

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Baukol Builders, Inc.,)
)
Plaintiff/Appellant,) Supreme Court Case No. 20060120
)
vs.)
)
County of Grand Forks,)
)
Defendant/Appellee.)

REPLY BRIEF OF PLAINTIFF/APPELLANT

ON APPEAL FROM A JUDGMENT FOR DISMISSAL WITH PREJUDICE
DATED FEBRUARY 28, 2006, AND THE DISTRICT COURT'S ORDERS, DATED
NOVEMBER 29, 2006, (CORRECTED FEBRUARY 15, 2007), AND JULY 6, 2007

IN DISTRICT COURT, NORTHEAST CENTRAL JUDICIAL DISTRICT,
GRAND FORKS COUNTY
THE HONORABLE LEE A. CHRISTOFFERSON, PRESIDING

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FACTS

¶1 The basic facts of this case, as laid out in the initial brief of Appellant Baukol Builders, Inc. (“Baukol”), are already known to this Court. But Baukol will highlight a few facts that were sidestepped by Appellee County of Grand Forks (“the County”).

¶2 **Temporary heat facts.** The County implies that Baukol could have put in an earlier completion date if it had attended the initial, non-mandatory Pre-Bid Conference, wherein bidders were verbally told that the County would provide temporary heat for winter work. (Response Brief ¶10, 21-24.)

¶3 But Baukol’s non-attendance at the Pre-Bid Conference is a red herring, because Baukol *was* verbally assured thereafter that the County would provide temporary heat. (Tr. at 333, 442) No written addendum was issued on this issue. (Tr. at 153-54, Ex. 1 on Complaint, Appendix at 30). The Bid Specifications specifically state that “Bidders shall not rely upon any information not in written form issued by the Owner and/or Architect.” Baukol attempted to obtain a written addendum regarding temporary heat, but the architect did not respond. (Tr. at 153,272-3, 155-56, 161,338- 39; Appendix at 75-76)

¶4 **Baukol’s performance on prior projects.** The County admits that certain Commissioners considered Baukol’s prior performance on County projects, yet offered no proof or even argument that Baukol did anything wrong (as in fact it had not) (Trial Ex. 5, Response Brief at ¶20) Baukol introduced substantial evidence at trial to show that the two project issues raised were not Baukol’s fault, and the County produced no evidence in contravention. (Appellant Brief, ¶¶61-67). Furthermore, Commissioner Gary Malm openly admitted at trial that he did not know who was at fault on prior jobs and did not try to find out – though he stated in his affidavit that he considered past job

performance as a factor against Baukol. (Tr. at 98, 104, 137; Trial Ex. 5) Baukol was paid in full for both of the projects in question, was not subject to any holdbacks of money, no liquidated damages were assessed, and the County never made any claim against Baukol's performance bonds. (Tr. at 85, 194) The County has no basis for its insinuations against Baukol.

¶5 **County's knowledge that there was to be no federal prisoner housing rate increase.** As discussed in Baukol's initial brief, Gary Gardner, the Commissioners, and the County stated numerous times in briefs and at trial that the federal inmate per-day housing rate would be increasing on October 1, 2005. This turned out to be false. The County in its brief stresses that at trial, the Commissioners had no knowledge that the increase would not happen. (Response Brief at ¶28-30). The County avoids mentioning that it had knowledge of this fact long before the District Court issued its decision on this case, but the County made no effort to correct the record.

LA W AND ARGUMENT

I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE COUNTY DID NOT VIOLATE N.D.C.C. § 48-01.1-02 IN FAILING TO AWARD TO THE LOWEST RESPONSIBLE BIDDER.

A. N.D.C.C. § 48-01.1-02 did not allow the County to consider anything other than the bidder's responsibility and price.

¶6 N.D.C.C. § 48-01.1-02 required that the County award the Project contract to the "lowest responsible bidder." There is no question that Baukol was the lowest bidder, and that Baukol is eminently responsible. Therefore, the County violated N.D.C.C. § 48-01.1-02 in awarding to CE.

¶7 The County relies on the American Jurisprudence 2d treatise to say what North Dakota law and caselaw does not say: that public boards are vested with "wide

discretion” in deciding which bidder should be awarded a contract. (Response Brief, ¶ 39). North Dakota caselaw, even as quoted by the County, states only that the contractor’s *responsibility* may be considered. Chaffee v. Crowley, 49 N.D. 111, 190 N.W. 308 (N.D. 1922); Ellingson v. Cherry Lake Sch. Dist., 55 N.D. 141, 212 N.W. 773 (1927).

¶8 Here, there was no question of Baukol’s responsibility. The County never asked Baukol to submit an AIA-A305 form regarding its responsibility as is the required method to determine responsibility provided in this bid solicitation. (Appendix at 38, 126-29, Tr. at 43-44, 169). The projects relied upon by Mr. Malm to question Baukol’s responsibility only show that Mr. Malm (as he admitted) did not bother to determine whether Baukol had actually done anything wrong.

¶9 The County further argues that the terms “lowest responsible bidder” and “lowest and best bidder” do not conflict and therefore the more specific statute, N.D.C.C. § 48-01.1-02, does not trump the “lowest and best bidder” language. (Response Brief, ¶41-43). But “lowest responsible bidder” plainly means that the lowest bidder who is responsible must be awarded the contract.

¶10 Furthermore, even the term “best bidder” would not do what the County wants. CE was not chosen because it was somehow the “best bidder” or “more responsible” than Baukol. CE was ostensibly chosen because it gave a shorter time-to-completion in its bid. *Neither* statute says what the County wants it to say: that the County may use undisclosed criteria to decide contract award.

¶11 Under the plain language of N.D.C.C. § 48-01.1-02 and North Dakota caselaw, Baukol should have been awarded the Project’s contract.

B. The recent statutory changes to N.D.C.C. § 48-01.1-02 do not support the County's violation of the previous version of N.D.C.C. § 48-01.1-02.

¶12 In 2007, N.D.C.C. Chapter 48-01.1 (the competitive bidding chapter, which contained N.D.C.C. § 48-01.1-02) was repealed and replaced by Chapter 48-01.2. Chapter 48-01.2, in its definition section, includes a definition of “lowest responsible bidder.” N.D.C.C. § 48-01.2-01(19). The County argues in its brief that this new definition should be applied to this case. (Response Brief, ¶45-52).

1. The statutory change of a subsequent legislature is not probative regarding the meaning of the statute passed by a previous legislature.

¶13 This Court has stated many times that actions taken by a subsequent Legislative Assembly cannot be taken as proof of what a previous assembly intended when it passed a bill. Schreder v. Cities Service Co., 336 N.W.2d 641, 643 n.2 (N.D. 1983); St. Alexius Hospital v. Eckert, 284 N.W.2d 441, 445 n.2 (N.D. 1979). The reason for this is clear: realistically, today's legislature probably has little or no idea what was in the minds of the legislators who passed the initial version of § 48-01.1-02. Further, the legislature may change a law, but it cannot *retroactively* change a law under the guise of “clarifying” it.

¶14 The County argues, however, that under the “New York Test,” discussed in Dilse v. Leer, 219 N.W.2d 195 (N.D. 1974), a court may, under very specific circumstances, consider subsequent legislation in interpreting prior legislation. Dilse quoted:

The New York court has established the following test: "The force which should be given to subsequent, as affecting prior legislation, depends largely upon the circumstances under which it takes place. **If it follows immediately and after controversies upon the use of doubtful phraseology** therein have arisen as to the true construction of the prior law it is entitled to great weight.... **If it takes place after a considerable lapse of time and the intervention of other sessions of the legislature, a radical change of phraseology would indicate an intention to supply**

some provisions not embraced in the former statute." Sands, 2A Sutherland Statutory Construction § 49.11 at 265, 266.

Dilse, 219 N.W.2d at 198 (emphasis added). Under this test, if a recently enacted statute was substantially unclear and caused uproar and confusion, and the next year the legislature amended it to fix the ambiguity, the subsequent amendment may be considered to interpret the original statute. That is not the case here.

¶15 Three factors are given in Dilse to determine whether a statutory change may constitute a clarification of an earlier statute: (1) the time between original passage and amendment; (2) the intervention of subsequent legislatures; and (3) the extent of the changes made to the statute. Here, none of the factors weigh in favor of allowing the statute to be considered in interpreting prior legislation. First, the previous version of N.D.C.C. § 48-01.1-02 was passed twelve years ago. N.D.C.C. §48-01.1-02 (1995) (source was S.L. 1995, ch. 443, § 16). In Dilse, a twenty-year gap between original passage and amendment was considered by itself sufficient for the Court to conclude that the amendment did not constitute a construction of the original statute. Dilse, 219 N.W.2d at 198.

¶16 Second, subsequent legislatures amended various portions of Chapter 48-01.1 between 1995 and 2007. See, e.g., N.D.C.C. § 48-01.1-01 (amended by S.L. 1997, ch. 394, §1; repealed 2007); N.D.C.C. § 48-01.1-03 (amended by S.L. 1997, ch. 394, §1; repealed 2007). These “interventions of other sessions of the legislature” further show that the new 2007 statutes cannot be used to interpret the prior statute.

¶17 Third, the change to § 48-01.1-02 was not a single clarification of a confusing phrase. *The entirety of Chapter 48-01.1 was repealed and replaced by Chapter 48-01.2.*

The new Chapter is a substantive re-writing of the prior bidding statutes, not a “clarification.” This case does not satisfy the Dilse test.

2. Even the new version of the competitive bidding law does not provide the unlimited discretion in judging bids claimed by the County.

¶18 Even if the whole new Chapter 48-01.2 were considered to be a mere “clarification” of the previous version of N.D.C.C. § 48-01.1-02, the new version does not support the County’s arguments about unbridled discretion. N.D.C.C. § 48-01.2-01 (containing the chapter definitions) defines “lowest responsible bidder” as follows:

“Lowest responsible bidder” means the lowest best bidder on the project considering past experience, financial condition, past work with the governing body, and other pertinent attributes that may be identified in the advertisement for bids.

This statute does not list or suggest criteria that go to any issue *other than* a bidder’s responsibility (ability to do the work).

¶19 Additionally, even if “other pertinent attributes that may be identified in the advertisement for bids” was misinterpreted to allow consideration of non-responsibility factors, the County’s solicitation did not say that job schedule would be considered for contract award (see section II).

II. UNWRITTEN CRITERIA WERE IMPROPERLY USED TO MAKE A CONTRACT AWARD DECISION.

¶20 In Mini Mart, Inc. v. City of Minot, 347 N.W.2d 131, 141 (N.D. 1984), this Court prohibited public agencies from using unwritten standards and criteria. This Court stated, “We conclude the City could not totally rely upon unwritten standards and criteria in denying Mini Mart, as the sole applicant, the remaining retail beer license. To allow a licensing authority to do so would open the door to unjust favoritism and discrimination.”

¶21 Furthermore, as the County tacitly admits in its response brief, this Court has concluded that a public agency may not use previously-unstated criteria in awarding a publicly-bid contract. (Response Brief, ¶¶60-61); Danzl v. City of Bismarck, 451 N.W.2d 127, 130 (N.D. 1990).

¶22 Here, the County claims that it based its contract award decision on price, completion dates, and revenues to be earned from housing federal inmates. The County argues that early completion was a permissible factor because the solicitation says that “it is the intent of the Owner to award a contract to the responsible bidder who proposed a bid which in the County’s judgment was in its own best interests.” (Response Brief, ¶ 54). The County claims that this satisfies the “writing” and “pre-bid disclosure” requirements of Mini Mart and Danzl. But this “best interests” provision is vague and prone to after-the-fact rationalizing. “Best interest” provides no notice of the actual criteria used to award contracts and opens the door to fraud, favoritism, and improvidence. Allowing “best interest” language to serve in lieu of actual notice of award criteria would entirely eviscerate Mini-Mart and Danzl.

¶23 The County also vaguely states that the “Instructions to Bidders clearly provided that the County would take into consideration the amount bid and the bidder’s estimated number of calendar days or date of completion.” (Response Brief, ¶ 54). The County fails to mention where the Instructions to Bidders says this. The Instructions in fact do not say this at all. The closest they come is to state that “All work should be substantially complete as soon as possible and the bidder shall indicate on his bid form the date he proposes to have the Work completed. The Owner’s anticipated substantial completion date is July 31, 2006.” Baukol used the owner’s July 31, 2006, suggested date.

¶24 The plain truth is that the County relied on a factor that Baukol did not know would even be a factor because it was not specified in the Bid Solicitation. This is a violation of Mini Mart and Danzl.

III. MR. MALM'S BLAMING OF, VOTING AGAINST, AND CONVINCING OTHERS TO VOTE AGAINST BAUKOL WAS AN ABUSE OF DISCRETION BECAUSE IT WAS BASED ON MR. MALM'S NEGLIGENT BRANDING OF BAUKOL.

¶25 Malm stated in his initial affidavit to the District Court that he was motivated against Baukol in part because he believed Baukol performed poorly on two previous projects. As one of the two Commission members from the Building Committee, Malm's opinion had great weight with the Commission. But as explained at length in Baukol's initial brief, the problems Malm blamed Baukol for were obviously not Baukol's fault, but instead were due to a County architect's mistake and a delay by a County vendor. Malm admitted at trial that he had never looked into the matter and had no idea of the details; his actions against Baukol were not based in fact, but were arbitrary and capricious. The County has produced *absolutely no evidence* to contradict Baukol's evidence regarding the prior jobs.

¶26 The County further argues that Malm's prejudice against Baukol was reasonable because Malm's prejudice was "based on the facts as Malm saw them." (Response Brief, ¶ 67) But an agency that bases its opinions and conclusions on incorrect facts, proceeding from a failure to investigate any facts, is the very definition of arbitrary and capricious.

¶27 The County further argues that because Malm was only one member of the Commission, his single opinion is irrelevant to the Commission's decision or the Building Committee's decision. But the Commission was swayed by Malm's

recommendation of CE. If Malm had not been prejudiced against Baukol, he would not have pushed so hard for CE, as he admits that his prejudice against Baukol was a factor (though unstated) in his recommendation to the Commission. Malm was one of only two members on the Building Committee, which advised the Commission on which bidder to select. His arbitrary and capricious opinion had an impermissible amount of weight with the Commission.

IV. THE COUNTY'S BAD FAITH IN FAILING TO CORRECT THE FALSEHOODS IT PRESENTED TO THE DISTRICT COURT MERITS AN AWARD OF ATTORNEY'S FEES TO BAUKOL.

¶28 N.D.C.C. § 28-26-31 states that “allegations and denials in any pleadings in court, made without reasonable cause and not in good faith, and found to be untrue, subject the party pleading them to the payment of all expenses, actually incurred by the other party by reason of the untrue pleading, including a reasonable attorney’s fee[.]” See also Napoleon Livestock Auction, Inc. v. Rohrich, 406 N.W.2d 346, 361-62 (N.D. 1987). The County argues that this does not apply here because in August 2005, the Commissioners were unaware that there would not be a federal rate increase. (Response Brief, ¶ 76). This is untrue. Before the trial, the County knew no contract had been signed increasing the daily rate; the County cannot blindly “trust” a County employee who says a rate adjustment exists or is forthcoming. Additionally, immediately after the trial, but before the Trial Court issues a decision, the County knew no rate increase existed. The County’s duty under N.D.C.C. § 28-26-31 was to alert the Court to the incorrect information it had presented to the Court, particularly in the next two months before the Court issued its decision. Instead, the County failed to disclose the true facts to the Court. This is a violation of N.D.C.C. § 28-26-31, which allows Baukol to recover its attorney’s fees.

¶29 The second ground for the award of Baukol's attorney's fees is the widely-accepted line of cases following Chambers v. NASCO, Inc, 501 U.S. 32, 45-46 (1991). The County argues that North Dakota has not yet adopted this bad faith exception to the normal American Rule. This Court has not yet had the opportunity to consider this rule. Baukol urges this Court to adopt the Chambers rule.

CONCLUSION

The County violated N.D.C.C. § 48-01.1-02, by its plain language, in refusing to award a contract to the lowest responsible bidder. The subsequent repeal of the entire Chapter 48-01.1 and passage of Chapter 48-01.2 does not constitute a “clarification” of Section 48-01.1-02. The County further violated North Dakota law by using unstated criteria to award the contract, by leaving itself the option to negotiate after bid opening, by adding criteria after bids were opened, and by failing to advertise the bid solicitation as required by law, and by failing to correct the record before the District Court issued its decision.

Respectfully submitted November 14, 2007.

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