In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00280-CV

CITY OF WACO AND TEXAS DOCUMENTS SOLUTIONS, INC., APPELLANTS

V.

CTWP, APPELLEE

On Appeal from the 170th District Court
McLennan County, Texas
Trial Court No. 2017-3559-4, Honorable Jim Meyer, Presiding

December 30, 2021

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and DOSS, JJ.

The City of Waco appeals from an interlocutory order denying its plea to the trial court's jurisdiction.[1] The underlying dispute arose from the acquisition of copier services. Apparently, CTWP was providing the City with such services. As the term of that

[1] Because this appeal was transferred from the Tenth Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3.

arrangement grew to an end, the City sought bids for copiers purportedly through a local purchasing cooperative. The latter was known as BuyBoard. Those efforts resulted in the City contracting with Texas Documents Solutions, Inc. (TDS). CTWP sued the two, in response. It contended that the City failed to comply with competitive bidding statutes, sought a declaratory judgment to that effect, and requested injunctive relief barring enforcement of the accord. The City then filed its plea to the trial court's jurisdiction, asserting governmental immunity. The trial court denied it, which decision resulted in this appeal.

A plaintiff has the burden to affirmatively establish a trial court's jurisdiction. *Town of Shady Shores v. Swanson,* 590 S.W.3d 544, 550 (Tex. 2019). Doing that includes the obligation to illustrate a governmental entity's immunity was waived. *Id.* So, when the entity challenges jurisdiction, the court need not look only to the pleadings but also may consider evidence touching upon the subject. *Id.* Indeed, it must consider such evidence if necessary to resolve the jurisdictional issue, such as when jurisdiction and the merits intertwine. *Id.* Should the existence of jurisdictional facts be at issue (as opposed to simply questioning whether the pleadings alone illustrate jurisdiction), the standard of review mirrors that utilized when considering traditional motions for summary judgment; in other words, all the evidence is viewed in a light most favorable to the plaintiff. *Id.*

Several procedural vehicles exist through which a trial court's jurisdiction may be attacked. They include a plea to the jurisdiction and both a traditional and no-evidence motion for summary judgment. *Id.* at 551–52. Furthermore, where the existence of jurisdiction and the underlying merits of the suit are intertwined, the evidence supporting jurisdiction and the merits is necessarily intertwined, too. *Id.* at 552. "Thus, when a

challenge to jurisdiction that implicates the merits is properly made and supported, whether by a plea to the jurisdiction or by a traditional or no-evidence motion for summary judgment, the plaintiff will be required to present sufficient evidence on the merits of her claims to create a genuine issue of material fact." *Id.* Finally, should the evidence of record illustrate the presence of a material issue of fact regarding jurisdiction, the pre-trial jurisdictional challenge must be denied and await later determination.

Declaratory Judgment

As previously mentioned, CTWP sought declaratory relief and an injunction. Regarding the former, it alleged 1) a "contract not made in compliance with the statutes governing competitive bidding is void"; 2) the performance of such a contract may be enjoined under § 252.061 of the Texas Local Government Code; 3) "CTWP asks the Court to declare that the TDS contract was awarded in a process that did not comply with the state law"; and 4) alternatively, it "asks the Court to declare that the contract ultimately executed with CTWP did not reflect the terms of CTWP's bid or proposal and[,] therefore[,] violates state procurement laws." As observed by the City under part B of its first appellate issue, the Uniform Declaratory Judgments Act, TEX. CIV. PRAC. & REM. CODE ANN. § 37.002, may be a means to avoiding governmental immunity, but only in a very limited way.[2] The underlying claims must involve an attack upon the validity of an ordinance or statute. *City of Buda v. N.M. Edificios LLC*, No. 07-20-00284-CV, 2021 Tex. App. LEXIS 2895, at *24–25 (Tex. App.—Amarillo Apr. 16, 2021, pet. filed) (mem. op.); *City of Dallas v. Turley*, 316 S.W.3d 762, 768 (Tex. App.—Dallas 2010, pet. denied).

[2] CTWP did not respond to this particular issue in its appellee's brief.

Perusing the tenor of CTWP's requests for declaratory relief, one discovers that the validity of a statute or ordinance does not underlie any of them. Thus, its claim for such relief remained barred by governmental immunity, and the trial court lacked jurisdiction over them.

Injunction

Next, we address the claim for injunctive relief. It implicates § 252.061 of the Texas Local Government Code. Per that statute, a "contract . . . made without compliance with this chapter [Chapter 252, Purchasing and Contracting Authority of Municipalities] . . . is void and the performance of the contract, including the payment of any money under the contract, may be enjoined by . . . (1) any property tax paying resident of the municipality." TEX. LOC. GOV'T. CODE ANN. § 252.061(1). CTWP invoked that provision while attacking the manner in which the City and TDS contracted.[3] It averred that its opponents failed to comply with Chapter 252 of the Local Government Code when seeking and contracting for copier services.

The City does not question that § 252.061 waives governmental immunity in situations encompassed by the provision, i.e., purchasing items through competitive bidding. Instead, it relies on another provision of the Local Government Code to thwart application of § 252.061. That provision is § 271.102(c). Through the latter, the legislature said a "local government that purchases goods or services under this subchapter [Subchapter F, Cooperative Purchasing Program Participation] satisfies ***any*** state law requiring the local government to seek competitive bids for the purchase of the goods or services." *Id.* § 271.102(c) (emphasis added). Subchapter F deals with buying

[3] No one disputes that CTWP is a tax paying resident of the municipality.

through a "cooperative purchasing program." That is, it authorizes a "local government [to] participate in a cooperative purchasing program with another local government of this state or another state or with a local cooperative organization of this state or another state." *Id.* § 271.102(a). The City purportedly utilized that authority and acquired the copying services of TDS through such a program administered by BuyBoard. That triggered application of § 271.102(c) which, in turn displaced § 252.061, according to the City. So, CTWP could not invoke § 252.061 as a way to pierce its governmental immunity, it concludes. Yet, the record prevents us from so concluding, at this juncture.

Simply put, the City's claim of immunity depends on whether the record illustrates it obtained the copier services from TDS through BuyBoard's cooperative purchasing program. In reading that record, we must remember to construe its content in a light most favorable to the nonmovant, i.e., CTWP. And, in so construing it, we find evidence that the City did peruse BuyBoard's website to obtain the identity of vendors who previously quoted prices for the sale/lease of copiers.[4] It discovered the identities of TDS and several others and decided to directly request from them a quote based on "cooperative pricing." CTWP, as the 'incumbent' vendor, was included in the eventual mix of vendors contacted. When asked at deposition why "a decision [was] made to go with a direct request for cooperative pricing as opposed to contacting the BuyBoard and going through the BuyBoard to obtain pricing," a City representative replied: "[w]e did that to give all the local vendors a chance to supply pricing for the city." Other evidence also reveals that

[4] According to the City's purchasing agent: "I went through on the BuyBoard, I went through each copier, wrote down that price, and then for all the copiers that were listed, I did that for CTWP and Texas Document."

no contact was actually made with BuyBoard and the latter did not know of the transaction until after CTWP sued the City.

Several vendors, including TDS and CTWP, responded to the City's direct request. That resulted in the City engaging in direct negotiations with either TDS or the copy machine manufacturer it represented, i.e., Sharp, to obtain a more favorable price than "cooperative pricing." One was received and presented to the Waco city council for approval. The council approved it. That resulted in the creation of a contract memorializing the agreement with TDS, which contract the City signed.

Also found in the record are documents explaining how a BuyBoard member, such as the City, effectuates a purchase through the BuyBoard cooperative purchasing program. A paragraph in one such document states that "BuyBoard must have a copy of the purchase order ***in order for the purchase to be considered a BuyBoard procurement***." (Emphasis added). The reader is then told that "[t]o ensure that your entity has satisfied state law requirements for competitive procurement, make sure that the BuyBoard has your purchase order." That no such purchase order was issued by the City is undisputed. The City suggests that the decision of CTWP to sue caused it to withhold issuance of a purchase order. Irrespective of the City's motivation for withholding issuance of a purchase order, evidence illustrates that a prerequisite to considering the transaction as a "BuyBoard procurement" was never performed.

Other evidence of record also touches upon whether the transaction was actually a BuyBoard or cooperative program acquisition. For instance, when being questioned via deposition about whether CTWP was provided all TDS documentation about BuyBoard pricing, a TDS represented stated: "This is not a BuyBoard purchase."

Simply put, some evidence of record creates a material issue of fact regarding whether the contract between TDS and the City occurred through BuyBoard or pursuant to its rules. City agents may have searched the cooperative buying program for the name of potential vendors, but it did not contact them through that entity. And, though the City executed an actual contract with TDS, it did not tender a purchase order to the vendor through BuyBoard before doing so. Tendering such a purchase order appears to be a prerequisite to effectuating a cooperative purchase, or so suggests BuyBoard procedures. And, we have evidence from a TDS employee indicating the transaction was not a BuyBoard purchase. That, at the very least, creates a material issue of fact about whether the TDS/City transaction was a cooperative purchase through BuyBoard for purposes of § 271.102(c). If it were not, then the City cannot utilize the protective cloak of § 271.102(c). Without that protective cloak, it does not have the immunity from suit it claims. Given the foregoing, we cannot say that the trial court erred in denying this aspect of the City's plea to the court's jurisdiction.

Standing

The City next suggests, through issue two, that CTWP lacks standing to complain of acts other than the selection of the TDS offer. However, only that contract forms the basis of CTWP's causes of action, according to CTWP. We accept CTWP's representation and concession. While its rather lengthy live pleading mentions various instances of supposed questionable activity, CTWP is not asserting claims other than those expressly mentioned under the headings "First Cause of Action: Injunction and Rebidding" and "Second Cause of Action: Declaratory Judgment" in "PLAINTIFF'S FIRST AMENDED ORIGINAL PETITION AND APPLICATION FOR TEMPORARY

RESTRAINING ORDER." It seeks only to avoid the one TDS/City copier arrangement discussed throughout this opinion that would displace it as the provider of such services. So, the City's second issue is overruled.

Moot

Our final task concerns the City's motion to dismiss the appeal as moot. It argues that same is appropriate because its contract with TDS expired by its own terms. Assuming *arguendo* that the expiration of a contract renders a dispute moot, our consideration of the record and contract at issue proves the City's contention inaccurate.

Per the City's resolution approving the business transaction, the contract would have an initial three-year term with the option to renew it for two succeeding one-year terms. Furthermore, the contract actually signed by the City provided that 1) the "Agreement shall remain in full force and effect, unless cancelled by either party in writing"; 2) "[t]he initial term of this Agreement shall commence on the date of equipment installation"; and 3) it "[s]hall be automatically renewed upon expiration of the initial period, for successful renewal terms at the standard published service rates, in effect at the time of applicable renewal." No one cited us to anything of record suggesting that either TDS or the City cancelled their agreement in writing.

The record also contains evidence indicating that TDS has yet to deliver the copiers per the accord. They being undelivered can lead one to reasonably infer that they were never installed. And, if they were never installed then the initial term has yet to begin, per the very terms of the contract. So, if the initial term never began, it is difficult to conclude that the term of the contract expired.

More importantly, no one cited us to any contract provision rendering the accord void, expired, or ended should the products go undelivered by a particular time. Nor did we find one. Instead, the City agreed that the "Agreement shall remain in full force and effect, unless cancelled by either party in writing."

Admittedly, one could doubt the expedience of either the City or TDS attempting to enforce the four-year-old accord. Yet, that would be their choice under the contract wording they selected. Nevertheless, the record before us prevents us from concluding, as a matter of law, that the contract expired and the dispute involving its execution became moot. The pending motion to dismiss for mootness is denied, therefore.

The trial court's order denying the City's plea to the trial court's jurisdiction is modified to the extent it retained jurisdiction over the declaratory action claim. That cause of action is dismissed for want of jurisdiction. As modified, we affirm the remainder of the trial court's order.

Brian Quinn
Chief Justice