

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

TRITON SERVICES, INC., :
 :
 Plaintiff-Appellant, : CASE NO. CA2010-05-112
 :
 - vs - : OPINION
 : 2/14/2011
 :
 BOARD OF EDUCATION :
 TALAWANDA CITY SCHOOL DISTRICT, :
 :
 Defendant-Appellee. :
 :

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. 2010-03-1021

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POWELL, P.J.

{¶1} When a contractor bidding on a public construction project was unsuccessful in convincing a school board that it was a "responsible" bidder, it took the school board to court. We affirm the decision of the trial court refusing to preliminarily enjoin the board

from awarding the contract to another contractor.

{¶2} Triton Services, Inc. was the apparent lowest bidder for the heating, air conditioning, and ventilating (HVAC) portion of the construction of a new high school for Talawanda schools. The Talawanda school board rejected the bid as not responsible. Triton asked the Butler County Common Pleas Court to declare that it is the lowest responsible bid for the HVAC work and to enjoin the board from rejecting its bid and awarding the contract to any other contractor. After the trial court refused to issue the preliminary injunction, Triton filed this appeal.

{¶3} Triton alleges, and Talawanda apparently does not refute, that Triton would not be afforded a meaningful or effective remedy by an appeal following final judgment and therefore, the trial court considered its decision as final and appealable. R.C. 2505.02.

{¶4} Triton argues in its single assignment of error on appeal that the trial court abused its discretion in denying the preliminary injunction when it refused to reverse the board's decision rejecting the bid as not responsible.

{¶5} In ruling on a motion for preliminary injunction, a trial court must consider whether (1) the moving party has shown a substantial likelihood that he or she will prevail on the merits of their underlying substantive claim; (2) the moving party will suffer irreparable harm if the injunction is not granted; (3) issuance of the injunction will not harm third parties; and (4) the public interest would be served by issuing the preliminary injunction. *Planck v. Cinergy Power Generation Servs., L.L.C.*, Clermont App. No. CA2002-12-104, 2003-Ohio-6785, ¶17. The party seeking the preliminary injunction must establish each of these factors by clear and convincing evidence. *DK Prods., Inc. v. Miller*, Warren App. No. CA2008-05-060, 2009-Ohio-436, ¶6.

{¶6} Courts should exercise caution in granting injunctions in cases where the

court is asked to interfere with or suspend the operation of important works or control the action of another department of government. *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991, ¶10.

{¶7} To prevail on a complaint seeking injunctive relief on the award of a public contract, the contractor must prove by clear and convincing evidence that the award constituted an abuse of discretion and resulted in some tangible harm to the public in general, or to the contractor individually. *Steingass Mechanical Contracting, Inc. v. Warrensville Hts. Bd. of Edn.*, 151 Ohio App.3d 321, 2003-Ohio-28, ¶16.

{¶8} The term "responsible" is not limited to a bidder's financial condition, but pertains to many other characteristics of the bidder, such as its general ability and capacity to carry on the work, its equipment and facilities, its promptness, conduct and performance on previous contracts, its suitability to the particular task, and other qualities that would help determine whether or not it could execute the contract properly. See *id.* at ¶14; see, also, R.C. 3313.46; R.C. 3318.10; R.C. 9.312. Determining "responsibility" will necessarily differ for any given project, and it is "important that it be subject to a fluid, abuse-of-discretion standard." *Steingass* at ¶15.

{¶9} Evidence was presented at the hearing that Triton sued Talawanda in 2007 after the parties disputed the scope of the site work Triton was contractually obligated to perform for the construction of a Talawanda elementary school. The dispute was ultimately settled by the parties.

{¶10} Triton presented testimony that it received "about 90 percent" of what it sought in the elementary school lawsuit, and therefore, the litigation was not frivolous. Triton also argued that since the lawsuit was settled, it should not be used as evidence against it.

{¶11} Triton asserted that it was not litigious. It explained the reasoning and

resolution of previous lawsuits it filed involving public projects, and argued that litigation was sometimes necessary for other contractors. Triton complained that it was the only contractor that had its history of litigation closely scrutinized for the high school bid. It claimed that Talawanda developed a "scheme" to reject its bid within days of its submission.

{¶12} Triton presented evidence that the same construction management company working with Talawanda found Triton to be a responsible bidder for another school project in Butler County. With its high school HVAC bid approximately \$109,000 less than the next lowest bidder, Triton argued that failure to award it the contract increased costs to taxpayers.

{¶13} Talawanda presented testimony that the school board was concerned when it learned that Triton had failed to include external or field glycol in the cost of its high school bid, which Triton estimated would add approximately \$50,000 to the cost. A witness for Talawanda's construction manager estimated that the field glycol and labor cost would be approximately \$75,000. Triton indicated that field glycol was originally omitted from the costs because there was some confusion on Triton's part as to whether field glycol was part of Triton's phase of the project. However, Triton said it would honor its original bid.

{¶14} Talawanda school officials indicated they were particularly concerned about the glycol omission because the previous elementary school litigation involved a dispute between the parties over the scope of work Triton was to perform under the contract.

{¶15} The trial court heard evidence that was both favorable and unfavorable to Triton and testimony pertaining to the relationship between Triton and Talawanda. The decision whether to grant or deny an injunction is a matter solely within the discretion of the trial court and a reviewing court should not disturb the judgment of the trial court in the

absence of a clear abuse of discretion. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590, 604, 1995-Ohio-301.

{¶16} The trial court issued an entry that denied Triton's motion for a preliminary injunction, without explanation. However, the trial court discussed the issues and made a number of findings on the record, as reflected by the transcript of the hearing. The trial court found that Triton did not show by clear and convincing evidence that the school board abused its discretion. Therefore, the record indicates that Triton has not shown a substantial likelihood that it would prevail on the merits of the underlying substantive claim. *Planck* at ¶17; *D.K. Prods.* at ¶6. After reviewing the record, we find the trial court did not abuse its discretion when it denied Triton's motion for a preliminary injunction.

{¶17} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

[Cite as *Triton Servs., Inc. v. Talawanda City School Dist. Bd. of Edn.*, 2011-Ohio-667.]