

**NOT DESIGNATED FOR PUBLICATION** COURT OF APPEALS  
FIFTH CIRCUIT

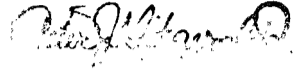
FLEMING CONSTRUCTION CO.,  
INC.

NO. 02-CA-503

FILED OCT 29 2002

VERSUS

FIFTH CIRCUIT



PARISH OF ST. CHARLES,  
ST. CHARLES PARISH COUNCIL  
AND ALLEN & LEBLANC, INC.

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-NINTH JUDICIAL DISTRICT COURT  
PARISH OF ST. CHARLES, STATE OF LOUISIANA  
NO. 50,199 - DIVISION "C"  
HONORABLE EMILE R. ST. PIERRE

**OCTOBER 29, 2002**

**THOMAS F. DALEY  
JUDGE**

Panel composed of Judges Thomas F. Daley,  
Marion F. Edwards, and Susan M. Chehardy

H. BRUCE SHREVES,  
DENISE C. PUENTE  
SIMON, PERAGINE, SMITH & REDFEARN, L.L.P.  
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ATTORNEYS FOR DEFENDANT/APPELLEE,  
PARISH OF ST. CHARLES

**AFFIRMED**

T.D.  
S.M.C.

In this case construing the provisions of the Public Bid Law, the trial court granted summary judgment in favor of defendant, the Parish of St. Charles, against Fleming Construction Co. Inc. On appeal, Fleming argues that the summary judgment was improperly granted in favor of St. Charles Parish on the basis of unsupported factual assertions made at oral argument that were never introduced into evidence or properly placed before the court. We affirm.

This case arises out of a public construction project let by St. Charles Parish involving the installation of approximately 16,000 feet of sewer main, known as the Bayou Gauche Sewer System project. Fleming alleges in brief that the bid form supplied by the Parish contained two different options: Schedule A, which contemplated the use of PVC pipe; and Schedule B, which contemplated the use of HDPE pipe. According to Fleming, PVC pipe costs less than HDPE pipe, but must be laid using a more expensive method of construction, open trench, rather than the

directional boring method that can be used to lay HDPE pipe. Though the bid specifications are not present in the record, it seems that the specifications did not specify the *method* in which the pipes were to be laid, only the description of the pipe itself, PVC or HDPE.

According to Fleming's brief, seven contractors submitted bids for the project, but only Fleming submitted a bid utilizing the Schedule B option, HDPE pipe. Fleming submitted the lowest bid; the second lowest bid was submitted by Allen & LeBlanc, which utilized Schedule A, PVC pipe.

According to Fleming, after the bids were opened, Fleming was advised by the project engineer for St. Charles Parish that it would not be able to utilize directional boring in performing the work, and that this method was not in conformity with the plans and specifications of the project. St. Charles Parish states in brief that it told Fleming that a request for a change order could be entertained after the awarding of the bid. Fleming argues that it was advised that it could either withdraw its bid or perform the work using the open trench cut method, but at the bid price. As open trench was much more expensive to perform than directional boring, Fleming could not perform for the bid price with that method. Fleming agreed to withdraw its bid and its bid bond was returned. The contract was then awarded to Allen & LeBlanc, the second lowest bidder. Fleming alleges in brief that it later learned that discussions were had between the Parish and Allen & LeBlanc, almost immediately after the project was awarded, to allow the latter to utilize directional boring to install the pipe, the very method that allegedly Fleming was told it could not use.

The proposed change order to allow Allen & LeBlanc to utilize directional boring was forwarded to the Parish Council on April 20, 1998, but no notices were given to the original bidders, Fleming alleges. The change order was issued to Allen

& LeBlanc allowing it to use HDPE pipe and directional boring. According to Fleming, even with the change order credit provided by Allen & LeBlanc, the price of the contract to the Parish, involving exactly the same materials and processes proposed by Fleming and rejected by the Parish, was still \$59,000.00 higher than the bid submitted by Fleming.

Fleming alleges in brief that at no time was it ever advised by the Parish or its engineer that Allen & LeBlanc was being allowed to use directional boring. It was not until August of 1999 when Fleming observed the work in progress that it learned of the change in the project. At that point, Fleming filed a Petition for Injunctive Relief, Declaratory Judgment and Damages. Prior to the hearing on the Preliminary Injunction, the parties agreed to a consent judgment removing the request for injunctive relief from the suit, as the project was substantially complete.

The Parish filed a Motion for Summary Judgment, arguing that Fleming was not entitled to relief because after withdrawing its bid on the project, it was no longer a bidder entitled to relief under the provisions of the Public Bid Law. At the hearing on the Motion, the Parish also alleged that Fleming had actual or constructive notice of the change order, by virtue of television coverage, publication of the change order request in the official journal for St. Charles Parish, action by the Parish Council, and public debate, and ,therefore, were not entitled to relief. It is this evidence that Fleming argues was improperly before the trial court in support of the Motion for Summary Judgment.

Fleming argues on appeal that there was no evidence introduced at the hearing on the Motion for Summary Judgment to support the trial court's conclusion that "the public manner in which the change order was authorized provided Fleming with adequate notice...", nor was that conclusion correct. Fleming argues that no evidence

was introduced to support this conclusion, but rather this information was contained only in unsupported arguments of counsel at the hearing, and as such was not competent "evidence" of which the trial court could take any judicial notice. Fleming argues that the Summary Judgment in favor of the Parish should be vacated, and the matter remanded for trial on the merits.

The Parish argues on appeal that because Fleming had voluntarily withdrawn its bid at the time Allen & LeBlanc was awarded the project, Fleming was not a "bidder" under the Public Bid Law and, therefore, is not entitled to relief under it.

It is well settled that a Motion for Summary Judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966. Under the recently amended version of article 966, the initial burden continues to remain with the mover to show that no genuine issue of material fact exists. If, as in this case, the moving party will not bear the burden of proof at trial, the moving party must only point out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The nonmoving party then must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. LSA-C.C.P. art. 966(C)(2). If the nonmoving party fails to do so, there is no genuine issue of material fact, and summary judgment should be granted. *Id.*

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's determination of whether a summary judgment is appropriate. Whether a particular fact in dispute is material can only be determined in light of the substantive law applicable to the case. Sanders v. Ashland Oil, Inc., 96-1751 (La.

App. 1 Cir. 6/20/97), 696 So.2d 1031, writ denied, 97-1911 (La. 10/31/97), 703 So.2d 29.

As this court stated in D & O Contractors, Inc. v. St. Charles Parish, 00-882 (La. App. 5 Cir. 2/28/01), 778 So.2d 1285:

the unsuccessful bidder bound to comply with all procedures regulating the availability of "post deprivation" remedies. And these procedures predicate the availability of damages for the lost contract on the unsuccessful bidder's having timely sought to prevent the public body from awarding the contract to a rival bidder:

[A]n unsuccessful bidder on a public contract who fails to resort to the relief granted by statute by attempting to enjoin timely the execution or the performance of the contract, when the facts necessary for injunctive relief are known or readily ascertainable by the bidder, is precluded from recovering damages against the public body.

....

If an aggrieved bidder does not timely file a suit for injunction, he has waived any right he may have to claim damages against the public body or the successful bidder.

....

The timeliness of a suit for injunction depends on the facts and circumstances of the particular case, including, among other things, the knowledge possessed by the attacking bidder concerning the wrongful award of the contract, the point in time the bidder acquired this knowledge, the point in time that the public body became indebted to the successful bidder, and the time period between the awarding of the illegal contract and the completion of construction.

Airline Const. Co. Inc., 568 So.2d at 1033, 1035 (emphasis added).

St. Charles Parish was the mover for summary judgment, but would not have borne the burden of proof in trial on the merits of establishing Fleming's right to relief under the Public Bid Law. Therefore, St. Charles Parish must only point out that there is an absence of factual support for one or more elements essential to Fleming's claim.

St. Charles Parish did not attach any affidavits or other supporting evidence to its Motion for Summary Judgment. Fleming filed an Opposition to Summary Judgment, to which it attached an affidavit by its Vice President, Jack Fleming, attesting to the events surrounding Fleming's bid and withdrawal thereof. Fleming alleged that he was never advised that if the bid utilized directional boring it would be rejected; however, Fleming claimed that after the bid day, Fleming was contacted by the project engineer for the purpose of reviewing and discussing Fleming's bid, whereupon Fleming was told that they would not be allowed to use directional boring without a change order. Fleming was advised it would be allowed to withdraw its bid, and did so, thereafter having no other contact with the Parish over the project.

Fleming attached a letter to its Opposition, dated February 17, 1998, from it to the Parish, where it withdrew its bid, noting "after our meeting of February 6, 1998, it was determined that the specifications ruled out directional boring on the above mentioned project." This was the reason Fleming asked to be able to withdraw its bid and bid bond.

Also attached was a letter dated February 25, 1998 from St. Charles Parish to Fleming, wherein St. Charles allowed Fleming to withdraw its bid and bid bond, but expressed serious displeasure that Fleming failed to bid the project in accordance with the plans and specifications, though the letter did not specify in what way. Fleming disagreed strongly that they failed to bid according to specifications, as evidence by Exhibit C to their Opposition, a letter from Fleming to St. Charles Parish addressing this contention.

Also attached to Fleming's Opposition is a Notice by the St. Charles Director of Public Works, setting the change order on the council's agenda for April 20, 1998.

At the hearing on the Motion for Summary Judgment, St. Charles Parish argued that Fleming's suit was untimely filed because facts were known, or should have been known to Fleming, of the proposed change order well in advance of Fleming's suit. St. Charles Parish argued that the notice of the proposed change order was publicly made:

"...This matter, the change order to allow directional drilling was publically noticed in the official journal of St. Charles. It was put on the agenda at the parish council meeting, it was publicly debated, it was televised, it was voted on by the parish counsel [sic], it was published again and all four months and something before the first objection by Flemming [sic] and long after the public had spent the money to substantially complete this project...."

Record at p. 133.

Far from objecting to this information as unsupported or improperly before the court, Fleming's counsel argued at the same hearing:

"...Mr. Zaunbrecher says there is all kinds of public hearings and everything else. He is right. We found that there was a change order that was approved by the parish council. But it's not like everybody in the community watches television shows, it was typical when you have a parish council and all the items are listed on the agenda. Fleming has no reason to suspect that the parish is going to treat the second low bidder any differently then [sic] they treated Fleming...."

Fleming's counsel did not address the Parish's argument that the notice of the change order was published in the official journal of the parish.

In its judgment granting the Parish's Motion for Summary Judgment, the trial court found that the Parish properly carried out the necessary procedures for addressing the change order on the record at a public meeting. It further found that the public manner in which the change order was authorized provided Fleming with adequate notice to inform itself of the facts necessary for injunctive relief prior to the substantial completion of the sewer system project, and by failing to file suit sooner, had forfeited any right it had under the Louisiana Public Bid Law (LSA-R.S. 38:2211



et seq) to claim damages, citing Airline Construction Company, Inc. v. Ascension Parish School Board, 568 So.2d 1029 (La. 1990).

It is important to note that Fleming did not object to the Parish's counsel's assertions at the hearing that the change order was publicly advertised by various means, and even further, agreed that the change order was public, but sought instead to excuse the fact that Fleming did not know about it; Fleming could not be expected to "watch television" and had no reason to believe it should avail itself of public information because it had no idea that Allen & LeBlanc would apply for a change order or that the Parish might entertain one. Arguments of counsel are not evidence, but St. Charles Parish was not required to put forth evidence in its Motion to Summary Judgment, as the party who would not bear the burden of proof at trial. It was merely required to point out deficiencies in Fleming's case, which it did, and which Fleming's counsel validated at the same hearing.

The fact that the change order was publicly announced, and Fleming, at the hearing, agreed with these facts, showed that Fleming had facts at its disposal within time to file a suit for injunction and should have taken steps at that time to correct what they saw as a violation of the Public Bid Law. The fact that Fleming did not object at the hearing on the summary judgment, but instead agreed with the facts related by opposing counsel, leaves them with no remedy on appeal. As the party who would not bear the burden of proof at trial, the Parish pointed out deficiencies in Fleming's case (here, the untimeliness of Fleming's suit), and here Fleming was unable to refute them.

Accordingly, we affirm the judgment of the trial court.

**AFFIRMED**



EDWARD A. DUFRESNE, JR.  
CHIEF JUDGE

SOL GOTHARD  
JAMES L. CANNELLA  
THOMAS F. DALEY  
MARION F. EDWARDS  
SUSAN M. CHEHARDY  
CLARENCE E. McMANUS  
WALTER J. ROTHSCHILD

JUDGES

# Court of Appeal

FIFTH CIRCUIT  
STATE OF LOUISIANA

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GLYN RAE WAGUESPACK  
FIRST DEPUTY CLERK

JERROLD B. PETERSON  
DIRECTOR OF CENTRAL STAFF

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## CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY OCTOBER 29, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

*Peter J. Fitzgerald, Jr.*  
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COURT OF COURT  
*Glyn Rae Waguespack*  
*J. Clerk*

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