VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 23-CV-00054

American Environmental, Inc. v. Burlington School District

ENTRY REGARDING MOTION

Title: Motion for Preliminary Injunction (Motion: 1)
Filer: Darren R. Misenko
Filed Date: January 20, 2023

This is a Rule 75 case involving bids for hazardous material abatement and demolition of the Burlington High School in preparation for replacing the building. Plaintiff American Environmental, Inc. (AEI) bid for the project but lost to another contractor, EnviroVantage (EV). Plaintiff seeks a preliminary injunction staying the award of the project to EV and "any further action by [the District] concerning the award and/or signing of the Project contract pending resolution of AEI's claims." Proposed Temporary Restraining Order. The court held a hearing on the motion on February 3, at which the parties agreed that the court could rule based upon the affidavits and exhibits already filed, as well as the brief testimony of one witness. Defendant Burlington School District represented that the work currently is projected to begin by February 17.

The Claims

In the interest of time, the court will not detail all of the facts, which are set forth in the parties' filings and are generally undisputed. The basics of the claim are as

follows. State law mandates the District to use a competitive bidding process, to set criteria for prequalification of bids, and to award the contract to "the lowest responsible bid conforming to specifications." 16 V.S.A. § 559(b)-(c). The statute also declares—with exceptions not relevant here—that any contract entered into in violation of the section "shall be void." Id. § 559(e). The District did create qualification requirements. Complaint Ex. 2, Request for Qualifications. Those included 11 criteria, and the following language: "In order for your firm to be considered for this project, your firm must meet the qualification criteria established by [16 V.S.A. § 559]." Id. p. 3. It went on to say that "contractors must meet" the 11 criteria to be "included on a selected list of pre-qualified bidders. . ." Id. The next page added in bold print: "**Only those contractors who qualify will be invited to submit a fee proposal bid**." Id. p. 4. In addition to the 11 criteria, the Request stated that certain documents "must be submitted, including "five (5) sample project examples from the past three years demonstrating compliance with the qualification criteria." Id.

The District prequalified five bidders on October 6, including AEI and AV. EV's subsequent bid was lowest, and on December 6 it was awarded the contract. AEI, whose bid was the next lowest, argues that EV did not actually satisfy the prequalification requirements and thus should not have been awarded the contract. Specifically, AEI argues that EV did not meet the requirements with regard to (1) the number, size and timing of prior jobs, and (2) having no prior citations for "noncompliance with. . . regulations pertaining to worker protection, removal, transport, or disposal related to PCBs or other hazardous materials." Complaint Ex. 2.

With regard to the latter, the District responds that AEI also had such a citation. The parties stipulate that AEI's citation, and one of EV's two citations, were asbestos-related and that asbestos is not considered a "hazardous material" for purposes of the bid. The District presented what amounted to hearsay testimony that EV's other citation was of the same type, but the court cannot rely on that hearsay. Thus, it is an open question.

Discussion

The complaint seeks Rule 75 review and, ultimately, a declaratory judgment awarding the contract to AEI. The motion before the court today, however, is more limited. It seeks a preliminary injunction stopping the District from executing the contract with EV while this case proceeds.

A preliminary injunction is "an extraordinary remedy never awarded as of right." Taylor v. Town of Cabot, 2017 VT 92, ¶ 19, 205 Vt. 586, quoting Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 24 (2008). "Because of the often drastic effects of the temporary injunction, the power to issue it must be used sparingly, and only upon a showing of irreparable damage during the pendency of the action . . ." State v. Glens Falls Ins. Co., 134 Vt. 443, 450 (1976). In addition to the plaintiff having to establish that irreparable harm is likely, the court must consider "the potential harm to the other parties; . . . the likelihood of success on the merits; and . . . the public interest." Taylor, 2017 VT 92, ¶ 19. This includes "balanc[ing] the competing claims of injury and . . . consider[ing] the effect on each party of the granting or withholding of the requested relief." Id., quoting Winter, 555 U.S. at 7. The test "is sufficiently flexible to allow for a preliminary injunction in cases in which the court cannot definitively

conclude that the movant is likely to prevail on the merits, but the balance of other factors tips strongly in favor of an injunction." Taylor, 2017 VT 92, ¶ 19 n. 3. The burden of proof is on the party seeking the injunction. It may not be granted "unless the right to relief is clear." Comm. to Save the Bishop's House v. Med. Ctr. Hosp. of Vermont, Inc., 136 Vt. 213, 218 (1978).

In sum, the court's role today is not to rule on the ultimate merits of the claim, but to predict whether AEI is likely to succeed in the future on the merits of its claims, and if so, balancing the other criteria for a preliminary injunction.

Alleged Delay in Filing this Action

The court begins with the question of whether Plaintiff has shown that this action is timely. Rule 75 requires that an action challenging a government entity's decision must be filed within 30 days of the decision. V.R.C.P. 75(c). The District argues that the relevant decision is the prequalification decision, which occurred in October, more than 30 days before this case was filed in January. AEI responds that until the bid award in December and AEI's investigation of the award to EV, it was not aware of the issues with regard to EV's qualifications. That may be, but the rule expressly requires filing "within 30 days after notice of any action or refusal to act of which review is sought." V.R.C.P. 75(c). Although AEI obviously is focused on the fact that EV won the bid, the action that is in dispute is the prequalification, not the award itself. There is nothing to suggest that AEI could not have done the same investigation of EV at the time of the prequalification as it did later. While the court has discretion to extend the deadline based upon "excusable neglect,"—Johnson v. Touchette, 2021 WL 1345738 at * 2 (Vt. 2021)(unpub. mem.)—the record to date does not establish a basis for finding that standard has been

met. Thus, the court concludes that on this issue, AEI has not shown that it is reasonably likely to succeed.

The District also argues that AEI's claim should be barred by the doctrine of laches. This "is an equitable defense which a party may invoke upon a showing that [it] was prejudiced by another party's delay in asserting a right." In re Grundstein, 2020 VT 102, ¶ 13, 213 Vt. 528. "In order for laches to apply, a party must have fail[ed] to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right." Smiley v. State, 2015 VT 42, ¶ 33, 198 Vt. 529 (quotations omitted). The burden of proving such a defense falls on the District.

What the District presents is evidence that any delay in the demolition project at issue here is likely to delay the "substantial completion" deadline of August 2025, and cost the District up to $700,000 per month of delay. Declaration of Timothy Kostuk. Thus, the fact that this action challenging the October 6 prequalification decision was not filed until three months later, and the preliminary injunction motion was not filed until January 20, strongly supports the District's argument on this point. On the other hand, AEI offers a reason for the delay, so the court could ultimately find that the delay was not "unexplained." The court cannot say that the District, which has the burden of proof, would likely succeed on this point.

Rule 75

The District argues that the claim here is not appealable under Rule 75 because it fails to meet the definition of certiorari, mandamus, or prohibition. "Rule 75 does not

explain which decisions are reviewable but 'provides a procedure applicable whenever . . . court review . . . is available as a matter of general law by proceedings in the nature of certiorari, mandamus, or prohibition.'" Rose v. Touchette, 2021 VT 77, ¶ 13, 264 A.3d 861, 866 (Vt. 2021)(quoting Reporter's Notes, V.R.C.P. 75).

What AEI argues is that the District's prequalification decision was in clear violation of the bid statute and thus an abuse of discretion. That is a commonly accepted basis for a Rule 75 challenge. Id. ("Mandamus review is available for allegedly arbitrary abuses of discretion that amount to a practical refusal to perform a certain and clear legal duty.") (quotations omitted); King v. Gorczyk, 2003 VT 34, ¶ 7, 175 Vt. 220 ("under V.R.C.P. 75, we will not interfere with the DOC's determinations absent a showing that the DOC clearly and arbitrarily abused its authority."). The claim here is precisely that type: AEI alleges that a statute required the District to follow specific guidelines, and it unjustifiably failed to do so.

Standing

To proceed with a lawsuit, a plaintiff must be able to show "injury in fact," meaning "the invasion of a legally protected interest." Ferry v. City of Montpelier, 2023 VT 4, ¶ 13 (citation omitted). The District argues that a disappointed bidder has no such interest, because the statute at issue is aimed at protecting the public, not the bidders. The District cites authorities in other jurisdictions that support this proposition. *See, e.g.*, Groves v. Dep't of Corr., 811 N.W.2d 563, 567 (Mich. App. 2011) ("Michigan jurisprudence has never recognized that a disappointed bidder such as Securus has the right to challenge the bidding process."); Marx v. Lake Lehman Sch. Dist., 817 A.2d 1242, 1245 (Pa. Commw. Ct. 2003)("competitors are not granted standing in bidding

award cases"). On the other hand, as the District acknowledges, the law has been developing in this area. *See, e.g.*, B.K. Instrument, Inc. v. U.S., 715 F. 2d 713, 717-23 (2nd Cir. 1983). Treatises are not consistent in their description of the majority view. *Compare* 1 Bruner & O'Connor Construction Law § 2:177 ("Although unsuccessful bidders historically have been held to have no standing to contest the validity of contract awards, virtually all jurisdictions now recognize the right of anyone 'aggrieved' with a 'directed economic interest' in a contract solicitation or award to protest the award.")(footnotes omitted) *with* 10 McQuillin Mun. Corp. § 29:87 (3d ed.)("Although there is authority to the contrary, many cases hold that the lowest bidder is not entitled to an injunction to restrain a proposed violation of a statute requiring contracts to be let to the lowest bidder, except where he or she seeks such relief as a taxpayer."). It is clear that not all courts are in accord and the issue must "be determined on a jurisdiction-by-jurisdiction basis." Bruner & O'Connor, § 2:177.[1]

[1] There are policy arguments on both sides of this issue, as another court has noted:

> [Plaintiff] argues that if only taxpayers are entitled to enforce the provisions of the competitive bidding statutes, it is likely that only a public decision that increases the price of a contract to the political subdivision will be challenged. For example, in plaintiff's view only an unsuccessful bidder, and not a taxpayer, is likely to challenge a decision in which inferior materials are substituted for those specified in the original bid solicitation but where the bid price remains the same. The public interest, Shook argues, dictates that an unsuccessful bidder be permitted to intervene in such circumstances.
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> Plaintiff also argues that a secondary purpose of statutes like the Public Purchasing Statute is to protect the sanctity of the competitive bidding process. Confidence that a level playing field is available for all contractors is essential, Shook argues, to maintain an active and competitive bidding environment for municipal construction. Allowing unsuccessful bidders to seek injunctive relief when statutory procedures are not adhered to clearly would further this goal.
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> However, there are important public policy arguments in favor of denying unsuccessful bidders the ability to seek injunctive relief. First, there is a clear public interest in expeditious construction of public works projects. Nowhere is time money more than in the construction field. And prompt completion of public construction projects is often important from a public safety standpoint. Second, the cost of litigating contracts awarded under competitive bidding statutes—perhaps multiple lawsuits in respect of a

As with so many issues, there is no Vermont case directly on point. Two cases on related issues, however, lend some support to the District's position. The first case involved the purchase by the State of crushed stone for road construction. A gravel company challenged the decision not to also consider gravel. The claim was based upon an Equal Protection claim, not a statutory one, but the court's language was broad:

> [T]his is an area where we must defer to an independent and separate branch of government as explained in *Lukens Steel*. When acting as a market participant, the government should "enjoy[ ] the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases." *Id*. at 127. . . Procurement laws are for the benefit of the state, not prospective bidders.
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> The government has a legitimate interest in making procurement decisions free from continuous litigation by suppliers who claim to have a better product. The judiciary cannot become the "Consumer Reports" of the procurement business, enforcing product choices on a reluctant executive branch.

Hinesburg Sand & Gravel Co. v. State, 166 Vt. 337, 343-45 (1997) (citation omitted).

The second—and more recent—case also rejected a disappointed bidder's claim, noting that "[b]ecause a bidder has nothing more than a unilateral hope or expectation of securing a contract, a disappointed bidder typically has no legitimate claim of entitlement and thus no protected property interest." Skaskiw v. Vermont Agency of Agric., 2014 VT 133, ¶ 21, 198 Vt. 187. Although that statement was in the context of a due process claim, the plaintiff also argued that she had a property interest arising from

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> single contract award if more than one unsuccessful bidder seeks relief—could pose a serious threat to public treasuries.

Shook Heavy & Env't Const. Grp., a Div. of Shook, Inc. v. City of Kokomo, 632 N.E.2d 355, 359 (Ind. 1994).

statutes "that regulate the bidding process prohibiting discrimination, conflicts of interest, and the like." Id. ¶ 22. The Court declared:

> The requirements to which Skaskiw refers do not change the fundamental nature of her interest. Although all government agencies must comply with anti-discrimination and conflict-of-interest restrictions, *DCF was under no obligation to award the VSNIP contract to any particular bidder irrespective of the price offer. Skaskiw had nothing more than a mere unilateral hope or expectation that she would win the contract*. This expectation is insufficient to create the needed property interest.

Id. (emphasis added). Although the statutes at issue there did not expressly include competitive bidding requirements, and the claim was grounded in due process, the logic arguably might apply equally here. This decision suggests that Vermont might not recognize a disappointed bidder's right to challenge a bid award. Thus, given that the law is unclear, the court cannot say that AEI is likely to establish standing here.

The Balance of Hardships and the Public Interest

Even if AEI may be able to establish a valid claim here, in the context of this preliminary injunction motion the court must balance the harm to one disappointed bidder against the harm to the District and the taxpayers who will foot the bill for the project. "Nowhere is time money more than in the construction field." Shook Heavy & Env't Const. Grp., 632 N.E.2d at 359. The evidence is that any delay here will be costly to the District—to the tune of $700,000 a month—and will inevitably delay the completion of the project. Declaration of Timothy Kostuk.

While AEI argued at the hearing that it could start the work immediately if it were awarded the contract, the issue of whether it should be awarded the contract is not an issue that would be decided now: the only relief sought in this motion is an order barring the current contract award to EV from proceeding. *See* Motion for Temporary

Restraining Order and Preliminary Injunction (filed Jan. 20, 2023). There is no question that this case will not be fully litigated by February 17 when demolition work is planned to begin. The delays would be significant under even the best scenario for speedy resolution of a newly filed case. Even a summary judgment motion filed tomorrow would take at least six weeks to be fully briefed and presented to the court for consideration, and longer for a ruling to issue.

Nor is there some overarching public interest on AEI's side of the balance: this is not a case of alleged fraud or collusion, or other serious harm to the public at large. While it may be that AEI has greater experience on large projects than EV does, and that EV has one more citation for violating regulations, the evidence fails to show that those facts create any danger to the public or likelihood of inadequate work. On balance, the interest in enforcing the statutory bidding process is heavily outweighed by the financial impacts of any delay upon the District and taxpayers.

Order

The motion for a preliminary injunction is denied. First, the court concludes that AEI has not met its burden of showing it is likely to succeed on its claims. Second, the court concludes that regardless of whether AEI is likely to succeed, the balance of hardships weighs in favor of the District. The public interest supports allowing the demolition of the existing school building to proceed in a timely manner.

Electronically signed on February 4, 2023 pursuant to V.R.E.F. 9(d).

Helen M. Toor
Superior Court Judge