2013 IL App (1st) 122441-U

SIXTH DIVISION
August 23, 2013

No. 1-12-2441

ACURA, INC., an Illinois corporation,	)	Appeal from the
	)	Circuit Court
Plaintiff-Appellant,	)	of Cook County
	)	
v.	)	No. 09 L 11206
	)	
CITY OF CHICAGO, a Municipal corporation,	)	Honorable
	)	Sanjay T. Taylor,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

ORDER

¶ 1 Held: The circuit court did not err in granting summary judgment to the City of Chicago in a case brought by an unsuccessful bidder on government contracts, asserting promissory estoppel and claiming intentional misrepresentation.

¶ 2 Plaintiff Acura, Inc. (Acura) appeals an order of the circuit court of Cook County granting summary judgment in favor of defendant City of Chicago (City) on claims the City should have awarded Acura two government contracts. On appeal, Acura argues genuine issues of material fact exist regarding whether the City was estopped to award the contract to the second-lowest bidder and whether the City made material misrepresentations it would award the contract to the

lowest responsible bidder and provide a bid protest process to bidders who were not awarded the contracts at issue. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The record submitted in support of and in opposition to summary judgment discloses the following facts. On June 30, 2008, the City Council of the City of Chicago enacted an ordinance authorizing City officials to enter into two construction projects with the Illinois Department of Transportation (IDOT). On October 29, 2008, the City and IDOT entered into an Individual Project Agreement for the 2007 Arterial Street ADA Ramp Program (2007 Project) and the 2008 Arterial Street ADA Ramp Program (2008 Project). The agreement states federal funds would account for 80 percent of the projects' $10 million dollar cost, with the City paying the remainder. The agreement also states the projects would be constructed in accordance with State approved plans and specifications. According to testimony from Byron Whittaker, an assistant procurement officer for the City, IDOT would be required to concur in the award of any contracts regarding federally-funded projects, including the 2007 and 2008 Projects.

¶ 5 On November 26, 2008, the City invited bids on the 2007 and 2008 Projects. The bids had an opening date of December 30, 2008. According to a joint report of IDOT and the Federal Highway Administration, the City's transportation department does not require pre-qualification of bidders, but has post-letting qualifications prior to awarding contracts.[1]

[1] Although the report does not expressly define these terms, the report indicates pre-qualification may involve prospective bidders demonstrating their qualifications a set period of

¶ 6 The City's invitation to bid on the 2007 and 2008 Projects stated that each contract would be awarded to the lowest responsible and responsive[2] bidder. Bids and proposals involving a deposit were required to be accompanied by bid bonds. The instructions for bidding on these projects also stated the City's chief procurement officer (CPO) "reserve[d] the right to reject any or all proposals *** when in his opinion the best interest of the City will be served by such action." The instructions further stated the CPO would "accept in writing one of the proposals or reject all proposals *** within 90 calendar days" from the opening bid date where approval from other agencies is required.

¶ 7 In addition, bidders were instructed as follows:

> "Each bidder bidding on construction projects shall have on file in the office of the [CPO] prior to bid opening a CONTRACTOR'S STATEMENT OF EXPERIENCE AND FINANCIAL CONDITION dated not earlier than the end of the Contractor's last fiscal year period. This shall be kept on file by the [CPO] as a representative statement

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time before bids are opened, or that bidders already be on a pre-qualified contractor list maintained by the agency at issue. Based on the context of the report, post-letting qualification appears to refer to qualifying bidders after bids are submitted, but prior to awarding a contract.

[2] Whether a bid is responsive refers to whether the bid conforms to the advertised requirements. See *Leo Michuda & Son Co. v. Metropolitan Sanitary District of Greater Chicago*, 97 Ill. App. 3d 340, 344 (1981). No question is raised in this case regarding whether the bids were responsive.

> for a period of one year only. *** Failure to have a current statement on file in the DEPARTMENT OF PROCUREMENT SERVICES at the time of bid opening shall be cause for the rejection of Contractor's Proposal."

¶ 8 Acura's Statement of Experience and Financial Condition was dated December 31, 2007.[3] The document declared in part the purpose of the statement was "to provide the Department with adequate information regarding a contractor's capabilities to undertake and satisfactorily complete any contract awarded by the City of Chicago." The document represented that the City's department of procurement services would analyze the submitted statement and related information, then issue a certificate of financial rating to inform the contractor of the maximum dollar amount of uncompleted work that he or she should have at any time during any given period. According to the document, "This will help the contractor decide whether he/she should bid for a City project considering the financial capacity available." In addition, the document stated, "No amendment or renewal of an existing financial rating requested by a contractor will be effective for a particular City Letting unless evidence pertaining to such changes is received at least thirty (30) calendar days prior to the Letting."

¶ 9 On January 5, 2009, the City issued a statement of financial rating finding Acura was qualified to perform construction work to the maximum amount of $478,000 from December 31,

[3] Although the cover date is December 31, 2007, an attached independent auditor's report was dated July 25, 2008 and an attached, unsigned affidavit was dated December 29, 2008.

2007, through April 30, 2009. Previously, on October 6, 2008, IDOT issued a certificate of eligibility stating Acura was qualified for uncompleted work not exceeding $2,531,000.

¶ 10 The City opened the bids on December 30, 2008. Acura submitted the lowest bids at $3,767,000 for each project. A firm named G & V Construction submitted the second-lowest bids on each project.

¶ 11 On February 2 and 9, 2009, the City wrote to IDOT, seeking the agency's concurrence in awarding the contracts for the 2007 and 2008 projects to Acura. According to Whittaker's deposition testimony, the City's position when seeking IDOT's concurrence was that Acura was the lowest responsible and responsive bidder. On February 19, 2009, however, internal e-mail from IDOT support engineer Greg Lupton noted Acura exceeded its financial rating by a total of $4,943,555.78 on the two projects. On February 20, 2009, IDOT employee Zubair Haider sent an e-mail to Whittaker indicating Acura did not meet the financial capability requirement and an award to Acura would seem to contradict the City's policy of awarding contracts to the lowest responsible bidder. Haider requested Whittaker to provide any justification the City had to award the contracts to Acura.

¶ 12 On February 24, 2009, City contract negotiator Sonji Ward advised Acura that its financial capability was insufficient for IDOT as funding agency to concur in an award of the contracts for the 2007 and 2008 Projects to Acura. Ward asked Acura to increase its line of credit by February 26, 2009, as part of the City's effort to award at least one of the contracts to Acura. The next day Acura obtained an increase in its line of credit and notified Ward on

February 26 of an increase to $1 million. Acura also forwarded its unaudited financial statement for 2008 to the City.

¶ 13 On March 5, 2009, Whittaker transmitted Acura's new information to Haider, stating "Acura is a minority-owned certified MBE/DBE firm and to award them the Arterial Street ADA Ramps 2007 projects represents an opportunity for them to build capacity, an initiative that both the City and IDOT encourages." Whittaker added if Acura provided an audited financial statement, it would show Acura had an estimated capacity of $10 million, but noted "time was of the essence for award of this requirement [sic] and Acura would be unable to provide this information timely for consideration of [the] award."

¶ 14 On March 13, 2009, IDOT notified the City's CPO that IDOT was unable to concur in the award of the 2007 Project due to Acura exceeding its financial capability. IDOT requested the City send its concurrence to award the contract to the second-lowest bidder. On April 3, 2009, the City transmitted its concurrence regarding G & V Construction, which had a financial capacity rating of $21,676,000. On April 6, 2009, IDOT concurred in awarding the contract for the 2008 Project to G & V Construction. On April 22, 2009, IDOT concurred in awarding the contract for the 2007 Project to G & V Construction.

¶ 15 Meanwhile, the City notified Acura by letter its bids were rejected due to Acura exceeding its financial capability. The letter stated the decision was based on the City's statement of financial rating, IDOT's certificate of eligibility and additional information Acura provided. Acura's president, Domenico DiGioia, testified by deposition the City's letter was dated April 6, 2009, but was not received until April 13, 2009.

¶ 16 Nevertheless, Acura submitted an audited 2008 financial statement to the City on April 8, 2009, and to IDOT on April 14, 2009. On the latter date, DiGioia also requested IDOT to revise Acura's financial rating based on the audited financial statement. DiGioia further emailed a copy of this request to Whittaker.

¶ 17 An April 21, 2009, letter from DiGioia to the City's department of procurement services sought reconsideration of awards for the 2007 and 2008 Projects, based on a new IDOT certificate of eligibility stating Acura had a financial capacity of $11,193,000. The next day, Whittaker e-mailed Haider to inquire regarding how to proceed in the matter, but received no reply before IDOT concurred in the second award to G & V Construction. Lupton indicated in his deposition testimony IDOT did not reply because the agency had not changed its stance. According to Lupton, Acura would have had to increase its financial capability prior to the letting. Lupton also testified, assuming the City allowed for revisions of financial capability, he would likely have sought guidance from an agency pre-qualification unit regarding how to proceed. Subsequently, on April 24, 2009, the City issued a new financial rating indicating Acura had a financial capacity of $9,241,000.

¶ 18 On May 8, 2009, Acura filed a bid protest with the City, as described in the instructions accompanying the invitation to bid. Acura asserted the award of the contracts to G & V Construction violated section 8-10-10 of the Illinois Municipal Code (Municipal Code) (65 ILCS 5/8-10-10 (West 2008)), which requires the award of any contract exceeding $10,000 shall be

made to the lowest responsible bidder.[4] A City employee acknowledged receipt of Acura's bid protest letter the same day. The protest, however, was neither reviewed nor answered. Whittaker testified in his deposition City attorneys never contacted him about any bid protest in this matter.

¶ 19 Acura filed its initial verified complaint against the City on September 22, 2009, but the operative pleading in this appeal is Acura's amended verified complaint (complaint), filed May 4, 2010. Acura's complaint contained two counts. In count I, sounding in promissory estoppel, Acura alleged it incurred considerable expenses in reliance on the City's promise in its bidding documents to provide a free, open and competitive process for awarding the contracts to the lowest responsible bidder, as well as a bid protest procedure. Acura also alleged the City violated sections 8-10-3 and 8-10-10 of the Municipal Code (65 ILCS 5/8-10-3, 8-10-10 (West 2008)). In count II, Acura alleged the City's aforementioned promises were also intentional misrepresentations made to induce Acura's reliance, and upon which Acura relied to its detriment. On both counts, Acura sought recovery of the costs, fees and expenses it incurred in its unsuccessful bid for the contracts, including sums expended in preparing its bid protest.

¶ 20 On March 6, 2012, following pretrial discovery, the City filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005(c) (West 2010)). The City argued it was entitled to judgment because: (1) Acura failed to

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[4] Section 8-10-10 of the Municipal Code requires awards to the lowest or highest responsible bidder, depending on whether the municipality is to expend or receive money, as required by section 8-10-3. See 65 ILCS 5/8-10-3, 8-10-10 (West 2008).

produce evidence raising a genuine issue of material fact, given the heightened standard for asserting estoppel against a municipality; (2) the City did not promise to award the contracts to Acura; (3) the City did not misrepresent its bidding procedures; and (4) the City was immune from liability pursuant to various sections of the Illinois Local Governmental Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/1-101 *et seq*. (West 2008)).

¶ 21 On May 16, 2012, Acura filed its response in opposition to the motion for summary judgment. Acura argued genuine issues of material fact existed regarding the City's promise to provide a free, open and competitive process for awarding the contracts to the lowest responsible bidder, as well as a bid protest procedure. In particular, Acura argued there was evidence the City determined Acura to be the lowest responsible bidder, yet awarded the contracts to the second-lowest bidder. Acura also argued the Tort Immunity Act did not apply to the City's written promises and misrepresentations or the City's failure to respond to Acura's bid protest.

¶ 22 On July 18, 2012, following a hearing on the matter, the trial court entered summary judgment in favor of the City. On August 14, 2012, Acura filed a timely notice of appeal to this court.

¶ 23 DISCUSSION

¶ 24 On appeal, Acura contends the circuit court erred in granting summary judgment to the City. Summary judgment is appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). The purpose of summary judgment is not to try a question of fact, but to determine

whether a genuine issue of triable fact exists. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 42-43 (2004). In determining whether a question of triable fact exists, "a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Summary judgment is "a drastic means of disposing of litigation," and should only be awarded when the moving party's right to judgment as a matter of law is "clear and free from doubt." *Id*. On the other hand, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999).

¶ 25 We review grants of summary judgment *de novo*. *Id*. Accordingly, the reviewing court "must independently examine the evidence presented in support of and in opposition to a motion for summary judgment" to determine whether a genuine issue of material fact exists. *Groce v. South Chicago Community Hospital*, 282 Ill. App. 3d 1004, 1006 (1996). Given this court's independent review, " 'we may affirm the trial court's grant of summary judgment for any reason that is supported by the record, regardless of whether that reason formed the basis for the trial court's judgment.' " *Hess v. Flores*, 408 Ill. App. 3d 631, 636 (2011) (quoting *Bovan v. American Family Life Insurance Co.*, 386 Ill. App. 3d 933, 938 (2008).

¶ 26 In this appeal, Acura does not assert or present arguments which are specifically tailored to its claims of promissory estoppel and intentional misrepresentation. Rather, Acura observes promissory estoppel is a viable cause of action in cases involving government contracting (see, *e.g.*, *State Mechanical Contractors, Inc. v. Village of Pleasant Hill*, 132 Ill. App. 3d 1027, 1031 (1985)), and asserts intentional misrepresentation is also a viable cause of action because its

elements are similar to those of promissory estoppel. Acura then claims a material question of fact exists regarding whether the City required a successful bidder demonstrate financial capability when the contracts were awarded, as opposed to when the contracts were bid. Acura also asserts the trial court correctly determined the City could not rely on IDOT's refusal to concur in an award to Acura as a ground for awarding the contracts to G & V Construction. Although the City addresses a portion of its argument to the extraordinary or compelling circumstances which a plaintiff typically is required to demonstrate to estop a municipal body such as the City (see, *e.g.*, *Morgan Place of Chicago v. City of Chicago*, 2012 IL App (1st) 091240, ¶ 33), we conclude this appeal may be more simply and directly decided by analyzing whether a genuine issue of material fact exists regarding Acura's assertion it was the "lowest responsible bidder" under Illinois case law.

¶ 27 In this case, Acura's claims ultimately are founded on the City's promise or representation it would award the contracts to the best bidder, *i.e.*, the lowest responsible bidder. See *State Mechanical Contractors, Inc.*, 132 Ill. App. 3d at 1031. The City was bound by its invitation to bid and the Municipal Code to award the contracts at issue to the "lowest responsible bidder." See 65 ILCS 5/8-10-3, 8-10-10 (West 2008). The phrase "lowest responsible bidder" appears in several statutes and has been previously interpreted by Illinois courts as not requiring a public body to award a contract to the lowest bidder. *Court Street Steak House, Inc. v. County of Tazewell*, 163 Ill. 2d 159, 165 (1994). The word "responsible" is generally interpreted to mean financially responsible, though financial capacity need not be the only relevant factor. *S. N. Nielsen Co. v. Public Building Comm'n of Chicago*, 81 Ill. 2d 290, 299 (1980). "[A] public body

exercises a great deal of discretion in determining the lowest responsible bidder ***." *Court Street Steak House, Inc.*, 163 Ill. 2d at 165. " 'In proper circumstances a contract may be awarded to one who is not the lowest bidder, where this is done in the public interest, in the exercise of discretionary power granted under the laws, without fraud, unfair dealing, or favoritism, and where there is a sound and reasonable basis for the award as made.' " *S. N. Nielsen Co.*, 81 Ill. 2d at 299 (quoting 10 E. McQuillin, Municipal Corporations sec. 29.73a, at 429-30 (3d ed. 1966).)

¶ 28 Acura claims a material question of fact exists regarding whether the City required a successful bidder demonstrate financial capability when the contracts were bid or awarded. Acura relies upon the joint report of IDOT and the Federal Highway Administration, which states the City does not require pre-qualification of bidders, but has post-letting qualifications prior to awarding contracts. Acura does not identify where any promise or representation regarding this question was made to them in the invitation to bid these contracts. Nevertheless, we consider the existence of a policy or practice could be evidence of arbitrariness by the City in a given case.

¶ 29 The existence of a City practice or policy of qualifying bidders after the letting, however, does not address the issue of whether the City properly relies upon already available data when qualifying bidders. Acura claims the assessment of a bidder's financial capacity is an ongoing process, based on the City's bidding instructions requiring the bidder, if requested, to present sufficient evidence within a reasonable time to the CPO of the bidder's ability to perform. Although the City reserves the right to demand proof of current ability to perform, there is no

evidence the City was required to request such proof.[5] The City's bidding instructions neither promised nor represented the City was required to base its award on data submitted after the bids were opened.

¶ 30 Moreover, the record demonstrates bidders were instructed they must have a Statement of Experience and Financial Condition on file with the City. The statement Acura filed expressly stated (and thus notified Acura) the purpose of the statement "is to provide the Department with adequate information regarding a contractor's capabilities to undertake and satisfactorily complete any contract awarded by the City of Chicago." The document also informed Acura the City would use the document to issue a financial rating for Acura. The document further informed Acura: "No amendment or renewal of an existing financial rating requested by a contractor will be effective for a particular City Letting unless evidence pertaining to such changes is received at least thirty (30) calendar days prior to the Letting."

¶ 31 In this case, Whittaker testified he believed Acura to be the lowest responsible bidder, but acknowledged in March 2009 "time was of the essence" for the award of these contracts and Acura would be unable to timely provide information showing adequate financial capacity for consideration of the award. Whatever efforts City officials undertook to assist Acura in

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[5] Indeed, as the City suggests, the City may reserve the right to demand additional proof of financial capacity to protect itself against awarding a contract to a bidder which appears financially capable when the contract is bid, but whose financial status suddenly deteriorates by the time the contract is to be awarded.

obtaining the awards for these contracts, there is no genuine issue of fact regarding Acura's failure to timely provide proof it had the financial capacity to be deemed a responsible bidder on these contracts. No genuine issue of fact exists regarding whether the City acted arbitrarily in awarding the contracts, as the record establishes the City followed its established procedures in awarding the contracts to G & V Construction.

¶ 32 In addition, the record establishes IDOT was required to concur in the award of any contracts regarding federally-funded projects, including the 2007 and 2008 Projects. Acura claims the trial judge determined the City could not rely on IDOT's refusal to concur in an award to Acura. In the transcript of proceedings on the motion for summary judgment, the trial judge states he is "not so sure you can rely so much on IDOT's ratings" because the contract and bidding documents did not make IDOT's procedure clear.

¶ 33 The bidding instructions, however, expressly informed Acura the City's CPO reserved the right to reject any or all proposals when "in his opinion the best interest of the City will be served by such action." The City's reservation of right is in accord with our case law, which permits the City to award a contract to one who is not the lowest bidder, where this is done in the public interest. See *S. N. Nielsen Co.*, 81 Ill. 2d at 299. Having decided to proceed with these largely federally-funded construction projects, it was in the best interest of the City to ensure the federal funding by obtaining IDOT's concurrence in the awarding of contracts.

¶ 34 Acura does not argue the City's compliance with this requirement is evidence of fraud, unfair dealing, or arbitrary or corrupt action on the part of the City. Acura argues it did not know of the requirement. The bidding instructions informed Acura the CPO would accept one of the

proposals or reject all proposals within 90 calendar days from the opening bid date where approval from other agencies is required. Thus, Acura was informed the City may require approval from other agencies, if not IDOT specifically. Furthermore, every person is presumed to know the extent of the powers of a municipal corporation. *Hass v. Commissioners of Lincoln Park*, 339 Ill. 491, 498 (1930); *M.A.T.H., Inc. v. Housing Authority of East St. Louis*, 34 Ill. App. 3d 884, 887 (1976). Thus, even if Acura had not been expressly informed as it was, Acura is presumed to know the City could award a contract to one who is not the lowest bidder, where this is done in the public interest and not for corrupt or arbitrary reasons. See *S. N. Nielsen Co.*, 81 Ill. 2d at 299.

¶ 35 Acura also argues IDOT's concurrence could only have been "based on its acceptance of the City's post-letting qualification policy," as evidenced by the joint report of IDOT and the Federal Highway Administration, which states the City does not require pre-qualification of bidders, but has post-letting qualifications prior to awarding contracts. Acura however, presents no argument to support this assertion. IDOT's recognition that the City does not pre-qualify bidders does not necessarily preclude IDOT from applying its own criteria in determining whether to concur in a contract award. Moreover, as previously stated, the City ultimately followed its established policy in this case.

¶ 36 Acura further argues "the evidence does not even support the City's argument that it was 'beyond dispute' that IDOT would not concur in any award of the federally-funded contracts to Acura had IDOT been reminded of the City's post-letting qualification practice." In this case, Lupton answered hypothetical questions by testifying he would likely have sought guidance from

an agency pre-qualification unit. Such testimony is not evidence IDOT would have changed its position. Rather, it is speculation and conjecture insufficient to withstand a motion for summary judgment. See *Sorce*, 309 Ill. App. 3d at 328. We reach the identical conclusion regarding Acura's assertion that IDOT may have reconsidered its position in the context of a City bid protest proceeding. See *id*.

¶ 37 In sum, no genuine issue of material fact exists regarding whether the City's awards involved fraud, unfair dealing, or favoritism. Moreover, no genuine issue of material fact exists regarding the City's decision to proceed with the projects by agreeing with IDOT's rejection of Acura as the lowest responsible bidder. The City, acting in accordance with its established policy, had a sound and reasonable basis for the award as made. Accordingly, Acura cannot advance a viable claim for damages on either count of its complaint, even with respect to the bid protest procedure.[6] Thus, the circuit court did not err in granting summary judgment to the City. *E.g.*, *Mayer v. Chicago Mechanical Services, Inc.*, 398 Ill. App. 3d 1005, 1013 (2010). Given this conclusion, we need not address whether the City was statutorily immune from liability in this case.

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[6] In this case, the promise or representation underlying Acura's claim is that contracts will be awarded to the lowest responsible bidder without fraud, favoritism or other improper practices. For the reasons already stated, we conclude the City met that obligation. Thus, Acura cannot show it was damaged by the City's failure to conduct a bid protest proceeding.

¶ 38 CONCLUSION

¶ 39 For all of the aforementioned reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 40 Affirmed.