STATE OF MICHIGAN

COURT OF APPEALS

THOMAS ELECTRIC, L.C.,

Plaintiff-Appellant,

v

SAGINAW SCHOOL DISTRICT,

Defendant-Appellee.

UNPUBLISHED
March 9, 1999

No. 203531
Saginaw Circuit Court
LC No. 96-015231 CZ

Before: White, P.J., and Markman and Young, Jr., JJ.

PER CURIAM.

Plaintiff Thomas Electric, L.C. appeals as of right an order granting summary disposition to defendant School District of the City of Saginaw pursuant to MCR 2.116(C)(8). We affirm.

This equal protection case arose in the spring of 1996 when defendant began taking bids for the reconstruction of two parking lots in the school district. Plaintiff, a non-union contractor, entered an electrical subcontracting bid with a general contractor, Pyramid Paving Company (Pyramid) and its owner Bruce Weiss, who then bid on the reconstruction project. The advertisement of the reconstruction and bidding process contained the following reservation:

> The subject reserves the right to waive any informality in any bid, to reject any or all bids, or accept any bid which is considered most favorable to the Owner.

The bid notice itself obtained from the school district contained the following language:

> RIGHT OF THE OWNER TO ACCEPT OR REJECT BIDS. The Owner reserves the right to accept or reject any and all bids, or parts thereof, and to waive any irregularities in the bid except those specifically mentioned above.

This language is similar to that in MCL 380.1267(5); MSA 15.41267(5), which states that, in connection with the construction of a new school building, "[t]he board or board of directors may reject any or all bids."

The lowest bid was eventually submitted by Pyramid. However, each contract relating to the parking lots had to be approved by the Saginaw School Board, and defendant requested a list from Pyramid of all of its proposed subcontractors. Daniel Lapan, the director of buildings and grounds for defendant, said that he investigated the list of subcontractors in order to determine if there had been problems in the past with any of them. According to Lapan, there were some concerns with plaintiff arising from his work on a previous job-- the paving of the Career Opportunity Center (COC)-- where Lapan had been required to investigate out-of-state "scab labor" brought in by plaintiff to work on the project. Lapan stated that two board members had prompted this earlier investigation by making inquiries into plaintiff's hiring practices, and that his investigation revealed that plaintiff had retained one worker from out-of-state to work for him, but that he was not in violation of any school district policy.

After completing the investigation in the instant case, Lapan concluded that he had no problems working with plaintiff. He subsequently recommended that all subcontractors be approved, including plaintiff. According to Lapan, after he makes a recommendation, it then has to be approved by the buildings and grounds committee of the school district. For reasons not communicated to Lapan, plaintiff was vetoed as a subcontractor by this committee.

After sending the school district a list of the subcontractors, Weiss claimed he was told that there might be a problem with plaintiff because plaintiff was non-union. Weiss was also allegedly told that defendant did not want to use plaintiff because he was not licensed in Saginaw. Richard Powell, defendant's Director of Facilities, said that he did not accept plaintiff's bid on the parking lot job because Powell had spent approximately two weeks the previous summer trying to determine if plaintiff was in conformance with board policy regarding prevailing wage payments, costing his office time and money. Powell further said that no one had spoken to him about plaintiff's non-union status. Lapan also stated that the bid instructions and the contracts used by the school district did not require union contractors, nor had anyone expressed to him a desire for union contractors. In the end, the electrical subcontract bid for the parking lot jobs was awarded to a union electrician.

On July 25, 1996, plaintiff filed a complaint against defendant alleging two counts: intentional interference with a contract when defendant "unreasonably objected" to plaintiff as a subcontractor for Pyramid, and intentional interference with a business relationship or expectancy when defendant "induced or otherwise caused Pyramid Paving Company to disrupt or terminate" the business relationship with plaintiff. On December 10, 1996, after taking depositions, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff opposed defendant's motion, arguing that defendant violated plaintiff's constitutional rights when it rejected his bid based on his non-union status. Plaintiff argued that, because he was bidding on a governmental contract, defendant was prohibited by the equal protection clause from discriminating against him. However, plaintiff never sought to amend his complaint to add an equal protection claim. On May 6, 1997, the trial court issued its order and opinion granting defendant's motion for summary disposition. The lower court held that the 'right to reject' clause included in the bidding contract was valid and enforceable based on MCL 380.1267; MSA 15.41267 and *Leavy v City of Jackson*, 247 Mich 447, 450; 226 NW 214 (1929). The court also determined that defendant's reason for rejecting plaintiff's bid, i.e., wanting to avoid a repeat of past problems with plaintiff, was valid. However, the court stated that "even if defendant

denied plaintiff the subcontract based on plaintiff's non-union status. . . defendant was entitled to do so," because nonunion or union status does not constitute a protected class for purposes of equal protection analysis. The court stated that since it had granted defendant's motion on equal protection grounds, it need not discuss "the other issues raised in this motion," apparently referring to plaintiff's tortious interference with a contract, and tortious interference with a business relationship or expectancy claims.

Plaintiff has not raised its claims of tortious interference with a contract, and tortious interference with a business relationship or expectancy, on appeal. Plaintiff only argues here that the trial court erred when it granted summary disposition to defendant under MCR 2.116(C)(8) because the denial of plaintiff's bid based on his status as a non-union contractor violated his constitutional equal protection rights.[1] This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing),* 206 Mich App 83, 85; 520 NW2d 633 (1994).

> MCR 2.116(C)(8) permits summary disposition when the opposing party has failed to state a claim upon which relief can be granted. A motion under this subsection determines whether the opposing party's pleadings allege a prima facie case. The court must accept as true all well-pleaded facts. Only if the allegations fail to state a legal claim is summary disposition pursuant to MCR 2.116(C)(8) valid. [*Id.*]

The federal and the Michigan State Constitution co-extensively provide for equal protection of the laws, US Const, Am XIV, § 1; Const 1963, art 1, § 2. *City of Cleburne v Cleburne Living Center,* 473 US 432, 439; 105 S Ct 3249; 87 L Ed 2d 313 (1985); *Frame v Nehls,* 452 Mich 171, 183; 550 NW2d 739 (1996). Since the United States Supreme Court has determined that union/non-union classifications deserve only the most limited form of equal protection review-- the level of review accorded to any mere legislative or state classification-- we must apply the rational basis test in the case at hand. *Lyng v UAW,* 485 US 360, 370; 108 S Ct 1184; 99 L Ed 2d 380 (1988); *Hoke Co, Inc v Tennessee Valley Authority,* 854 F2d 820, 828 (CA 6, 1988). Legislation and state action will be upheld if a classification is rationally related to a legitimate state interest. *Cleburne, supra* at 440; *Neal v Oakwood Hospital Corp,* 226 Mich App 701, 717; 575 NW2d 68 (1997). This rational basis test is "typically quite deferential and legislative classifications are 'presumed to be valid.'" *Lyng, supra* at 370, quoting *Massachusetts Board of Retirement v Murgia,* 427 US 307, 314; 96 S Ct 2562; 49 L Ed 2d 520 (1976). This is because "the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Id.* Particularly in cases involving social and economic benefits, the courts have consistently refused to invalidate on equal protection grounds state action that they deem "unwise or unartfully drawn." *United States Railroad Retirement Board v Fritz,* 449 US 166, 174; 101 S Ct 453; 66 L Ed 2d 368 (1980). As long as the classification has some 'reasonable basis,' the equal protection clause does not allow courts to impose their views as to what constitutes wise economic or social policy. *Id.* Further, the rational basis test is satisfied when the action is supported by any state of facts either known or that could reasonably be assumed. *Neal, supra* at 719. "The Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Cleburne, supra* at 440.

In *Hoke, supra*, the Sixth Circuit Court of Appeals addressed a case that appears to be directly on point with the case at hand here. There, the plaintiff argued that by choosing to award a coal purchase contract to a union contractor, rather than to the plaintiff, a non-union contractor, the defendant discriminated against non-union coal contractor in violation of equal protection. The Court of Appeals assumed, for the purposes of analyzing the claim, that Hoke's non-union status was the sole reason that TVA awarded the contract to the union contractor instead of Hoke. *Id.* at 828. The court found that "in *Lyng v UAW*, the Supreme Court addressed the question of whether union members constituted a protected class for purposes of equal protection analysis and found that they did not. . . nor do union or non-union contractors." *Id.* at 828 (citation omitted). Thus, the court applied the rational basis test and although it stated that its opinion should not serve as a "carte blanche authorization to favor union contractors over non-union contractors in the award of bids for public contracts without the presence of other relevant extenuating circumstances," the court found that the determination was rationally related to a legitimate government interest in the effective operation of the TVA. *Id.* at 828-29.

In the case at hand, plaintiff similarly argues that defendant violated equal protection by choosing a union subcontractor over plaintiff, a non-union subcontractor.[2] In analyzing the trial court's determination that plaintiff failed to state a claim for an equal protection violation, we accept as true for the purposes of this appeal plaintiff's allegation that his bid was rejected because he was not a union subcontractor. MCR 2.116(C)(8). Accordingly, we apply the rational basis test to the facts of this case to determine whether a union distinction here was rationally related to a legitimate government interest. We begin with the presumption that the action of the representatives of the people in Saginaw County was valid. *Lyng, supra* at 370. The burden of proving that this action lacks a rational basis, and is therefore arbitrary, rests with plaintiff. *Neal, supra* at 719. Although plaintiff here recognizes the determination in *Hoke, supra*, that the award of a bid on the basis of union status was rationally related to a legitimate government interest, and thus did not violate equal protection, plaintiff argues that this conclusion was based on the unique circumstances of that case and does not apply here.[3] However, we need not rely exclusively on defendant's explanation-- or lack thereof here-- in evaluating whether there is a rational basis to defendant's action, but instead may base our determination on any facts known or reasonably assumed. *Neal, supra* at 719.

We subscribe to the specific reasoning above of the Court in *Hoke* and find that, accepting the facts as alleged by plaintiff, the circumstances of the case at hand are not sufficiently distinguishable from those in *Hoke* to justify a different conclusion. Here, defendant expended time and resources in connection with the COC project to investigate plaintiff's compliance with school board policies such as the prevailing wage policy. It is not irrational for defendant to conclude that using a union subcontractor would avoid the need to ascertain compliance with the board's policies on an individual basis, and thus save time and resources.[4] Further, avoiding potential labor problems is a legitimate and rational objective. *Hoke, supra*. Plaintiff has failed to sustain its burden of establishing that these concerns, in the context of the instant case, are arbitrary and irrational. In our judgment, the specific reasoning of *Hoke* is applicable in this case: defendant's alleged classification of the bidders for the reconstruction projects as union and non-union subcontractors is not so arbitrary or irrational that it is clearly prohibited by the Constitution.[5]

On the basis of the above analysis, we conclude that plaintiff failed to state a legal claim for which relief could be granted. MCR 2.116(C)(8). Even accepting plaintiff's version of the facts, plaintiff had no equal protection claim because defendant here could constitutionally base a decision to reject a subcontractor's bid on his non-union status. The union/non-union distinction receives only deferential, rational basis review. Whether or not this Court agrees with the wisdom of awarding school contracts on the basis of such a distinction, this is an issue that rests within the scope of the school board's authority. Ultimately, it is the electorate that must assess the merits of such a policy. We have faith that any "improvident decisions will eventually be rectified by the democratic processes." *Hoke, supra* at 829.

Affirmed.

/s/ Helene N. White
/s/ Stephen J. Markman
/s/ Robert P. Young, Jr.

[1] Defendant argues on appeal that its reservation of the right to "reject any and all bids, or parts thereof," along with MCL 380.1267(5); MSA 15.41267(5), which provides the authority for school boards to "reject any or all bids," allowed defendant to unilaterally reject plaintiff's bid. See *Leavy v City of Jackson*, 247 Mich 447, 450; 226 NW 214 (1920). However, plaintiff does not disagree with defendant's contention that defendant had the statutory authority to reject bids, arguing only that the statute's authority is limited by the federal and state Constitutions. Since all legislation and state action must indeed comply with the federal and state Constitutions, and since plaintiff does not contest the statutory authority of defendant to reject bids as long as such rejection does not violate equal protection, we will address only the equal protection issue appealed by plaintiff.

[2]There appears to be a question of fact remaining whether defendant rejected plaintiff's bid on the basis of some policy to bar non-union subcontractors, or because of past problems in confirming plaintiff's compliance with school board policies, or a combination of both. Therefore, summary disposition pursuant to MCR 2.116(C)(10) would be inappropriate.

[3] Plaintiff also argues that because the purpose of MCL 380.1267; MSA 15.41267 is to "obtain school buildings at the lowest possible cost to the school district," *Hatch v Maple Valley Twp Unit School*, 310 Mich 516, 536; 17 NW2d 735 (1945), and because rejecting its bid based on its non-union status was not rationally related to that purpose, it has stated a claim on which relief may be based. However, the bid price is not necessarily the only project cost to be considered.

[4] While we view the facts in the light most favorable to plaintiff, plaintiff does not dispute that this investigation took place. Rather, plaintiff asserts that it was exonerated, and impliedly challenges the motivation for the investigation as originating in the close relationship of one or two school board members with the unions. We accept these allegations as true in reaching our conclusion.

[5] We emphasize that we do not attempt here to make judgments regarding the relative merits of union and non-union businesses or workers in any particular business, labor or economic circumstance, but simply to accord deference to the representatives of the people in choosing policies which they believe to be in the best interests of their communities and which are not clearly barred by the Constitution.