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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-896

No. COA22-181

Filed 20 December 2022

Wake County, No. 20 CVS 5190

WALL RECYCLING, LLC, Plaintiff,

v.

WAKE COUNTY and TT&E IRON & METAL, INC., Defendants.

Appeal by plaintiff from judgment entered 29 October 2021 by Judge G. Bryan Collins, Jr., in Wake County Superior Court. Heard in the Court of Appeals 5 October 2022.

Morningstar Law Group, by William J. Brian, Jr., Jeffrey L. Roether, and Matthew J. Limoli, for plaintiff-appellant.

Wake County Attorney's Office, by Senior Deputy County Attorney Roger A. Askew, Deputy County Attorney Kenneth R. Murphy, III, and Deputy County Attorney Claire Hunter Duff, for defendant-appellee Wake County.

Howard, Stallings, From, Atkins, Angell & Davis, P.A., by Kenneth C. Haywood and Joseph H. Stallings, for defendant-appellee TT&E Iron & Metal, Inc.

DIETZ, Judge.

¶ 1

This case concerns Wake County's contract for discarded scrap metal from its residents—things such as pots and pans, empty paint cans, and large appliances. Wake County collects these items at county recycling facilities. Private recycling

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companies will pay substantial sums to retrieve this scrap metal and resell it to smelters and other businesses.

¶ 2 In April 2019, Wake County released a request for proposal seeking bids “for the payment for scrap metal and white goods collected” at the county’s facilities. The proposal required bidders to provide a price per ton that they would pay for the scrap metal, with that price factoring in “all costs associated with the scrap metal collection,” such as providing the recycling containers for the facilities and removing the containers once they are full.

¶ 3 By statute, when a county sells property through a sealed bidding process like the one used here, the county must select the highest responsible bidder. After the county awarded the contract in this case, Wall Recycling, an unsuccessful bidder, sought a declaratory judgment that the county failed to comply with the statutory procedure for selecting the highest responsible bidder. The trial court granted summary judgment in favor of Wake County and the successful bidder. This appeal followed.

¶ 4 As explained below, there are genuine issues of material fact concerning whether the scrap metal is county property, and genuine issues of material fact concerning various aspects of the bidding process. We therefore reverse the trial court’s entry of summary judgment and remand for further proceedings.

Facts and Procedural History

¶ 5 Plaintiff Wall Recycling is a recycling company with operations throughout North Carolina. The company buys, processes, and resells scrap metal. Defendant TT&E Iron & Metal operates a similar business and is a market competitor of Wall Recycling.

¶ 6 As a service to its residents, Wake County collects scrap metal at designated facilities throughout the county. This includes household items such as pots and pans, metal containers such as empty paint cans, and larger items such as household appliances and machinery. This scrap metal has commercial value because, once separated and processed, it can be sold to smelters and other businesses for further processing and reuse.

¶ 7 Wake County contracts with a private recycling business to collect the scrap metal from its collection locations. Because the scrap metal is valuable, this private business will pay substantial sums to Wake County for the metal.

¶ 8 Since 2015, the county has contracted with TT&E. From 2015 to 2019, TT&E paid around \$4 million to Wake County for the scrap metal.

¶ 9 In April 2019, Wake County released a request for proposal seeking bids “for the payment for scrap metal and white goods collected” at the county’s facilities. The request for proposal stated that the county “desires revenue for recyclable materials” and sought to maximize “the earnings associated with the recycling of scrap metal.”

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The proposal also included services related to the scrap metal collection, such as managing and removing the containers at the county's facilities where residents deposit their scrap. The proposal required bidders to provide a price per ton that they would pay for the scrap metal, with that price factoring in "all costs associated with the scrap metal collection" set out in the proposal.

¶ 10 The proposal also committed the county to award the contract through a multi-factor review procedure. It stated that the county would use a "forced choice matrix spreadsheet" to rank the evaluation criteria and each bidder's "level of excellence" on the criteria to determine a numerical score for each bidder. Before 2019, the county had repeatedly ranked price as the most important criterion for awarding the contract.

¶ 11 Throughout 2019, three companies responded to the proposal. Wall Recycling offered the county the highest price—nearly \$10 per ton more than that offered by TT&E. Typically, when evaluating proposals, Wake County uses the matrix spreadsheet to have the evaluation committee rank the relative importance of the evaluation criteria before reviewing any of the proposals. The county uses this reviewing practice to prevent committee members from manipulating the criteria rankings to achieve a desired outcome.

¶ 12 Before the May 2019 meeting regarding the proposal, however, the evaluation committee members already had reviewed the three competing proposals. During this

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meeting, the committee ranked price as the fourth most important criterion. The committee then gave TT&E a higher score than Wall Recycling in two of the three criteria that it ranked as more important than price.

¶ 13 The county entered into the contract with TT&E and Wall Recycling objected. In July 2019, Wall Recycling met with county officials to discuss its objections and asked the county to reevaluate the proposal responses or, alternatively, issue a new request for proposals. The county refused. In April 2020, Wall Recycling learned that the county was extending the contract with TT&E and would not be issuing a new request for proposal.

¶ 14 Wall Recycling then filed this action seeking a declaration that, under a series of statutes concerning county contracts, Wake County was required to award the contract to the highest responsible bidder. The company also asserted a number of related statutory and constitutional claims.

¶ 15 TT&E and Wake County both moved to dismiss for failure to state a claim. The trial court denied the motions. After discovery, Wall Recycling moved for summary judgment and the county moved for cross-summary judgment. The trial court entered an order granting the county's motion, denying Wall Recycling's motion, and entering judgment dismissing Wall Recycling's claims. Wall Recycling appealed.

Analysis

¶ 16 The central issue in this appeal is whether the contract that Wake County

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awarded to TT&E is subject to statutory provisions that prioritize the highest contract bidder. The trial court’s summary judgment order, by implication, concluded that these statutory provisions did not apply, leading to dismissal of all of Wall Recycling’s claims.

¶ 17 This Court reviews a trial court’s entry of summary judgment *de novo*. *Virginia Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191 (1986). On appeal, we determine whether the forecast of evidence in the trial record creates any genuine issues of material fact or whether the matter can be resolved by the court as a matter of law. *Oliver v. Roberts*, 49 N.C. App. 311, 314, 271 S.E.2d 399, 401 (1980).

¶ 18 By law, a county must “dispose of any real or personal property belonging to it according to the procedures prescribed in Chapter 160A, Article 12.” N.C. Gen. Stat. § 153A-176. Chapter 160A, Article 12 provides that a county may dispose of its property in five ways: (1) private negotiation and sale; (2) advertisement for sealed bids; (3) negotiated offer, advertisement, and upset bid; (4) public auction; or (5) exchange. *Id.* § 160A-266. The option relevant here—advertisement for sealed bids—must be “done in the manner prescribed by law *for the purchase of property*.” *Id.* § 160A-268 (emphasis added).

¶ 19 The “manner prescribed by law for the purchase of property” is a series of criteria contained in N.C. Gen. Stat. § 143-129(b), which states that a purchase contract “shall” be awarded to “the lowest responsible bidder or bidders, taking into

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consideration quality, performance and the time specified . . . for the performance of the contract.” A “responsible bidder” is one that has the “skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability.” *Kinsey Contracting Co., Inc. v. City of Fayetteville*, 106 N.C. App. 383, 385, 416 S.E.2d 607, 609 (1992).

¶ 20 By its plain terms, Section 143-129 requires the contract to be awarded to the lowest bidder. This makes sense when addressing the purchase of property. But when addressing the sale of property, it would be absurd to require counties to select the *lowest* bidder. See *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005); *Puett v. Gaston Cty.*, 19 N.C. App. 231, 235, 198 S.E.2d 440, 442 (1973). Thus, when applying this statute to the *sale* of county property, Section 160A-268 requires the contract to be awarded to the *highest* responsible bidder, taking into consideration quality, performance, and the time specified.

¶ 21 Having set out this statutory criteria, we reach the critical question in this appeal: is the disputed contract in this case one for the sale of county property? Wake County asserts two arguments for why we should answer this question in the negative, and we address them in turn.

I. Ownership of the scrap metal

¶ 22 First, the county argues that the scrap metal and other items that its residents deposit at these recycling facilities are not county property. “Ownership of personal

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property, when challenged, is always a mixed question of law and fact.” *Bullman v. Edney*, 232 N.C. 465, 467, 61 S.E.2d 338, 339 (1950). We thus examine whether there is a genuine fact dispute concerning the ownership of this property.

¶ 23 The county submitted evidence establishing that the industrial containers into which residents deposit their scrap are supplied by the contracting business, not the county. The county also presented evidence that, when the scrap is deposited in those containers, “the metal objects sit in a ‘holding pattern’ until the containers become full and the service provider hauls them away for processing and recycling.” Thus, the county argues, the scrap metal never becomes the property of the county. Instead, title to the property passes from its residents directly to the private recycler.

¶ 24 But the county’s solid waste facilities manager, whose deposition testimony established many of these facts, also provided testimony that contradicts the county’s position. For example, the county collects the scrap metal at facilities it owns or leases. These facilities are surrounded by security fencing and subject to access restrictions established by the county. The county does not permit the public to access the scrap metal once it is deposited on the facility grounds. The county’s solid waste facilities manager also acknowledged that *the county* collects the scrap metal from residents and later turns it over to the private recycler:

Q. Once deposited by the public within the containers at the multisite, no one can take them away from the –

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A. No one can take any items that are even set on the ground from the facility.

Q. And why is that?

A. That's a safety and security situation.

Q. The county takes possession and control of those material once they're left on site?

A. Yeah. We take possession of them in a holding pattern until they're collected, and we don't want people removing them from the site.

...

Q. How is it secured?

A. We have fencing around the entire facility.

...

Q. Are members of the public allowed to take scrap metal from convenience centers?

A. No. We don't allow removal of any material from any of our facilities.

...

Q. The scrap metal in particular, that becomes the property of the county at the time it's deposited by the public in these containers at multisites and convenience centers?

A. I'm not sure if it becomes the property of the county, but I do know that we collect it at the county and in a holding position. We don't keep it forever, so I don't know that "property of the county" is the appropriate word.

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Q. But at the time that it's deposited, the county treats it as its own?

...

A. I wouldn't say we treat it as our own. I would say we would treat it as a material that we're collecting and holding until it's picked up for processing.

¶ 25 In light of this competing evidence in the record, there are genuine issues of material fact concerning whether the scrap metal is county property. The record indicates that the residents who deposit items in the recycling containers are doing so because the county advertises to them that the county is providing these locations to turn in recyclable material as a county service to residents. Thus, residents who take their scrap to these locations may intend for title to the property to pass to the county. *See Askew v. Matthews*, 175 N.C. 187, 189–90, 95 S.E. 163, 164 (1918).

¶ 26 Even if residents intend solely to abandon the property—that is, relinquish their ownership permanently as they would with other forms of trash—there are fact issues to resolve. *Kitchen v. Wachovia Bank & Tr. Co.*, 44 N.C. App. 332, 334–35, 260 S.E.2d 772, 774 (1979). Once abandonment takes place, title to the abandoned property “passes to the first person who thereafter takes possession.” *State v. West*, 293 N.C. 18, 30, 235 S.E.2d 150, 157 (1977). County witnesses testified that *the county* is “collecting and holding” the metal scrap until it is removed from the county facility. Moreover, there are many indications in the record that the county exercises

authority and control over the scrap while it is at the county facilities. For example, the county places restrictions on who can access the scrap and remove it. The county would have no right to unilaterally impose these restrictions if it did not hold title to the property. And, importantly, nothing in the contract or anywhere else in the record suggests that TT&E—the party currently responsible for providing the containers—directed the county to impose these restrictions. Simply put, there are genuine issues of material fact concerning whether the scrap metal that county residents deposit at these facilities is county property.

II. Contract predominantly for services

¶ 27 The county also argues that, even if the scrap metal is county property, the disputed contract “is plainly and unambiguously a contract for the provision of scrap metal recycling *services*.” In other words, the county argues that the contract does not concern the sale of county property and thus is not subject to the statutory criteria described above.

¶ 28 To support this argument, the county points to a Fourth Circuit case holding that a trash removal contract was a “service contract” not subject to the statutory sealed bidding requirements. *A&B Trash Serv. v. Town of Shallotte*, 14 F.3d 593, 1993 WL 515173 (4th Cir. 1993) (unpublished). But that case highlights the key weakness in the county’s argument. In *A&B Trash Service*, the town put out a bid for collecting trash from residents and the competing businesses submitting bids

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identifying *how much they would charge the county* to provide that trash collection service. *Id.*

¶ 29 Here, by contrast, Wall Recycling and the other bidders were not competing based on how much they would charge the county for some service. The county’s request for proposal explained that “Wake County is Requesting Proposals *for the payment for scrap metal and white goods* collected at Wake County Solid Waste Management facilities.” (Emphasis added). In other words, the proposal sought bidders for the possible acquisition of county property. The proposal required bidders to provide a price per ton that they would pay for the scrap metal, with that price factoring in “all costs associated with the scrap metal collection as described below.”

¶ 30 To be sure, the contract requires the recycler to provider various collection services to the county. But those services are part of the payment the recycler is making to obtain the scrap metal from the county—indeed, the proposal expressly details how bidders should account for the cost of these collection services when calculating the amount they would pay per ton for the scrap metal. Moreover, the record indicates that this scrap metal has significant value, with TT&E paying millions of dollars to the county in the 2015 to 2019 time period.

¶ 31 The county also contends that, even if we conclude the contract involves the sale of county property, we should examine whether that is the “predominant purpose” of the contract—a test used to distinguish service contracts from contracts

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for the sale of goods. But this “predominant purpose” doctrine exists under contract law to determine whether contracts are governed by common law or the Uniform Commercial Code. *See Hensley v. Ray’s Motor Co. of Forest City, Inc.*, 158 N.C. App. 261, 265, 580 S.E.2d 721, 724 (2003). It has no application here. N.C. Gen. Stat. § 153A-176, titled “Disposition of property,” requires counties to dispose of “property belonging to it” through the procedure set out by law, which we detailed above. Thus, *any* sale of county property falls within this statute’s scope, regardless of whether the sale of that property is the predominant purpose of the contract governing it. Were it otherwise, counties readily could evade the statute’s reach by disposing of property through contracts largely addressing a service—for example, by selling their surplus office equipment in a contract with the county’s janitorial services provider.

¶ 32 In sum, we hold that, if the scrap metal is county property, the challenged contract concerns the disposition of that property and therefore must comply with statutory criteria in N.C. Gen. Stat. §§ 153A-176, 160A-268, and 143-129. Because the ownership of that scrap metal involves disputed questions of fact, and because there also are fact questions concerning the county’s compliance with this statutory criteria, we reverse the entry of summary judgment in favor of the county. We likewise reverse the entry of summary judgment on the other corresponding statutory and constitutional claims, which depend on the existence of the statutory contract right for which there are disputed fact issues. We leave it to the trial court, on

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remand, to determine whether there are other grounds on which to rule in this case as a matter of law, or whether the case must proceed to trial. *See Copeland v. Amward Homes of N.C., Inc.*, 269 N.C. App. 143, 151, 837 S.E.2d 903, 909 (2020).

Conclusion

¶ 33 We reverse the entry of summary judgment and remand for further proceedings.

REVERSED AND REMANDED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).