NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2014 CA 0658

COMMAND CONSTRUCTION INDUSTRIES, L.L.C.

VERSUS

LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, SHERRI LEBAS, IN HER OFFICIAL CAPACITY AS SECRETARY OF LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, METROPOLITAN COUNCIL FOR THE PARISH OF EAST BATON ROUGE, AND CITY OF BATON ROUGE/PARISH OF EAST BATON ROUGE

Judgment Rendered: MAR 06 2015

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C621815

The Honorable Kay Bates, Judge Presiding

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BEFORE: MCDONALD, CRAIN, AND HOLDRIDGE, JJ.

HOLDRIDGE, J.

Plaintiff/Appellant, Command Construction Industries, L.L.C. (Command), appeals a trial court judgment sustaining a peremptory exception raising the objection of no cause of action and dismissing its petition for a writ of mandamus. For the reasons that follow, we affirm in part, reverse in part, and remand with instructions.

FACTUAL AND PROCEDURAL HISTORY

This suit arises out of a public works construction project, State Project No. H.007137 (Project), for improvements to or around Jones Creek Road in East Baton Rouge Parish. According to Command's petition, the project was financed as a cooperative endeavor between the Louisiana Department of Transportation and Development (DOTD) and the City of Baton Rouge/Parish of East Baton Rouge (City/Parish.)

On December 6, 2012, DOTD issued its Construction Proposal for the Project that included a Notice to Contractors. The Notice to Contractors provided that the Project's Estimated Cost Range was $15,000,000.00 to $20,000,000.00. The contract for the Project was to be awarded to the lowest bidder under a Cost-Plus-Time Bidding format. The Project was let on February 13, 2013. A total of nine bids were submitted.

Fenton Excavating & Construction Inc. (Fenton) was the apparent low bidder and the only bidder who submitted a bid of less than $15,000,000.00 for construction costs.[1] The eight remaining bids for construction costs all fell within the Estimated Cost Range of $15,000,000.00 to $20,000,000.00.

Fenton's bid was subsequently ruled to be irregular by DOTD and was rejected. Command had the next lowest bid for the Project, with construction costs

[1] Fenton's bid was $13,608,800.03 for construction costs and a contract time of 330 days.

in the amount of $15,721,993.50 and a contract time of 520 days. Thus, Command became the lowest responsive bidder.

On March 26, 2013, Bryan K. Harmon, of the City/Parish's Department of Public Works (DPW), informed DOTD that the City/Parish could not concur in the award of the Project to Command. In so doing, he noted that all eight bids "were significantly higher than both the DPW and DOTD engineer[s'] estimate[s] and the monies currently budgeted for the Project." Additionally, the associated contract time was deemed to be longer than desired or anticipated. Consequently, the City/Parish recommended that DOTD reject all of the bids.

On April 1, 2013, DOTD informed Command that all of the bids for the Project had been rejected by DOTD's Chief Engineer because they were "outside of the established threshold of the preconstruction estimate for the [P]roject as documented in [DOTD's] Engineering Directives and Standards #I.3.1.2 . . . ."

Following DOTD's rejection of the bids, Command filed a petition for a writ of mandamus alleging that DOTD had improperly rejected its bid for the Project based on section I.3.1.2. According to Command, "DOTD Engineering Directives and Standards Manual I.3.1.2 states that when the low bid for a state project overruns the cost estimate by more than ten percent (10%), then examination shall be made to determine the possible reasons for [its] lack of [compliance] and [a] bid review committee shall make a recommendation for [its] acceptance or rejection."

Command asserted that an engineer hired by the City/Parish's DPW had provided an estimate of construction costs in the amount of $14,855,881.00, but that this estimate failed to include the costs for certain addenda to the bid proposal. Even so, Command asserted that its bid of $15,721,993.50 "was less than ten percent (10%) overrun compared to the estimated construction cost" prepared on behalf of the DPW.

Command attached several documents to its petition, including a copy of DOTD's bid tabulations for the Project. This form reflects that DOTD's "Estimated Construction Cost" (preconstruction estimate) for the Project was $13,719,170.77. Thus, Command's bid of $15,721,993.50 exceeded DOTD's preconstruction estimate by more than ten percent.

Nevertheless, Command asserted that DOTD had violated La. R.S. 48:255 by failing to award it the contract for the Project as the lowest responsive bidder. Accordingly, Command asserted that it was entitled to the issuance of a writ of mandamus directing DOTD to award it the contract and directing the City/Parish to concur in the award.

On July 11, 2013, the City/Parish filed a peremptory exception raising the objection of no cause of action based, in part, on La. R.S. 48:255B. That statute allows, but does not require, DOTD to reject any and all bids for "just cause." "Just cause" includes the failure of a bidder to submit a bid within an established threshold of the preconstruction estimate by DOTD's engineers. La. R.S. 48:255B.(1) and (5)(b). The City/Parish maintained that DOTD had "just cause" to reject all bids and that the decision to do was within the discretion of DOTD's chief engineer. Therefore, the City/Parish maintained that Command had failed to state a cause of action for mandamus.

Following a hearing, first on the City/Parish's exception of no cause of action, and then on Command's petition for writ of mandamus, the trial court took both matters under advisement. On November 27, 2013, the trial court issued written reasons for judgment. Therein, the trial court discussed the pertinent facts contained within the petition and attached documents. After examining La. R.S. 48:255, the trial court determined that, in its petition, Command had improperly utilized the cost estimate prepared for DPW, rather than the preconstruction

estimate of DOTD's engineers, as prescribed in the pertinent statute. Because Command's bid of $15,721,993.50 was 14.59% higher than DOTD's preconstruction estimate of $13,719,170.77, the trial court found that Command's bid was outside the established threshold. Therefore, it found that DOTD had just cause, and thus the discretion, to accept or reject the bid. Citing **Gibson & Associates, Inc. v. State, Dept. of Transp. & Development**, 2010-1696 (La.App. 1 Cir. 5/18/11), 68 So.3d 1128, the trial court concluded that because DOTD's decision required the use of discretion, Command had failed to state a cause of action for mandamus. Thus, the trial court pretermitted ruling on the merits of the mandamus. On January 23, 2014, the trial court signed a judgment sustaining the City/Parish's peremptory exception raising the objection of no cause of action and dismissing Command's suit with prejudice. From this judgment, Command appeals.

APPLICABLE LAW

No Cause of Action

The peremptory exception raising the objection of no cause of action is designed to test the legal sufficiency of the petition by determining whether the plaintiff is afforded a remedy in law based on the facts alleged in the pleading. **Bunge North America, Inc. v. Board of Commerce & Industry and Louisiana Department of Economic Development**, 2007-1746 (La.App. 1 Cir. 5/2/08), 991 So.2d 511, 519, writ denied, 08-1594 (La. 11/21/08), 996 So.2d 1106. A court must review the petition and accept all well pleaded facts as true, and the only issue on the trial of the exception is whether, on the face of the petition, plaintiff is legally entitled to the relief sought. **Everything on Wheels Subaru, Inc. v. Subaru South, Inc.**, 616 So.2d 1234, 1235 (La. 1993); **Cage v. Adoption Options of Louisiana, Inc.**, 94-2173 (La.App. 1 Cir. 6/23/95), 657 So.2d 670, 671.

Furthermore, the facts shown in any documents attached to the petition must also be accepted as true. **Pelican Educational Foundation, Inc. v. Louisiana State Bd. of Elementary and Secondary Educ.**, 2011-2067 (La.App. 1 Cir. 6/22/12), 97 So.3d 440, 444. As a general rule, no evidence may be introduced to support or controvert the objection.[2] La. C.C.P. art. 931.

An exception of no cause of action is likely to be granted only in the unusual case in which the plaintiff includes allegations that show on the face of the petition that there is some insurmountable bar to relief. **Lyons v. Terrebonne Parish Consol. Government**, 2010-2258 (La.App. 1 Cir. 6/10/11), 68 So.3d 1180, 1183. In reviewing a trial court's ruling sustaining an exception of no cause of action, an appellate court conducts a *de novo* review because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition and attached documents. **Torbert Land Co., L.L.C. v. Montgomery**, 2009-1955 (La.App. 1 Cir. 7/9/10), 42 So.3d 1132, 1135, writ denied, 2010-2009 (La. 12/17/10), 51 So.3d 16.

Mandamus

Mandamus is a writ compelling a public officer to perform a ministerial duty required by law. La. C.C.P. arts. 3861 and 3863. A "ministerial duty" is one in which no element of discretion is left to the public officer. **Newman Marchive**

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[2] The jurisprudence recognizes an exception to this rule whereby a court may consider evidence admitted without objection as enlarging the pleadings. **City of New Orleans v. Board of Directors of Louisiana State Museum**, 98-1170 (La. 3/2/99), 739 So.2d 748, 756. Nonetheless, where a hearing in the trial court encompasses both an exception of no cause of action and another exception or a motion, evidence introduced in support of the other exception or motion, for which evidence is properly admissible, cannot be considered by the court in passing on the exception of no cause of action, for which evidence is not admissible. **Twenty-First Judicial Dist. Public Defender Bd. v. Clark**, 2008-0222 (La.App. 1 Cir. 12/23/08), 2008 WL 5377689, 2 (unpublished opinion). In the instant matter, no evidence was admitted at the hearing on the exception of no cause of action. The only evidence admitted was specifically offered "with respect to the merits of the mandamus[.]" Because there was no opportunity to object to the court's consideration of evidence for the purposes of the exception, we do not find that the pleadings were enlarged.

Partnership, Inc. v. City of Shreveport, 2007-1890 (La. 4/8/08), 979 So.2d 1262, 1266. Mandamus is an extraordinary remedy, which must be used sparingly by the court and only to compel action that is clearly provided by law. **Poole v. The Louisiana Board of Electrolysis Examiners**, 2006-0810 (La.App. 1 Cir. 5/16/07), 964 So.2d 960, 963. It never issues in doubtful cases. **City of Hammond v. Parish of Tangipahoa**, 2007-0574 (La.App. 1 Cir. 3/26/08), 985 So.2d 171, 181.

Although the granting of a writ of mandamus, as a general rule, is considered improper when the act sought to be commanded contains any element of discretion, it has been allowed in certain cases to correct an arbitrary and capricious abuse of discretion by public boards or officials, such as the arbitrary refusal by an administrative body to grant a license. **Pelican Educational Foundation, Inc.**, 97 So.3d at 444-445. Absent just cause to reject all bids, mandamus can be used to compel the award of a contract to the lowest responsible bidder. **Pittman Const. Co., Inc. v. Parish of East Baton Rouge**, 493 So.2d 178, 191 (La.App. 1 Cir.), writ denied, 493 So.2d 1206 (1986); **Wallace C. Drennan, Inc. v. Sewerage & Water Bd. of New Orleans**, 2000-1146 (La.App. 4 Cir. 10/3/01), 798 So.2d 1167, 1177.

Bidding and Award of DOTD Contracts

Louisiana Revised Statute 48:250, *et seq.*, specifically govern the bidding and award process for public construction projects let by DOTD. Louisiana Revised Statute 48:255, provides, in pertinent part, as follows:

> B. (1) For all construction, maintenance, or improvement projects for department facilities or other public facility projects, advertised and let by the department, the department or the contracting agency may reject any and all bids for just cause but otherwise shall, with the concurrence of all funding sources, award the contract to the lowest responsible bidder[.]
>
> . . . .

(5) For the purposes of this Section "just cause" means but is not limited to the following circumstances:

. . . .

(b) The failure of any bidder to submit a bid within an established threshold of the preconstruction estimate for the project by the department's engineers.

DISCUSSION

As a preliminary matter, we note that, although the judgment at issue sustained the City/Parish's peremptory exception raising the objection of no cause of action and **dismissed** Command's suit with prejudice, Command's arguments on appeal are premised on the mistaken belief that the trial court actually **denied** its claim for mandamus on the merits. However, both the judgment and the written reasons for judgment make it abundantly clear that the trial court did not reach the merits of the mandamus claim, still less, rule on them.[3]

At oral argument, counsel suggested that the judgment sustaining the exception was essentially the equivalent to a ruling on the merits, and therefore, urged us to address the merits on appeal. However, we decline to do so. Appeals are taken from judgments and the judgment appealed from in this case patently sustained a peremptory exception raising the objection of no cause of action, and dismissed Command's suit with prejudice. See La. C.C.P. art. 2082. This state's appellate standard of review, "which is constitutionally based and jurisprudentially driven, is that a court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding which is manifestly erroneous or clearly wrong." **Stobart v. State, Dept. of Transp. and Development**, 617 So.2d 880, 882, n.2 (La. 1993). It is only when an appellate court finds that a reversible error

[3] Notwithstanding the plain, unambiguous language of both the judgment and the written reasons for judgment, we note that the trial court's written reasons for judgment referred only to facts contained within the petition and attached documents, and made no mention of any arguments put forth, or evidence submitted, by Command relative to the merits of its mandamus claim.

of law or manifest error of material fact was made in the trial court, that it is required, whenever the state of the record on appeal so allows, to redetermine the facts *de novo* from the entire record and render a judgment on the merits. **Wooley v. Lucksinger**, 2009-0571 (La. 4/1/11), 61 So.3d 507, 555. Consequently, we must find legal error in the trial court judgment sustaining the exception of no cause of action before we can address the merits of Command's mandamus claim. In conducting our review, we will attempt to address those arguments that Command has asserted, both on appeal and in the court below, which may be relevant to the issue of whether it has stated a cause of action.

In opposing the City/Parish's exception in the trial court, Command argued that it had expressly alleged in its petition that DOTD had violated La. R.S. 48:255 in failing to award it the contract for the Project. Pointing out that all well-pleaded facts in the petition must be accepted as true for the purposes of the exception, Command asserted the court was required to accept as true its allegation that DOTD lacked just cause to reject its bid, thus, making mandamus appropriate. However, it is well-settled that conclusions of law asserted as facts are not considered well-pled allegations of fact and the correctness of those conclusions are not conceded, for purposes of the peremptory exception raising the objection of no cause of action. **Hooks v. Treasurer**, 2006-0541, 2006-0100 (La.App. 1 Cir. 5/4/07), 961 So.2d 425, 429 writ denied, 2007-1788 (La. 11/9/07), 967 So.2d 507. Accordingly, we find this argument to be without merit.

Command also asserted that DOTD lacked just cause to reject its bid, because, as alleged in its petition, Command's bid was within the established threshold of the estimate provided to the City/Parish. According to Command's petition, the established threshold is "ten percent (10%) overrun." However, like the trial court, we find that pursuant to La. R.S. 48:255B.(5)(b), "just cause" exists

when the bid exceeds the established threshold of the preconstruction estimate performed by **DOTD's engineers**.

Command next argues that DOTD should be bound by its published "Estimated Cost Range" especially when, as alleged here, it exceeded the amount of DOTD's preconstruction estimate. Command essentially argues that under such circumstances, DOTD does not have just cause to reject bids. However, this contention is likewise without merit. In **Gibson & Associates, Inc.**, DOTD's preconstruction estimate was lower than its published estimated cost range. **Gibson & Associates, Inc.**, 68 So.3d at 1140, n.15. Nevertheless, because the bids exceeded the established threshold of the DOTD's preconstruction estimate, this court determined that DOTD's chief engineer had the discretion to reject the bids. Specifically, this court noted as follows:

> [W]hile an "estimated cost range" is published to prospective bidders in the construction proposal, that estimated range is for "information purposes" only. The DOTD also prepares a preconstruction estimate, which is a figure not published prior to the letting of a project and which is a figure used internally by the DOTD to determine whether a bid should be rejected. Specifically, in deciding whether to reject a bid, the DOTD has established a range of plus 10% to minus 25% of the internal preconstruction estimate, as the threshold amounts constituting just cause to reject the bid. Thus, when a bid is above the established threshold of the preconstruction estimate, it is subject to being rejected by the DOTD chief engineer. [La. R.S.] 48:255(B)(5)(b). According to the testimony of the chief engineer, even though a bid is above the established range of the preconstruction estimate, he may nonetheless accept the bid if there are revenues available to fund the project. Further, the DOTD chief engineer has sole responsibility in deciding whether to accept or reject a bid that is outside the established range of the preconstruction estimate.

Gibson & Associates, Inc., 68 So.3d at 1140. Accordingly, this court concluded that the rejected bidder was not entitled to mandamus relief.

Finally, Command contends that it has alleged in its petition that DOTD failed to comply with its own procedures as set forth in section I.3.1.2 of its

Engineering Directives and Standards Manual, making DOTD's decision to reject all bids arbitrary and capricious. However, our review of the petition reveals no such allegation. To the contrary, we interpret the pertinent paragraphs to allege that DOTD had rejected Command's bid based on **Command's** noncompliance with DOTD Engineering Directives and Standards Manual I.3.1.2.[4]

Even if it could be interpreted otherwise, Command did not allege any facts establishing how DOTD failed to comply. As we previously observed, mere conclusions of law asserted as facts are not considered well-pled allegations of fact for purposes of the peremptory exception raising the objection of no cause of action. **Hooks**, 961 So.2d at 429. Nor does our review of the petition reveal any other factual allegations to support a claim that DOTD's rejection of all bids was arbitrary and capricious or in any way an abuse of its discretion.

In sum, the facts alleged in the petition and attached documents show that just cause existed for DOTD to reject all bids because they exceeded the preconstruction estimate of DOTD's engineers. Therefore, DOTD had the discretion to accept or reject the bids. Because DOTD had the discretion to accept or reject all bids that fell outside the established threshold, we conclude that the issuance of a writ of mandamus is not relief available under the allegations of the petition and documents attached thereto. Thus, we find no error in the trial court's judgment insofar as it sustained the peremptory exception of no cause of action.

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[4] The two pertinent paragraphs in Command's petition provide:

XXVIII.

On April 1, 2013, DOTD informed Command that all bids for the Project were rejected by DOTD Chief Engineer for noncompliance with DOTD Engineering Directives and Standards Manual I.3.1.2. See Exhibit "5".

. . . .

XXXVI

DOTD wrongfully rejected Command's bid for the Project for noncompliance with DOTD Engineering Directives and Standards Manual I.3.1.2.

However, we note that La. C.C.P. art. 934 expressly provides that if a petition can be amended to state a cause of action, the party opposing the exception must be given a fair opportunity to amend. We conclude that Command may be able to allege additional facts to state a cause of action, if perhaps not for a writ of mandamus, then for some other type of relief, including injunctive relief. Therefore, we reverse that part of the trial court judgment that dismissed Command's suit with prejudice and we remand this matter to the trial court to afford Command an opportunity to amend its petition pursuant to La. C.C.P. art. 934 and the views expressed herein.

MOTION TO REMAND

Lastly, while this appeal was pending, DOTD filed a motion to remand this matter to the trial court for the purpose of admitting new evidence regarding the mootness of Command's mandamus claim. Because we have decided to remand this matter to afford Command an opportunity to amend its petition, DOTD's motion is now moot.

CONCLUSION

For all of the foregoing reasons, we affirm the trial court judgment insofar as it sustained the peremptory exception raising the objection of no cause of action. However, we reverse that part of the judgment that dismissed Command's suit with prejudice, and we remand this matter to the trial court with the instruction that an order be issued affording Command the opportunity to amend its petition to state a cause of action, if it can, within a delay deemed reasonable by the trial court. Command Construction Industries, L.L.C. is cast with all costs of this appeal.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH INSTRUCTIONS. MOTION TO REMAND DENIED AS MOOT.