IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 17, 2008

BAIRD TREE COMPANY, INC. v. CITY OF OAK RIDGE, ET AL.

Appeal from the Circuit Court for Anderson County
No. A4LA0774 Donald R. Elledge, Judge

No. E2007-01933-COA-R3-CV Filed June 24, 2008

Baird Tree Company, Inc. ("Plaintiff") was one of three bidders on a tree trimming and removal project submitted for bid by the City of Oak Ridge ("Oak Ridge"). Plaintiff was notified by letter of several deficiencies in its bid and Oak Ridge requested that the bid be supplemented with additional information. Plaintiff explicitly refused to do so and informed Oak Ridge that its bid was fine just the way it was. After the contract was awarded to a different company, Plaintiff filed suit claiming it should have been awarded the contract because it was the lowest bidder and further claiming that Oak Ridge violated the Tennessee Trade Practices Act, Tenn. Code Ann. § 47-25-101, *et seq*. Oak Ridge filed a motion for summary judgment claiming, among other things, that it was entitled to summary judgment because Plaintiff's bid was invalid to begin with and the Trade Practices Act did not apply to this case. The Trial Court agreed and granted the motion for summary judgment. Plaintiff appeals raising numerous issues. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

David H. Dunaway, LaFollette, Tennessee, for the Appellant, Baird Tree Company, Inc.

Benjamin K. Lauderback and Hanson R. Tipton, Knoxville, Tennessee, for the Appellee City of Oak Ridge.

OPINION

Background

Oak Ridge began accepting bids in July of 2004 for a two year project involving tree trimming, tree removal, brush and limb chipping, etc. Plaintiff was one of three bidders on this project. The two other bidders were Wolf Tree Trimming ("Wolf Tree") and Seelbach and Company, Inc. ("Seelbach"). After bidding was completed and the contract was awarded to Seelbach, Plaintiff filed this lawsuit primarily alleging that the bidding process was improper and Plaintiff was the lowest bidder and should have been awarded the contract.[1] Plaintiff also claimed that Oak Ridge violated the Tennessee Trade Practices Act, Tenn. Code Ann. § 47-25-101, *et seq.* (the "TTPA"). Plaintiff sought compensatory damages in the amount of profit it would have realized had it been awarded the contract.

Oak Ridge filed a motion for summary judgment claiming, *inter alia*, that the undisputed material facts established that it was entitled to a judgment as a matter of law because: (1) Plaintiff's bid failed to meet the necessary bidding requirements; (2) even if Plaintiff's bid did meet the necessary requirements, Plaintiff's bid was not the lowest bid; and (3) Plaintiff failed to state a claim upon which relief could be granted under the TTPA.

In support of its motion for summary judgment, Oak Ridge furnished the Trial Court with affidavits, deposition transcripts, and numerous exhibits. One of the exhibits is an August 20, 2004, letter from Jerry Dover ("Dover"), the Electric Operations Manager for Oak Ridge. This letter was sent to Mr. Bobby Baird, the owner and president of plaintiff Baird Tree Company, Inc. Dover's letter concerned the bid that had been submitted by Plaintiff. In this letter, Dover stated that Oak Ridge was "having difficulty determining your firm's qualifications and ability to perform the work as outlined in the bid documents." The letter then provides a detailed description of additional information needed by Oak Ridge. According to the letter, Plaintiff's bid did not provide three references for whom work similar to that being bid on was performed. Next, the bid documents required Plaintiff to furnish a list of five "right of way and tree trimming/herbicide application (spraying) contracts performed in the last twelve months." According to Dover, this information was not supplied by Plaintiff. Finally, Dover stated that Plaintiff had not complied with the requirement in the bid documents to furnish a list of all contracts presently being performed. The letter then states:

> This letter is to advise you that the information supplied with the bid is inadequate in that the information requested under this item was not supplied. Please supply a list of all such similar contracts presently being performed along with the names and telephone numbers of the persons with whom the contractor has primary contact. If your firm has no such contracts, so state in your reply.

[1] Plaintiff also sued Seelbach, but all claims against Seelbach were dismissed by entry of an agreed order on August 7, 2007, leaving Oak Ridge as the only party defendant.

> The City wishes to proceed with summarizing of the bid responses to the referenced contract as expeditiously as possible. Please furnish the requested information and clarifications in writing by the close of business August 25th, 2004.

On August 23, 2004, Mr. Baird sent a response to Dover's letter. In this letter, Mr. Baird flat out refused to supply any additional information. Mr. Baird's response states, in part, as follows:

> On August 23, 2004, I received a letter from you in which you required a detailed response by August 25, 2004. I find this to be an unreasonable request and in the interest of time and brevity this letter is hereby forwarded.
>
> In response to your letter the following information is submitted:
>
> A) This company has submitted to you adequate information regarding the references and evidence of outstanding execution and workmanship.
>
> B) Baird Tree Company, Inc. has all required State Licenses for Tree Trimming and Brush Control along overhead power lines.
>
> It is my belief that your additional requirements are onerous in that they are particularly prejudicial to small, locally owned businesses.…
>
> In your letter, you have placed tremendous emphasis on requesting an in depth detailed listing of erroneous requirements.…
>
> In closing, *we will follow up by submitting to you a list of questions we would like answered* concerning the verification process utilized to confirm your current contractors are meeting contract specifications. (emphasis added)

Not surprisingly, Mr. Baird was questioned during his deposition about the contents of his response. When he was asked why Plaintiff did not send any additional information to Oak Ridge as requested in the letter dated August 20, 2004, Mr. Baird stated: "I guess we felt we'd give them all the information that was necessary." Mr. Baird admitted at his deposition that Plaintiff was unable to furnish some of the additional requested information. For example, Plaintiff did not have five right of way and tree trimming/herbicide application contracts in the past year. Mr. Baird also testified that Oak Ridge's requirement that a bidder have a certain number of crews was "unreasonable." When Oak Ridge pressed Mr. Baird for an explanation as to why he felt the bidding requirements were unreasonable, Mr. Baird stated that be believed it was because Oak Ridge was trying to create bidding requirements specifically to exclude Plaintiff from being able to successfully

bid on the contract. When asked why Oak Ridge would try to do that, Mr. Baird stated "I don't know." Mr. Baird admitted that neither he nor his company ever had problems with anyone in the past, with the possible exception of Dover whom Mr. Baird claimed on one occasion spoke to him with a "tone of the voice" that Mr. Baird did not like.

As to Mr. Baird's assertion that the needed number of crews was unreasonable, the documents created by Oak Ridge when analyzing the bids provide as follows as to the crews available for Plaintiff:

> Bidder lacks depth in number of crews. There is concern if a major storm event were to occur that other utilities in the area would be affected and would not release the contractor's crews.

Plaintiff presented nothing in the record to indicate that Oak Ridge's concern about the number of crews Plaintiff had available was anything less than legitimate.

As noted, Oak Ridge informed Plaintiff in the August 2004 letter that references needed to be provided for projects similar to the project being bid on. Mr. Baird's written response stated that the references he originally provided were good enough. With regard to whether Plaintiff's stated references were sufficient, Oak Ridge filed Mr. Dover's affidavit. According to Dover:

> Baird Tree listed three references for work performance in 2003 performed that was similar to what [Oak Ridge] was bidding out, Knoxville Utilities Board, Dillard-Smith Construction Co. and "TN Dept. of Highway (A. B. Long Construction Company)", and Baird stated that the work done in 2003 for each was completed before the deadline.
>
> I spoke with Arnold Clevenger, the representative for Dillard-Smith Construction, and was advised by Mr. Clevenger that the Plaintiff had not done any work for Dillard-Smith in the last couple of years. Mr. Clevenger advised that Baird Tree Company had only three or four crews. I attempted to follow-up on Baird Tree's reference listed as the Tennessee Department of Highway (A. B. Long Construction Company). I contacted the Tennessee Department of Transportation and the person I spoke with, whose name I do not recall, had never heard of Baird Tree or A. B. Long Construction Company. I further attempted to speak with a representative of A. B. Long Construction Company by conducting an internet search for an

address and telephone number, but the internet did not turn up any such company.[2]

Plaintiff also filed the affidavit of Angela O'Connor, a staff accountant for Dillard-Smith Construction Company. Ms. O'Connor confirmed that Plaintiff had not performed work for Dillard-Smith Construction Company since March of 2001.

Plaintiff filed the affidavit of David Donoho, a civil engineer with the Tennessee Department of Transportation. Donoho stated that the Department had no records of Plaintiff ever being a prime contractor with the Department of Transportation. Donoho also stated that A. B. Long, Inc., operated in Knoxville until the early 1980's, at which point it became known as "The Long Island Land Corporation." Donoho added that, to the best of his knowledge, "The Long Island Land Corporation" ceased doing business several years ago.

In addition to what is set forth above, there were other components of Plaintiff's bid that were incomplete or simply unresponsive to the requirements contained in the bidding documents. The following is an excerpt from Mr. Baird's deposition:

Q. Does Baird have a substance abuse policy in writing?

A. Yes.

Q. Did you submit that to the City?

A. No.

Q. Any reason why not?

A. [That is the way] we had always answered before. We had never had any problems in the past with it.…

Q. Do you know what a "TQM" is in reference to quality control?

A. No.

Q. Did you ever contact the City to ask them what they meant by TQM before submitting your bid?

A. No.

---

[2] The trouble Dover had when attempting to contact Plaintiff's references is a good example of why, in the original bidding documents and again in the August 2004 letter, it was requested that Plaintiff supply the contact information for the references. As mentioned previously, Plaintiff refused to supply this information when requested.

Q. Why not?

A. I have no idea.

Q. Do you have a formal, written employee-training program?

A. Yes.

Q. Did you provide a list of the requirements of that program for each class of worker as part of your bid package?

A. No.

Q. Why not?

A. I probably just answered the questions down through there like we normally had, you know.

Q. Well, the question is list the requirements of that employee-training program for each class of worker. Is it simply an oversight on your part, or is there any other reason why you didn't list it?

A. That's normally how we answer a lot of those contracts that come in. Usually there's normally not any problem with those contracts.…

Q. You were asked to provide the crew foreman, the name, previous employers, dates of employment, employment dates with contractor, and description of responsibilities with contract tenure, but you failed to do so. Is there any reason why you failed to do that?

A. I just gave them what we normally give.…

Q. Is there any reason why you did not include your safety manual with your bid?

A. We normally turn this stuff in like this, and they accept it, and we just – we thought you all would accept it like that.

The bidding contract also required the bidder to have a full-time arborist on staff. Plaintiff did not have such an employee, but instead used an arborist on a consulting basis.

The Trial Court granted Oak Ridge's motion for summary judgment. The Trial Court announced its decision from the bench and the Trial Court's findings and conclusions were transcribed and incorporated into its final judgment. According to the Trial Court, the contract at

issue was a contract for services, as opposed to goods, and, therefore, the TTPA did not apply. As to Plaintiff's claims that it improperly was not awarded the contract, the Trial Court observed that the threshold issue was whether Plaintiff had submitted a valid bid that was subject to being accepted. The Trial Court then stated:

> In this case let me find that Oak Ridge took, in my mind, an unusual step on August 20 and sent a letter to Mr. Baird asking him to reply and supply additional information.… And this is, no question, … a $600,000 bid at least. And Mr. Baird, upon receiving that letter from the City of Oak Ridge, his response was I've met or exceeded all requirements, and my response is, according to Mr. Baird, I'm going to forward questions to you. That letter was in response to the bid he submitted, the references that he had – that Mr. Baird had – and so forth. But that was his response.… [L]ogic and common sense says when the person you're bidding to is asking questions for clarification and you don't respond, it's going to leave a question in their mind as to the validity of the bid. Candidly, it was like an "in your face." Not only am I not going to respond; I'm going to ask you questions.… [T]hat's … not the appropriate response in this situation. They didn't have to send you a letter; they did; those questions went unanswered….
>
> The bid that was submitted [by Plaintiff] … didn't address an employee who, as required on Page 2, was an arborist.… [The person used by Plaintiff] was a consultant. That in and of itself could disqualify the bidding.…
>
> All of that goes back into whether or not Mr. Baird had an appropriate bid to be accepted by Oak Ridge. And I've already found it didn't qualify as far as an arborist is concerned, and that was one of the requirements. He didn't have that, it's not a qualifying bid, that in and of itself.… Mr. Dover and the City of Oak Ridge had questions concerning his references, and Mr. Baird fail[ed] and refused to respond, other than to say I've done all I'm going to do, mine is appropriate, and I'm going to ask you questions.… So looking at the forest for the trees, I don't find it was a valid bid to begin with.

The Trial Court then determined that even if Plaintiff's bid was valid, Plaintiff was not the lowest bidder and was not entitled to be awarded the contract at issue. The Trial Court determined that Seelbach was the lowest bidder, Wolf Tree was the next lowest, and the highest bid was Plaintiff's.

Plaintiff appeals raising numerous issues. Plaintiff claims: (1) the Trial Court erred when it determined that Plaintiff's bid was not valid; (2) Oak Ridge waived its bidding requirements

such that Plaintiff was eligible to bid; (3) Plaintiff was entitled to be awarded the contract; (4) the award of the contract to Seelbach was "illicit"; and (5) the Trial Court erred when it determined that the TTPA did not apply.

Discussion

In *Teter v. Republic Parking System, Inc.*, 181 S.W.3d 330 (Tenn. 2005), our Supreme Court recently reiterated the standards applicable when appellate courts are reviewing a motion for summary judgment. The Court stated:

> The purpose of summary judgment is to resolve controlling issues of law rather than to find facts or resolve disputed issues of fact. *Bellamy v. Fed. Express Corp.*, 749 S.W.2d 31, 33 (Tenn. 1988). Summary judgment is appropriate only when the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993). In reviewing the record, the appellate court must view all the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in favor of the non-moving party. *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000). And because this inquiry involves a question of law only, the standard of review is de novo with no presumption of correctness attached to the trial court's conclusions. *See Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

Teter, 181 S.W.3d at 337.

The first issue we will address is whether the Trial Court erred when it concluded that the Tennessee Trade Practices Act did not apply. Tenn. Code Ann. § 47-25-101 (2001) provides as follows:

> 47-25-101. **Trusts, etc., lessening competition or controlling prices unlawful and void. –** All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void.

This Court considered the applicability of the TTPA in *Bennett v. VISA U.S.A., Inc.*, 198 S.W.3d 747 (Tenn. Ct. App. 2006). We stated:

> The law is well settled that the TTPA applies only to tangible goods, not intangible services. This principle was established by the Tennessee Supreme Court in *McAdoo Contractors, Inc. v. Harris*, 222 Tenn. 623, 439 S.W.2d 594 (1969). In *McAdoo*, Carroll County invited bids for the construction of a warehouse to be leased to Henry I. Siegel Company, Inc. Although McAdoo Contractors, Inc., submitted the lowest bid, the contract was awarded to another contractor upon the advice of the future lessee. McAdoo Contractors, Inc., filed suit against the county's architect, the county judge, Henry I. Siegel Company, Inc., and Forcum-Lannom, Inc., alleging that they "entered into a combination in restraint of trade contrary to T.C.A. § 69-101," now codified at § 47-25-101.
>
> In *McAdoo*, the trial court dismissed the claim, and on appeal to the Tennessee Supreme Court, the Court said:
>
> > We think it clear upon reading T.C.A. § 69-101 that it has no application under the facts and circumstances of this case. The statute in express terms applies to articles of foreign and domestic origin, so that it would be virtually impossible to bring under the statute a case involving only the award of a building construction contract. It would seem the statute would in such case apply only to an unlawful effort to control the price of the building material, and not to the award of the contract where control of cost of articles was not a factor.
> >
> > On the basis of the well pleaded facts, the sole reason McAdoo did not get the contract, was not because of arrangements or agreements with respect to competition in articles of foreign or domestic origin, but because Carroll County had reserved to itself the right to award it to any bidder it might choose. And acting under this reservation, the contract was awarded by Carroll County to Forcum-Lannom, which its responsible advisers thought to be more experienced.
> >
> > Before this statute could apply, it would be necessary to find and hold that this kind of contract provision has been outlawed by this Code section. But this is so obviously not the case that even complainant does not make this contention.

Id. at 597-98.

> The *McAdoo* Court distinguished between a contract for tangible goods, where the TTPA would apply, and a contract for intangible services, to which the TTPA would not apply. Since that case, our courts have consistently followed this distinction and held that the TTPA only prohibits "arrangements" or "combinations" which involve products, not those that involve services.…

Bennett, 198 S.W.3d at 751, 752.

In the present case, Plaintiff argues that the bid contract was a contract for goods or a combination of goods and services because the winning bidder would have to purchase herbicides in order to complete some of the contractual requirements. If a contractor having to purchase building materials to complete construction of a warehouse does not involve tangible goods, we fail to see how the service contract at issue would involve tangible goods simply because herbicide would have to be purchased in order to complete some of the requirements of the service contract. This case does not involve allegations that Oak Ridge unlawfully was attempting to control the price of herbicides. We agree with the Trial Court's conclusion in the present case that the contract at issue was purely a service contract. Therefore, the Trial Court correctly determined that the TTPA did not apply.

The next issue is whether the Trial Court erred when it determined that Plaintiff's bid was invalid. The undisputed material facts demonstrate that the bidding documents required the bidder to have a full time arborist on staff, which Plaintiff did not have. The undisputed material facts demonstrate that there were numerous deficiencies in Plaintiff's original bid. Although not required to do so, Dover sent a letter to Plaintiff's owner and president requesting the additional necessary information. Mr. Baird refused to supply any additional information and even went so far as to inform Dover that he (i.e., Mr. Baird) would be sending questions to Dover that he wanted answered. The Trial Court correctly characterized this response as being "in your face." This Court is at a loss as to how a company can send such a response to legitimate questions that were raised about its bid, and then complain when it is not awarded the bid.

Regardless of the propriety of Mr. Baird's response, the question on appeal is whether Oak Ridge successfully negated an essential element of Plaintiff's claims or conclusively established an affirmative defense. *See Blair v. West Town Mall*, 130 S.W.3d 761 (Tenn. 2004). Before Plaintiff can claim it was entitled to be awarded the bid, it must begin by showing its bid was valid and subject to being accepted. The undisputed material facts demonstrate that Plaintiff's bid was not valid for the numerous reasons discussed above. Consequently, Oak Ridge has successfully negated an essential element of Plaintiff's claim that it was entitled to be awarded the bid, and the Trial Court correctly granted summary judgment to Oak Ridge on that claim.

Plaintiff argues that Oak Ridge has waived any right to assert that the bid was invalid because Oak Ridge processed Plaintiff's bid after knowing it was defective. In *Cherry, Bekaert & Holland v. Childree*, No. 01A01-9410-CH-00498, 1995 WL 316257 (Tenn. Ct. App. May 26, 1995),

no appl. perm. appeal filed, this Court explained that "[i]n order to constitute a waiver, a party's conduct must reasonably manifest an intention not to claim the right at issue." *Id.*, at *5 (citing *W.F. Holt Company v. A & E Electric Company*, 665 S.W.2d 722, 733 (Tenn. Ct. App.1983)). Even though Oak Ridge did not immediately reject the bid for the stated deficiencies, the undisputed material facts show that Oak Ridge had no intention whatsoever to waive its right to insist that Plaintiff have a valid bid before being awarded the contract at issue.

Because Plaintiff did not submit a valid bid, the issue of whether Plaintiff was the lowest bidder is moot. Likewise, because Plaintiff was not a valid bidder, it has no standing to attack the validity of Seelbach's bid. Any remaining issues are rendered moot.

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for collection of the costs below. Costs on appeal are taxed to the Appellant, Baird Tree Company, Inc., and its surety.

_____

D. MICHAEL SWINEY, JUDGE