IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7499

Summary Calendar

FERRARA FIRE APPARATUS, INC.,

Plaintiff-Appellant,

v.

MAYOR JERRY McLEAN, Etc.,
ET AL.,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Mississippi
(2:93-CV-91(P)(N))

(March 24, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Plaintiff-appellant Ferrara Fire Apparatus, Inc. ("Ferrara") appeals from a summary judgment granted in favor of the defendants-appellees. Finding no reversible error, we affirm.

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I. Background

In October of 1992, the City of Monticello, Mississippi (the "city"), acting through its board of aldermen[1], decided to seek bids for the purchase of a new fire truck. In accordance with Mississippi's public purchase laws, the city published bid notices and filed specifications for the desired vehicle. The bid specifications provided for a truck with a 228" wheel base and a length of 155" from cab to axle. The city also specified that "time is of the essence" and thus that "early delivery will be an extremely important consideration and will be a major factor in the awarding of the bid."

The notices provided that all bids were to be received by November 3, 1992, at 7:00 p.m. At that time, two vendors submitted bids to the city in response to the bid request -- Ferrara and defendant-appellee Sunbelt Fire Apparatus, Inc. ("Sunbelt"). The Ferrara bid was for $120,898, and the Sunbelt bid was for $124,847. Ferrara represented that it met or exceeded all bid specifications (except for one involving paint type which is not at issue here).

The board of aldermen convened on November 3, 1992, to discuss the bids, but, desiring more time, voted for a recess to allow the mayor and fire chief to review both bids in greater

---

[1] The board of aldermen is comprised of defendants-appellees Joan Jolly, James Hill, and Maxey Lambert, who were sued both individually and in their capacity as aldermen. Jerry McLean, the mayor of Monticello, was also sued both individually and in his capacity as mayor. These defendants will be referred to as the "individual defendants."

detail and to determine whether either complied with the advertised specifications. The fire chief, Wayne ("Chief Harrison"), met with the board again on November 18, 1992, and, according to the minutes, "explained that the Ferrara proposal does not meet the requirements as spelled out in the bid." Consequently, the board resolved to take the matter up with the city's attorney before having further discussions. Chief Harrison subsequently testified by affidavit that he felt the Ferrara bid was nonconforming because it proposed a wheel base and a cab to axle length that were 15" shorter than the ones requested in the bid specifications. Chief Harrison claimed to have noticed other deficiencies in the Ferrara bid, as follows: (i) Ferrara did not provide fully modular equipment which could be swapped easily to another chassis, (ii) Ferrara did not include a copy of the motor vehicle dealer license for its representative, Reggie Ridgway ("Ridgway"), and (iii) Ferrara failed to submit evidence of product liability insurance until after the bid deadline, all of which were required by the bid specifications. The fire chief also recounted unfavorable reports about the Ferrara products and business practices from other fire departments. Finally, Chief Harrison explained that the relative delivery times were highly relevant to his decision to recommend the Sunbelt bid: Sunbelt estimated that it could deliver the finished product in 150 to 180 days, although Ferrara anticipated delivery in 180 to 210 days.

In a subsequent meeting held on December 3, 1992, the board of aldermen agreed to have yet another meeting to evaluate the bids and to invite both bidders to answer questions. Both Ferrara and Sunbelt representatives attended the December 15, 1992, meeting and made presentations of their proposals. The minutes reflect that the board discussed a letter from Ferrara dated December 14, 1992, in response to some of the board's concerns about the Ferrara bid. The entire text of the letter is contained in the December 15 minutes. Significantly, Ferrara admitted in this letter that its bid proposed a shorter wheel base and cab to axle length than requested in the bid specifications, but explained that the shorter frame would "provide a better handling truck with a shorter turning radius." Consequently, Ferrara took the position that the shorter vehicle exceeded the city's bid specifications.

At the December 15, 1992, meeting, in response to inquiries from the board members, Ferrara's representative, Ridgway, acknowledged that his company could provide a truck of the requisite dimensions but argued that changing the frame size would also alter the storage compartments. As reflected in the board minutes, "[a]fter continued discussions regarding the wheel base and compartments, Alderman Lambert made a motion to award the contract to Sunbelt Fire."

Ridgway apparently attended a subsequent board meeting on December 29, 1992, during which he stated that "the wheel base not meeting specifications was not a valid excuse for [the

board's] reject[ion of] the bid by Ferrara." He also accused the board of drawing the specifications "in such a manner as to exclude all bidders except Sunbelt Fire(E-l)." The minutes from this meeting reflect that the city's attorney asked Chief Harrison "how he came to draw up the specifications for the fire truck," and that Chief Harrison named several other fire chiefs with whom he had conferred and several other cities in Mississippi whose fire trucks he had inspected "to decide on the body type he felt we needed for our department." The minutes further show that "[a]fter lengthy discussion, [Mayor] McLean thanked Mr. Ridgway for coming and advised him that this Board will stand behind its decision to award the contract to Sunbelt Fire."

Ferrara then filed a complaint in the United States District Court for the Southern District of Mississippi against the mayor and aldermen of the City of Monticello and "Sunbelt Fire Protection Contractors, Inc." on April 13, 1993, asserting that the city had unlawfully awarded the fire engine contract to Sunbelt. Sunbelt, and Emergency One, Inc., the manufacturer of the truck proposed by Sunbelt ("E-1"), were substituted for an erroneously-named party in Ferrara's first amended complaint filed on June 4, 1993. Ferrara sought (i) an injunction against the city from performing or enforcing its contract with Sunbelt, (ii) a writ of mandamus to the board to accept the "lowest and best bid" for the contract, (iii) damages, (iv) statutory

penalties, and (v) a declaration that the contract of sale between the city and Sunbelt was null and void.

After the lawsuit was filed, the board amended its minutes from the December 15, and December 29, 1992, meetings to explain further its rationale for accepting the Sunbelt bid and rejecting the Ferrara bid. This addendum expanded upon the reasons that the shorter truck was considered unacceptable and related Chief Harrison's assessment of other perceived problems with the Ferrara bid, including (i) the omission of product liability insurance certificates, (ii) the failure to include an automobile dealer's license for its salesmen, and (iii) unfavorable reports about Ferrara from other fire departments. The board then "determined that all of the reasons stated by Chief Harrison were sound and proper and any one of those reasons would constitute grounds for rejection of Ferrara's bid." Addendum to Minutes of Board of Aldermen's meetings of December 15, 1992, and December 29, 1992. The addendum was formally adopted by the board on May 4, 1993, and the minutes of the adoption meeting recite the city attorney's advice that

> it would be appropriate to issue an addendum to the minutes in view of the lawsuit filed by Ferrara, because issuing such an addendum at this time will record what everyone recalls was actually discussed at the meetings. Months or years from now everyone's memory will not be as specific as it is at this point in time. It is legal and proper to issue addendums to the minutes as long as the Minute Book clearly reflects that the addendum was issued at a later date and that everything stated in the minutes was in fact discussed at the original meeting.

Approximately seven weeks later, on June 23, 1993, the individual defendants moved for summary judgment on the basis that they had complied with the Mississippi public purchase laws since their decision to accept the Sunbelt bid was neither arbitrary nor capricious. In support of this motion, they submitted an affidavit from Chief Harrison summarizing his reasons for the Sunbelt recommendation, as well as copies of the relevant board minutes. Sunbelt and E-1 filed a motion to dismiss on the basis that they could not be responsible for the city's compliance with Mississippi's public purchasing laws. Alternatively, Sunbelt and E-1 requested the court to permit them to join in the individual defendants' motion for summary judgment. Ferrara requested more time to obtain discovery necessary to rebut the defendants' allegations under Federal Rule of Civil Procedure 56(f) and subsequently responded on the merits. The district court granted the motion for summary judgment by order entered August 31, 1993, and by amended order entered September 16, 1993.[2] Ferrara filed timely notices of appeal from each of these orders.

II. Analysis

Ferrara contends that the district court erred in granting a summary judgment since there are material issues of fact regarding the city's alleged violations of Mississippi's public purchasing laws. Specifically, Ferrara charges that (i) the city

[2] The purpose of the amendment was to correct an erroneous recitation in the prior order that Ferrara had failed to file a response to the motions for summary judgment.

drafted bid specifications specifically for another bidder -- i.e., Sunbelt, (ii) Ferrara's bid was the lowest and best and therefore, it should have been awarded the contract, and (iii) the board failed to set forth in detail in the board minutes its reasons for awarding the bid to the higher bidder.

A. Standard of Review

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party who bears the burden of proof at trial to show with "significant probative" evidence that there exists a triable issue of fact. In re Municipal Bond Reporting Antitrust Litig., 672 F.2d 436, 440 (5th Cir. 1982). We review a summary judgment de novo, applying the same criteria employed by the district court in the first instance. Federal Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). We also review the district court's interpretations of Mississippi law de novo. Salve Regina College v. Russell, 499 U.S. 225, 231 (1991).

In this case, the district court was asked to review the decision of a municipal authority to purchase a vehicle. As the Mississippi Supreme Court noted in Canton Farm Equip., Inc. v.

Richardson ("Canton I"), 501 So. 2d 1098, 1104 n.5 (Miss. 1987), the courts do not undertake this review lightly; rather, "[d]eference must be given the decision of the purchasing body consistent with the lawful responsibility imposed upon that authority." Id.; see also Northeast Miss. Community College v. Vanderheyden Constr., 800 F. Supp. 1400, 1404 (N.D. Miss. 1992) (noting that "an authority's decision is afforded some deference, and judicial intervention would be inappropriate merely because the court, `if it were considering the matter ab initio, would have accepted a different bid.'") (citation omitted). Judicial intervention is therefore not warranted unless "the board's action is arbitrary and capricious or in violation of some duty imposed upon the board by our positive law or some right vested in an unsuccessful bidder." Canton I, 501 So. 2d at 1104. With these standards in mind, we review Ferrara's claims.

B. Compiling the Bid Specifications

Ferrara first attacks the bid specifications themselves, asserting that the city contrived to require certain specifications unique to the Sunbelt (E-1) product with respect to the dimensions of the truck solicited. The sum total of Ferrara's evidence on this point is (i) conclusory affidavits to the effect that the specifications "were generic" for the E-1 product sold by Sunbelt and written to exclude comparable equipment manufactured by Ferrara, and (ii) an admission that Chief Harrison spoke to a Sunbelt representative, in addition to

fire department officials and other equipment professionals, before drafting the specifications.

The city responded with an affidavit from Willard Rogers, a General Motors dealer, who stated that the 228" wheel base and 155" cab to axle length specified by the city were standard and that trucks of this dimension were "available as a stock item" from General Motors. Rogers also pointed out that the dimensions of the shorter truck bid by Ferrara were not standard and were only available from General Motors as a special-order equipment option. Ferrara did not introduce any countervailing evidence to create a fact issue that the dimensions required in the city's specifications were anything other than standard; rather, it demonstrated that the shorter truck proposed in its bid was standard to at least one company and was, in its opinion, superior to the dimensions set forth in the bid specifications. In fact, Ferrara's representative conceded that his company could have built the truck as specified, but chose to bid the shorter truck because of perceived advantages. We fail to see how this evidence creates a fact issue that the city improperly drafted its specifications so as to preclude Ferrara from competing for the business.

C. The Decision to Award to Sunbelt

Ferrara also claims a fact issue with respect to its purported entitlement to the purchase contract, being the "lowest and best bidder." See MISS. CODE ANN. § 31-7-13(c) & (d) (1992 Supp.). The public purchasing statute provides two criteria for

determining which bid a purchasing authority is to accept -- it may enter into a contract with the "lowest and best bidder." Id. As the Mississippi Supreme Court noted, "there is a great ambiguity latent within these two bid acceptance criteria. . . . [T]he statute does not assign a primacy to one or the other where both may not be satisfied." Canton I, 501 So. 2d at 1104 n.3. This provision therefore does not require the purchasing authority to accept the lowest dollar-wise bid. It does, however, mandate that the board shall enter in its minutes "detailed calculations" and a "narrative summary" explaining why the "accepted bid was determined to be the lowest and best bid." MISS. CODE ANN. § 31-7-13(d).

The unequivocal documents evidence that Ferrara's bid was lower than Sunbelt's by approximately $4,500. Inherent in Ferrara's argument that it was the "best bidder," however, is a perception that its bid conformed to the city's bid specifications. The city counters that the Ferrara bid did not conform to the specifications, and, for additional reasons, was not the "best" bid. Although Ferrara introduces several affidavits in which its experts and employees aver that its bid met or exceeded all requirements, the undisputed facts demonstrate that the city's bid specifications were for a truck with a 228" wheel base and a length of 155" from cab to axle and that Ferrara's bid was for a truck with dimensions that were shorter by 15". Chief Harrison testified by affidavit that it was important to the city that the wheel base be 228" because

"General Motors makes a truck of the proper size with this exact wheel base." He also claimed that shortening the wheel base would force undesireable modifications to other parts of the truck.[3]

Ferrara does not dispute the fact that its proposed truck was shorter than that solicited in the city's specifications, but instead maintains that its bid **exceeded** the specifications because a shorter truck is more manageable and desirable. We agree with the district court that such conclusory allegations cannot in this case defeat the city's properly supported motion for summary judgment:

---

[3] Ferrara takes issue with the district court's failure to strike Chief Harrison's affidavit since it was "replete with hearsay references." Ferrara maintains that Chief Harrison would not have been able to testify at trial as to Ferrara's and Sunbelt's corporate structure and gross sales or as to comments allegedly made by representatives from other fire departments concerning Ferrara's business practices. Ferrara also criticizes several purported factual errors in the affidavit. While we agree that the information regarding Ferrara's and Sunbelt's business structure and revenues would not likely be within Chief Harrison's personal knowledge, we do not find this to be a basis for striking the affidavit. Clearly, his research in drafting the bid specifications, personal review of the bids, and opinions of the proposals were within Chief Harrison's personal knowledge. Moreover, the information regarding corporate practices of the two bidders and reports from other fire officials was not offered for its truth -- e.g., that Ferrara has a less than stellar reputation with other fire departments -- but to show what information Chief Harrison relied upon in making the recommendation he did. See Akin v. Q-L Investments, Inc., 959 F.2d 521, 530-31 (5th Cir. 1992) ("[C]ertainly as to reliance, [the affiants'] statements were based on personal knowledge."). We therefore conclude that the district court did not err in refusing to strike Chief Harrison's affidavit. Even if there were erroneous statements of fact in the affidavit, the trial court properly disregarded them, rather than striking the entire document. See Akin, 959 F.2d at 530 (noting that the district court "should disregard only those portions of an affidavit that are inadequate and consider the rest").

> If the [city] had wanted a non-standard truck, it could have solicited bids for one. To analogize, if the [city] had wanted a sports car instead of a family sedan, it would have prepared the bid specifications accordingly. The [city] requested a truck with a standard 228 inch wheel[]base for stated and legitimate purposes. Ferrara chose not to bid in accordance with that request by offering a non-standard truck. Whatever other problems there were with the Ferrara bid, and there appear to be many, this one alone justifies the [city] in rejecting the Ferrara bid as not being the "lowest and best."

Ferrara cites to the Mississippi Supreme Court's decision in Richardson v. Canton Farm Equip., Inc. ("Canton II"), 608 So. 2d 1240 (Miss. 1992), in support of its contention that the city committed several "procedural sins" in awarding the bid to Sunbelt, which should void the Sunbelt contract. We do not read Canton II to support this result. In Canton II, the Madison County Board of Supervisors solicited bids for the purchase of backhoes on four occasions. Prior to the solicitations, however, the board had taken delivery of two backhoes from its co-defendant Tubb-Williamson. The subsequent pattern of putting the contract out for bids was characterized by the Mississippi court as contrived so that the county could purchase the hoes from Tubb-Williamson. Id. at 1242. For example, the first three times the contract was put out for bids, Tubb-Williamson was outbid by another vendor, and the board rejected all of the bids. Id. On the fourth "go-round," the board directed that the clerk solicit bids for the cash purchase of backhoes. Interestingly, the board also authorized that the purchase be for "two new or slightly used rubbertied backhoes," which was "understandable in that, by this time, the two Tubb-Williamson backhoes had been in

use . . . for some six months." Id. at 1243. The published notices mistakenly read that the bids should be for a lease, rather than cash, purchase, and the bids were consequently for lease purchase. Although the plaintiff, Canton, submitted the lowest bid "dollar-wise," the board awarded the contract to Tubb-Williamson, citing several "pretextual" reasons for so doing. Id. at 1242-43. The Mississippi Supreme Court upheld the circuit court's voidance of the purchase, concluding (i) that the board had no authority to accept a lease purchase contract when it had authorized a cash purchase, and (ii) that the board "had acted in a wholly bizarre manner," which could only be explained by its obvious desire to award the contract to Tubb-Williamson. 608 So. 2d at 1243-44.

By contrast, the undisputed summary judgment evidence in the case presented shows that the City of Monticello requested bids for a truck of specified, standardized dimensions, rejected an offer from Ferrara which did not meet those requirements, and accepted one that did. Indeed, the language of Canton II could be viewed as supporting the board's decision not to award the contract to Ferrara, since its bid did not conform to the specifications. See Canton II, 608 So. 2d at 1246 ("The Board had no authority . . . to accept a bid on terms other than those authorized.").

D. Compliance with the Mississippi Public Purchasing Laws

In the original minutes entered directly after the November and December 1992 meetings, the board recited the following:

> a. The Mayor "called for the bids received on the proposed purchase of a new fire truck to be opened . . . . The following bids were received:
>
> > 1. **Ferrara** Fire & Apparatus **Bid $120,898.00** (with GMC Chasis [sic])
> >
> > 2. **Sunbelt** Fire pparatus [sic], Inc. **Bid $124, 847.00** [sic] (with GMC chasis [sic])
>
> (November 3, 1992 meeting);
>
> b. Chief Harrison "**explained that the Ferrara proposal does not meet the requirements as spelled out in the bid**." (November 18, 1992, meeting);
>
> c. Ridgway admitted in a letter dated 12/14/92 (the text of which is contained in the minutes) that Ferrara's bid proposed wheel base and cab to axle length were "**15" less than the specified maximum**," but explained that the shorter base would "provide a better handling truck with a shorter turning radius." During the board meeting, **Ridgway acknowledged "that his company could build the truck as specified with the length of wheel[]base but it would make the storage compartments larger**. Ridgway stated that his company felt that the shorter wheelbase would be better for the Town of Monticello than the one specified in the specs. . . . After continued discussion regarding the wheel base and compartments, Alderman Lambert made a motion to award the contract to Sunbelt Fire." (December 15, 1992, meeting); and
>
> d. "**Mr. Ridgway presented [sic] to the Board that the wheel[]base not meeting specifications was not a valid excuse for rejecting the bid by Ferrara**," and, "after lengthy discussion," the board advised Ridgway that it would "stand behind its decision to award the contract to Sunbelt Fire (E-1)." (December 29, 1992, meeting).

Minutes of 11/3/92, 11/18/92, 12/15/92, & 12/29/92 meetings of the Monticello Board of Aldermen (emphasis added). These passages consistently reflect the city's primary reason for rejecting the Ferrara bid and show that the city complied with its duty to place on its minutes a "narrative summary" explaining

why "the accepted bid was determined to be the lowest and best bid, including the dollar amount of the accepted bid and the dollar amount of the lowest bid." MISS. CODE ANN. § 31-7-13(d). Consequently, we need not address the legality of the board's May 4, 1993, attempt to supplement the minutes to give additional reasons for rejecting the Ferrara bid.

III. Conclusion

There being no genuine issue of material fact as to the city's compliance with Mississippi's purchasing requirements, the trial court properly granted summary judgment in favor of the defendants-appellees. Accordingly, we AFFIRM the judgment of the district court.