

RENDERED: DECEMBER 22, 2000; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-002213-MR

ALEX NOFFEL, JR.

APPELLANT

v. APPEAL FROM FULTON CIRCUIT COURT  
HONORABLE WILLIAM L. SHADOAN, JUDGE  
ACTION NO. 99-CI-00035

CITY OF FULTON, KENTUCKY;  
ROBERT VAUGHN; AND MICHAEL  
GOODWIN

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: BUCKINGHAM, JOHNSON AND MILLER, JUDGES.

JOHNSON, JUDGE: Alex Noffel, Jr. has appealed from the summary judgment entered by the Fulton Circuit Court on August 19, 1999, that dismissed his complaint which contested the acceptance by the City of Fulton of a bid by Robert Vaughn to purchase real estate when Vaughn's bid was lower than the bid submitted by Noffel. Based on the authority of Ohio River Conversion, Inc. v.

City of Owensboro,<sup>1</sup> which stated "absent fraud or collusion, the courts will not interfere with power to accept or reject bids by a governmental agency," we affirm.

The facts of this case are not in dispute; and Noffel does not contend that the case was not appropriate for summary judgment. Instead, he contends that as a matter of law summary judgment should have been entered in his favor. Thus, our review is limited to determining whether the City was entitled to judgment as a matter of law.<sup>2</sup>

On February 25, 1999, the City ran a legal notice in the local newspaper of an ordinance declaring "[t]he former Coca-Cola Bottling Company property as surplus property, and authorizing the City Manager of the City of Fulton, Kentucky to advertise for sealed bids for the sale of [the] propert[y]." The ordinance continued by stating "with the City of Fulton having the right to reject any and all bids" and that the parcel "shall be sold 'as is' as to condition and title, and the City of Fulton will in no way warrant or guarantee the condition of same." No further conditions were placed on the bids.

A problem arose because the notice failed to specify a deadline for the submission of bids. Michael Goodwin, who was named as a defendant and appellee, attempted to submit a bid after the bids that had been received had been opened. When

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<sup>1</sup>Ky.App., 663 S.W.2d 759, 761 (1984).

<sup>2</sup>Scifres v. Kraft, Ky.App., 916 S.W.2d 779, 781 (1996).

Goodwin was informed by the City that his bid was not timely, he advised the City that a deadline had not been included in the advertisement.

At the Board of Commissioner's meeting on March 8, 1999, the Commissioners decided that the February 25th notice was defective since it failed to specify a deadline for the submission of the bids. A new ordinance was adopted which contained all of the language in the previous ordinance, plus the following: "Sealed bids will be taken on the above surplus property. All bids must be in by Thursday, March 18, 1999 by 1:00 PM. Sealed bids will be open [sic] in the city manager's office on the above date and time."

Noffel submitted a bid for \$15,010, and appellee Robert Vaughn submitted a bid for \$12,018. At the Board of Commissioner's meeting on March 22, 1999, Commissioner Smith moved that the City accept Noffel's bid, but the motion died from lack of a second. Commissioner Hohlbein then stated that he supported accepting Vaughn's bid even though it was for \$2,992 less than Noffel's bid. Commissioner Hohlbein made the following points: (1) the City made a mistake on the first bids and Joe Crass had the highest bid which was not accepted because of the City's mistake; (2) Vaughn's bid was on behalf of Crass; (3) Vaughn's bid was approximately three times larger than Crass' original bid; (4) Crass had stated his intentions of repairing the building and putting his business in the building; and (5) the City needs to convey a message to the public that it will

reward people who are willing to upgrade property and put a business in the property. The Board of Commissioners voted 3-0, with one abstention, to accept Vaughn's bid.

On March 30, 1999, Noffel filed a complaint in the Fulton Circuit Court against the City, Vaughn and Goodwin.<sup>3</sup> Noffel alleged that the City in an attempt to sell the property "asked for sealed bids without any other restrictions and then rejected [his] high bid." Noffel alleged that he was "an individual, tax-paying citizen of the [C]ity of Fulton, Kentucky," who also was "the highest bidder" on the property. Noffel claimed that "[a]lthough the City of Fulton could have rejected all bids, by rejecting the high bid, the City turned down the sale price that would most benefit the City's interest and the taxpayer's interest." Noffel claimed that "[a]s a tax-paying citizen of Fulton, Kentucky, [his] rights are being violated and the City of Fulton should be required to sell the surplus property to the highest bidder." Noffel also claimed that his "rights as the high bidder are being violated and if the property is transferred to the low bidder, [he] will be denied the property."

Noffel, the City and Vaughn all filed motions for summary judgment. On August 19, 1999, the trial court apparently granted summary judgment to the City and Vaughn since it ordered the complaint to be dismissed. However, as is evident from the

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<sup>3</sup>It is unclear why Goodwin was sued. He has not entered an appearance and did not file a brief.

language quoted below, the basis for the order is unclear. The trial court's order in toto stated:

The Court having considered the Motions for Summary Judgment by Plaintiff, as well as the Defendant, and having reviewed the file and the Memorandums contained therein, is of the opinion that the City of Fulton passed an Ordinance directing the City Manager to sell certain surplus property. There does not appear to be a Notice to the public by the City Manager or the City of Fulton, Kentucky, that the property would be sold and what conditions were required for the bid; therefore, the issue as raised by the parties at this time is moot. The Court is of the opinion that if the City wishes to sell the surplus property, they have a right to do so, but they should specify under what conditions in the Notice for bids. The Court is also of the opinion that the Owensboro case cited by the Defendants is the prevailing law involved in this matter and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED the Complaint is dismissed.

This appeal followed.

Noffel has stated three arguments in his brief: (1) "The trial court's ruling that the Appellant must plead fraud or collusion to challenge the award of the bid to Robert Vaughn was erroneous"; (2) "The City of Fulton's decision to award the Coca-Coal Plant to Robert Vaughn was arbitrary and capricious and violated generally accepted principles that a municipality must act in good faith and treat citizens equally"; and (3) "The Appellant, Alex Noffel, Jr., was denied his constitutional rights by the City of Fulton whose actions were an invasion of his legally protected property interest." In his brief, Vaughn

addresses the arguments raised by Noffel without any reference to the confusion caused by the trial court's order.<sup>4</sup>

Regardless of this confusion, everyone seems to be in agreement that the applicability of Ohio River Conversion, Inc., supra, is at the center of this appeal. In Ohio River Conversion, this Court affirmed the Daviess Circuit Court's summary judgment in favor of the City of Owensboro that had dismissed Ohio River Conversion's complaint. Ohio River Conversion had bid \$7,610 for a boat dock owned by the City of Owensboro that had been advertised for sealed bids. The City of Owensboro's legal notice included "right to reject" language similar to the City of Fulton's: "The City of Owensboro reserves the right to reject any and all bids and to waive any irregularities in said bids."<sup>5</sup> The City of Owensboro received a second bid for \$7,000 from Meschko. When the City's Board of Commissioners met to make the award of the sale, the Commissioners "learned that Ohio River Conversion intended to remove the boat dock to Louisville, thus leaving some of the boating public without space to harbor their craft" and that Meschko "would operate the dock in Owensboro."

This Court discussed the Model Procurement Code (Kentucky Revised Statutes (KRS) Chapter 45A) under which the City of Owensboro operated and noted that "it must be kept in

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<sup>4</sup>The City's brief merely adopted Vaughn's brief.

<sup>5</sup>Id. at 760.

mind that its primary function is to benefit the citizens, as is the real purpose of government itself and the laws pertinent thereto." This Court then stated that it was lead "to inquire as to the standing of the appellant to bring the action in the first instance." This Court then cited the established law that provides that an unsuccessful bidder does not have "standing to request the judicial award of the contract or seek damages from the municipality." While this Court recognized "that a qualified taxpayer of the city [may] commenc[e] this type of litigation . . . . appellant is neither a taxpayer nor a resident of Owensboro." This Court then noted that it was "cognizant of the fact that the trial court made no reference to the question of standing and appellees only incidentally alluded to it by way of brief, but we deem it essential to the consideration of this cause." With that said, this Court then went in an entirely different direction, and stated:

There are other legal theories of long standing having application here which we are unwilling to disturb and those are, absent fraud or collusion, the courts will not interfere with power to accept or reject bids by a governmental agency. No fraud or collusion was alleged here. In addition, municipalities have wide discretion in the exercise of acceptance or rejection, and where they reserve the right to reject, the courts will not disturb their actions based on mere technicality, even if made unwisely or under mistake. Fosson v. Fiscal Court of Boyd County, Ky., 369 S.W.2d 108 (1963).<sup>6</sup>

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<sup>6</sup>Ohio River Conversion, supra at 761.

Noffel recognizes the obvious need to distinguish his case from Ohio River Conversion and attempts to do so in three ways. Noffel first notes that Noffel resides in the City of Fulton and pays taxes there. This distinction is significant as to the issue of standing, but it does not appear that the trial court relied upon Ohio River Conversion's holding on standing to bar Noffel's claim. Thus, the fact that the case sub judice is distinguishable from Ohio River Conversion on the issue of standing is of no consequence.

Secondly, Noffel points to the \$610 difference in the bids in Ohio River Conversion as compared to the \$2,992 difference in the bids in the case sub judice; and "more importantly" to the fact that "the City of Fulton would be selling government surplus property for less than two-thirds of its appraised value of \$32,000." We fail to see how the selling price matters unless fraud or collusion is alleged. As this Court stated in Ohio River Conversion, "the court will not disturb [the municipalities'] actions . . . even if made unwisely."<sup>7</sup>

As his third grounds for distinguishing Ohio River Conversion, Noffel points out that "the [C]ity of Owensboro was not merely selling surplus property, but was selling a municipal boat dock which it utilized for the benefit of its citizens who own boats . . . . Clearly, the rationale for awarding [ ] the

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<sup>7</sup>Id. at 761.



boat dock to someone other than the higher bidder was that it was in the public's best interests." However, as Vaughn points out in his brief, the "Commissioners determined that Fulton and its citizens did in fact have an interest that would be protected if [ ] Vaughn's bid . . . was accepted." We agree and we believe the Commissioners sufficiently expressed that interest when they expressed their intent "to reward people who are going to put a business in and upgrade the property to make it look like something rather than just being a vacant rental building." Since Noffel has not been able to distinguish Ohio River Conversion from this case, we must follow the established law and affirm the dismissal of the complaint.

For his second issue, Noffel claims the City's actions were "arbitrary and capricious and violated generally accepted principles that a municipality must act in good faith and treat citizens equally." The foreign cases relied upon by Noffel obviously are not binding on this Court and cannot overcome the established law as set forth in Ohio River Conversion. Once again, Noffel's claim must fail because there has been no allegation of fraud or collusion.

Noffel's last issue which alleges a violation of his Fourteenth Amendment right to equal protection was not presented to the circuit court and accordingly was not preserved for our review.<sup>8</sup>

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<sup>8</sup>Regional Jail Authority v. Tackett, Ky., 770 S.W.2d 225,  
(continued...)

For the foregoing reasons, the order of the Fulton Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Jim Paitsel  
Fulton, KY

BRIEF AND ORAL ARGUMENT FOR APPELLEE, ROBERT VAUGHN:

Stacey A. Blankenship  
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BRIEF AND ORAL ARGUMENT FOR APPELLEE, CITY OF FULTON:

Hal Warren  
Fulton, KY

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<sup>8</sup>(...continued)  
228 (1989).