

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001794-MR

KOCH CORPORATION

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LISABETH HUGHES ABRAMSON, JUDGE
ACTION NO. 98-CI-003684

5TH STREET HIGH RISE CORPORATION, INC.

APPELLEE

OPINION
AFFIRMING
** **

BEFORE: COMBS and DYCHE, Judges; JOHN POTTER, Special Judge.¹

COMBS, JUDGE: Koch Corporation appeals from a judgment entered by the Jefferson Circuit Court on July 27, 2001 in favor of 5th Street High Rise Corporation, Inc. ("5th Street"). We conclude that the trial court's factual findings are supported by substantial evidence and that it correctly applied the law to those facts. Thus, we affirm.

5th Street, d/b/a J. O. Blanton House, a non-profit corporation, provides low cost rental housing units to elderly and low income Kentuckians. In 1996, Blanton House received a

¹Senior Status Judge John Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

\$1,035,000 Operating Assistance loan from the U.S. Department of Housing and Urban Development ("HUD"). Blanton House subsequently issued an invitation for bids to replace the windows of the facility.

On September 20, 1996, Koch Corporation submitted a bid on the project in the amount of \$512,816.00. Another bidder, W.R. Cole & Associates ("W.R. Cole"), submitted a lower bid of \$508,700.00. Koch Corporation and W.R. Cole were the two lowest bidders - with all other bids being significantly higher.

On October 1, 1996, the Operations Committee of the 5th Street Board of Directors considered the bids on the window replacement project and decided to accept the bid of Koch Corporation. Although Koch Corporation's bid was slightly higher than that of W.R. Cole, the Operations Committee concluded that Koch Corporation's bid satisfied certain Minority Business Enterprise ("MBE") requirements of the bid solicitation while W.R. Cole's bid did not. Stephen Koch, President of Koch Corporation, was orally notified of the resolution.

W.R. Cole, the low bidder, immediately lodged a bid protest. At a special meeting of the Operations Committee held on October 24, 1996, the committee conducted further inquiry and deliberation. It then determined that the window replacement contract should be awarded to W.R. Cole. On December 4, 1996, W.R. Cole received authorization from the project architect to proceed with the window replacement.

Koch Corporation filed an action pursuant to 42 U.S.C. §1983 against 5th Street in the United States District Court for

the Eastern District of Kentucky. Early in the proceedings, U.S. Magistrate Judge James D. Moyer granted summary judgment in favor of 5th Street. The Sixth Circuit United States Court of Appeals affirmed.

In July 1998, Koch Corporation filed this action against 5th Street for breach of contract. Following a bench trial, the Jefferson Circuit Court entered its findings of fact, conclusions of law, and judgment in favor of 5th Street. This appeal followed.

Koch Corporation contends that the trial court erred by failing to conclude that 5th Street had breached the parties' agreement. It argues that the initial resolution of 5th Street's Board of Directors resulted in a binding contract that would not allow for modification so as to award the project to W.R. Cole. As the trial court aptly concluded, however, 5th Street retained broad, ongoing discretionary authority in awarding the contract; its initial resolution was final or not binding on either party.

As part of the competitive bidding process, both Koch Corporation and W.R. Cole were required to complete a document which provided, in pertinent part, as follows:

In submitting this bid it is understood and agreed that the J.O. Blanton House reserves the right to accept any bid, or portion thereof, reject any or all bids, to waive any informalities in bids received where such acceptance, rejection, or waiver is considered to be in the best interest of the J.O. Blanton House Louisville and to reject any bid where evidence or information submitted by the bidder does not satisfy the J.O. Blanton House Louisville that the bidder is qualified, capable of carrying out the requirements of the Contract Documents or is

in any manner unresponsive in the preparation of its bid.

If written notice of intent to award the contract connected with this bid is mailed, telegraphed or delivered to the undersigned within sixty (60) days after the opening thereof, or at any time thereafter, unless the bid is withdrawn in writing, the undersigned agrees to execute and deliver a contract in the prescribed form and furnish the required bonds and meet other stipulated requirements within ten (10) days after the contract is presented to him/her for signature. (Emphases added.)

Koch Corporation never received a "written notice" of 5th Street's intent to award the contract to Koch Corporation. Instead, Stephen Koch was informed orally by a representative of 5th Street that it was the intent of the Board of Directors to award the contract to Koch Corporation. In light of W.R. Cole's bid protest and before any written notice was delivered, 5th Street elected to exercise its prerogative to re-evaluate the bids and awarded the contract to W.R. Cole. In reaching its decision, 5th Street relied on the paragraph quoted above, by which it had reserved:

the right to accept any bid, reject any or all bids, to waive any informalities in bids received when such acceptance, rejection or waiver is considered to be in the best interest of the J.O. Blanton House.

Early in the process, 5th Street identified MBE participation in the project as a "priority objective." W.R. Cole's low bid was initially passed over in favor of Koch Corporation because W.R. Cole had omitted to include such participation in its bid. Upon closer scrutiny, however, 5th Street became convinced that Koch Corporation's proposed

subcontractor, Juanita Burks (or Burks Construction), did not satisfy MBE requirements. First, the proposed subcontractor could not produce (per subsection XXII of the Supplemental Instructions to Bidders) "evidence satisfactory to 5th Street of minority ownership." Next, the Operations Committee had serious concerns about the ability of Ms. Burks's company to perform the proposed contract. While Koch Corporation's bid indicated that Ms. Burks's company was to furnish workers and install windows in the Blanton House project, it could not be established that the company had a place of business, had any inventory or equipment, or employed any workers. In fact, evidence indicated that the company was merely a broker lending its name and minority status in exchange for a percentage of the contract price.

Upon concluding that the Koch Corporation bid failed to fulfill initial MBE participation goals, 5th Street determined that it could no longer be preferred over W.R. Cole, the low bidder. 5th Street's decision to award the contract to W.R. Cole was undoubtedly justified under the broad discretion that it retained under the bid documents.

We agree with the trial court that 5th Street's initial resolution in favor of Koch Corporation (as memorialized in its Board Minutes) did not constitute a final award of the contract to Koch Corporation nor did it give rise to any binding obligation on the part of 5th Street's Board of Directors. The bid documents clearly outlined the procedure by which a contract between the parties was to be formulated. First, "written notice of intent to award the contract connected with this bid" would be

"mailed, telegraphed or delivered to the undersigned within sixty days after the opening thereof." The same paragraph further provided that unless the bid were withdrawn in writing, the bidder would be required to execute and deliver a contract in the prescribed form "within ten days after the contract is presented to him/her for signature." Thus, by the plain terms of the bid documents, Koch Corporation could not claim any entitlement until it received "written notice" of 5th Street's intent to contract and then executed the prescribed contract - a sequence of events which never occurred. Instead, W.R. Cole immediately filed its protest of the initial vote to award the contract to Koch Corporation. 5th Street's Board of Directors reacted promptly to address the protest.

Any reliance by Koch Corporation on the preliminary, oral notification was clearly premature and tentative. We agree with the trial court's conclusion that there was no contract between 5th Street and Koch Corporation. At most, there was an "agreement to agree" in the loosest fashion which never matured into a binding contract. The trial court correctly concluded that no other basis exists for awarding Koch Corporation any damages on the facts presented.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

Richard L. Masters
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Cecil A. Blye, Sr.
Louisville, Kentucky

