STATE OF MICHIGAN

COURT OF APPEALS

WDG INVESTMENT COMPANY, LLC, Plaintiff-Appellee,	UNPUBLISHED October 25, 2002
V MICHIGAN DEPARTMENT OF MANAGEMENT AND BUDGET and JANET PHIPPS, Defendants-Appellants.	No. 229950 Ingham Circuit Court LC No. 00-091838-AA

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendants appeal by leave granted the trial court's denial of their motion for summary disposition. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

I. Basic Facts and Procedural History

The facts are largely undisputed. This case involves the procurement of bids for a building in Grand Rapids to provide office space for state employees. The anticipated lease would run for many years. The process to lease or purchase property for use by the state is governed by statute and administrative rules.[1]

[1] By statute, the director of the Department of Management and Budget (DMB) has the authority to provide for a lease of facilities for governmental use "in the manner provided by law." MCL 18.1221(1). The statute also requires that the state administrative board approve rentals and leases. MCL 18.1221(1). The administrative rules applicable to the DMB's Property Management Division are found at 1983 AACS, R 18.501 through R 18.509. Unless waived, the procurement of any leasing agreement is to be conducted through competitive bidding. Rule 18.502(5). Under Rule 18.502(1), the DMB is required to lease property in a manner that allows all individuals an equal opportunity to participate in the process, but there is no abrogation of the DMB's director's authority to award contracts that are deemed to be in the state's best interests. All lease agreements are also subject to the approval of the attorney general (limited to legal form) and the State Administrative Board, before execution by the director. Rule 18.502(3), (4).
(continued…)

In November 1999, the DMB's real estate division issued a Request for Proposals ("RFP") to collect bids from developers for a new state office building. The RFP was a comprehensive document that included bidding instructions, facility requirements, and an evaluation system based upon points. Any proposals submitted in response to the RFP were to be evaluated by a "Joint Evaluation Committee" (JEC) selected by DMB. The RFP also made it clear that a winning proposal was not binding until all terms could be agreed upon:

> The State hopes to select a winning proposal by January 26, 2000**,** though that is dependent on the number and complexity of proposals received and other factors. *A winning proposal will be selected with the explicit understanding that the implementation of that proposal will be governed by a lease contract and that the terms of that contract will be dictated by the specific criteria of the proposal selected and, where the proposal is mute, by specific terms in the enclosed standard DMB lease document.* In the unlikely event that DMB and the winning bidder are somehow unable to agree on a lease contract crafted along those lines, DMB may unilaterally terminate that negotiation and select the next ranking proposal submitted under the current RFP or seek new proposals under a new RFP. (Emphasis added).

Several documents were incorporated into the RFP by reference or by attachment, including the text of the "standard state commercial lease." This lease provided that it would not be binding or effective without approval of the lessor, the lessee, the Attorney General, the DMB, the building committee of the state administrative board, and the state administrative board. Finally, in the section of the RFP explaining the evaluation criteria, it was again stated that the state reserved "the right to reject any and all proposals that do not meet the best interests of the state at the state's sole discretion."

The RFP was sent to a number of potential bidders and ultimately plaintiff was announced to be the winning bidder on January 26, 2000. Plaintiff was contacted by telephone, as were the unsuccessful bidders. A press release was issued.

Defendant had a preliminary meeting with plaintiff on February 3, 2000. Plaintiff was informed that the lease approval process would take one to two months and plaintiff agreed to proceed at it's own risk. A further meeting was scheduled for February 17, 2000, to discuss terms of the anticipated lease. However, before this second meeting could be held, another bidder whose proposal was not accepted sent a letter of protest to the director. Defendant then suspended further proceedings regarding the lease. After the proceedings were suspended, a representative of the DMB, Mary Ellen Perkowski, wrote to plaintiff 's manager, Fred Gordon, informing him:

> …[T]hat upon reassessment of the City of Grand Rapids leased office space proposal, the State has determined that it is in its best interests to reject all bids

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(…continued)

The administrative rules also expressly reserves to the state "the right to reject any or all bids or to waive defects in bids for good cause when deemed in the best interest of the state." R 18.508. An person aggrieved by the process may "protest" to the DMB director. R 18.509(1).

> received under this Request for Proposal to insure the Kent County client base is served. Therefore, pursuant to Section II.A., second to the last paragraph, the State is exercising its discretion to reject all bids received under this Request for Proposal.

Plaintiff filed a protest of the decision to reject all bids that was eventually denied by the State Administrative Board. Plaintiff filed an FOIA request seeking information relating to the RFP process. Although some information was provided, plaintiff was certain was more information was available that should have been provided. A follow-up request was made seeking the personal notes of all persons who participated in evaluating the submitted proposals, including the notes of all members of the JEC. Some members of the JEC were from agencies other than the DMB. The requested information was not provided to plaintiff.

Plaintiff filed suit alleging theories under the APA, the management and budget act, MCL 18.1101 *et seq*., breach of contract, and constitutional claims including due process, equal protection, and a claim under Const 1963, art 1, §17 (fair and just treatment in the course of legislative and executive investigations and hearings). Before filing an answer, defendants moved for summary disposition under MCR 2.116(C)(8) and (10), primarily arguing that plaintiff lacked standing because it was merely a "disappointed bidder" and had not obtained any contractual rights in the bidding process. Plaintiff amended the complaint, adding counts for mandamus and under the freedom of information act (FOIA) MCL 15.231, but dropped its breach of contract count. Defendant filed a second motion for summary disposition reiterating its standing argument and further argued alternative bases for summary disposition. Finally, defendants argued there was no basis for finding that the FOIA had been violated because the DMB did not have a duty under the FOIA to produce written notes of non-DMB employees which were not in the DMB's possession.

The trial court denied defendants' motion for summary disposition ruling that plaintiff had standing to challenge the decisions made by defendants during the bidding process because plaintiff's bid was initially accepted by defendants. Although not specifically addressed or referred to, the trial court also denied defendants' motion for summary disposition on plaintiff's FOIA claim. This Court granted defendants application for leave to appeal and stayed the trial court proceedings.

II. Standard of Review

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint. The motion should be granted only if the claim is so clearly unenforceable as a matter of law that no factual development could justify recovery. The sufficiency of the claim is tested by the pleadings alone. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994), reh den 448 Mich 1202 (1995). All well-pleaded factual allegations are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996), lv den 453 Mich 955 (1996).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995), lv den 451 Mich 857 (1996). The court is not allowed to assess credibility or determine facts when deciding the merits of the motion for summary disposition. *Downey v Charlevoix Co Bd of Co Road Comm'rs*, 227 Mich App 621, 626; 576 NW2d 712 (1998), lv app dis by stip 586 NW2d 88 (1998).

III. Standing

Defendants' assert a number of grounds in support of its contention that the trial court erred in denying its motion for summary disposition with regard to the bidding procedure. However, the issue of plaintiff's status as a disappointed bidder is dispositive of all claims relating to defendants' bidding process and we find the trial court erred in finding plaintiff had standing to bring this action.

Whether a party has standing to bring an action involves a question of law that is reviewed under the de novo standard. *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001), reh den 465 Mich 1204 (2001). In general, standing is a term that denotes "the existence of a party's interest in the outcome of litigation that will ensure sincere and vigorous advocacy." *House Speaker v State Administrative Bd*, 441 Mich 547, 554; 495 NW2d 539 (1993). In order to establish standing, a plaintiff must demonstrate: (1) a sufficient personal stake in the outcome of the dispute to ensure that the controversy to be adjudicated will be presented in an adversarial setting that is capable of judicial resolution; and (2) a legally protected interest which is in jeopardy of being adversely affected. *Taylor v Blue Cross & Blue Shield of Michigan*, 205 Mich App 644, 655-656; 517 NW2d 864 (1994). When standing is at issue, the question is whether the person whose standing is challenged is the proper person to bring the suit, not whether the issue itself is justiciable. *Allstate Ins Co v Hayes*, 442 Mich 56, 58; 499 NW2d 743 (1993).

A. The "Disappointed Bidder" Rule

Both before the trial court and on appeal, defendants rely on the long-established rule that one who is unsuccessful in bidding on a public contract does not have standing to challenge the result or the bidding process itself. This rule is based on the belief that statutes or ordinances requiring such bidding procedures for public contracts were adopted to benefit taxpayers or the general public. *Talbot Paving Co v Detroit,* 109 Mich 657, 660-661; 67 NW 979 (1896). Accordingly, any duty owed under such procedures is to the public, not those individuals involved in the solicitation process. *Id*. at 661-662.[2]

Federal courts interpreting Michigan law have also had occasion to address the standing issue in the "disappointed bidder" context. See, *Malan Construction Corp v Board of County Road Commr's*, 187 F Supp 937, 939 (ED Mich, 1960) (holding "competitive bidding is not intended to benefit bidders. The incidental benefit received by bidders from competitive bidding does not allow an unsuccessful bidder to bring a private action.") and *City Communications Inc v City of Detroit*, 650 F Supp 1570, 1581 (ED Mich, 1987), (finding "[T]he law of Michigan gives no rights to an unsuccessful bidder… only the public and not the bidder has standing to challenge the bidding process.") In *United of Omaha Life Ins Co. v Solomon*, 960 F2d 31 (CA 6, 1992). the court further discussed the disappointed bidder rule and found:

> "A 'disappointed bidder' to a government contract may establish a legitimate claim of entitlement protected by due process by showing either that it was actually awarded the contract at any procedural stage or that local rules limited the discretion of state officials as to whom the contract should be awarded.
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> "Michigan statutory and case law neither requires the lowest bidder be awarded a state contract nor creates a property interest in disappointed bidders on state contracts." *Id*. at 34.

However, plaintiff contends that the "disappointed bidder" rule is inapplicable since they are a "successful bidder" as their proposal was initially selected in response to the RFP. However, we find the mere selection of plaintiff's proposal at the initial stage of the process created no legally protected interest in a binding agreement. Without such an interest, plaintiff lacks standing to seek redress from defendants.

In order to have a legally protected interest in some benefit, a plaintiff must clearly show more than an abstract need or desire for it, or more than a unilateral expectation for it. Instead,

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[2] A similar result was reached in *Detroit v Wayne Circuit Judge*, 128 Mich 438; 87 NW 376 (1901), where an unsuccessful bidder tried to use its status as a taxpayer to gain standing. The Court dissolved a preliminary injunction issued by a circuit judge, stating: "As a bidder, the complainant has no standing. . . . [w]e do not discover in the brief of respondent any claim that he has, as a bidder, a right to relief." 128 Mich at 439.

there must be a legitimate claim of entitlement to that benefit. *Northwestern Nat'l Casualty Co v Comm'r of Ins,* 231 Mich App 483, 491-492; 586 NW2d 563 (1998), lv den 459 Mich 993 (1999), quoting *Bd of Regents of State Colleges v Roth,* 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972). An entitlement is not established if the public officials involved may still exercise their discretion in the matter. Rather, an entitlement should be recognized only when, by awarding the contract, the public agency has fully exercised its discretion in the matter to create a binding obligation under state law. See *Michigan Environmental Resources, supra*, 669 F Supp at 161; *Kasom v City of Sterling Heights,* 600 F Supp 1555, 1559 (ED Mich, 1985), aff'd 785 F2d 308 (CA 6, 1986).

In the case at bar, defendants' initial approval of plaintiff's proposal only created the environment to begin negotiations and did not obligate defendants beyond the negotiation stage. While plaintiff was deemed to have submitted the winning proposal in this matter, that award was rescinded before any binding agreement was entered into. Further steps were required before a final agreement could be reached and at all times during the process, defendants reserved the right to reject all bids in their sole discretion. As set forth in the RFP itself, any agreement with defendants was not binding until all necessary parties had approved a final lease contract. Accordingly, plaintiff's status remained simply as a bidder, even a "successful bidder", but it never entered into any binding agreement before defendants informed plaintiff that all bids were being rejected. Plaintiff did not show that it suffered an invasion of a legally protected interest to support a conclusion that plaintiff has standing. While plaintiff may have expended its own money developing this project and lost out on that investment, it expended those sums without any legal basis for holding defendants liable and at its own risk. A plaintiff must show a right to be awarded a contract, not merely a unilateral hope. *United of Omaha Life Ins Co. v Solomon, supra* at 35.

Alternatively, plaintiff argues that the trial court did not err in denying defendants' motion for summary disposition because discovery was not yet complete at the time of defendants' motion.[3] Plaintiff contends that further discovery will establish whether defendants properly exercised their discretion in rejecting all bids. We disagree.

A party opposing a motion for summary disposition must provide the court with independent evidence that a factual dispute exists. *Village of Dimondale v Grable,* 240 Mich App 553, 567; 618 NW2d 23 (2000), lv den 463 Mich 943 (2000); *Michigan Nat'l Bank v Metro Institutional Food Service, Inc,* 198 Mich App 236, 241; 497 NW2d 225 (1993). In the case at bar, plaintiff has not produced any evidence to suggest that it can prove or further discover evidence of fraud, abuse or illegality by defendants. Further, plaintiff fails to explain what the actual factual dispute entails and has not offered any independent evidence to support its claim of possible fraud, collusion or some other form of malfeasance. Indeed, when plaintiff raised this issue in the trial court, it could not adequately explain what evidence it expected to produce,

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[3] A motion for summary disposition under MCR 2.116(C)(10) is typically premature if discovery on a disputed issue has not been completed. *Colista v Thomas,* 241 Mich App 529, 537; 616 NW2d 249 (2000). However, summary disposition is not precluded if there is no reasonable possibility that further discovery will produce factual support for the nonmoving party's case. *Id.* at 537-538.

other than information about the FIA's client base that defendants relied upon to rescind its approval of plaintiff 's bid and how a map of the FIA's clients was a factor in this decision.

Because plaintiff cannot establish that it had any right to a binding contract in this matter, it lacked standing to maintain it's claims with respect to DMB's bidding process or to challenge defendants' decision to reject all bids. Defendants' motion for summary disposition should have been granted.

IV. FOIA

Defendants also argue that plaintiff failed to state a claim under the FOIA. Plaintiff requested all notes or other writings used in the process of reviewing the proposals by all members of the JEC assigned to evaluate this project, regardless of whether they were employed by the DMB or other departments. Defendants assert that the DMB had no obligation to provide plaintiff with "personal"[4] notes of non-DMB members of the JEC and the requested information was not a "public record," as defined in the act. We disagree.

Under the FOIA, a "public body" is required to disclose any public records that are not exempt under the act. MCL 15.233(1); *Jackson v Eastern Michigan University Foundation,* 215 Mich App 240, 244; 544 NW2d 737 (1996). Clearly DMB and its JEC are "public bodies".[5] A "public record" under the FOIA "means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. . . ." MCL 15.232(e). The public body itself need not create the record. *The Detroit News, Inc v Detroit,* 204 Mich App 720, 724-725; 516 NW2d 151 (1994)

Here, even if the requested records were not retained by the DMB, the DMB was still under a duty to conduct a reasonable search to request and locate the records. The FOIA provides that where a court requires the production of a public record, the court shall order the public body to produce all or a portion of the record withheld regardless of the location of the record. MCL 15.240(4); MacKenzie *v Wales Twp,* 247 Mich App 124, 131-132; 635 NW2d 335 (2001). 131-132.

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[4] It is not at all clear from the record what defendants mean by "personal" notes. We therefore decline to address this argument at this time. It is not for this Court to search for authority or discover and unravel a party's arguments. *Mitcham v Detroit,*355 Mich 182, 203; 94 NW2d 388 (1959).

[5] Rule 18.505 of the DMB's administrative rules, acknowledges the department's duties under the FOIA: :

> Leasing information shall be a matter of public record to the extent provided in Act No. 442 of the Public Acts of 1976, as amended, being § 15.231 et seq. of the Michigan Compiled Laws, and shall be available to the public pursuant to this act.

When a public body refuses to provide a requested record under the FOIA, that public body has the burden of proving that its refusal was justified. *MacKenzie, supra*, 247 Mich App at 128. Because defendants appear to only argue that they were not required to produce the requested notes because those notes were located in other departments, defendants have not met their burden of non-disclosure and were not entitled to summary disposition at this time. Defendants did not demonstrate that the requested documents were not public records used by the DMB in performing its official functions simply because the records were not kept in the DMB's offices. Accordingly, we find the trial court did not err in refusing to grant summary disposition of plaintiff 's FOIA count at this stage of the litigation.[6]

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski

[6] On appeal, plaintiff contends that it has learned since filing its amended complaint that there are other public records that defendants never produced, such as copies of e-mails that were sent. This argument is raised for the first time on appeal, and this Court declines to address it. We note that the record with respect to the FOIA count is underdeveloped and upon remand, both parties can address these new grounds.