

NOT DESIGNATED FOR PUBLICATION

RYAN GOOTEE GENERAL * **NO. 2015-CA-0678**
CONTRACTORS LLC

VERSUS * **COURT OF APPEAL**

PLAQUEMINES PARISH * **FOURTH CIRCUIT**
SCHOOL BOARD, ET AL. * **STATE OF LOUISIANA**

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APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 61-968, DIVISION "B"
Honorable Michael D. Clement,

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Judge Dennis R. Bagneris, Sr.

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(Court composed of Judge Dennis R. Bagneris Sr., Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins)

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**AFFIRMED IN PART;
REVERSED IN PART; AND
REMANDED**

NOVEMBER 18, 2015

This appeal arises out of a dispute over the award of a public works bid contract. The appellant, Plaquemines Parish School Board, appeals the trial court's judgment that granted the motion for mandamus of appellee, Ryan Gootee General Contractors, LLC, and denied the School Board's exceptions of no right of action and no cause of action. The writ of mandamus judgment ordered the School Board and its Superintendent to award the disputed contract to Gootee. Gootee's answer to the appeal alleges the trial court erred in failing to award Gootee attorney's fees and an adjustment in its bid price. For the reasons that follow, we affirm the judgment that denied the School Board's exceptions of no right and no cause of action; reverse the judgment that granted Gootee's motion for mandamus; and deny Gootee's request for attorney's fees and an adjustment in its bid price. The matter is remanded for further proceedings as may be deemed necessary and consistent with this judgment.

FACTS/PROCEDURAL HISTORY

In September 2014, the School Board advertised for a bid contract for a public works construction project known as “South Plaquemines High School--Recreational Field House and Restroom-Concession Buildings” (hereinafter, “the Contract”). After the bids were opened, One Construction, LLC, was deemed the lowest bidder and Gootee’s bid was the second lowest.

Gootee discovered that One Construction’s bid proposal may not have included a certified copy of a resolution authorizing execution of the Contract by its authorized signatory, a violation of La. R.S. 38:2212(B)(5) of the Louisiana Public Bid Law.¹ Gootee telephoned the School Board’s architect about this alleged deficiency on October 24, 2014 and October 27, 2014; and on November 10, 2014, Gootee’s counsel submitted a letter to the School Board’s counsel to advise that One Construction’s bid lacked a duly authorized signatory.

The School Board sent out a notice on November 4, 2014 advising that it would meet on November 10, 2014 to discuss the bid proposals. The Contract was awarded to One Construction on that date. Gootee was not present at the meeting.

Thereafter, on November 17, 2014, Gootee filed a “Petition For Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, Mandamus, And Declaratory Judgment” against the School Board and One Construction in the 24th Judicial District for Jefferson Parish. The petition alleged that One Construction was not the lowest responsive bidder because its bid did not include the duly executed authorization form required by the Public Bid Law. Gootee requested that an injunction be issued, that the Contract be nullified, that it be designated the

¹ La. R.S. 38:2212(B)(5) provides in part that: “Written evidence of the authority of the person signing the bid for public works shall be submitted at the time of bidding.”

lowest responsive bidder, and that a mandamus issue to compel the School Board to award Gootee the Contract. The petition maintained that venue was proper in Jefferson Parish pursuant to La. R.S. 38:2181(A), which allows a suit to annul a public contract on the ground of illegality be instituted in the parish or the domicile of the contractor.

In response, the School Board filed a Peremptory Exception Of Prescription/No Right Of Action, Declinatory Exception Of Improper Venue, Peremptory Exception Of No Cause Of Action, And Dilatory Exception of Improper Cumulation Of Actions. The exceptions of prescription/no right of action and no cause of action maintained that Gootee was not entitled to injunctive relief because its request was untimely. The School Board also claimed that injunctive relief was not proper because Gootee could not prove that the School Board's determination that One Construction's bid proposal met the Contract's specifications was arbitrary. The exception to venue argued that as a political subdivision, the mandatory venue requirements of La. R.S. 13:5104(B) dictate that venue for a suit against the School Board was only proper in the 25th Judicial District for the Parish of Plaquemines.

The trial court granted the School Board's exception to venue. Gootee's claims against the School Board were transferred to Plaquemines Parish. The trial court allowed all surviving claims against One Construction to remain in Jefferson Parish.²

² The trial court denied One Construction's Exception of Improper Venue, Lack of Jurisdiction Over the Subject Matter, and Non-Joinder of a Party (the School Board) Under LSA-C.C.P. Articles 641 and 642.

After a hearing, the 24th JDC trial court granted Gootee's request for preliminary injunction against One Construction. Gootee and One Construction consented to a permanent injunction in order to expedite the appeal process. One Construction filed a suspensive appeal of the judgment granting the permanent injunction to the Fifth Circuit Court of Appeal.³

Gootee's suit against the School Board was transferred to the 25th JDC for Plaquemines Parish in February 2015. At the same time, Gootee filed an Amended And Supplemental Petition for Mandamus And Damages that added Denis Rousselle, the School Board's Superintendent, as a party defendant.

Thereafter, Gootee filed a Motion For Writ of Mandamus. The motion asked for a writ of mandamus to be directed to the School Board to award the Contract to Gootee and for an award of attorney's fees. The motion averred that inasmuch as One Construction, the first low bidder, had been permanently enjoined from work on the Contract, that Gootee should be awarded the Contract as the legitimate, lowest responsible bidder.

The School Board filed exceptions of no cause of action and no right of action to Gootee's supplemental and amended petition. The School Board asserted that although La. R.S. 38:2220(B)⁴ allows interested parties to bring an action to enjoin an award that violates the Public Bid Law, established case law places time

³ One Construction's Notice of Appeal to the Fifth Circuit Court of Appeal includes two judgments dated January 23, 2015. The judgments were the denial of One Construction's Exceptions of Improper Venue, Lack of Jurisdiction Over the Subject Matter, and Non-Joinder of a Party (the School Board) under LSA-C.C.P. Articles 641 and 642; and the permanent injunction judgment which enjoined One Construction from performing work under the Contract. At the time of this opinion, the appeal was still pending.

⁴ La. R.S. 38:2220(B) provides: "The district attorney in whose district a violation of this Part occurs, the attorney general, or any interested party may bring suit in the district court through summary proceeding to enjoin the award of a contract or to seek other appropriate injunctive relief to prevent the award of a contract which would be in violation of this Part, or through

limitations as to when the action may be brought. The School Board cited *Airline Const. Co. v. Ascension Parish School Bd.*,⁵ which held that held that “an unsuccessful bidder on a public contract who wishes to obtain relief because of the rejection of its bid must seek injunctive relief at a time when the grounds for attacking the wrongful award of the contract were known or knowable to the bidder and when corrective action as a practical matter can be taken by the public body.” The School Board argued that if timely injunctive relief is not sought, the unsuccessful bidder’s claims are considered waived.⁶ Therefore, the School Board claimed that Gootee’s request to enjoin enforcement of the Contract with One Construction was not timely. The School Board noted that although Gootee had knowledge of the alleged deficiencies in One Construction’s bid proposal, it waited until after the Contract had been awarded to One Construction to seek to enjoin the Contract; and, thereafter, Gootee waited months to file suit against the School Board in the proper venue.

In its opposition to Gootee’s Motion For Writ of Mandamus, the School Board iterated that the permanent injunction Gootee obtained against One Construction in the 24th JDC had no legal effect upon it or the 25th JDC trial court because the School Board was not a party to that action. The School Board emphasized that no injunctive relief had been obtained against the School Board before the Plaquemines Parish trial court. As to the merits of the Contract, the School Board averred that Gootee could not meet its burden of proof to show that

ordinary proceeding to seek appropriate remedy to nullify a contract entered into in violation of this Part.”

⁵ 568 So.2d 1029, 1035 (La. 1990).

⁶ *Ramelli Group, L.L.C. v. City of New Orleans*, 08-0354, p. 9 (La. App. 4 Cir. 10/22/08), 997 So.2d 612, 618.

the One Construction bid proposal was a nullity or that the School Board was arbitrary in its award of the Contract to One Construction.

Upon hearing argument on the School Board's exceptions of no right of action and no cause of action and Gootee's motion for mandamus, the trial court denied the School Board's exceptions and granted Gootee's motion for mandamus.

The School Board then filed the present appeal. Gootee's answer to the appeal sought attorney's fees and an adjustment in its bid price commensurate with potential costs and fees incurred by the delay in its award of the Contract.

LAW/DISCUSSION

The gist of the School Board's assignments of error is that the trial court erred in denying its peremptory exceptions of no right of action and no cause of action and in granting Gootee's motion for writ of mandamus. We shall first consider whether the trial court erred in denying the School Board's exceptions.

Exceptions of No Right of Action/No Cause of Action

The focus in an exception of no right of action is on whether the particular plaintiff has a right to bring the suit; while the focus in an exception of no cause of action is on whether the law provides a remedy against that particular defendant. *Industrial Companies, Inc. v. Durbin*, 02-0665, p. 6 (La. 1/28/03), 837 So.2d 1207, 1212. The exception of no cause of action is triable on the face of the petition; and in deciding the merits of the exception, each well-pleaded fact in the petition is accepted as true. *See Badeaux v. Southwest Computer Bureau, Inc.*, 05-0612, 05-719, p. 7 (La. 3/17/06), 929 So.2d 1211, 1217. In reviewing a district court's judgment on an exception of no cause of action, appellate courts conduct a de novo review because the exception raises a question of law. *Id.*

In the present matter, we find that La. R.S. 38:2200(B) clearly affords Gootee, the second lowest bidder, a right of action and cause of action to challenge the validity of the School Board's award of the Contract to One Construction. On the face of Gootee's original and supplemental petitions, Gootee alleges facts, which if true, would entitle it to relief.

When we more closely examine this assignment of error, however, the relief requested by the School Board is for this Court to find that Gootee no longer has a right of action or cause of action because Gootee failed to timely assert the relief afforded to it by La. R.S. 38:2220(B). "The timeliness of a suit for injunction depends on the facts and circumstances of the particular case, including among other things, the knowledge possessed by the attacking bidder concerning the wrongful award of the contract, the point in time the bidder acquired this knowledge, the point in time the public body became indebted to the successful bidder, and the time period between the awarding of the illegal contract and the completion of construction." *Airline Const. Co.*, 568 So.2d at 1035.

In this case, the record shows that Gootee notified the School Board of possible issues with One Construction's bid proposal before the Contract was awarded. It filed suit against One Construction and the School Board in the 24th JDC to nullify the award of the Contract to One Construction approximately a week after the award. Moreover, Gootee obtained a temporary restraining order and later, a permanent injunction against One Construction to prohibit its performance under the Contract. These actions were taken before One Construction started any work. Based upon our review of the totality of the pleadings and the facts of this case, we find that Gootee timely filed suit to enjoin

enforcement of the Contract. Accordingly, the trial court did not err in denying the School Board's exceptions of no right of action and no cause of action.

We now turn to whether the trial court erred in granting the motion for mandamus and ordering that the Contract be awarded to Gootee.

Writ of Mandamus

"[M]andamus is an extraordinary remedy, which must be used sparingly by the court and only to compel action that is clearly provided by law." *Hamp's Const., L.L.C. v. Housing Authority of New Orleans*, 10-0816, pp. 3-4 (La. App. 4 Cir. 12/1/10), 52 So.3d 970, 973 (citing *Allen v. St. Tammany Police Jury*, 96-0938, p. 4 (La. App. 1 Cir. 2/14/97), 690 So.2d 150, 153). "Mandamus will not lie in matters in which discretion and evaluation of evidence must be exercised. *Id.* "The remedy is not available to command the performance of an act that contains any element of discretion, however slight." *Id.* (citing *Fire Protection Dist. Six v. City of Baton Rouge Dept't of Public Works*, 03-1205, p. 3 (La. App. 1 Cir. 12/31/03), 868 So.2d 770, 772).

In this matter, the School Board reiterates that the trial court erred in granting mandamus relief because the permanent injunction granted against One Construction in the Jefferson Parish trial court had no res judicata effect upon the School Board or the Plaquemines Parish trial court as the School Board was not a party to the Jefferson Parish litigation. It also adds that a judgment of nullity was not included in the permanent injunction judgment. The School Board relies on La. R.S. 13:4231,⁷ which requires the parties to be the same in both the first and

⁷ La. R.S. 13:4231 provides in part:

Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:

the subsequent matter in order for a judgment in one proceeding to have a binding effect in another proceeding. It points out that Gootee elected not to make the School Board a party to the injunction or any other relief sought in Jefferson Parish and that it chose to proceed in Jefferson Parish exclusively against One Construction rather than have all the issues litigated in Plaquemines Parish.

Gootee counters that it does not matter that the School Board was not a party to the permanent injunction because a valid judgment was obtained that barred One Construction from commencing work on the Contract. Gootee suggests that the granting of the permanent injunction was necessarily premised on a finding that One Construction's bid proposal was null and void. As the only remaining responsive bidder that could perform the work, Gootee contends the trial court correctly issued a writ of mandamus to compel the School Board to award the Contract to Gootee.

Upon our review, we find that the trial court erred in granting the motion for mandamus. First, the permanent injunction judgment was rendered exclusively against One Construction. This Court acknowledges that the impact of the injunction against One Construction effectively prohibited performance of the Contract between the School Board and One Construction. Nevertheless, the School Board was not a party to this judgment, nor did the judgment specifically nullify the Contract between One Construction and the School Board. Although Gootee suggests that the granting of the permanent injunction necessarily infers

(1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.

that the trial court also granted its request to nullify the Contract with One Construction, we decline to interpret the judgment to afford such broad relief. In conjunction with the exceptions filed by One Construction, the School Board may also rightfully argue that it must be joined in any action that decides the nullification of the Contract. Clearly, it has an interest in the matter; complete relief cannot be accorded amongst the parties in its absence; and the parties risk multiple or inconsistent obligations in the School Board's absence. *See* La. C.C.P. art. 641.⁸

Next, as previously referenced herein, One Construction has suspensively appealed the Jefferson Parish judgments that granted the permanent injunction and denied its exception of nonjoinder of a party under articles 641 and 642. La. C.C.P. art. 2781 provides that “[a] judgment rendered in a Louisiana court may be made executory in any other Louisiana court of competent jurisdiction, if its execution has not been and may not be suspended by appeal.” Here, the Jefferson Parish judgment may not be made executory because it is the subject of a pending appeal. Therefore, the trial court erred in deciding that the granting of the permanent injunction made Gootee the lowest responsible bidder because it is the

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

⁸ Art. 641. Joinder of parties needed for just adjudication

A person shall be joined as a party in the action when either:

- (1) In his absence complete relief cannot be accorded among those already parties.
- (2) He claims an interest relating to the subject matter of the action and is so situated that the adjudication of the action in his absence may either:
 - (a) As a practical matter, impair or impede his ability to protect that interest.
 - (b) Leave any of the persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations.

subject of a pending appeal. The effects of the judgment, including whether or not the Jefferson Parish trial court had the authority to render the judgment in the absence of the School Board as a party to the litigation, have been suspended on appeal.

A writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law. La. C.C.P. art. 3863. “If a public officer is vested with any element of discretion, mandamus will not lie.” *Hoag v. State*, 04-857, p. 7 (La. 12/1/04), 889 So.2d. 1019, 1024. (citing *Vogt v. Board of Comm’rs of the Orleans Levee District*, 01-0089 (La. App. 4 Cir. 3/27/02), 845 So.2d 648). As it presently stands, the judgments granting the permanent injunction and denying One Construction’s exceptions have not been made executory; there has been no specific judgment that nullifies the Contract between One Construction and the School Board; and Gootee has not been adjudicated the lowest, responsible bidder. Thus, we find that the School Board presently retains discretion as to the award of the Contract because no final determination has been made that the award of the Contract to One Construction violated the Public Bid Law. Accordingly, the trial court erred in granting the motion for mandamus.

Having found that the trial court erred in granting the motion for mandamus, we deny Goote’s answer to the appeal, which requests attorney’s fees and an adjustment to its bid price.

Wherefore, based on the foregoing reasons, we affirm the judgment denying the exceptions of no right of action and no cause of action; we reverse the judgment granting the motion for mandamus; and deny Gootee’s request for

attorney's fees and an adjustment in its bid price. The matter is remanded for further proceedings as may be deemed necessary and consistent with this opinion.

**AFFIRMED IN PART;
REVERSED IN PART; AND
REMANDED**