly allow or prohibit the use of an escalation clause. Clark, pursuant to the Bid Packet instructions, reached out to the Executive Director of Ignite and simply asked whether Ignite accepts and considers escalation clauses during the sealed bid process. Clark was told not only that they accept escalation clauses, but that they have historically accepted escalation clauses in the past in similar sealed-bidding processes. In fact, Ignite accepted a bid that contained an escalation clause as recently as February of 2018. Relying on this information, Clark wrote his starting bid in numeric and alphanumeric form, as the Bid Form instructed, followed by an escalation clause. Based on the fact that Ignite has historically accepted escalation clauses as part of sealed bids, and the fact that

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delivered in the sealed envelope with the Bid form..." Am. Compl., Ex. 1, p. 2.

Clark received express confirmation that an escalation clause would be considered in a bid for the Property, Clark's inclusion of the escalation clause was not improper under the circumstances.

Lastly, Swallow/Alvarado argue that Clark's inclusion of an escalation clause makes his bid non-responsive, and to consider it "would undermine the fair competition objective that is required in the sale of public property." Mem. in Supp. of Pls.' Mot. for Summ. J., 6. This argument also ignores the fact that 1) Clark did comply with the Bid instructions, 2) Clark received express approval from Ignite to add an escalation clause, 3) Ignite has historically accepted escalation clauses as part of sealed bids, and 4) Berns phone number was noted on the bid packet and Swallow/Alvarado could have called Berns (Ignite) to find out that they, too, could submit a bid with an escalation clause. However, the Court appreciates Swallow/Alvarado's fair competition argument. The Court obviously sees flaws in how this process was conducted. For the sake of fairness, and after providing approval and receiving notice that a bidder would be including an escalation clause, Ignite should have informed all potential bidders that the use of escalation clauses was permitted. Instead, Ignite made that information available only if a party hunted for that information by calling Berns, and knowing what questions to ask of Berns. This Court agrees with Swallow/Alvarado that doing so undermined the fair competition objective that is required in the sale of public property. But from Ignite's standpoint, doing so no doubt minimized the amount of the high bid. As a public entity, Ignite has a duty to act in the public interest. Idaho Code § 50-2011(b). Presumably, this would include the need to maximize the revenues obtained from its sales of surplus property.

As stated above, this Court finds dispositive the fact that the Bid Packet contains no language indicating that the auction would be a "no reserve" auction, or a "without

reserve" auction. In fact, the Bid Packet states a "reserve" amount in that it reads, "[T]he minimum bid shall be not less than one hundred percent (100%) of the appraised value of the Property, $220,000." Am. Compl., Ex. 1, p. 1. And, as set forth above, this Court finds that at no time did Ignite accept Clark's bid (or Swallow/Alvarado's for that matter) as the high bidder. As set forth above, this Court finds that fact is also dispositive.

The fact that this was not a "no reserve" auction (and was a "reserve" auction) gave Ignite the ability to reject all bids at any time. Because Ignite has not accepted any party's bid, this case is brought prematurely. The following cases found by the Court make clear certain aspects in the bidding process which is before the Court. First, it is clear this is a "reserve" auction and not a "no reserve" auction. The fact that it was a sealed bid auction does nothing to change the fact that this was a "reserve" auction. The fact that the Bid Packet did not mention that it was a "reserve" auction does not matter, because if silent on the issue, a "reserve" auction will be presumed because a "no reserve" or a "without reserve" auction is unusual, potentially harsh to the seller, and spins the law of auctions upside down as compared to a "reserve" auction. Second, because this is a "reserve" auction, Ignite has the ability to not accept any party's offer. This is so because in a "reserve" auction, the contract is not formulated until the offer of the bidder is accepted by the seller. Because Ignite has not accepted either Clark's bid on one hand, or Swallow/Alvarado's bid on the other, there has been no formulation of any contract. The auction has not been consummated. There is nothing for this Court to decide as to the issues submitted by the parties, that is, "Which bid prevails?" The answer is, "Neither bid prevails." From a declaratory judgment standpoint, there is no justiciable controversy.

The case of *Pitchfork Ranch Company v. Bar TL Corp.*, 615 P.2d 541 (Wyo. 1980) is instructive. In that case, the Bar TL Ranch was valued at four million dollars. *Id.* at

542. At auction, Ronald Florance bid $1.61 million, and Pitchfork bid $1.6 million. Pitchfork sued to quiet title and Florance assigned his rights to Bar TL Corp. before its quiet title suit was filed. *Id.* The July 1, 1978, auction was widely advertised as a no-reserves sale, highest bid is the winner. *Id.* The district judge issued summary judgment in Bar TL's favor. *Id.* The district judge denied summary judgment on Pitchfork's counterclaim for specific performance. *Id.* Pitchfork appealed, claiming it was the highest lawful bidder. *Id.* The issue as to "lawful bidder" was this: the auctioneer had announced the bids would be confined to $25,000.00 increments, and the seller had not authorized the auctioneer to adopt a minimum-increment policy. *Id.* at 545. Pitchfork bid $1.6 million, and Florance bid $1.61 million, or ten thousand more than Pitchfork, but not the $25,000.00 more, in accordance with the stated rule. *Id.* at 546. On appeal, the Wyoming Supreme Court affirmed the district court's conclusion that Pitchfork's bid was not the highest bid. *Id.* at 555. The $25,000.00 increment rule did not matter, because this was a "no reserves sale", and as such the property had to be sold to the highest bidder. *Id.* Thus, enforcing that rule would have been antithetical to a "no reserves sale." *Id.* Florance's bid (now assigned to Bar TL Corp.) was the highest bid, thus, Bar TL was under no obligation to deliver title to Pitchfork. *Id.* The complete analysis of the Wyoming Supreme Court does an excellent job of explaining what a reserves auction is and what a no-reserves auction is, and the legal significance of each.

> While the above enumerated facts stand uncontroverted in the record the only ones essential to our decision herein are: (a) the auction was advertised as a no-reserves sale; and (b) there was a higher bid than that made by Pitchfork.
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> It becomes necessary, therefore, to call upon the law of auctions and auctioneers to see if Bar TL and Pitchfork entered into a binding contract of sale.
>
> AUCTIONS AND AUCTIONEERS
>
> *What is an Auction Sale?*
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> The legal definition of an auction is "a public sale of property to the highest bidder." The popular concept of an auction is identical to the legal

definition of an auction. Webster's Third New International Dictionary; and *Brewer v. Cowan*, 220 La. 189, 56 So.2d 149, 150 (1951).

It is said in 7A C.J.S. Auctions & Auctioneers § 2, p. 853:

"An auction is a public sale of property to the highest bidder, by one licensed and authorized for that purpose. The main purpose of auction sales is to obtain the best financial returns for the owner of the property sold; and they are based on the purpose and policy of obtaining the worth of property by free and fair competition among the bidders. . . ." (Footnote references omitted.)

It is said in 7 Am.Jur.2d, Auctions and Auctioneers, § 1, p. 360:

"The custom of selling goods at auction is as old as the law of sales. An auction, as usually defined, is a public sale of property to the highest bidder. Competitive bidding is an essential element of an auction sale; hence, any agreement unfairly restrictive of that opportunity is against public policy and void, ..." (Footnote references omitted.)

Offer and Acceptance With Reserve Auctions

It is said in 7 Am.Jur.2d, § 16, supra, at pp. 374-375:

"A sale at auction, like every other sale, must have the assent, express or implied, of both seller and buyer. An announcement of an auction or the act of putting property up for sale at auction does not constitute an offer to sell capable of acceptance by the making of a bid. An advertisement of an auction is not an offer to sell which becomes binding, even conditionally, on the owner when a bid is made. Rather, an announcement that a person will sell his property at public auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received. It is a mere invitation to those attending the sale to make offers by bids. The contract becomes complete only when the bid is accepted, this being ordinarily denoted by the fall of the hammer." (Footnote references omitted.)

The aforesaid text goes on to say:

"These common-law principles are adopted by the Uniform Commercial Code." (Footnote references omitted.)[11]

Thus, it can be said that where the auction has not been announced to be without reserve, the sale contract is consummated by the offer of the bidder to buy and the acceptance of the bid by the seller.

Corbin on Contracts § 108, "Auction Sales Offers to Sell and to Buy," pp. 481-483, puts it this way:

"When an auctioneer presents an article for sale at auction and asks for bids, he is ordinarily not making an operative offer and creates no power of acceptance. Instead, he is asking for offers to be made to him; and the bids made in response thereto are themselves offers that can be revoked by the bidders prior to an acceptance by the auctioneer. This is true even though the seller or his representative has issued advertisements or made other statements that the article will be sold to the highest bidder, or is offered for sale to the highest bidder. Such statements are merely preliminary negotiation, not intended and not reasonably understood to be intended to affect legal relations. When such is the case, the seller or his representative is as free to reject the bids, highest to lowest, as are the bidders to withdraw them. The seller may at any time withdraw the article

> from sale, if he has not already accepted a bid. He need give no reasons; indeed, he rejects all bids by merely failing to accept them by doing nothing at all. It is not necessary for him to say that 'the privilege is reserved to reject any and all bids.' Such a statement is merely evidence that the goods are not being offered 'without reserve.' " (Footnote references omitted.)

This court's holding in *State v. State Board of School Land Comm'rs*, 27 Wyo. 54, 61-62, 191 P. 1073, 1075 (1920), is consistent with the principles announced above when we said in a matter involving a with-reserves auction:

> ". . . 'Acceptance of a bid is denoted by the fall of the hammer, or by any other audible or visible means signifying to the bidder that he is entitled to the property on paying the amount of his bid according to the terms of the sale. Once a bid has been accepted, the parties occupy the same relation toward each other as exists between promisor and promisee in an executory contract of sale conventionally made. Thereafter, as a rule, the seller has no right to accept a higher bid, nor may the buyer withdraw his bid.' 2 R.C.L. 1126; *Coker v. Dawkins*, 20 Fla. 141, 153; *State v. Hoboken Bank*, 84 Md. 325-331, 35 Atl. 889; *Sherwood v. Reade*, 7 Hill (N.Y.) 439."

In summary, then, the law seems to be settled that in an auction with reserves which seems to include all auctions where the advertisements and preliminary information representations do not announce the sale to be without reserves the contract is formulated by the offer of the bidder and the acceptance of the seller.

Offer and Acceptance No Reserves Auctions

A "no reserves " auction is significantly different than the auction with reserves above described. As has been noted, in auctions with reserves the bidder is deemed to be the party making the offer, while the auctioneer (as agent for the seller), is the offeree with authority to either accept the bid or reject it. The ramifications of this are that the latter need not sell if he or his principal chooses not to and may, at any time before the hammer falls, withdraw the property from the auction block. If the bidding is too low, the auctioneer need do nothing and there is no resulting contract between the seller and any bidder. This is not the case with a no-reserves auction.

In the no reserves type of sale, which is the kind of sale with which we are here concerned, the legal relationship as between the seller and bidder is reversed. In the no-reserves sale, the seller becomes the offeror and the bidder the offeree by reason of a collateral contract theory which will be discussed in detail, infra. This role-switching exercise results in a significant readjustment of rights and obligations between the parties. For example, in the no-reserves auction, the contract is consummated with each bid, subject only to a higher bid being received. This is so because the seller makes his offer to sell when he advertises the sale will be a no-reserves sale to the highest bidder. Once the first bid has been received, the only acceptance which forms a binding agreement is the one offered by the highest bidder. In this type of sale, the seller may not withdraw his property once any legitimate bid has been submitted, as he may do at any time before the hammer falls in the with-reserves auction. In the no-reserves situation, the seller is absolutely committed to the sale once a bid has been entered, no matter what the level of bidding or the seller's notion of the property's true value. This is the catastrophic situation in which Housel found himself where $4,000,000.00 worth of his property was being bid at the

$1,600,000.00 level. He could not extricate his property from the sale because he had committed it to sale to the highest bidder (no matter how low the bid) but that was his only commitment that he would sell to the highest bidder. He was not committed to selling to the next highest bidder.

Lastly, all parties who have been notified of the fact that the sale is a no-reserves auction are bound by the consequences which flow from the law applicable thereto.

The propositions aforesaid are supported by the following discussion of authorities:

Authority Relative to No-Reserves Auctions

It is said in 7 Am.Jur.2d, s 17, Auctions and Auctioneers, "Withdrawal of property; sales without reserve," p. 376:

> ". . . The words 'without reserve' as used in auctions are words of art, as showing prospective bidders that the property will actually go to the bidder offering the highest price, and the seller may not nullify this purpose by bidding himself or through an agent, or by withdrawing the property from sale if he is not pleased with the bids." (Footnote reference omitted and emphasis supplied.)

At 7A C.J.S. Auctions and Auctioneers s 11, entitled, "Right to Withdraw Property; Sales without Reserve," pp. 868-869, it is said:

> "Until the hammer falls and a bid is accepted, a locus penitentiae remains, and the seller may withdraw his property from sale; and he may withdraw it before any bidding, even where the sale is without reserve. The owner is under no legal duty to hold an advertised auction sale and may call it off without incurring liability to the buyers.
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> "However, when the auction is 'without reserve,' the owner of the property may not withdraw it from sale after bidding has commenced, and the owner may be held liable for withdrawal of the property from the sale after a bid. The words 'without reserve' are words of art and mean that in making such an announcement the owner enters into a collateral contract with all persons bidding at the auction that he will not withdraw the property from sale, regardless of how low the highest bid may be; and the highest bona fide bidder at an auction 'without reserve' may insist that the property be sold to him or that the owner answer to him in damages. A statement that the sale would be made to the highest bidder, or that part or all of the property would be sold that day, is not the equivalent of an announcement that the auction will be 'without reserve.' " (Footnote references omitted, and emphasis supplied.)

Corbin on Contracts, supra, pp. 483-484, says:

> "An auction sale is one in which the price is determined by the competition of bidders. Even at such a sale as this, it is possible for the seller to make an operative offer to sell and thus cause each bid to be an acceptance of the offer. All that is necessary is that the seller shall express such an intention clearly and bring it sufficiently to the attention of the bidders. One mode of expression has been in such common use as to have received judicial interpretation. If the seller states in his advertising of the auction, or states openly at the place of auction, that the sale will be 'without reserve', the seller thereby promises to sell the goods to the bidder who makes the highest bid in the competition at that time and

place. Before any bid has been made in response to such an offer, the seller has the power to revoke and to withdraw the goods from sale; but after one bid has been made the seller's offer is held to be irrevocable. He is under a legal duty to sell the goods to the bidder at the price bid, conditional only on the absence of any *550 higher bid at that time and place." (Footnote references omitted and emphasis supplied.)

See, also, American Law Institute, Restatement of the Law of Contracts § 27, p. 34, where the black-letter law says:

"§ 27. AUCTIONS: SALES WITHOUT RESERVE.

"At an auction, the auctioneer merely invites offers from successive bidders which he may accept or reject unless, by announcing that the sale is without reserve or by other means, he indicates that he is making an offer to sell at any price bid by the highest bidder. In that case after a bid has been made the auctioneer cannot withdraw. Even though the sale is announced to be without reserve any bidder may withdraw his bid until the auctioneer by fall of hammer, or in other customary manner, announces that the sale is complete."

In Vol. 15, Minnesota Law Review, 1931, in an article entitled "Bids as Acceptance in Auctions 'Without Reserve,' " at page 389, Professor Harvey Hoshour makes reference to the American Law Institute's "Official Draft" of the above-quoted § 27 and quotes the following from the "explanatory note appended to section 27":

" 'It must be possible . . . for an auctioneer, if he uses appropriate language, to become the offeror. An announcement that goods will be sold to the highest bidder has this effect. Fairly interpreted the language means that the auctioneer promises that whoever makes the highest bid shall become owner of the subject matter of the sale.' "

These propositions are expressed by the author in Williston on Contracts, Third Edition § 29, pp. 76-77, entitled, "Formation of Contract at Auction," when he says:

". . . But the law has adopted the doctrine that putting up goods for sale is merely an invitation to those present to make offers which they do by making bids, one of which is ultimately accepted by the fall of the hammer. By the weight of authority, the auctioneer may be said to invite offers. Since the bargain is incomplete until the hammer falls, a bidder may retract his bid until that time.

"The same point is involved in decisions turning on the right of the auctioneer to withdraw an article offered for sale; and for the same reason, until the hammer falls, the auctioneer may withdraw, unless it has been advertised or announced that the sale shall be without reserve. If such an advertisement or announcement has been made, the property may not be withdrawn after it has been put up and a bid made.

"Apart from statute, it would seem that it is a strong inference of fact that the auctioneer merely invites offers, and that he might make himself the offeror by using language appropriate to the purpose, that is, by using language which, fairly interpreted, amounts to a promise on his part to sell to any person who shall make the highest bid. The announcement that he will sell without reserve, made in any form of words, would justify this interpretation. With reference to the sale of

goods, it has been enacted that such an announcement binds the auctioneer, though the bidder may withdraw his offer at any time prior to the fall of the hammer." (Emphasis supplied.)

In the Minnesota Law Review article, supra, at page 377, the author expresses the concept in the following way:

". . . It is the very fact that the sale is announced to be without reserve by the person who is responsible therefor that justifies the bidders, acting reasonably, in understanding that the property involved will be sold to the highest bidder, and that in such case a sale will be completed by each bid, subject only to the condition that no higher bid be received. It is conceivable that bidders would understand without such statement or its equivalent that even the putting up of goods does not constitute an offer, but where the sale has been announced to be without reserve the proposition is so unequivocal that a reasonable bidder could, it is submitted, understand it as meaning only one thing. . . ."

The doctrine was earliest analyzed in the holding in the English case of *Warlow v. Harrison* (1859) 1 E. & E. 309, where the court used the following language in a suit by the highest bidder against the auctioneer where the principal was undisclosed:

" 'The name of the auctioneers, of whom the defendant was one, alone was published; and the sale was announced by them to be without reserve. This, according to all the cases both at law and equity, means that neither the vendor nor any person in his behalf shall bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not; *Thornett v. Haines*, 15 M. & W. 367. We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward, or that of a railway company publishing a time table stating the times when, and the places to which, the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue upon a contract with him; *Denton v. Great Northern Railway Company*, 5 E. & B. 860. Upon the same principle, it seems to us that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts up for sale upon such a condition pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that this contract is made with the highest bona fide bidder; and, in case of a breach of it, that he has a right of action against the auctioneer. . . .' " Vol. 15, Minn.L.R., supra, at 379.

Modern American cases have followed and are following this doctrine.

In *Zuhak v. Rose*, 264 Wis. 286, 58 N.W.2d 693 (1953), where the owner in a no-reserves auction withdrew the property because the bids were not high enough, the court, construing the Uniform Sales Act, held that the seller could not withdraw and he was bound to sell to the highest bidder.[12] [[12] It is said in states where the Uniform Commercial Code has been adopted that the law is the same. See 7 Am.Jur.2d, Auctions and Auctioneers s 17, p. 377, where it is said: "Under the provisions of the Uniform Commercial Code an auction sale is with

reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve, the auctioneer may withdraw the goods at any time until he announces completion of the sale; in an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. Similar provisions exist under the Uniform Land Transactions Act."] The court said:

> "The words 'without reserve' as used in auctions are words of art, assuring prospective bidders that the property will actually go to the bidder offering the highest price. The seller may not nullify this purpose by bidding himself or through an agent, nor by withdrawing the property from sale if he is not pleased with the bids. Thus, the seller may not refuse to accept a bid where the auction is without reserve; the bid itself establishes a right in the bidder to have the property unless someone else by raising his bid succeeds to his right." 58 N.W.2d at 696.

The court then went on to say:

> " ' * * * (W)here a sale is advertised or stated to be without reserve, there is an implied guaranty that the property is to be sold to the highest bidder, and each bidder has the right to assume that all previous bids are genuine, and the seller in substance so assures him; * * *.' 7 C.J.S. Auctions and Auctioneers § 7, page 1257." (58 N.W.2d at 696),

and concluded with the thought

> ". . . that when the real estate in question was put up for sale and the first bid made on it, defendant could no longer withdraw it but was bound to accept the highest bid unless other bids for different combinations of parcels or bids for the farm as a whole produced more money, as specified in the advertisement. Defendant cannot defeat the right which plaintiff had acquired as highest bidder either by withdrawing the specific land from sale or by failing to fulfill the promise of the advertisement. . . ." 58 N.W.2d at 697. (Emphasis supplied.)

In *Drew v. John Deere Company of Syracuse, Inc.*, 19 A.D.2d 234, 241 N.Y.S.2d 267, 269-270 (1963), the court said:

> "The plaintiff's whole case rests upon the theory that the auction was one 'without reserve'. At such an auction, the owner of the property has no right to withdraw the property after bidding has commenced. It is also necessarily implicit in an auction 'without reserve', that the owner of the property may not himself bid in the property, as this would be equivalent to withdrawing it from sale (Restatement, Contract, s 27). Various legal theories have been advanced for the holding that the announcement that the auction would be 'without reserve' imposes a binding legal obligation upon the owner, but the best view seems to be that the owner, by making such an announcement, enters into a collateral contract with all persons bidding at the auction that he will not withdraw the property from sale, regardless of how low the highest bid might be (Gower, 'Auction Sales of Goods Without Reserve,' 68 Law Quarterly Review 457; Warlow v. Harrison (1859) 1 E. and E. 295, 309). Therefore, the highest bona fide bidder at an auction 'without reserve' may insist that the property be sold to him or that the owner answer to him in damages (*Zuhak v. Rose*, 264 Wis. 286, 58 N.W.2d 693; *Forbes v. Hunter*, 223 Ill.App. 400; *Jones v. Hackensack Auto Wreckers*, 124 N.J.L. 289, 11 A.2d 595; 7 Am.Jur.2d

Auctions, § 21, p. 240; Annot., 37 A.L.R.2d 1049, 1056; 1 Corbin on Contracts, § 108, p. 341; 2 Williston on Sales, § 297, p. 205).

"On the other hand, in an auction not expressly announced to be 'without reserve', the owner may withdraw the property at any time before it is actually 'knocked down' to a bidder by the auctioneer. There is no contract until the offer made by the bidder is accepted by the auctioneer's 'knocking down' the property to him (Personal Property Law, s 102, subd. 2). 'An action "with reserve" is the normal procedure' (Comment 2 to section 2-328, Uniform Commercial Code)." (Emphasis supplied.)

In *Wilcher v. McGuire*, Mo.App., 537 S.W.2d 844 (1976), the owner refused to sign the contract of sale to the highest bidder and the argument centered around the question of whether the pronouncements made by the auctioneer preceding the bidding rendered the sale one with or without reserve. Defendant-seller contended that the sale was "with reserve" and she could, therefore, withdraw the land the high bidder contending the sale was "without reserve," which, when the high bid was made, rendered the collateral contract consummated. The court said:

". . . The words 'without reserve' are words of art and mean that in making such an announcement the owner 'enters into a collateral contract with all persons bidding at the auction that he will not withdraw the property from sale, regardless of how low the highest bid might be (citations omitted). Therefore, the highest bona fide bidder at an auction "without reserve" may insist that the property be sold to him or that the owner answer to him in damages (citations omitted).' *Drew v. John Deere Company of Syracuse*, Inc., 19 A.D.2d 308, 241 N.Y.S.2d 267, 269(1, 2) (1963).

"Thus, in this case the plaintiffs argue that by stating all or part of the property would be sold on that day, the auctioneer was stating the sale was to be 'without reserve'." 537 S.W.2d at 846. (Emphasis supplied.)

The United States Court of Appeals, Tenth Circuit, adopts the collateral-contract no-reserves doctrine set out herein where, in *United States v. Blair*, 10 Cir., 193 F.2d 557 (1952), the United States brought action against one Blair to recover the difference between a bid of $100.50 and a bid of $1,542.00 by a third party whose bid was overlooked. The advertised condition of the sale was:

". . . 'In all cases the property will be awarded to the bidders submitting the highest bid. If through error we should make an award to someone other than the high bidder, the erroneous award will be revoked and the proper award will be made.' " 193 F.2d at 559.

The court found the above-quoted condition controlled when it said:

"Generally, a sale by auction is complete when the auctioneer announces its completion. 7 C.J.S., Auctions and Auctioneers § 7, page 1250. And, title passes to the successful bidder at that time, unless the parties intend to the contrary. *Harris v. Merlino*, 137 N.J.L. 717, 61 A.2d 276; *Lott v. Delmar*, 2 N.J. 229, 66 A.2d 25; 7 C.J.S. Auctions and Auctioneers § 8, page 1260. The owner of the property offered for sale at the auction has the right to prescribe the manner, conditions and terms of the sale. 7 C.J.S., Auctions and Auctioneers, § 7, page 1251. The buyer may rely upon such announced terms and conditions of the sale, and he is likewise

bound thereby, whether present at the time of the announcement or has knowledge thereof. 5 Amer.Juris. Auctions, Sec. 15, p. 454; *Kivett v. Owyhee County*, 58 Idaho 372, 74 P.2d 87; *Erie Coal & Coke Corp. v. United States*, 266 U.S. 518, 45 S.Ct. 181, 69 L.Ed. 417; See Annot. 28 A.L.R. 991.

"It follows that the award to Blair and the issuance of the title documents were subject to the announced condition that if his bid was not the highest one, the award would be 'revoked and the proper award will be made', . . .

". . . Here, the highest bid was an unalterable condition of the sale, and title did not unconditionally pass to any other bidder." 193 F.2d at 560. (Emphasis supplied.)

The Auctioneer's Discretion in a No-Reserves Auction

In light of the above, we place little store in the appellant's argument that the auctioneer, through his right to establish bidding increments, has the power to defeat the seller's contract with the highest bidder in a no-reserves auction.

Succinctly stated: The auctioneer's authority must and is determined by his contract. It is said in 7A C.J.S. Auctions and Auctioneers § 5, supra, p. 861:

"Auctioneer's authority, when based upon the express contract or instrument, is governed by its terms. . . ."

Here the auctioneer was bound by contract to

"use their (his) best efforts to obtain buyers who will pay the highest prices obtainable at the public auction."

In pursuit of this purpose, the auctioneer agreed to conduct in fact insisted upon conducting a no-reserves auction. As we have seen, in a no-reserves auction there can be no contract except with the highest bidder. This means that once the policy decision is made that the auction will be a no-reserve sale, and bidding has commenced, the auctioneer has no more discretion with respect to whether he will or will not sell to a bidder other than he who makes the highest bid than does the owner which is none at all. The owner can't withdraw his property once bidding has commenced and title to his property must and does pass to the highest bidder. For all the same reasons, the auctioneer cannot consummate a sale in the owner's behalf with anyone except the highest bidder. It follows that a no-reserves auction cannot be conducted, as it was in this case, with an increment policy which has as its effect the rejection of the highest bid, for the reason that the owner, when he advertises the no-reserves auction, makes an unconditional offer to sell only to the highest bidder.

Pitchfork, informed of the highest-bidder concept in the no-reserve rule (see fn. 6, supra), cannot here be heard to assert and rely upon the auctioneer's erroneous understanding of the law and the auctioneering business in order to defeat the law of no-reserves auctions. Pitchfork came to the sale relying upon the highest-bidder requirement of the no-reserve rule and is bound by the rule, as is everyone connected with the sale.

The cold, hard fact of the matter is that there was no contract entered into with Pitchfork because it did not submit the highest bid in a no-reserve auction, where only the highest bidder is qualified to contract with the seller for purposes of acquiring title to the property.

CONCLUSION

Under the above authorities and for the reasons set out herein, a no-reserves sale contemplates that the offer to sell to the highest bidder is made by the seller when he advertises the property for sale at auction and undertakes to conduct the auction without reserve. All bidders at such sale are bound to the no-reserves condition of the sale. There is no contract of sale until the highest bid is made. The seller's contract is with the highest bidder. The highest bidder can enforce his rights in damages. Other bidders have no right against the seller because they have no contract upon which to base a right of action. Since there is no contract possible except that which exists between the highest bidder and the seller, the appellant's argument to the effect that the sale was consummated between the seller and Pitchfork because of the auctioneer's minimum-increment policy is without validity. The auctioneer agreed to a no-reserves sale and he is bound by it, as is Bar TL, Pitchfork and all other bidders.

The trial court was correct in its conclusion. Pitchfork's was not the highest bid in a no-reserves sale where contract with the highest bidder is requisite to the passage of title. Since a contract of sale was not consummated between Bar TL and Pitchfork, Bar TL is under no obligation to deliver title to the subject ranch properties to Pitchfork.

Affirmed.

615 P.2d 546--554.

The other case this Court reviewed is *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964). In that case, the Secretary of Interior, Stewart Udall, invited bidding on some isolated tracts of public land. *Id.* at 708. Before a cash certificate was issued to the high bidder on two of the sales, the Secretary determined the land was appraised several times higher than the high bid price, and the Secretary entered an order vacating the sale. *Id. at* 709. The high bidders on the two different sales sued the Secretary claiming it was an abuse of discretion for the Secretary to not issue the certificates to the high bidders. *Id.* The Ninth Circuit Court of Appeals held that the procedure developed by the Secretary for selling these tracts resembled, "an auction with reserve, since the Secretary reserves the right to reject any and all bids prior to the issuance of the certificate. See Restatement, Contracts 27; *Wilcoxson v. United States*, 114 U.S.App.D.C. 203, 207, 313 F.2d 864, 888." *Id.* at 710. The Ninth Circuit Court of Appeals rejected the bidders' argument that the public notice had to state that the auction was being held with reserve,

in order for these conditions to be binding. *Id.* The Ninth Circuit Court of Appeals held, "[h]owever, in this kind of auction, as in any other, the auction is deemed to be conducted with reserve, unless there is an express announcement or advertisement to the contrary before the auction takes place. 1 Williston, Contracts (3d ed.) § 29, pages 76-77. For this reason, even without the regulations, the Secretary had a right to reject a bid." *Id.* "In our view, however, the difference in reason given for refusing to sell is no basis for distinguishing the cases [the case at hand from *Wilcoxon*], since the Secretary, in his discretion, may refuse to sell for whatever reason he finds adequate." *Id.* at 711. The Ninth Circuit Court of Appeals found, "the Secretary's refusal to issue these certificates is not subject to judicial review." *Id.*

One treatise, Contracts, E. Allen Farnsworth, describes the relationship as follows:

> The reasoning behind these reward cases [where a reward is "offered" for furnishing information that leads to the apprehension of a criminal, and only a very limited number of people will have information and be able to accept that offer] is not, however, applied to proposals to sell to the highest bidder. When an auctioneer puts property up for sale to the highest bidder, he is taken, in the absence of a contrary understanding or usage, to be interested in entertaining offers in the form of bids, not in making an offer. Even though only one of the many possible bidders could claim the property as the highest bidder, it is assumed that even the highest bid might be too low. The auctioneer's proposal is not an offer, but each bid is an offer that the auctioneer may accept or reject. Under the Uniform Commercial Code, there is no contract until the accepts by "the fall of the hammer or in other customary manner."[28] [[28] UCC 2-328(2). *Accord: Anderson v. Wisconsin Cent. Ry.*, 107 Minn. 296, 120 N.W. 39 (1909) (auctioneer sold land to second highest bidder because the highest bidder's raise was too small); *Payne v. Cave*, 3 Term. R. 148, 100 Eng. Rep. 502 (K.B. 1789) bidder retracted bid on goods). Although the Code rule applies only to auctions of goods, it largely restates the common law, and courts can be expected to apply it by analogy in cases involving auctions of land. *Pitchfork Ranch Co. v. Bar RL*, 615 P.2d 541 (Wyo. 1980) (though the Code is "inapplicable to the sale of realty, its provisions with respect to auctions are useful").] Such a typical auction is described as being "with reserve." If the auction is announced to be "without reserve," the Code provides that the "putting up" of an item for bids amounts to a commitment, irrevocable for a reasonable time once the auctioneer calls for bids, to sell the item to the highest bidder.[29] [[29] UCC 2-328(3). *Cf. Pitchfork Ranch v.*

> *Bar TL, supra* note 28 (land: auctioneer had no authority "to defeat seller's contract with the highest bidder" by requiring minimum bidding increments); see also *Sly v. First Natl. Bank*, 387 So.2d 198 (Ala. 1980)(Bank's announcement that it would sell to the "highest, best and last bidder" was not sufficient to make auction without reserve); *Short v. Sun Newspapers*, 300 N.W.2d 781 (Minn. 1980) ("whether the solicitation for [bids] was an offer or only an invitation to make an offer is a question of fact.")] But although the auctioneer may not withdraw the item, a bidder may retract his bid before the auctioneer announces completion of the sale. The rule for auctions "with reserve" is applied by analogy to construction contracts that are to be awarded on the basis of public bidding. Generally the owner merely "invites" offers, and it is the contractor's bid that is the offer.

Contracts, E. Allen Farnsworth, § 3.10 p. 129--131, 1982. The pertinent portions of the Uniform Commercial Code read:

> **§ 2-328. Sale by Auction**
> (1) In a sale by auction if goods are put up in lots each lot is the subject of a separate sale.
> (2) A sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior priod the auctioneer may in his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.
> (3) such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, that article or lot cannot be withdrawn unless no bid is made within a reasonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.
> (4) if the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid, and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection shall not apply to any bid a a forced sale.

U.C.C. § 2-328(1)--(4).

The Court finds as undisputed facts: 1) Ignite mad a offer to solicit bids, and 2) at no time has Ignite accepted any party's bid. There is no justiciable controversy from which this Court may make a decision on this declaratory judgment action. Accordingly, this Court finds that it cannot decide the two motions for summary judgment.

Swallow/Alvarado distinguish *Pitchfork Ranch Company* and *Ferry* as follows.

> Although Plaintiffs address the cases cited by the Court in detail below, Plaintiffs point the Court's attention to *Scott v. Buhl Joint School Dist. No. 412*, 123 Idaho 779, 852 P.2d 1376 (1993). In that case, a bidder (Scott) was not awarded a contract for bus transportation even though the bidding statute at issue required that the bid be awarded to the lowest bidder. The Court looked to the school district's bidding statutes and found that an award to the lowest responsible bidder was mandatory:
>
> > As our emphasis indicates, the statute speaks in mandatory terms. *See Goff v. H.J.H. Co.*, 95 Idaho 837, 839, 521 P.2d 661, 663 (1974) ("The word *shall,* when used in a statute, is mandatory." (emphasis in original)). This statute mandates that once bids are received by the board of trustees, it must award the contract to the lowest bidder unless the lowest bidder is not a "responsible" bidder.
>
> *Id.* at 783, 1380 (emphasis added). Thus, the Court ruled that the school district had a legal duty to award the contract to Scott as the lowest responsive bidder.
>
> Like in *Scott,* Ignite has a legal duty to sell the Property to Plaintiffs. Ignite chose to sell the Property to a private party pursuant to its authority under Idaho Code § 50-2011, which allows Ignite to prescribe its competitive bidding rules. By resolution, Ignite invoked the municipal sale laws outlined in I.C. § 50-1403(1). *See Ignite's SUF*, at 4. That statute provides:
>
> > When the property is offered for sale, the property shall be sold at a public auction to the highest bidder and no bids shall be accepted for less than the minimum declared value previously recorded on the record at a public meeting of the council, provided however, if no bids are received, the city council shall have the authority to sell such property as it deems in the best interest of the city.
>
> (emphasis added). Not only does the statute require that Ignite award the Property, but the Bid Packet also requires that result because it contains no reservation to reject all bids, and does contain an obligation to have the highest bidder enter into the Purchase and Sale Agreement with Ignite. Thus, like *Scott*, Ignite has a mandatory obligation to convey the Property to the highest bidder, "unless the lowest bidder is not a 'responsible' bidder." *Scott, supra*. As Plaintiffs have previously briefed in further detail, Clark's bid did not comply with the instructions of the Bid Packet and is not responsive. Accordingly, Ignite has a legal duty to reject Clark's bid, and pursuant to the statutory authority that it has cited for purposes of this sale, Ignite shall award the Property to the highest responsible bidder--the Plaintiffs.

Pls./Counterdefs.' Suppl. Mem. in Supp. of Mot. for Summ. J. 3-5 (underlining in original).

The Court is not persuaded by such argument. *Scott* is distinguishable in a couple of

ways. *Scott* dealt with a bid for services by a public entity (low bid wins), which seem to be treated differently by case law interpretation than bids for the sale of land (high bid wins). The situation in *Scott* was clearly controlled by statute, in that case Idaho Code Section 33-1510. Idaho Code Section 33-1510 specifically requires the school board "*shall* award the contract to the lowest responsible bidder." *Scott*, 123 Idaho 779 at 783, 852 P.2d 1376, 1380 (1993). The statute applicable in the present case is Idaho Code Section 50-1403(1). The language in that statute reads in part, "[w]hen the property is offered for sale, the property shall be sold at a public auction to the highest bidder and no bids shall be accepted for less than the minimum declared value...". I.C. § 50-1403(1). That statute requires the sale at auction to the highest bidder, but the statute does nothing to claw back from the public entity its right to reject a bid, or to reject all bids, or its right to not accept any bids. This Court agrees with the statement made by counsel for Ignite, "[i]f the property is going to be sold, it must be sold to the highest bidder. However, the statutes do not make a sale mandatory." Ignite CDA's Suppl. Mem. of Law, 3. There is no Idaho appellate court case interpreting the pertinent language of that statue, but this Court is convinced our Idaho appellate courts would not likely ignore case law such as *Pitchfork Ranch Company* and *Ferry*, well established contract law treatises and the Uniform Commercial Code. Finally, the pertinent portion of Idaho Code Section 50-1403(1), "no bids shall be accepted for less than the minimum declared value...", make the bid a reserve bid, not a "no reserve" bid. As the case law shows, a "no reserve" bid flips the offeror and offeree relationship.

Swallow/Alvarado's argument continues:

> The Court cites to *Pitchfork Ranch Co. v. Bar TL*, 615 P.2d 541 (Wyo. 1980) and *Ferry v. Udall*, 336 F.2d 706 (9th Cir. 1964) as persuasive authority guiding the Court's concerns. Plaintiffs submit that *Pitchfork Ranch* and *Ferry* are distinguishable as both cases focus on the contract

principles for awarding property when a seller desires to reject a bid or invalidate a sale.

Pitchfork Ranch involved the sale of private property by an auctioneer in a "no-reserve" auction setting. The Court went to great lengths to distinguish between a reserves auction (where no contract is formed and a seller reserves the right to reject all bids) and a no-reserve auction (where the seller creates an irrevocable offer to sell to the highest bidder). 615 P.2d at 548. The Court concluded in that case that the auctioneer's attempt to create a minimum bidding increment requirement was invalid and could not be used to reject the highest submitted bid in a "no-reserve" auction. *Id.* at 553. Although *Pitchfork Ranch* provides potentially persuasive case law with respect to private auction sales, this is not applicable to the facts at hand.[1] [[1] Furthermore, *Pitchfork Ranch* does not provide any legal authority on how a contractual right would arise pursuant to a "sealed bid" process versus a live auction process.] The Idaho Supreme Court has already ruled on the steps that a court must take in reviewing public bids for the sale of public property. *Parks v. City of Pocatello*, 91 Idaho 241, 419 P.2d 683 (1966). In the public context, a court must first determine if the bidder complied with the terms of the bid packet. If he/she did not, then the person does not even reach status as a "bidder" and the public agency has a legal duty to reject the bid. *Id.* at 245, 687.

Although *Ferry* did involve a public agency sale scenario, it too is distinguishable because it involved a reserve auction sale wherein the public agency (the Department of the Interior) vacated the sales to the highest bidders prior to issuing final sale certificates. 336 F.2d at 709. The applicable statute authorizing the Department to sell property expressly held that the sale was not final, and thus no contractual obligations were created, "until the issuance of a cash certificate." *Id.* In contrast, Ignite's statutory authority to sell property to private parties requires that Ignite make competitive bidding rules (here, the Bid Packet). The Bid Packet provides that the highest Bidder must enter into the Purchase and Sale Agreement within 60 days and does not reserve the right for Ignite to reject all bids. Furthermore, the statutory authority for the sale of property by municipal agencies, relied upon by Ignite, provides that the entity "must sell the property to the highest bidder." I.C. § 50-1403. Thus, in stark contrast to *Ferry*, Ignite does not have any statutory discretion to reject bids and in fact is required to sell to the highest bidder. Moreover, *Ferry* is crucially distinguishable because the agency in that case was seeking to reject all bids, whereas Ignite claims to have "interplead" the property and has specifically asked this Court to award the property to either Plaintiffs or Clark.

Because the posture of this case does not involve a private "no-reserves" auction, nor does it involve a public agency seeking to invalidate or avoid the award of the Property, these cases are not pertinent to whether Ignite is required to award the Property to Swallow-Alvarado in this instance. The Court is free to review the validity of the bids to determine which bidder is entitled to enter into the Purchase and Sale Agreement with Ignite.

Pls./Counterdefs.' Suppl. Mem. in Supp. of Mot. for Summ. J., 5--6 (underlining in original). This Court agrees that a "sealed bid" process such as occurred in the present case places an interesting wrinkle on the situation. Most case law involving auctions of property seem to involve live auctions. However, this Court could find no case law on its own, and this Court has been presented with no case law by the parties in this case, as to why a "sealed bid" process would obviate case law such as *Pitchfork Ranch Company* and *Ferry*, well established contract law treatises and the Uniform Commercial Code. This Court cannot find a practical reason why such established law would be different in a sealed bid situation. This Court finds Swaliow/Alvarado's argument that *Pitchfork Ranch Company* is distinguishable because it concerned the sale of private land, to be without merit, especially in light of *Ferry*, which dealt with the sale of public land. Swallow/Alvarado's argument that in *Ferry,* "[t]he applicable statute authorizing the Department to sell property expressly held that the sale was not final, and thus no contractual obligations were created, 'until the issuance of a cash certificate.'" *Id.* at 6. A cursory reading of *Ferry* shows the Ninth Circuit Court of Appeals found that the applicable statute lead to the same result as case law. As this Court discussed above, the Ninth Circuit Court of Appeals held that the procedure developed by the Secretary for selling these tracts, resembled "an auction with reserve, since the Secretary reserves the right to reject any and all bids prior to the issuance of the certificate." 336 F.2d at 710. This Court agrees with the arguments and statements set forth by Ingite in Ignite CDA's Supplemental Memorandum of Law. Specifically, this Court has read the case cited in that memorandum, *King v. Alaska State Housing Authority*, 633 P.2d 256 (Ala. 1981) and finds it instructive. *King* concerned a bid for a contract to redevelop land for a public agency. 633 P.2d at 258. The land had been condemned by the public agency, and part

of the land condemned had been owned by the plaintiffs King and Cherrier, prior to condemnation. *Id.* The public agencies rules gave a preferential consideration to prior owners for the redevelopment contract, but only if the prior owner's proposal was equal to or superior to the proposals of other developers. *Id.* King and Cherrier were not awarded the redevelopment contract and sued the public agency for damages. *Id.* While *King* did not concern an "auction", the case did involve bids solicited by a public agency. The Alaska Supreme Court held:

> It is established that in Alaska, as elsewhere, an agency's solicitation of bids is not an offer, but rather a request for offers; no contractual rights based on the content of a bid arise prior to its acceptance by the agency. *Beirne v. Alaska State Housing Authority*, 454 P.2d 262, 264 (Alaska 1969). This principle was recognized by the Court of Claims in *Heyer Products Company, Inc. v. United States*, 140 F.Supp 409, 412 (Ct.Cl. 1956):
>
> > The advertisement for bids was, of course, a request for offers to supply the things the Ordnance Department wanted. It could accept or reject an offer as it pleased, and no contract resulted until an offer was accepted. Hence, an unsuccessful bidder cannot recover the profit he would have made out of the contract, because he had no contract.

633 P.2d at 261. *King* is certainly consistent with *Pitchfork Ranch Company* and *Ferry*, consistent with well-established contract law treatises and consistent with the Uniform Commercial Code.

Moving forward from this juncture, the solution would is in the hands of Ignite. Ignite could accept one of the two bids. Once one of the bids is accepted, in theory this litigation could resume. Alternatively, Ignite could continue to not accept either bid, and try to clean up the mess it created by having another auction and making it clear this time around whether escalation clauses are allowed.

Finally, this Court must address the attorney fees issue. Both Swallow/Alvarado and Clark claim they are entitled to attorney fees against Ignite. The Court refuses to grant attorney fees to Swallow/Alvarado or to Clark, against Ignite. The Court finds an

award of costs in favor of any party against Ignite, would not be just under Idaho Code Section 10-1210 (costs under declaratory judgments). The Court finds neither Swallow/Alvarado nor Clark have a contract with Ignite, so no attorney's fees can be awarded under Idaho Code Section 12-120(3). Additionally, an action by an unsuccessful bidder does not allege a commercial transaction within the meaning of Idaho Code Section 12-120(3). *Scott v. Buhl Joint Sch. Dist. No. 412*, 123 Idaho 779, 786, 852 P.2d 1376, 1377 (1993); *Andrea v. City of Coeur d'Alene*, 132 Idaho 188, 190, 968 P.2d 1097, 1099 (Ct. App. 1998). Idaho Code Section 12-117 is closest to being on point as it provides attorney fees to the prevailing party in cases involving state agencies. Ignite is a public agency. However, Idaho Code Section 12-117 only allows attoney's fees to the prevailing party, and neither Swallow/Alvarado nor Clark are prevailing parties, at least at this point in time. More importantly, there is no way that this court can find that Ignite acted without a reasonable basis in fact or in law. This is based on the above legal discussion regarding auctions. At this point in time, Ignite has not accepted any party's offer. Ignite need not ever accept any party's offer. Accordingly, Ignite cannot be said to have acted without a reasonable basis in fact or in law. Ignite has every right to do what it has done, at least up to now.

VI. CONCLUSION AND ORDER

The Court will not make a decision on either Clark's Motion for Summary Judgment or Swallow/Alvarado's Motion for Summary Judgment. The Court will keep this case open for sixty days in case Ignite choses to accept one of the two bids, and a justiciable controversy then exists. At the end of sixty days, the Court will administratively close this case.

IT IS HEREBY ORDERED the Court will not decide the two motions for summary judgment at issue before this Court, due to the lack of a justiciable controversy at this

time.

IT IS FURTHER ORDERED this case will be administratively dismissed sixty (60) days from the date of this decision, if no further action is taken by the parties.

Entered this 5th day of March, 2019.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 5th day of March, 2019, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

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