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NO. COA05-884

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

HY-TECH CONSTRUCTION, INC.,  
Plaintiff,

v.

Wake County  
No. 04 CVS 388

WAKE COUNTY BOARD OF EDUCATION,  
Defendant.

Appeal by plaintiff from order entered 21 April 2005 by Judge Leon Stanback, Jr. in the Superior Court in Wake County. Heard in the Court of Appeals 15 March 2006.

*Safran Law Offices, by Perry R. Safran and Brian J. Schoolman, for plaintiff-appellant.*

*Tharrington Smith, L.L.P., by Rod Malone and Kara Grice Acree, for defendant-appellee.*

HUDSON, Judge.

Plaintiff Hy-Tech Construction, Inc., ("Hy-Tech") submitted a sealed bid to defendant Wake County Board of Education ("BOE") for a school renovation project. After the BOE awarded the contract to the second lowest bidder, Hy-Tech filed a complaint alleging violation of N.C. Gen. Stat. § 143-129 and violation of due process and equal protection against the BOE on 12 January 2004. The BOE moved for summary judgment, which motion the court granted on 21 April 2005. Hy-Tech appeals. As discussed below, we affirm.

Hy-Tech is a North Carolina corporation licensed as a general contractor. In 2003, the BOE solicited bids for construction work at Daniels Middle School ("the project"). Hy-Tech submitted a bid to serve as the single prime contractor of Phase I of the project. Although Hy-Tech's was the lowest bid submitted, Ken Fuller, the director of the construction management department for the Wake County school system notified Hy-Tech that his staff did not intend to recommend Hy-Tech be awarded the contract. Fuller invited Hy-Tech to submit a written response to his statement of intent to award the contract to the second-lowest bidder. Hy-Tech responded by letter, disputing the various allegations of deficiencies made against. Representatives from the BOE met with those from Hy-Tech on 2 October 2003 to discuss the matter. On 8 October 2003, the construction staff issued its recommendation that Hy-Tech not be awarded the project "due to its documented poor performance on previous contracts." The BOE followed this recommendation and awarded the contract to the second-lowest bidder.

The previous contract on which the BOE based its decision involved Hy-Tech's construction of a football stadium at Middle Creek High School ("Middle Creek"). Hy-Tech took an extra four months to complete the Middle Creek project and required an additional \$200,000 to address subsurface conditions. Hy-Tech contends that these delays and problems were caused by bad weather and by unexpected and undisclosed subsurface conditions.

Hy-Tech argues that the court erred in granting summary judgment against it. We disagree.

Hy-Tech contends that the court employed the wrong standard in determining whether the BOE was entitled to summary judgment. The proper standard of review on appeal from summary judgment is:

whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense. Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a prima facie case at trial.

*Hoffman v. Great Am. Alliance Ins. Co.*, 166 N.C. App. 422, 425-26, 601 S.E.2d 908, 911 (2004) (internal citations and quotations omitted). The evidence presented must be viewed in the light most favorable to the non-moving party. *Bruce-Terminix Co. V. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

The court's order states that

1. The applicable standard for Plaintiff's claims requires a showing that the Board engaged in fraud, corruption, abuse of discretion or any other improper motive, see *Kinsey Contracting Co. v. Fayetteville*, 106 N.C. App. 383, 384, 416 S.E.2d 607, 609 (1992).
2. The Plaintiff cannot meet its burden of proving its claim that the Board engaged in fraud, corruption, abuse of discretion or any other improper motive . . .

The court's order reflects its conclusion that the BOE showed through discovery that Hy-Tech cannot produce evidence to support

an essential element of its claim. *Hoffman*, 166 N.C. App. at 425-26, 601 S.E.2d at 911. This showing by the BOE shifted the burden to Hy-Tech to "produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [it] can at least establish a *prima facie* case at trial." *Id.* at 426, 601 S.E.2d at 911. In its second paragraph, the court concluded that Hy-Tech had failed to produce the required evidence. The trial court applied the correct legal standard here and we overrule this assignment of error.

Hy-Tech also contends that, in the light most favorable to it, genuine issues of material fact remained, particularly concerning whether the BOE exceeded its discretion and acted in bad faith in deciding not to award the contract to Hy-Tech. The procedure for awarding public contracts is prescribed by statute. N.C. Gen. Stat. § 143-129 states that the public entity "shall award the contract to the lowest responsible bidder or bidders, taking into consideration quality, performance and the time specified in the proposals for the performance of the contract." N.C. Gen. Stat. § 143-129(b) (2003). The statute also discusses grounds for rejecting a bid:

Proposals may be rejected for any reason determined by the board or governing body to be in the best interest of the unit. However, the proposal shall not be rejected for the purpose of evading the provisions of this Article.

N.C. Gen. Stat. § 143-129(b) (2003). "In reviewing the decision of a local government to award a public contract '[i]t is a general rule that officers of a municipal corporation, in the letting of

municipal contracts, perform not merely ministerial duties but duties of a judicial and discretionary nature, and that courts, in the absence of fraud or a palpable abuse of discretion, have no power to control their action.'" *Kinsey Contracting Co. v. Fayetteville*, 106 N.C. App. 383, 384, 416 S.E.2d 607, 608, *disc. review denied*, (1992) (quoting *Mullen v. Town of Louisburg*, 225 N.C. 53, 60, 33 S.E.2d 484, 488-89 (1945) (citations omitted)).

Hy-Tech argues that the BOE acted in bad faith by failing to disclose critical information to Hy-Tech during the Middle Creek project and then using Hy-Tech's problems on that project as the basis to deny it the contract for Daniels. Hy-Tech must show genuine issues of material fact about whether the BOE's decision was based on fraud, corruption, abuse of discretion or other improper motive. Hy-Tech alleged that the BOE lacked justification to award the Daniels project to the second-lowest bidder and wrongfully rejected Hy-Tech's bid arbitrarily and capriciously. Mr. Fuller's affidavit states that the construction staff was concerned due to "Hy-Tech's inadequate performance on the Middle Creek Project." After citing the failure to meet completion deadlines on the Middle Creek project, Mr. Fuller notes the Daniels project is more complex than Middle Creek because it involves proximity to students (i.e. interior renovations as opposed to constructing a football stadium).

Hy-Tech's principal states in his affidavit that the BOE provided incorrect information about the condition of the Middle Creek site. Specifically, he states that the site was not

undeveloped, but instead had subsurface debris indicating that it had been used as a construction dump site, and that these conditions necessitated additional work and time to complete the project. Mr. Hyatt also disputes Mr. Fuller's allegations about problems encountered on the Middle Creek project, such as whether Hy-Tech intentionally stopped work, or refused to negotiate with the owner or architect.

The forecast of evidence shows that the parties disagree about numerous circumstances surrounding Middle Creek project and Hy-Tech's performance, as well as about the BOE's actions and decision-making process in the Daniels project bidding. However, these issues do not prevent the Board from rejecting a bid "for any reason determined . . . to be in the best interest of the unit" and do not create an issue of fact as to bad faith or evading the purpose of the statute. N.C. Gen. Stat. § 143-129(b) (2006). Thus, the trial court correctly determined that summary judgment was proper here.

Affirmed.

Judges HUNTER and BRYANT concur.

Report per Rule 30(e).