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2012 IL App (4th) 110850-U

Filed 8/1/12

NOS. 4-11-0850, 4-11-0994 cons.

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

RIVER CITY CONSTRUCTION, L.L.C.,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.    (No. 4-11-0850)	)	Sangamon County
THE CAPITAL DEVELOPMENT BOARD; FREDRICK	)	No. 11CH950
W. HAHN; and DONALD BROUGHTON,	)	
Defendants-Appellees.	)	
and	)	
CONTEGRA CONSTRUCTION COMPANY, L.L.C.,	)	
Intervenor Defendant-Appellee.	)	
_____	)	
	)	
RIVER CITY CONSTRUCTION, L.L.C.,	)	No. 11CH1424
Plaintiff-Appellant,	)	
v.    (No. 4-11-0994)	)	
THE CAPITAL DEVELOPMENT BOARD; FREDRICK	)	
W. HAHN, Chief Procurement Officer; DONALD	)	
BROUGHTON; and CONTEGRA CONSTRUCTION	)	Honorable
COMPANY, L.L.C.,	)	John Schmidt,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.  
Presiding Justice Turner and Justice Knecht concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where plaintiff, a construction company, failed to allege that defendants' procurement process of soliciting bids and awarding a construction contract involved fraud, corruption, or illegal activity, or was clearly erroneous, arbitrary, or capricious, the circuit court was without authority to grant equitable relief and properly dismissed plaintiff's complaints.

¶ 2 Plaintiff, River City Construction, L.L.C. (River City), submitted a bid proposal to

defendant, the Illinois Capital Development Board (Board), for the construction of a new state facility. Although River City submitted the lowest bid, the Board's chief procurement officer, defendant Fredrick W. Hahn, determined that River City's bid was nonresponsive. River City filed a complaint seeking injunctive and declaratory relief, claiming Hahn's decision was erroneous, arbitrary, and an abuse of discretion. After allowing the next lowest bidder, Contegra Construction Company, L.L.C. (Contegra), to intervene in the lawsuit, the circuit court granted defendants' motion to dismiss. Thereafter, the Board awarded the contract to Contegra and construction began. River City filed a subsequent lawsuit seeking similar relief as in the first lawsuit, changing the allegations only to reflect the award to Contegra. The court dismissed the second lawsuit on grounds of *res judicata*. River City appealed both orders of dismissal. We consolidated the appeals and for the reasons that follow, we affirm.

¶ 3

#### I. BACKGROUND

¶ 4 In July 2011, the Illinois State Police planned to build a new facility known as the Metro East Forensic Laboratory in Belleville, Illinois. The cost of the project was estimated at \$25 million. The Board, on behalf of the State Police, advertised for bids for the construction of this "single prime" project. A "single prime" project meant the Board would enter into only one contract with one project contractor, rather than multiple contracts with various trade contractors. The single-prime contractor must then identify its "protected" subcontractors for five major trades, *i.e.*, electrical, heating, plumbing, sprinkler, and ventilation.

¶ 5 River City submitted a bid and, in fact, submitted the lowest bid for the project. It had identified its five protected subcontractors and their bids for each of the respective trades. According to River City, it was the "lowest responsive and responsible bidder" for the project.

However, defendant Donald Broughton, the administrator of contracts for the Board, notified River City that its bid was rejected as "non-responsive." Apparently, River City had named Custom Mechanical, LLC as its heating, plumbing, sprinkler, and ventilation subcontractor. However, Custom Mechanical was a company who, according to the Board, was not licensed to perform plumbing work. When questioned by Broughton, Custom Mechanical identified Wells Plumbing as its second-tier plumbing subcontractor. However, Wells Plumbing had not been prequalified with the Board and therefore, was not acceptable as a subcontractor. This nullified River City's bid.

¶ 6 On July 20, 2011, River City's attorney contacted Hahn as the chief procurement officer, via letter, advising that neither the bid documents, the applicable statute (30 ILCS 500/30-30 (West 2010)), nor the Board's standard documents for construction contained the following requirements: (1) a protected subcontractor cannot utilize the services of a second-tier subcontractor, (2) a protected subcontractor must actually perform the work with its own workforce, and (3) all subcontractors must be prequalified firms.

¶ 7 On July 25, 2011, River City filed a verified complaint for injunctive relief (including a request for a temporary restraining order (TRO)), declaratory judgment, *mandamus*, writs of *certiorari* and prohibition, and administrative review in the Sangamon County Circuit Court, docketed as case No. 11-CH-950. The next day, the circuit court entered a TRO and preliminary injunction, finding River City had demonstrated a likelihood that it would succeed on the merits, there was no adequate remedy at law, and it would suffer irreparable harm if injunctive relief was not granted. The court enjoined the Board from awarding the construction contract for the project to any bidder other than River City.

¶ 8 On August 12, 2011, the Board and Hahn filed a motion to dismiss pursuant to

section 2-619.1 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/2-619.1 (West 2010)), claiming (1) the lawsuit was barred by the doctrine of sovereign immunity, (2) *mandamus* relief was not available because the Board's decision was discretionary, (3) a writ of prohibition did not lie where the decision was not made by a tribunal, and (4) a writ of *certiorari* did not lie where the decision was an executive decision, not a quasi-judicial decision.

¶ 9 On August 23, 2011, Contegra filed a motion to intervene in the action as the lowest responsive and responsible bidder on the project. (Contegra's bid was the second lowest bid after River City's, but its bid had not been evaluated by the Board to determine whether it was a responsive bid.) The same day, Contegra filed a motion to dismiss the complaint and dissolve the preliminary injunction.

¶ 10 On September 7, 2011, River City filed a motion for leave to file a first-amended complaint, which proposed to add Broughton as a defendant, add an alternative claim for administrative review, and otherwise make minor "clarifications of its claims."

¶ 11 At a September 9, 2011, hearing, the circuit court first considered Contegra's motion to intervene. Noting that the issue in this litigation was "very, very narrow," it allowed the motion as a matter of discretion. The court granted River City's motion for leave to file its first-amended complaint and proceeded to consider the motions to dismiss. The Board argued on the merits that it "felt that naming a subcontractor in a trade that cannot be fired from that trade, that has no intention of doing, performing the work for that trade, does not comply with the bidding documents and the statutes, and that was within their authority." They claimed River City's complaint did not adequately allege the Board abused its discretion, engaged in fraud, or that its decision was arbitrary or capricious.

¶ 12 After considering the arguments of counsel, the circuit court took the matter under advisement. On September 15, 2011, the court entered an order dismissing River City's complaint.

The court found as follows:

"The issue presented is whether or not the plaintiff has a cause of action against the defendants for rejecting his bid and whether or not the court has the authority to order the defendant to award the contract to the plaintiff. The answer to both questions is no.

The defendants, the Capital Development Board and Fredrick Hahn, Chief Procurement Officer, are vested with wide discretion in awarding State contracts. Absent the proof of fraud or other illegal reason this court has no authority to substitute its discretion with that of the defendants'. It logically follows given the Capitol Development Board's broad discretion; it has the authority to determine who is the lowest responsible responsive bidder. The court has no authority to interfere in that decision."

¶ 13 River City filed a timely motion to reconsider, claiming it had alleged sufficient facts to survive a motion to dismiss and that the applicable statutes support its claim for relief. River City argued the circuit court erred in failing to recognize its authority to reverse an agency's decision if the agency had abused its discretion or acted arbitrarily. River City also requested the court reinstate the TRO previously granted, and issue a "stand-still order."

¶ 14 At an October 6, 2011, hearing, the circuit court denied River City's motions. River City appealed to this court. We docketed the appeal as case No. 4-11-0850.

¶ 15 On October 7, 2011, River City filed with this court an emergency motion for a stay. We denied the motion.

¶ 16 On November 2, 2011, River City filed a subsequent verified complaint for injunctive and other relief in Sangamon County Circuit Court case No. 11-CH-1424. River City named as defendants the Board, Hahn, Broughton, and Contegra. River City alleged (1) the bid documents did not require the subcontractors to be prequalified by the Board or that the "protected" subcontractors be required to self-perform any of the work; (2) River City submitted the lowest bid but, on October 5, 2011, the Board awarded the contract to Contegra; (3) Contegra's bid, like River City's, identifies a subcontractor, who "does not intend to self-perform any of the identified trade work"; and (6) the Board applied "inconsistent and different standards" in determining which bids were responsive. River City sought injunctive relief (including temporary relief), a declaratory judgment, and administrative review.

¶ 17 On November 3, 2011, the circuit court denied River City's motion for a TRO, finding the Board's decision was not fraudulent, "arbitrary, capricious[,] or erroneous." The court also dismissed the case, finding the claims were barred by the doctrine of *res judicata*. River City appealed to this court. We docketed the appeal as case No. 4-11-0994 and have consolidated the two appeals, and pursuant to River City's request, we have placed the appeals on this court's accelerated docket.

¶ 18 II. ANALYSIS

¶ 19 River City raises three claims in these consolidated appeals. First, it argues the circuit court erred in dismissing the original lawsuit. Second, it claims the court erred in concluding it did not have authority to review the Board's decision that River City's bid was nonresponsive. And third,

it contends the court erred in dismissing the subsequent complaint on grounds of *res judicata*.

¶ 20 A. Contegra's Motion To Dismiss Appeal as Moot

¶ 21 Before addressing the merits of River City's claims, we address Contegra's motion to dismiss the appeals as moot. Contegra contends River City's claims are moot because the Board already awarded the contract to Contegra, and therefore, River City is without an equitable remedy. Although we acknowledge that construction has been commenced by Contegra, and thereby this court is unable to grant River City the relief requested, we nevertheless deny Contegra's motion and decide the issues on the merits under the public-interest exception to the mootness doctrine.

¶ 22 "The mootness doctrine provides that we must dismiss an appeal when the issues involved have ceased to exist because intervening events have made it impossible for us to grant effectual relief." *People v. Hill*, 2011 IL 110928, ¶ 6. However, the public-interest exception to the mootness doctrine allows a court to resolve an otherwise moot issue if it involves a substantial public interest. In its response to Contegra's motion, River City does not assert the application of an exception. Instead, it insists the claims are not moot and that effective relief may still be granted. We disagree. Because the Board already awarded the contract to Contegra, and Contegra has commenced construction, River City's request for relief is no longer available.

¶ 23 The criteria for application of the public-interest exception are (1) the public nature of the question, (2) the desirability of an authoritative determination for the purpose of guiding public officers, and (3) the likelihood that the question will recur. *Wisnasky-Bettorf v. Pierce*, 2012 IL 111253, ¶ 12. A clear showing of each criterion is required. *Id.* Under the circumstances before us, we find an authoritative guide for future controversies is needed, as a similar issue will likely recur. A definitive decision by this court will provide future guidance when addressing the extent

of the Board's discretion during the procurement process. See *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 63. Therefore, we will address the merits of this cause.

¶ 24 B. Merits of River City's Appeal

¶ 25 River City originally alleged defendants, the Board and Hahn, acted outside the authority conferred upon them by the Illinois Procurement Code (Procurement Code) (30 ILCS 500/1-1 to 99-5 (West 2010)) and the governing administrative regulations of the procurement practices (44 Ill. Adm. Code 8.90 to 8.220 (2010)) in determining that River City's bid was nonresponsive. River City alleged defendants' actions were arbitrary, capricious, and contrary to applicable law.

¶ 26 In its subsequent complaint, River City again alleged defendants' actions were arbitrary, capricious, and contrary to applicable law for the same reasons as previously alleged. However, River City added Contegra as a defendant in the subsequent lawsuit since the Board had awarded Contegra the construction contract by the time the complaint was filed. River City alleged Contegra's bid contained some of the same flaws as River City's bid. Without alleging more serious conduct, River City claimed the Board acted unfairly in awarding Contegra the project in favor of River City.

¶ 27 In the original lawsuit, defendants filed a motion to dismiss under section 2-619.1 of the Procedure Code (735 ILCS 5/2-619.1 (West 2010)), which the circuit court granted. In the subsequent lawsuit, on its own motion apparently, the court dismissed River City's complaint under section 2-619 of the Procedure Code (735 ILCS 5/2-619 (West 2010)). It is from these judgments of dismissal that River City appeals.

¶ 28 "A motion under section 2-619.1 of the Procedure Code allows a party to 'combine

a section 2-615 motion to dismiss based upon a plaintiff's substantially insufficient pleadings with a section 2-619 motion to dismiss based upon certain defects or defenses.' [Citation]." *Carr v. Koch*, 2011 IL App (4th) 110117, ¶ 25. The trial court's dismissal of a complaint pursuant to section 2-619.1 is subject to *de novo* review. *Carr*, 2011 IL App (4th) 110117, ¶ 25.

¶ 29 "The purpose of a section 2-619 motion to dismiss is to dispose of issues of law and easily proved issues of fact at the outset of litigation." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003). "A section 2-619 motion admits as true all well-pleaded facts, along with all reasonable inferences that can be gleaned from those facts." *Porter v. Decatur Memorial Hospital*, 227 Ill. 2d 343, 352 (2008). On appeal from a section 2-619 motion, the reviewing court must determine "whether there is a genuine issue of material fact and whether defendant is entitled to judgment as a matter of law." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 494 (1994). The court must construe the pleadings and supporting documents in favor of the nonmoving party. *Czarowski v. Lata*, 227 Ill. 2d 364, 369 (2008).

¶ 30 As grounds for dismissal under section 2-619 of the Procedure Code (735 ILCS 5/2-619 (West 2010) in the original lawsuit, defendants relied on the doctrine of sovereign immunity. As grounds for dismissal under section 2-615 (735 ILCS 5/2-615 (West 2010)), defendants argued the declaratory-judgment claim must be dismissed for failure to state a cause of action because, according to defendants, the entry of a judgment declaring River City the lowest responsive and responsible bidder would not terminate the controversy, as sovereign immunity barred the circuit court from ordering the Board to award the contract to River City.

¶ 31 Also, under section 2-615 (735 ILCS 5/2-615 (West 2010)), defendants argued the complaint seeking a writ of *mandamus* should be dismissed for failure to state a claim since the

decision whether to award River City the contract is discretionary, and does not involve a ministerial act. Finally, defendants argued the complaint seeking a writ of *certiorari* must be dismissed for failure to state a claim since the decision to reject River City's bid was an executive decision, not a quasi-judicial decision.

¶ 32 The basis for River City's complaint is found in the Procurement Code (30 ILCS 500/1-1 to 99-5 (West 2010)), which governs the State's competitive-bidding process for many State contracts. Specifically, article 30 of the Procurement Code governs construction contracts like the one at issue in this litigation. See 30 ILCS 500/30-5 to 30-150 (West 2010). Section 30-20(b) provides that "[c]onstruction and construction[-]related[-]professional[-]services contracts over \$25,000 may be awarded to any qualified suppliers, pursuant to a competitive bidding process." 30 ILCS 500/30-20(b) (West 2010).

¶ 33 The competitive bidding process in this case involved five subdivisions of the work to be performed: "(1) plumbing; (2) heating, piping, refrigeration, and automatic temperature control systems, including the testing and balancing of those systems; (3) ventilating and distribution systems for conditioned air, including the testing and balancing of those systems; (4) electric wiring; and (5) general contract work." 30 ILCS 500/30-30 (West 2010). Sections 30-30(v) and (vi) further require "the successful low bidder has prequalified with the [Board and] the bid of the successful low bidder identifies the name of the subcontractor, if any, and the bid proposal costs for each of the [five] subdivisions of work set forth in this Section." 30 ILCS 500/30-30(v), (vi) (West 2010).

¶ 34 A "[r]esponsive bidder" means a person who has submitted a bid that conforms in all material respects to the invitation for bids." 30 ILCS 500/1-15.85 (West 2010). A "[r]esponsible bidder or offeror" means a person who has the capability in all respects to perform

fully the contract requirements and the integrity and reliability that will assure good faith performance." 30 ILCS 500/1-15.80 (West 2010).

¶ 35 After the bidding process is complete, the Procurement Code provides that:

"The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids, except when a State purchasing officer determines it is not in the best interest of the State and by written explanation determines another bidder shall receive the award. The explanation shall appear in the appropriate volume of the Illinois Procurement Bulletin. The written explanation must include:

- (1) a description of the agency's needs;
- (2) a determination that the anticipated cost will be fair and reasonable;
- (3) a listing of all responsible and responsive bidders;
- and
- (4) the name of the bidder selected, pricing, and the reasons for selecting that bidder." 30 ILCS 500/20-10(g) (West 2010).

¶ 36 The express language of the statute clearly provides the Board's purchasing officer with the discretion to determine whether accepting a particular bid would be in the best interest of the State regardless of the bidder's position as the "lowest responsible and responsive bidder" on the project. In order to utilize the discretion, the purchasing officer need only explain its decision

following the guidelines set forth in the statute. The Procurement Code also makes clear that "[n]o person shall have any right to a specific contract with the State unless that person has a contract that has been signed by an officer or employee of the purchasing agency with appropriate signature authority. The State shall be under no obligation to issue an award or execute a contract." 30 ILCS 500/1-25 (West 2010).

¶ 37 Again, as set forth above, section 20-10(g) of the Procurement Code sets forth the rebuttable presumption that the contract will be awarded to the lowest bidder whose bid meets "the requirements and criteria set forth in the invitation for bids." The general criteria for bids is found in Title 44 of the Illinois Administrative Code (Administrative Code). Specifically, section 8.120 of Title 44 refers bidders to the "Standard Documents for Construction" for guidelines setting forth the Board's requirements. 44 Ill. Adm. Code 8.120 (2012).

¶ 38 The publication entitled "Standard Documents for Construction" includes the requirement that "[t]he Contractor shall submit with his/her bid the names and [the Board] issued identification (ID) numbers (prequalification ID number or registration ID number), if known, of all first tier subcontractors and suppliers." It further provides the Board will reject any bid if the subcontractors fail to obtain prequalification before bid opening. See 44 Il. Adm. Code 8.120(m) (2012). Additionally, the "Standard Documents for Construction" includes a requirement that the contractor for each of the major trades perform 20% of the work using its own work force, while each subcontractor must perform at least 40% of that respective trade work with its own work force.

¶ 39 Section 20-75 of the Procurement Code sets forth the following with regard to disputes and protests that occur during the bidding and award process:

"The chief procurement officers shall by rule establish

procedures to be followed in resolving protested solicitations and awards and contract controversies, for debarment or suspension of contractors, and for resolving other procurement-related disputes."

30 ILCS 500/20-75 (West 2010).

Such procedural rules are found at section 8.150 of Title 44 of the Administrative Code, which allows a protester to challenge "any phase of the solicitation process for a particular contract." 44 Ill. Adm. Code 8.150(b)(1) (2012). "The subject of the protest shall concern fraud, corruption[,] or illegal acts undermining the objectives and integrity of the procurement process." 44 Ill. Adm. Code 8.150(b)(2) (2012). The section continues with an explanation of the specific procedures involved. This language makes clear the Board will entertain a protest only if it involves "fraud, corruption[,] or illegal acts" in the procurement process. The Board's chief procurement officer is authorized to make a decision on the protest and that decision is "final and conclusive unless clearly erroneous, arbitrary, capricious[,] or contrary to law." 44 Ill. Adm. Code 8.150(e)(4) (2012).

¶ 40 River City does not allege in its original complaint that the procurement process relating to this particular project involved fraud, corruption, or illegal acts. Rather, it alleges only that the Board abused its discretion in failing to award the contract to River City, the lowest bidder. River City does not allege or demonstrate that the Board engaged in any fraudulent, corrupt, or illegal act in determining that River City's bid was nonresponsive. Instead, River City alleges the Board's decision was erroneous and arbitrary. However, the Board's decision cannot be clearly erroneous, arbitrary, capricious, or contrary to law if the decision to reject a bid was due to the bid proposal not complying with the Board's rules.

¶ 41 In this case, River City's bid named Custom Mechanical as its plumbing

subcontractor. The Board learned that Custom Mechanical was not licensed to perform plumbing work. Rather, it intended to subcontract the plumbing work to Wells Plumbing, a supplier not prequalified by the Board. For these reasons, River City's bid did not comply with the provisions of the "Standard Documents for Construction" in that the subcontractor, Custom Mechanical, would not be performing at least 40% of the plumbing work since it was not licensed to do so. In Hahn's opinion, River City's bid was nonresponsive, as noncompliant with the bidding requirements. Based on these circumstances and the discretionary authority granted to the procurement officer, River City could not allege a valid cause of action based on the Board's decision to reject River City's bid. The circuit court was without authority to grant River City any relief on the allegations set forth in its complaint.

¶ 42           Neither the Procurement Code nor the relevant portions of the Administrative Code specifically adopt the Administrative Review law (735 ILCS 5/3-101 to 3-113 (West 2010)) for procedures related to the Board's procurement process. An express adoption of the review law is required in order to judicially review an agency's decision. See 735 ILCS 5/3-102 (West 2010). Without express adoption, administrative review does not lie to review the Board's procurement decisions.

¶ 43           Our decision extends to River City's complaint filed in its subsequent case as well. There, the allegations were similar to the original complaint in that River City sought to again challenge the Board's decision that its bid was nonresponsive. River City added allegations pertaining to the substance of Contegra's bid, claiming Contegra's contained similar flaws and it was therefore unfair for the Board to award the contract to Contegra rather than River City. River City again could not allege the Board engaged in fraudulent, corrupt, erroneous, arbitrary, capricious, or

illegal conduct based on these facts. Thus, the same principles, statutes, and administrative rules apply to defeat River City's claims as a matter of law in the subsequent lawsuit as well.

¶ 44

### III. CONCLUSION

¶ 45 For the foregoing reasons, we affirm the circuit court's orders dismissing both of River City's complaints, as the claims stated therein are barred as a matter of law.

¶ 46 Affirmed.