

STATE OF MICHIGAN
COURT OF APPEALS

WAYNE COUNTY CHIEF EXECUTIVE,
COUNTY OF WAYNE, THOMAS CAREY,
DALE JURCISIN, CAROL STEFFANNI, and
LAURA WILLEY,

UNPUBLISHED
March 2, 1999

Plaintiff-Appellees,

v

STATE OF MICHIGAN, DEPARTMENT OF
TRANSPORTATION, TRANSPORTATION
COMMISSION, GOVERNOR AND
DEPARTMENT OF TRANSPORTATION
DIRECTOR,

No. 212636
Wayne Circuit Court
LC No. 98-802103 AZ

Defendants-Appellants.

Before: Sawyer, P.J., and Bandstra and R. B. Burns*, JJ.

PER CURIAM.

Defendants appeal from a circuit court order denying in part their motion for summary disposition and entering judgment in plaintiffs'¹ favor on their claim that the Michigan Department of Transportation (MDOT) wrongfully refused to allow Wayne County to bid on highway maintenance projects. The court summarily reversed MDOT's decision to preclude the county from bidding on such projects and granted plaintiffs a writ of mandamus compelling MDOT to let the county submit bids on the projects. We reverse and remand.

The state is solely responsible for the cost of constructing, improving and maintaining trunk line highways. MCL 250.61; MSA 9.901. MDOT did the year-round maintenance on trunk line highways in one of two ways. MDOT employees did the work in some counties or MDOT contracted to have other counties (or sometimes specific cities) do the work, as permitted under MCL 250.62; MSA 9.902. Such maintenance included lawn mowing, snow plowing, filling potholes, and repairing

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

guardrails, on an “as needed” basis. Specific highway projects, on the other hand, were competitively bid by private contractors who were “prequalified” under the Bidders on Public Works Act (BPWA), MCL 123.501 *et seq.*; MSA 5.2311 *et seq.*, as eligible to bid on the type of work involved.

Until 1992, MDOT negotiated its year-round maintenance contracts directly with various governmental units. Beginning in 1992, MDOT decided to test competitive bidding on the year-round maintenance contracts to see what private contractors would charge. Wayne County’s bid was approximately \$750,000 less than that of a private sector bidder and approximately \$386,000 less than MDOT’s engineer estimate and therefore it was awarded the contract. The contract expired and was rebid in 1996. Wayne County’s bid was approximately \$1.9 million less than that of the next lowest bidder, a private contractor, and approximately \$210,000 less than the engineer estimate and again it got the contract. The county continued to do year-round maintenance on other roads in its jurisdiction under its negotiated contract.

In October of 1997, MDOT advertised a request for bids on a design, building and maintenance contract for a portion of I-275 near I-96. However, MDOT rejected all the submitted bids because they exceeded the engineering estimate. Because the current maintenance contract was due to expire at the end of 1997 and a new contract would not be in place by that time, Wayne County, at MDOT’s request, took over general maintenance of that part of I-275 on January 1, 1998. In December of 1997, MDOT once again advertised for bids on the project. The ad did not specify that the bid was closed to governmental units, so Wayne County requested a bid proposal in January of 1998. However, it was informed that it had to be prequalified under MCL 123.501; MSA 5.2311 in order to receive bid documents on the project.

Plaintiffs filed this lawsuit in January of 1998. Plaintiff contended that MDOT’s prequalification requirement was unwarranted and illegal. Nonetheless, in February of 1998, Wayne County submitted a prequalification application, which MDOT denied. MDOT’s position was that Wayne County was not a “bidder” as that term is defined in the prequalification rules, 1979 AC, R 247.11(5). Therefore, Wayne County could not be prequalified to compete against private contractors for highway construction work.

In an amended complaint filed in February of 1998, plaintiffs alleged that defendant MDOT’s decision to exclude Wayne County from bidding on I-275 and other highway construction and maintenance contracts violated the State Trunk Line Highway System Act “STLHSA,” MCL 247.651 *et seq.*; MSA 9.1097(1) *et seq.* In Counts I and II of the complaint, plaintiffs alleged that defendant’s conduct constituted a violation of §11(1)(g) and 11(c), respectively, of the STLHSA. In Count III, plaintiffs requested mandamus relief, contending that if defendant’s conduct constituted a violation of the STLHSA, then they had a clear legal duty to let Wayne County bid on maintenance and construction projects. In Count IV, plaintiffs asserted that they had no avenue for appeal or other judicial review of MDOT’s decision to preclude Wayne County from bidding on highway maintenance and construction projects and that the decision should be reversed under MCL 600.631; MSA 27A.631. In Count V, plaintiffs alleged that defendant’s conduct wrongfully deprived them of their due process rights under the Michigan Constitution. In Count VI, plaintiffs requested permanent injunctive relief.

In lieu of filing an answer, defendants moved for summary disposition pursuant to MCR 2.116(C)(4), (5)(8) and/or (10) in March of 1998. They asserted that Counts I and II should be dismissed because the STLHSA does not require MDOT to allow Wayne County to bid on highway contracts. Defendants further asserted that because MDOT is not required by law to allow Wayne County to bid on highway contracts, plaintiffs were not entitled to writ of mandamus, warranting dismissal of Count III. Defendants further contended that Count IV should be dismissed because plaintiffs had administrative remedies. Defendants contended that Count V should be dismissed because plaintiffs alleged no liberty or property interest of which Wayne County was deprived. Defendants contended that plaintiffs failed to meet the requirements for obtaining injunctive relief, warranting dismissal of Count VI. Defendants further asserted that plaintiffs did not have standing to sue because (a) the one project Wayne County was not allowed to bid on, the I-275 project, had been abandoned, and (b) Wayne County's pre-qualification application had been denied and the County had not exhausted its administrative remedies. Finally, defendants argued that even assuming that Wayne County had the right to bid on the highway projects, MDOT was authorized to require that bidders be prequalified pursuant to the BPWA.

Plaintiffs responded that they did have a right to relief because defendant's conduct did violate the STLHSA. They further responded that they did have standing to sue and did not have to exhaust their administrative remedies because they were not challenging the denial of the pre-qualification application. Rather, the issue before the court was whether MDOT's decision to exclude Wayne County from bidding on highway maintenance projects violated the competitive bidding requirement of the STLHA. Plaintiff's requested that the court deny defendants' motion and grant a judgment in their favor pursuant to MCR 2.116(I)(2). Following oral argument the court took the matter under advisement.

Later, the court ruled under Counts I, II, III, and IV:

[T]he Court is of the opinion that the claims have been stated for which relief can be granted. There is really no administrative remedy that the County has at its disposal because there was a categorical denial of their request to be able to pre-qualify for bidding on the State projects.

As result of that categorical denial that denies the County the opportunity to bid, which this Court views is a violation of Section 11(c) of the State Trunkline Highway System Act requiring competitive bidding. By denying the county the opportunity to bid, it does not give the State the best possible scenario in terms of getting the best price to do the work, and that in fact directly impacts upon the taxpayers because it will not only increase tax expenditure but, also could increase and cause needless taxation to taxpayers.

The County Executive is the Chief Executive Officer of Wayne County. [He] [i]s the proper person to bring such an action to contest the State's activity. Therefore, he does in fact have standing on behalf of residents of Wayne County to bring this

action. The taxpayers, since they are directly effected (sic), it could be by the action of the State (sic) do also have standing to bring this action.

That being the situation, the Court is of the opinion that the motion for summary disposition as to Counts I, II, III, and IV, should in fact be denied as to the state and the action that is requested by the plaintiff relative to those counts is granted.

The Court is of the opinion that Section 11(c) of the State Trunkline Highway Systems Act requires the competitive bidding. The Court, therefore, will issue an order of mandamus ordering the State of Michigan to allow Wayne County to bid on the I-275 project.

When defense counsel pointed out that the I-275 project had been abandoned, the court ruled that MDOT had to let the County bid on “whatever other projects fall within the purview that Wayne County wishes to bid on.” The court granted defendants’ motion as it pertained to counts V and VI.

The court later entered an order reversing MDOT’s decision precluding Wayne County from bidding on highway projects and granted a writ of mandamus compelling MDOT “to allow the County the opportunity to bid on any highway maintenance project (as the term maintenance is defined in MCL 247.661) that defendants decide to let out for bid.”

In the meantime, Wayne County was pursuing its administrative remedies because of MDOT’s denial of the prequalification application. In March of 1998, Wayne County requested an administrative hearing on MDOT’s decision to deny the prequalification application. In June of 1998, the Prequalification Committee upheld the decision, agreeing that the County was not a “bidder” as that term is defined under Rule 247.11(5). Wayne County appealed to the State Transportation Commission, which also upheld the denial of its prequalification application in September of 1998. At the time of oral arguments in this appeal, an appeal of that decision was pending in Wayne County Circuit Court.

Mandamus is an extraordinary remedy and is appropriate only when there is no other remedy, legal or equitable, that might achieve the same result. Issuance of writ of mandamus is proper where (1) the plaintiff has a clear legal right to performance of a specific duty sought to be compelled, (2) the defendant has a clear legal duty to perform such act, and (3) the act is ministerial, involving no exercise of discretion or judgment. *Tuscola Co Abstract Co, Inc v Tuscola Co Register of Deeds*, 206 Mich App 508, 510-511; 522 NW2d 686 (1994). Mandamus will lie to compel the exercise of discretion, but will not lie to review or control the exercise of discretion or to compel its exercise in a particular manner. *Teasel v Department of Mental Health* 419 Mich 390, 410; 355 NW2d 75 (1984). The burden of proof is on the plaintiff to present proof that the defendant has a clear legal duty to perform in the manner requested. *Burger King Corporation v Detroit* 33 Mich App 382, 384; 189 NW2d 797 (1971).

In this case, mandamus relief is inappropriate because plaintiffs have another remedy that might achieve the same result. As noted, plaintiffs have an appeal of the denial of the prequalification

application pending in circuit court. If that appeal is successful, plaintiffs would be granted the right to be prequalified and to bid on the projects at issue. “The general rule is that

a writ of mandamus is not to be issued where the plaintiff can appeal the error.” *Keaton v Beverly Hills*, 202 Mich App 681, 683; 509 NW2d 544 (1993). Accordingly, the trial court erred in granting mandamus relief.

Reversed and remanded. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Richard A. Bandstra

/s/ Robert B. Burns

¹ Plaintiffs Thomas Carey, Dale Jurcisin, Carol Steffani and Laura Willey are taxpayers of the State of Michigan, and residents and property owners in Wayne County.