

IN THE SUPREME COURT OF THE STATE OF NEVADA

MKD CONSTRUCTION, INC., A
NEVADA CORPORATION,
Petitioner,
vs.
THE WALKER RIVER IRRIGATION
DISTRICT, A NEVADA IRRIGATION
DISTRICT,
Respondent.
and
V & C CONSTRUCTION, INC.,
Real Party in Interest.

No. 48905

FILED

APR 26 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER GRANTING, IN PART, PETITION FOR WRIT OF MANDAMUS

This original petition for extraordinary writ relief challenges respondent Walker River Irrigation District's decision to award a public works project to real party in interest V & C Construction, Inc., instead of to petitioner MKD Construction, Inc.

In autumn 2006, the Walker River Irrigation District announced that it would be accepting contractor bids on the Topaz Reservoir Diversion Improvements Project. The bidding documents emphasized that the project involved soil cement and roller compacted concrete work, and each bidder was asked to demonstrate its qualifications as to that type of work. Specifically, the bidding documents provided, "To be eligible to perform the work, the contractor must have the following qualifications: [a]t least three years of experience with soil mixed with cement. . . . List of at least three successfully completed soil cement and/or roller compacted concrete projects."

MKD Construction submitted the lowest bid on the project, based on it completing the soil cement and roller compacted concrete work itself, without the use of a subcontractor. V & C Construction submitted

the next-lowest bid, which included an amount based on subcontracted soil cement and roller compacted concrete work.

After further inquiries into MKD Construction's soil cement and roller compacted concrete qualifications, which its original bid assertedly lacked, the District's project engineer apparently concluded that MKD Construction was qualified to do the work, primarily based on its employment of one person with an "incredible amount of experience . . . in soil cement and roller compacted concrete[,] . . . at depths that exceed the depths that [the District is] particularly concerned about on this project." At a February 6, 2007 meeting, the project engineer voiced this conclusion to the District and recommended that MKD Construction be awarded the project's contract. The District's counsel, however, advised that the project specifications required MKD Construction, as an entity, to have three years' soil cement experience, which, in his opinion, MKD Construction did not have.¹

After MKD Construction answered further questions about its experience, one District board member noted that both MKD Construction and V & C Construction had excellent references, appeared to do exceptional work, and would likely "do an excellent job for us." But based on its counsel's advice, the District ultimately determined that MKD

¹In a January 17, 2007 letter, the project engineer stated that MKD Construction, as a company, did not have "demonstrable experience in placing soil cement in similar situations and depths as required by this project." (Emphasis in original.) Nevertheless, based on his opinion that MKD Construction personnel—one employee in particular—had sufficient and demonstrable relevant experience in placing roller compacted concrete, which was comparable to soil cement, he indicated that he was prepared to recommend that MKD Construction be awarded the project's contract.

Construction's qualifications were lacking because, as a contractor, it did not have the requisite three years of experience. Therefore, the District apparently adopted its counsel's recommendation that, as MKD Construction's bid materially varied from the project's "three-years-of-experience" specification, awarding it the contract would not be in the public's best interest.

The District then awarded the contract to V & C Construction. As a result, MKD Construction now requests this court to intervene to compel the District either to award it the contract, instead of V & C Construction, or to reject all bids as non-responsive. The District and V & C Construction timely filed answers to MKD Construction's writ petition, as requested.

A writ of mandamus is available to compel the performance of an act legally required as a duty resulting from an office, trust, or station, or to control a manifest, arbitrary, or capricious abuse of discretion.² Mandamus is an extraordinary remedy, however, and its issuance is within this court's sole discretion.³ A petitioner seeking mandamus relief has the burden of demonstrating that this court's intervention is warranted.⁴

²NRS 34.160; Building & Constr. Trades v. Public Works, 108 Nev. 605, 609, 836 P.2d 633, 636 (1992) (explaining that mandamus will not lie to control discretionary action, unless that discretion is manifestly abused or arbitrarily or capriciously exercised).

³See Smith v. District Court, 107 Nev. 674, 818 P.2d 849 (1991).

⁴Pan v. Dist. Ct., 120 Nev. 222, 228-29, 88 P.3d 840, 844 (2004); NRAP 21(a).

Here, MKD Construction asserts that writ relief is warranted because the District failed to consider and/or comply with Nevada statutory law in determining that its bid failed to meet the project's soil cement specifications and that its rejection would be in the public's interest, and then in awarding the project's contract to V & C Construction. In so arguing, MKD Construction contends that the District incorrectly concluded that Nevada law and the project specifications did not allow it to rely on the experience of MKD Construction's principal personnel, but rather, required it to examine the overall experience of MKD Construction as an entity. It also contends that, even under the District's interpretation of the law and project specifications, the District improperly awarded the project's contract to V & C Construction, because thereunder, the District was not entitled to rely on subcontractors' qualifications in determining V & C Construction's qualifications as an entity. To the extent MKD Construction asserts that the District did not validly reject its bid, we agree.

The District was required, under NRS 338.143(4), to award the project's contract to "the lowest responsive and responsible bidder," unless it rejected that bidder's bid for a reason listed in NRS 338.143(5).⁵ Under NRS 338.143(5), the District may reject the lowest bidder's bid only if it determines that (a) the bidder was not responsive or responsible, (b) the quality of the bidder's offered services, material, equipment, or labor

⁵Although MKD Construction relies on NRS 338.1377 and NRS 338.1389, it appears, based on the District's and V & C Construction's answers and the documents submitted to this court in this writ proceeding, that NRS 338.143 to 338.148 apply to this matter. See NRS 338.1373(1) (delineating the three separate statutory sections that may apply to bidding processes).

did not conform to the approved plans or specifications, or (c) the public interest would be served by the rejection.⁶

In this matter, as the District appears to have recognized, evidence was introduced that MKD Construction, the lowest bidder, was responsive and responsible. Accordingly, once presented with this evidence, the District was required to award the contract to MKD Construction, unless it determined that MKD Construction's bid should be rejected under NRS 338.143(5). But in rejecting MKD Construction's bid here, the District did not explain, in detail, its reasons for doing so, in light of one of these limited statutory provisions, and it is not clear from the documents submitted to this court that the District's rejection was even considered under these provisions.⁷ Thus, because the documents

⁶See also NRS 338.147 (describing "best bid" procedures when the project's estimated cost exceeds \$250,000, which also require, among other things, that the project be awarded to the lowest responsive and responsible bidder).

⁷The District argues that it had a duty to reject any bid that materially varied from the project specifications and thereby affected the competitive nature of the bidding process by giving one bidder an advantage or benefit over other bidders, under our pre-NRS 338.143 decision in Faust v. Donrey Media Group, 95 Nev. 235, 237, 591 P.2d 1152, 1154 (1979) (discussing a bidder's rejection under NRS Chapter 332). Although the District asserts that MKD Construction circumvented the project specifications by not using a subcontractor for the soil cement and roller compacted concrete work, it points to no provision in the bidding documents requiring the use of a subcontractor for that work, and no such provision appears to exist.

Further, it is unclear how MKD Construction's intention to use one of its own employees for the work, without more, materially varied from the project specifications. The bidding document provisions that the District points to in order to show that it properly relied on V & C Construction's subcontractor's qualifications in determining whether V &

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submitted to this court do not reflect whether or why the District, despite evidence to the contrary, determined that MKD Construction was not actually responsive or responsible,⁸ that the quality of MKD Construction's offered services, material, equipment, or labor did not conform to the approved plans or specifications, or that the public interest would be served by the rejection of MKD Construction's bid, we cannot determine whether the District exercised its NRS 338.143(5) discretion in deciding to reject the bid. Since it failed to make any findings or explain its reasoning for rejecting MKD Construction's bid, we are unable to conclude that the District performed its legally required duty under the terms of this statute.

Accordingly, we grant MKD Construction's petition in part.⁹ The clerk of this court is directed to issue a writ of mandamus compelling

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C Construction met the soil cement experience requirement, Articles 12 and 19.04, not only refer to the qualifications of subcontractors, but also to those of any "person" and "individuals."

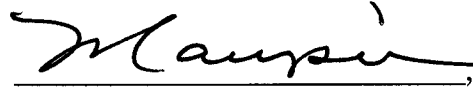
⁸See Hoole v. Kinkead, 16 Nev. 117, 220-21 (1881) (recognizing that, "in deciding upon the responsibility of bidders, it was [the board's] . . . right and duty to inquire and ascertain which ones, in point of skill, ability, and integrity, would be most likely to do faithful, conscientious work and fulfill the contract promptly, according to its letter and spirit").

⁹With regard to MKD Construction's request that the District be compelled to reject all bids as non-responsive, based on all bidders' failure to provide three years of contractor soil cement experience, the District explains that V & C Construction's (and other bidders') subcontractor possessed the necessary soil cement experience. The District's reliance on subcontractor work seems to conflict with its interpretation that the bidding documents require the bidding contractor, as an entity, to demonstrate prior soil cement experience. But, as noted above, see supra note 7, the bidding document provisions relied on by the District appear to

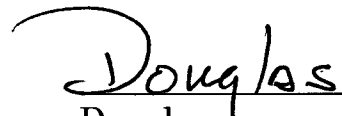
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the District to vacate its award to V & C Construction and to hold a new meeting on this matter within two weeks from the date of this order, so that it may reconsider its rejection of MKD Construction's bid in light of NRS 338.143(4) and (5) and explain in detail its decision thereunder.

It is so ORDERED.¹⁰


_____, C.J.
Maupin


_____, J.
Hardesty


_____, J.
Douglas

cc: Law Offices of Michael B. Springer
Woodburn & Wedge
McDonald Carano Wilson LLP/Reno

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allow it to examine the qualifications of subcontractors, persons, and individuals. Accordingly, extraordinary relief is not available at this time to compel the District to reject all bids as non-responsive.

¹⁰In light of this order, we deny as moot MKD Construction's motion for a stay.