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2012 IL App (4th) 120057-U

Filed 6/18/12

NO. 4-12-0057

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ROWE CONSTRUCTION, a Division of United)	Appeal from
Contractors Midwest, Inc.,)	Circuit Court of
Plaintiff-Appellant,)	McLean County
v.)	No. 11CH399
THE TOWN OF NORMAL, an Illinois Municipal)	
Corporation; and H.J. EPPEL & COMPANY,)	Honorable
Defendants-Appellees.)	Scott Drazewski,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's denial of the plaintiff's claim for preliminary injunctive relief, concluding that the defendant's omission of an addendum to its winning bid for a street resurfacing project was not a material variance that rendered the bid "nonresponsive."

¶ 2 In October 2011, defendant, the Town of Normal, requested bids for a street resurfacing project. After considering the bids submitted by plaintiff, Rowe Construction, and defendant, H.J. Eppel & Company, the Town awarded the project to Eppel.

¶ 3 In November 2011, Rowe sued the Town and Eppel for injunctive relief and damages, arguing, in part, that Eppel's failure to attach an addendum to its bid constituted a material variance that rendered the bid nonresponsive. Following a hearing that concluded in December 2011, the trial court denied Rowe's suit.

¶ 4 Rowe appeals, arguing that the trial court erred by denying its amended complaint for injunctive relief and damages. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 A. The Circumstances That Prompted Rowe's Suit

¶ 7 In October 2011, the Town published a "bid call," requesting sealed bids for a "2011 Street Resurfacing" project. The bid call conveyed (1) the scope of the resurfacing project, (2) the required materials and their approximate quantities, (3) an October 12, 2011, prebid conference to answer questions regarding the project, and (4) an October 17, 2011, deadline for bid submissions. The Town also published the details of the prebid conference in the local newspaper and the "Illinois Department of Transportation Notice to Contractors Bulletin" on two successive weeks during that month.

¶ 8 Included with the Town's bid call was a "Proposal" packet that contained, in part, a "Notice to Bidders." The notice provided potential bidders information regarding when and where the bids were to be opened, a brief description of the work to be performed, and the "bidders instructions." The bidders instructions contained the following guidance:

"The Awarding Authority reserves the right to waive technicalities and to reject any or all proposals as provided in [the Bureau of Local Roads and Streets] Special Provision for Bidding Requirements and Conditions for Contract Proposals contained in the 'Supplemental Specifications and Recurring Special Provisions'."

¶ 9 The notice to bidders also listed the following items that were required to be

included with any bids for the project:

"Bidders need not return the entire contract proposal when bids are submitted unless otherwise required. Portions of the proposal that must be returned include the following:

- a. *** Contract Cover
- b. *** Notice to Bidders
- c. *** Contract Proposal
- d. *** Contract Schedule of Prices
- e. *** Signatures
- f. *** Proposal Bid Bond (if applicable)
- g. *** Apprenticeship or Training Program[.]"

¶ 10 At the October 12, 2011, prebid conference, representatives from Rowe and Eppel met with the Town's engineering representatives, Eric Herbst and Gene Brown. Herbst then sent the following message to Rowe and Eppel by electronic mail (e-mail):

"Attached please find a copy of the attendance list and minutes for yesterday's pre[]bid meeting for the Town's 2011 Street Resurfacing Project ***. The minutes and sign-in sheet are titled [a]ddendum [No.] 1 and need to be returned with the bid documents.

PLEASE RESPOND TO THIS MESSAGE TO CONFIRM RECEIPT OF THE MINUTES AND ATTENDANCE LIST." (Emphasis in original.)

¶ 11

Addendum No. 1 also stated, in pertinent part, the following:

"8. Short-term pavement markings are intended to include lane lines, stop bars, and turn arrows where they already exist; plan quantities reflect this. Inclusion of crosswalks will be on a case-by-case basis.

10. On streets with overlaid gutter pans, asphalt from previous overlays is present in a number of driveway approaches. Removal of this existing asphalt from driveway approaches will not be paid for separately but shall be included in the contract unit price per square yard for Bituminous Surface Removal. Placement of asphalt to facilitate drainage may be required in these and possibly other driveways. Placement of asphalt in driveway approaches, including all cleaning, sweeping, blowing, and priming needed, shall be included in the contract unit price per ton for [Hot Mixed Asphalt] Surface Course. On this project, filled gutters are present on the southern portion of Adelaide Street, Mulberry Street, the southern portion of School Street, and the southern portion of Grandview Drive.

* * *

22. These minutes and the attached sign-in sheet shall be known as [a]ddendum No. 1 and shall be included in the contract.

This addendum shall be returned with the bid documents."

(A "driveway approach," as that term is used in addendum No. 1, begins where the driveway entrance contacts the street surface and ends just prior to the public sidewalk that usually intersects a driveway.)

¶ 12 On October 17, 2011, the Town clerk opened the sealed bids and determined that Eppel's bid was approximately \$12,000 lower than Rowe's. One week later, Rowe filed a protest with the Town, arguing that because Eppel's bid did not include addendum No. 1 as mandated, the Town was required to reject Eppel's bid as nonresponsive. In November 2011, the Town's manager issued a written decision on Rowe's protest, concluding as follows:

"Based on a reasonable finding of technical or minor variance, the binding nature of the pre[]bid minutes, the presence of all bidders at the pre[]bid conference[,] and the lack of evidence showing fraud, corruption[,] or illegal acts having the effect of undermining the integrity of the procurement process, the Rowe protest is denied."

¶ 13 At a November 7, 2011, meeting, the Town council considered, in pertinent part, (1) the bids proffered by Rowe and Eppel; (2) the written decision by the Town manager, denying Rowe's protest; and (3) presentation by the respective parties regarding the merits of Rowe's protest. Thereafter, the council awarded the 2011 Street Resurfacing project to Eppel.

¶ 14 Two weeks later, Rowe filed an amended complaint for injunctive relief and damages, arguing, in part, that Eppel's failure to attach addendum No. 1 to its bid constituted a material variance that required the Town to reject Eppel's bid.

¶ 15 B. The Evidence Presented on Rowe's Complaint for Injunctive Relief and Damages and the Trial Court's Determination

¶ 16 At a hearing on Rowe's complaint that began later that same month, Rowe's vice-president, Michael L. Goeken, testified that Rowe had previously bid on the Town's street resurfacing projects for 20 of his 27 years of employment with Rowe. Goeken stated that addendum No. 1, which Rowe used to prepare its bid for the 2011 street resurfacing project, "affected the cost of the of the work to be performed." As an example, Goeken explained that paragraph eight of the addendum—pertaining to short-term pavement markings—increased costs because the project plans required a "4-inch stripe on the pavement" and turn arrows were more labor intensive. Goeken also stated that paragraph 10 of the addendum affected the scope of the street resurfacing project because (1) replacing asphalt in driveways requires manual labor, which increased the cost and (2) prior to the addendum's issuance, Rowe "did not intend on nor [was it] directed by the [bid call] plans to do any driveway, driveway removal, or driveway work."

¶ 17 Goeken noted that addendum No. 1 did not change the Town's estimated material quantities for the overall road resurfacing project, but that the removal of asphalt from driveway approaches—which would not be paid separately—would necessarily increase the cost-estimate for the street resurfacing work. Goeken estimated that Rowe would have to remove the existing asphalt from 26 driveway approaches, but conceded that (1) addendum No. 1 did not specify the number of driveway approaches requiring asphalt removal and (2) his estimate was a guess. Goeken acknowledged that each section of the Town's proposal packet, which included the notice to bidders, proposal, schedule of prices, signature page, proposal bid bond, and apprenticeship or training program sections, each prominently displayed the message, "RETURN WITH

BID." Goeken admitted that addendum No. 1 did not display a similar message.

¶ 18 Herbst, who prepared the street-resurfacing-project plans, testified that although the plans did not specifically mention removing asphalt from driveway approaches, "common sense and prior experience" indicated that the asphalt removal was to be accomplished. Herbst explained that when he calculated the approximate material quantities required for the project, which were listed in the bid call, he did not calculate the asphalt required to replace the asphalt removed from driveway approaches because he estimated that those quantities were "small." Herbst stated that the purpose of addendum No. 1 was to "disseminate information to get a record of what was said at the meeting."

¶ 19 Herbst noted that neither Rowe nor Eppel acknowledged receipt of his October 13, 2011, e-mail, but he opined that the discussion at the prebid conference pertained to minor issues that did not change the bid call. Herbst recalled that questions were asked regarding the driveway approaches at the prebid conference, but he could not remember the specific questions asked or which prospective bidder posed them. Herbst stated that (1) the driveway approach requirements in addendum No. 1 were similar to bid calls of the previous five years and (2) in the absence of a prebid conference, any issues regarding the removal of asphalt from driveway approaches would have been resolved at the time of the resurfacing. Herbst reiterated his rationale for not including the amount of asphalt required to replace that removed from driveway approaches into his estimates, adding that (1) he had factored in an additional three percent—or eight tons—of asphalt for "incidentals" and (2) "this is the same way that it's been accounted for ever since I have been working for the Town, so I didn't think of it as significant."

¶ 20 Gene Brown, the Town's engineer, testified that he was aware Eppel had not

included addendum No. 1 with its bid, but he viewed the omission as a "minor technicality." Brown based his opinion on his observation at the prebid meeting that (1) no changes were made to the scope of the project, the quantities estimated, or the expense categories and (2) Eppel and Rowe were represented at the prebid meeting. Although he agreed that Eppel was the winning bidder, Brown had "procedural concerns" regarding the propriety of the award because it had to be approved by the Illinois Department of Transportation (IDOT) to receive federal funding.

¶ 21 Based on that concern, sometime after the sealed bids were opened, Brown contacted Eppel by phone to discuss the fact that Eppel had not included addendum No. 1 as part of its bid. Brown explained the rationale that prompted his phone call, as follows:

"I *** wanted to make sure that *** [Eppel] had received the addendum when it was sent, even though I realize [Eppel] didn't acknowledge it, but I wanted to make sure that [Eppel] had gotten it, and they did acknowledge *** that *** they did get the e-mail with the addendum, and *** that [Eppel] considered it [the minutes] in their bid. *** I just wanted to make sure [Eppel] had received it."

¶ 22 Brown acknowledged that he had exchanged e-mails with IDOT representative David Speicher regarding whether Rowe's protest would preclude IDOT from releasing the \$400,000 federal funding allotted for the 2011 street resurfacing project. In one exchange, Speicher noted that "if an addendum was issued[,] it must be important" but clarified that he was not suggesting that minutes to a mandatory prebid meeting should be considered an addendum. Brown admitted that he did not inform the Town council of his e-mail exchanges with Speicher

because Speicher's opinion was not IDOT's official position. On October 31, 2011, Brown received a correspondence from the Chief Procurement Office, IDOT Highway Construction, informing the Town that (1) Rowe had also filed its protest with IDOT's chief procurement officer and (2) Rowe's protest should be addressed through the Town's local procedures. Brown revealed the IDOT procurement office letter to the Town council.

¶ 23 Brown noted that although paragraph 10 of addendum No. 1 concerned the removal of existing asphalt from driveway approaches, it did not add to the project's bid call requirements because "prior experience and knowledge" dictated that resurfacing a street "gutter to gutter" may cause the removal of asphalt from driveway approaches. Brown recounted that (1) Rowe had performed similar street resurfacing work for the Town and had, in the past, addressed the removal of asphalt from driveway approaches in a satisfactory manner and (2) the issue of asphalt removal from driveway approaches was discussed at the prebid conference and neither Rowe nor Eppel expressed any concern. Brown did not believe that the topics discussed at the prebid conference were likely to cause either Rowe or Eppel to incur increased costs, but he conceded that he did not know the respective costs structures of either business.

¶ 24 Thereafter, the trial court found, as follows:

**** [T]he court finds that the failure on the part of Eppel to **** include the prebid meeting minutes along with its bid is not a material variance to the invitation to bid or the bid itself, that it is a waivable [*sic*] technical variance for which the Town has exercised its right to do so in a reasonable and nonarbitrary manner."

¶ 25 This appeal followed.

preliminary injunction for an abuse of discretion, which occurs only when the ruling 'is arbitrary, fanciful, or unreasonable, or when no reasonable person would adopt the court's view.' (Internal quotation marks omitted.) [Citation.] Purely legal questions arising in the preliminary-injunction analysis, however, are reviewed *de novo*."

¶ 30 Rowe argues that the appropriate standard of review in this case is *de novo* because Eppel's failure to include addendum No. 1 in its bid constituted a material variance. Here, however, the trial court denied Rowe's suit after considering evidence presented by various witness over two days of trial. Thus, because the court's denial of Rowe's suit was not confined to a question of law, as Rowe claims, we agree with Eppel that the appropriate standard of review is whether the trial court abused its discretion by denying Rowe's amended complaint for injunctive relief and damages. See *Walsh/II in One Joint Venture III v. Metropolitan Water Reclamation District of Greater Chicago*, 389 Ill. App. 3d 138, 145, 904 N.E.2d 1158, 1164 (2009) (concluding that a deferential standard of review applies when a trial court considers evidence prior to deciding whether to grant or deny a preliminary injunction).

¶ 31 B. Rowe's Claim Regarding Eppel's Failure To Submit Addendum No. 1

¶ 32 Rowe contends that Eppel's failure to submit addendum No. 1 with its bid constituted a material variance. We disagree.

¶ 33 A bidder has the right to participate in a fair bidding process, which is not without qualification in that proffered bids must conform to the advertised requirements of the invitation to bid. *Walsh*, 389 Ill. App. 3d at 147, 904 N.E.2d at 1166. Although a variance from the stated

requirements that is "minor" does not require rejection of the proposed bid, a variance that is "material" will require rejection because such a bid is nonresponsive in that it does not conform to the advertised contract offer. *Id.* A variance is material if it provides the bidder " 'a substantial advantage or benefit not enjoyed by other bidders.' " *Id.*

¶ 34 In support of its assertion, Rowe primarily relies on *Walsh*, which, for the following reasons, we conclude is distinguishable from the facts of this case.

¶ 35 In *Walsh*, 389 Ill. App. 3d at 139-40, 904 N.E.2d at 1160-61, the Metropolitan Water Reclamation District of Greater Chicago, invited bids on a project. The District's bid package outlined the requirements necessary for a valid and responsive bid, which mandated—on numerous pages within the bid package—the bidder's inclusion of a signed affirmative action utilization plan. *Walsh*, 389 Ill. App. 3d at 140, 904 N.E.2d at 1160-61. The proposal also prominently noted—again, on numerous pages—that failure to include a signed plan would result in the District's rejection of the bid as nonresponsive. *Walsh*, 389 Ill. App. 3d at 140-41, 904 N.E.2d at 1161. In addition, at a mandatory prebid conference, potential bidders were informed of the utilization plan requirements and the consequences of noncompliance. *Walsh*, 389 Ill. App. 3d at 152, 904 N.E.2d at 1170.

¶ 36 At the public opening of the bids, the District determined that Walsh had the winning bid but immediately noticed that Walsh failed to provide a signed utilization plan. *Walsh*, 389 Ill. App. 3d at 141-42, 904 N.E.2d at 1162. After a thorough review of Walsh's bid, the District deemed Walsh's bid nonresponsive and awarded the project to the next lowest bidder. *Walsh*, 389 Ill. App. 3d at 152, 904 N.E.2d at 1171. Walsh later sued the District, in pertinent part, for preliminary injunctive relief, which the trial court later denied.

On appeal, the appellate court affirmed the trial court's judgment, concluding, as follows:

"[The District] sought an assurance *** that the bidder be bound to the Utilization Plan and its contents. *** [T]he Utilization Plan asks the bidders to state at the time of their bid the identity of the minority subcontractors they will work with on the project, the amount of work they will do and what that work will be, to see if it fits the auspices of the Ordinance's purposes. The bidder's signature *** binds the bidder under oath to work with these subcontractors and to work with them within the scope promised. Without a signature, there is nothing to bind the bidder to either the Utilization Plan as a whole or to the specific terms it may have filled in, if partially completed. This frees the bidder, were it to be awarded the contract despite the lack of signature, to renegotiate with any minority subcontractors named in a partially complete Utilization Plan (or hire other subcontractors not even mentioned) regarding the work to be done and prices to be paid. We cannot imagine a more substantial advantage than this, which left Walsh enjoying the ability to remain unbound to a Utilization Plan due to its failure to sign ***, while every other bidder remained bound because they followed all the requirements as advertised." *Walsh*, 389 Ill. App. 3d at 152-53, 904 N.E.2d at 1171.

¶ 38 Unlike *Walsh*, in this case, the Town's bid call packet, which contained the notice to bidders, listed seven documents that were required to be included in the bids for the resurfacing project—none of which involved addendum No. 1 or the only document contained therein, the prebid conference minutes. In addition, the record does not show that Rowe and Eppel were informed at the prebid conference that the conference minutes would be required to be returned with their respective bids and that failure to do so would result in rejection of that bid.

¶ 39 Here, the requirement levied upon Rowe and Eppel to return addendum No. 1 with their respective bids originated outside the Town's bid call in the form of an e-mail and in the body of the meeting minutes contained therein, which were both authored by Herbst. The parties do not dispute that Eppel failed to include addendum No. 1 with its bid. Thus, as framed by Rowe, the issue before us is whether Eppel's failure to include addendum No. 1 in its bid was a material variance. In other words, did Eppel enjoy "a substantial advantage or benefit" not enjoyed by Rowe by not including addendum No. 1 with its bid.

¶ 40 In support of its contention that Eppel's failure to submit addendum No. 1 with its bid constituted a material variance, Rowe asserts that Eppel had an advantage in that Eppel could have later reneged, claiming that its bid was nonconforming. Thus, Rowe posits, without elaboration, that at the time the Town considered their respective bids, Eppel had estimated its bid on a basis different from that afforded to Rowe. Eppel responds that section 6.200 of title 44 of the Illinois Administrative Code renders the return of the prebid meeting minutes immaterial.

¶ 41 Section 6.200 of title 44 of the Administrative Code, entitled, "Pre-Bid Conferences," provides as follows:

"Pre-bid conferences may be conducted to enhance under-

standing of the procurement requirements. They will be announced in the Bulletin. The conference should be held long enough after the Invitation for Bids has been issued to allow bidders to become familiar with it, but sufficiently before bid opening to allow consideration of the conference results in preparing their bids. Only the written minutes of the conference shall be binding. Nothing stated in the pre-bid conference shall change the Invitation for Bids unless a change is made by written amendment to the Invitation for Bids. Minutes of the conference will be available upon request to all those prospective bidders known to have received an Invitation for Bids. If the conference is mandatory, the minutes shall be supplied to attendees only." 44 Ill. Adm. Code 6.200, amended at 35 Ill. Reg. 16518 (eff. Sept. 30, 2011).

¶ 42 Rowe dismisses Eppel's response, claiming that "minutes cannot, by virtue of their existence, create contractual obligations absent receipt, acknowledgment, and acceptance thereof ***." Despite Rowe's claim, however, the record shows that (1) the Town appropriately announced the time and place of the prebid conference in appropriate periodicals; (2) representatives from Rowe and Eppel attended that conference; (3) the issues discussed at the conference were published in written minutes distributed to the respective representatives; and (4) the parties do not dispute that Rowe and Eppel received the Town's prebid conference minutes prior to submitting their respective bids. Therefore, consistent with the plain language of section 6.200 of title 44 of the Administrative Code, both Rowe and Eppel were bound by the prebid confer-

ence minutes.

¶ 43 More important, our review of those minutes clearly shows that the information contained therein sought to clarify the parameters of the Town's bid call instead of materially altering its original content. For example, paragraph eight merely conveyed that (1) previously existing street markings were to be replaced after the street resurfacing, (2) the estimated material quantities listed in the bid call reflected this replacement, and (3) the inclusion of crosswalks would be considered on a case-by-case basis. Similarly, paragraph 10 conveyed how bidders were to categorize the costs associated with removal and replacement, respectively, of asphalt from driveway approaches, noting by street name where such driveways existed.

¶ 44 Accordingly, we reject Rowe's contention that Eppel's failure to submit addendum No. 1 with its bid constituted a material variance.

¶ 45 C. Rowe's Claim Regarding the Town's Preferential Conduct

¶ 46 Rowe also contends that the Town's conduct toward Eppel after opening the parties' respective bid constituted favoritism and unfair dealing. Specifically, Rowe asserts that Brown unfairly (1) attempted to solicit confirmation of Eppel's receipt and acceptance of the terms contained in addendum No. 1 after the bids were opened and (2) omitted Speicher's e-mail from the report submitted to the Town council on Rowe's protest. We disagree.

¶ 47 Absent fraud, unfair dealing, favoritism, or other arbitrary conduct, the discretion to determine the lowest bidder rests with the public entity advertising the invitation to bid.

Walsh, 389 Ill. App. 3d at 147, 904 N.E.2d at 1166-67.

¶ 48 With regard to Rowe's first assertion, the record shows that Brown contacted Eppel to ensure only that Eppel had received the October 13, 2011, e-mail which contained the

