STATE OF MICHIGAN

COURT OF APPEALS

THE GARRISON COMPANY, Plaintiff-Appellant, v BISHOP INTERNATIONAL AIRPORT AUTHORITY, Defendant-Appellee.	UNPUBLISHED November 18, 2010 No. 293415 Genesee Circuit Court LC No. 08-088216-CK

Before: MURPHY, C.J., and METER and SHAPIRO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition under MCR 2.116(C)(10) in this dispute regarding whether a contract existed between the parties with respect to the construction of an air freight handling facility referred to as the Intermodal Center. We find that the trial court erred in granting defendant's motion for summary disposition, and we agree with plaintiff that a contract was formed as a matter of law. Accordingly, we reverse and remand for further proceedings.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills School Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). The question of whether a contract existed or was formed is an issue of law that is also reviewed de novo on appeal. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001); *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought pursuant to MCR 2.116(C)(10) tests the factual support for a party's cause of action. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider

substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The trial court may not weigh the evidence, assess credibility, or determine facts for purposes of a summary disposition motion. *Skinner*, 445 Mich at 161.

Here, the project manual included or incorporated all of the documents associated with constructing the facility and with bidding on the construction project, which we shall refer to collectively as the bid documents or bid package. The bid package was comprised of over 1,000 pages in materials. The bid documents included an American Institute of Architects (AIA) owner-contractor agreement, referred to as AIA-A101, and a contract of general conditions governing the construction project, referred to as AIA-A201. A "bid form" was also included in the bid package. The bid form provided:

> The undersigned, having become thoroughly familiar with the terms and conditions of the proposed [bid documents] and with local conditions affecting the performance and costs of the work at the place where the work is to be completed, and having fully inspected the site in all particulars, hereby proposes and agrees to fully perform the work within the time stated and in strict accordance with the proposed [bid documents], including furnishing any and all labor and materials, specified allowances, and to do all of the work required to construct and complete said work in accordance with the [bid documents], for the following sum of money:

By submitting a bid, plaintiff was effectively agreeing to abide by all of the bid documents, including contracts AIA-A101 and AIA-A201 (hereinafter "construction contracts"), should its bid be accepted. The bid form further provided that upon acceptance of a bid and communication of the acceptance to the winning contractor, the contractor agreed to execute and deliver the bid documents, and thus the included construction contracts, to defendant in accordance with the bid as accepted, along with various bonds and proof of insurance. There can be no doubt that a contractor would be contractually obligated to perform on acceptance of a bid and communication of the acceptance, which performance would include the formality of executing the construction contracts. The contractor could not opt to walk away from the project without liability.

Plaintiff submitted a bid in the amount of $6,650,000, along with the necessary bid documents. Defendant's governing board subsequently passed a unanimous resolution accepting plaintiff's bid on the project. The resolution indicated that the board had entered into an engineering contract with an architectural firm for design services, that the firm prepared the bid documents, that the firm reviewed the bids it found to be acceptable in general, and that the architectural firm recommended that the board accept plaintiff's bid, which was the low bid. The resolution further provided that the board's staff, after consultation with the operations committee, recommended accepting plaintiff's bid and awarding the project to plaintiff. According to the resolution, funding for the project was available. Based on the information provided to the board, the board voted "to accept the bid" from plaintiff to construct the facility. Finally, the resolution authorized the airport director, who is defendant's chief executive officer (CEO) according to defendant, to execute the necessary construction contracts to carry out and complete the project. The board's decision was communicated and delivered to plaintiff. Numerous emails between one of plaintiff's employees and an architect employed by the

architectural firm that planned the project suggest that the parties were proceeding as if a contractual relationship existed and that execution of the construction contracts was a mere formality. Defendant's CEO did not execute the construction contracts, nor were they executed by any other of defendant's agents. And approximately one month after the bid was accepted by the board, the board rescinded its acceptance.

Plaintiff filed suit, alleging that the parties had formed a binding contract, that defendant rescinded the contract absent a factual basis or legal authority, and that AIA-A201, although allowing defendant to terminate the contract for purposes of convenience, entitled plaintiff to recover the amount of expenses incurred by plaintiff for any completed work together with a reasonable amount for overhead and lost profits. Plaintiff asserted that AIA-A201 required arbitration of the dispute but defendant refused to participate, claiming that there was no enforceable contract. Plaintiff sought an order compelling arbitration or, in the alternative, a judgment for damages in the amount of $600,000. Defendant's position was and is that no contract was ever formed. After first denying cross-motions for summary disposition on the basis that an issue of fact existed in regard to contract formation and that discovery had just commenced, the trial court subsequently granted defendant's motion for summary disposition. The court ruled, as a matter of law, that the documentary evidence reflected that the parties did not intend to be contractually bound until the construction contracts themselves were actually executed by both sides, which never occurred.

This case boils down to whether there was acceptance by defendant of plaintiff's offer to perform the construction project for $6,650,000 in accordance with the bid documents, such that a contract was legally recognizable and enforceable. In order to form a contract, there must be mutual assent or a meeting of the minds on all material or essential terms. *Kloian*, 273 Mich App at 453. If the promises and performances to be rendered by the parties are set forth with reasonable certainty, encompassing the essentials, missing details will not militate against a conclusion that there was a meeting of the minds. *Nichols v Seaks*, 296 Mich 154, 159-160; 295 NW 596 (1941). "Destruction of contracts because of indefiniteness is not favored." *Id.* at 159. The question whether there was a meeting of minds is judged by an objective standard, examining the parties' express words and visible acts and not their subjective states of mind. *Id.* at 454. A contract requires an offer and an unambiguous acceptance in strict conformance with the offer. *Id.* at 452. Discussions, negotiations, and unaccepted offers do not suffice to create a contract. *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). An acceptance sufficient to create a contract arises when the person or entity to whom an offer is extended manifests an intent to be bound by the offer through voluntarily undertaking some unequivocal act that reflects such an intent. *Kloian*, 273 Mich App at 453-454. Additionally, we note that a contract to enter into or execute a subsequent contract may be just as valid as any other contract if the essential terms are in place. *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 359; 320 NW2d 836 (1982).

We find that upon the board's passage of the unanimous resolution accepting plaintiff's bid on the project and communication of the acceptance to plaintiff, there was objective evidence of a meeting of minds on the essential terms of a contract; the resolution constituted a voluntary and unequivocal act reflecting a manifestation of intent to be bound by the offer. There were absolutely no conditions or condition precedents set forth in the resolution, nor were further pertinent negotiations envisioned; the bid and all of the bid documents were accepted. We

initially note the inherent conflict in defendant's position, where it claims that it did not become contractually bound on acceptance of plaintiff's bid and communication thereof, but where the bid documents themselves clearly indicated that the contractor submitting a bid that is accepted is contractually bound. We find a lack of relevant support for the trial court's position that the parties did not intend to be contractually bound until the construction contracts themselves were fully executed. We have no doubt that had plaintiff, after submission and acceptance of its bid and communication of acceptance, attempted to renege, defendant would have claimed breach of a formed contract. Once plaintiff's offer was made and the board resolved to accept the offer and communicated the acceptance, all of the requisite elements of a valid contract were present, i.e., parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement or assent, and mutuality of obligation. *Hess v Cannon Twp*, 265 Mich App 582, 592; 696 NW2d 742 (2005). While there were some minor details that needed addressing, the *essential* terms of a contract were in place; therefore, the trial court's focus on non-essential terms as a basis to find a lack of intent to be contractually bound was misplaced. The act of formally executing the construction contracts was not a step that had to be completed before a valid contractual relationship arose, given that plaintiff had already agreed to these contracts as part of the bidding process and that defendant had necessarily agreed to these contracts by making them available to bidding contractors and mandating that they be part of the bid documents. Furthermore, the resolution accepting plaintiff's bid and communication of acceptance can also be viewed as forming a contract to enter into or execute the construction contracts, with all of the essential terms being in place, and a failure to execute the construction contracts would constitute a breach.

Defendant argued that the AIA-A201 required execution of the construction contracts by the parties before a contractual relationship could be recognized. However, the cited provision, while stating that the construction contracts shall be signed, goes on to merely provide that, if unsigned, the architect shall identify the unsigned documents, not that there is no binding contractual relationship. Indeed, the provision supports a conclusion that execution was a formality, finalizing an already existent contractual relationship. Further, as indicated above, there was a preexisting obligation to execute the construction contracts predicated on acceptance of the bid.

Defendant argues that there was no acceptance of plaintiff's offer because the board lacked the authority to enter into a contract on its own behalf where only defendant's CEO had the authority to enter into a contract, and he never accepted plaintiff's offer, nor executed any contract. This argument is predicated on § 114(4) and (5) of the Public Airport Authority Act (PAAA), 259.108 *et seq.*, and results in the parties digressing into the law of agency relative to the actions of an architect and his relationship with the CEO.

It is wholly unnecessary to discuss agency principles because defendant's interpretation of the PAAA is incorrect and ignores relevant provisions of the PAAA. We note that, if one takes defendant's argument to its logical end, a CEO could completely ignore a board's acceptance or rejection of a bid on a construction project or make an independent decision, as the board, according to defendant, lacks authority to contract and only the CEO can enter into a contract. This reasoning turns the PAAA on its head. To the extent that defendant is arguing that a board's decision on a matter is not contractually binding until the CEO actually executes a

document reflecting the board's decision, the argument is inconsistent with the PAAA and subjects persons and entities dealing with the board to the whims of a CEO.

Under the PAAA, the "authority," here defendant, "means a public airport authority created by or pursuant to section 110 *and governed by a board*." MCL 259.109(d) (emphasis added). A board is defined as "the governing body of an authority . . . ." MCL 259.109(e). Thus, defendant operates through the actions of its board. The board appoints the CEO, the board prescribes his or her duties and responsibilities that are in addition to PAAA duties and responsibilities, and the CEO serves at the pleasure of the board. MCL 259.114(4). The CEO "shall supervise, and be responsible for, . . . [t]he negotiation, supervision, and enforcement of contracts *entered into by the authority* . . . ." MCL 259.114(4)(e) (emphasis added). Contrary to defendant's argument, this subsection does not provide that only the CEO can enter into a contract and that the board lacks authority to do so. Rather, it clearly indicates that, while the CEO is responsible for negotiating a contract, it is the authority that ultimately enters into the contract. And the authority operates through its governing board; therefore, it is the board that enters into contracts. With respect to MCL 259.114(5), also relied on by defendant, it provides that a CEO "shall have the power and authority to execute and deliver, and to delegate signatory power for, contracts, leases, obligations, and other instruments *approved by the board* or for which power to approve has been delegated to the [CEO] of the authority." (Emphasis added.) This language simply indicates that the CEO has the authority to execute contracts approved by the board. In other words, it is the board that enters into contractual relationships, with the CEO engaging in the formality of signing or executing the document reflecting the contractual relationship, unless the board delegates approval power to the CEO himself or herself. There is generally no independent discretion for the CEO to ignore instruments approved by the board. And while approval power can be delegated to a CEO, there is nothing here in the resolution or the bid documents indicating that the CEO had been delegated this power or that the CEO would need to make an independent assessment of the bid and bidder before a contractual relationship would be recognized regardless of the board's acceptance. We do not find that the language in MCL 259.114(5) supports a conclusion that there was no binding contract here unless or until the CEO formalized the construction contracts by executing them.

MCL 259.114(6)(a) provides that the authority, and thus the board, shall establish contracting policies and procedures providing for competitive bidding in regard to the construction of airport facilities. "[A] contract shall not be awarded by an authority *or* the [CEO] for the construction . . . of an airport facility unless the contract is let pursuant to a procedure that requires a competitive bidding." (Emphasis added.) This language directly contradicts defendant's argument in that it expressly contemplates an authority's board awarding a contract after completion of a competitive bidding process, and it does not indicate that the CEO must join in on making the award. Although MCL 259.114(6)(a) indicates that the CEO can also award a contract after competitive bidding, this does not mean that the CEO is free to ignore a decision by the board to award a contract when the bidding matter was presented to the board for resolution, nor that a contract cannot be formed and recognized as between a board and a winning bidder.

In the context of the PAAA, and given the nature of the board's fairly dominant relationship over the CEO, the CEO generally has no discretion in whether to execute a contract formally approved by the board, otherwise the board would be ineffective and subservient to the

CEO. Of course, if the board granted a CEO this discretion, matters might be different, but again, neither the resolution nor the bid documents recognized such to be the case here.

Further, the authority, and thus its governing board, has the power to extend, construct, improve, and enlarge an airport and airport facilities. MCL 259.116(1)(c). Additionally, the authority, through its governing board, "may make and enter into all contracts and agreements necessary or incidental to the performance of its duties and execution of its powers under this chapter with any department or agency of the United States, with any state or local governmental agency, or with any other person, public or private, upon those terms and conditions acceptable to the authority . . . ." MCL 259.116(1)(f). This language not only evidences the board's authority to enter into contracts, it establishes that the contract does not need to be acceptable to the CEO. This provision could certainly encompass a board's action to engage in the bidding process on an improvement project and to enter into a contract with the contractor who submitted the winning bid. Further, the authority, and thus the board, "is responsible for developing all aspects of the airport and airport facilities, including, but not limited to, . . . [t]he location of terminals, hangars, aids to air navigation, parking lots and structures, cargo facilities, and all other facilities and services necessary to serve passengers and other customers of the airport." MCL 259.116(i)(*i*). Section 116(1)(n) and (o) provide:

> (n) An authority may enter into exclusive or nonexclusive contracts . . . with any person or persons for terms not exceeding 50 years, for granting the privilege of . . . improving . . . any portions of the airport or the authority's airport facilities, for commercial airline-related purposes consistent with its obligations under applicable federal law, regulations, and assurances associated with accepting grants from the FAA or any other agency of the United States or this state.
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> (o) An authority may enter into exclusive or nonexclusive contracts . . . not described in subdivision (n) for commercially reasonable terms consistent with its obligations under applicable federal law, regulations, and assurances associated with accepting grants from the FAA or any other agency of the United States or this state.

Accordingly, the PAAA provided the board with authority to enter into a contract with plaintiff with respect to the construction of the Intermodal Center. And the board did so when it accepted plaintiff's bid and communicated the acceptance. The execution of the construction contracts by the CEO was but a formality, and the CEO was obligated, under contract principles considered in conjunction with the PAAA, to execute the construction contracts that reflected the agreement of the board, which agreement was established by the board's resolution to accept plaintiff's bid. Under the circumstances in this case, the CEO did not have the authority or right to make his own decision on the matter after the board's act of acceptance.

Defendant spends several pages speaking of a due diligence period that runs from the date *after* the board's resolution accepting a bid to, in this case, the date of rescission, which period in other cases would run from the date of bid acceptance to the date of contract execution by the CEO. According to defendant, during this due diligence period, the CEO "researches issues involving the contractor and the project itself before deciding whether to enter into and sign a contract." Defendant maintains that the CEO has been directed by the board to

communicate problems, questions, or concerns discovered by the CEO during the due diligence period and to not sign contracts if issues arise. Defendant argues that a due diligence period makes sense, citing as an example the case at bar in which plaintiff was an unknown entity to defendant.

First, defendant cites no legal authority acknowledging such a due diligence period. Next, if any due diligence is to be conducted, logic dictates that it generally be done *before* acceptance of a bid. Indeed, the resolution itself indicates that the hired architectural firm and the board's staff, in conjunction with the operations committee, examined and investigated the prospective contractors. Finally, the PAAA does empower the board to dictate the actions of a CEO, which conceivably allows it to create a due diligence period and give the CEO the due diligence powers being claimed. However, this does not mean that the PAAA provides a mechanism by which a board can circumvent an *unconditional* acceptance of a bid that makes no reference to a due diligence period and wriggle itself out of a contractual obligation. The bid documents also made no reference to a due diligence period. Under defendant's theory, the CEO could, for an undefined duration of time, exercise so-called due diligence by checking into a contractor *whose bid has already been accepted without conditions* and then go to the board and recommend rescission. And thereafter, under defendant's theory, the board can rescind the acceptance with impunity, despite never calling a due diligence period to the attention of the contractor. This is not a theory of contract law of which we are familiar. Defendant essentially seeks the benefit of a contractor being contractually obligated to follow through after acceptance of a bid absent a corresponding obligation on the part of the board. We refuse to endorse this approach.

Next, contrary to defendant's argument, our ruling is also consistent with *Central Bitulithic Paving Co v Village of Highland Park*, 164 Mich 223; 129 NW 46 (1910). In that case, the Michigan Supreme Court stated:

> It is the general rule that where the specification of a public improvement fully describes the work to be done, and a bid in writing is made to do such work and is accepted and entered of record, sufficient evidence of a contract exists to satisfy the statute of frauds. And if, in such a case, the execution of a written contract is provided for, in terms, in the charter of a city, is not executed, and the materials are furnished and used, the neglect to execute the contract will not prevent the recovery of the reasonable value of whatever is furnished. We assume that if the street had been paved in accordance with the specification and bid, the mere fact that the contract was not signed by the president and clerk of the village would not support the contention, if it was made, that there was no contract. But a contract is not made so long as, in the contemplation of both parties thereto, something remains to be done to establish contract relations. The law does not make a contract when the parties intend none, nor does it regard an arrangement as completed which the parties thereto regard as incomplete. [*Id.* at 228 (citations omitted).]

Here, the bid documents fully described the work to be done, a bid in writing was made to do such work, and defendant accepted the bid as entered into the record by way of resolution. Although the execution of written construction contracts was contemplated, they were not executed. However, under the circumstances of this case, the contracts had already been

incorporated into the bidding and selection process, covering essential terms and reflecting acceptance of those terms. Nothing more needed to be done to establish contract relations after acceptance of the bid and communication of the acceptance; events thereafter concerned formalities relative to non-essential terms and execution.

We also note our Supreme Court's decision in *Kutsche v Ford*, 222 Mich 442; 192 NW 714 (1923). The Court stated that "'[i]t is undoubtedly true that, filing a bid, as plaintiff did, upon invitation, was an offer intended of itself, if accepted, to create legal relations beyond the power of one party to sever without liability, because no future negotiations were contemplated and nothing remained to be done beyond reducing the same to form strictly in accord with the accepted offer.'" *Id.* at 446 (citation omitted). We hold that such was the situation here.

In regard to the topic of using local subcontractors on the project, defendant does not point to any provision in the bid documents, including the construction contracts, nor any language in the resolution, which makes that matter a contractual issue or a basis to find that a contract was never formed.

In sum, the parties had a binding contract as a matter of law and plaintiff was entitled to summary disposition on the issue. Plaintiff prays for an order referring the case to arbitration pursuant to the construction contracts. However, we decline to do so. Rather, the case is remanded to the trial court for entry of an order finding the existence of a binding contract. The parties and the trial court can then pursue the issue of whether defendant is compelled to engage in arbitration.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff having prevailed in full is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Douglas B. Shapiro