IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ELAN MARKETING, INC., D/B/A ELAN OFFICE SYSTEMS, A NEVADA CORPORATION,
Appellant,
vs.
CITY OF LAS VEGAS; GAYLE LLOYD-LEAKOS, AN INDIVIDUAL; REBEKAH HOLDER, AN INDIVIDUAL; AND STEVEN MARTIN, AN INDIVIDUAL,
Respondents.

No. 78497-COA

MAY 20 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

Elan Marketing, Inc. appeals from a district court order granting the City of Las Vegas' motion for summary judgment in a tort action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Elan Marketing, Inc. (Elan) served as the City of Las Vegas' multifunctional device (MFD) supplier for several years, supplying office machines that can copy, scan, and fax documents.[1] When Elan's contract ended in 2015, the City issued a public request for proposals seeking to award a new contract for MFD services (RFP 1). RFP 1 advertised that the City would award the contract to the "responsive and responsible [o]fferor(s) whose proposal(s) is most advantageous to the City." The City also expressly retained "the right to reject any and all proposals received." Once all submissions were received, an evaluation committee consisting of various City employees would handle the evaluation process.

[1]We do not recount the facts except as necessary to our disposition.

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Elan and its competitor, the Les Olson Company (Les Olson), were among the offerors who submitted proposals for RFP 1. Although Elan and Les Olson both advanced to the second part of the evaluation process, the evaluation committee notified all offerors that it would be recommending to the Las Vegas City Council that Les Olson be awarded the contract. Elan immediately protested the decision, claiming it was improper because Elan had the lowest pricing and the City unfairly favored Les Olson. The City responded by initiating an investigation into RFP 1 and ultimately cancelled RFP 1 altogether, choosing not to award the MFD contract. Later, the City advertised a new request for proposals for the same services, but for "peripheral equipment" instead of MFDs (RFP 2).

Elan did not submit a proposal for RFP 2. Instead, Elan sued the City and several City employees in their individual capacities, alleging: intentional interference with prospective economic advantage, breach of fiduciary duty, constructive fraud, civil conspiracy, concert of action, and declaratory relief. The City moved for summary judgment on behalf of all named defendants, on all claims, arguing Elan had no cognizable claims because RFP 1 was cancelled, Elan did not participate in RFP 2, and the City and its employees were immune from suit. The district court granted the City's motion, finding that Elan had no cognizable claims because RFP 1 was cancelled and Elan had failed to exhaust its administrative remedies by not participating in RFP 2.

On appeal, Elan argues that summary judgment was improper because there were genuine issues of material fact regarding RFP 1 and RFP 2. Specifically, Elan contends that the district court erred by: (1) incorrectly interpreting NRS 332.065 and finding that RFP 1 was issued under NRS 332.115; (2) concluding that NRS 332.075 gave the City

authority to cancel RFP 1; (3) concluding that Elan failed to exhaust its administrative remedies; and (4) failing to make summary judgment findings for the individual defendants.

We review a district court's order granting summary judgment de novo and will uphold summary judgment only where "the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (alteration in original) (quoting NRCP 56(c)). We review the pleadings and proof in a light most favorable to the nonmoving party. *Id.* at 732, 121 P.3d at 1031. "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Id.* at 731, 121 P.3d at 1031.

First, Elan argues that the district court incorrectly interpreted NRS 332.115 and NRS 332.065 to find that RFP 1 was issued under NRS 332.115 and exempt from Nevada's competitive bidding requirements. Elan further argues that the district court erred in concluding the City had a right to cancel RFP 1 under NRS 332.075.

Statutory construction is a question of law that we review de novo. *Waldman v. Maini*, 124 Nev. 1121, 1129, 195 P.3d 850, 856 (2008). If a statute's words are "clear and unambiguous, we do not look beyond its plain meaning, and we give effect to its apparent intent from the words used, unless that meaning was clearly not intended." *Seput v. Lacayo*, 122 Nev. 499, 502, 134 P.3d 733, 735 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008).

Elan argues that the district court erred by determining that NRS 332.115(1)(g) and (h) applied to RFP 1, instead of NRS 332.065, Nevada's competitive bidding statute. The City responds that it was exempted from NRS 332.065's requirements under NRS 332.115(1)(g) because it sought to award a contract for copy machines and the City solicited for proposals, not bids.

The government is afforded "a great deal of discretion in awarding contracts." *Bud Mahas Constr., Inc. v. Clark Cty. Sch. Dist.*, 767 F. Supp. 1045, 1047 (D. Nev. 1991). "If a governing body or its authorized representative has advertised for or requested bids in letting a contract, the governing body must . . . award the contract to the lowest responsive and responsible bidder." NRS 332.065(2) (2018). However, NRS 332.115 excludes certain contracts, including those for "[h]ardware and associated peripheral equipment and devices for computers" and "[s]oftware for computers" from having to solicit by competitive bidding. *See* NRS 332.115(1)(g), (h). Nonetheless, if a government agency chooses to use the competitive bidding process despite the exemption, it must follow NRS Chapter 332's rules for competitive bidding. *See Orion Portfolio Servs. 2 LLC v. Cty. of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397, 402, 245 P.3d 527, 530 (2010).

We conclude that the district court did not err in finding that RFP 1 was exempt from competitive bidding requirements. NRS 332.115(1)(g) distinctly provides an exception to Nevada's competitive bidding requirements if a government agency seeks to contract for "[h]ardware and associated peripheral equipment and devices for computers." Machines that copy, scan, and fax documents fall squarely into this exception. Further, when the City issued its advertisement, it

specifically requested proposals for services and equipment not subject to NRS 332.065's competitive bidding requirements.

Next, we consider Elan's argument that the district court erred by finding that NRS 332.075 gave the City authority to cancel RFP 1. Prior to its 2019 amendment, NRS 332.075 provided that "[a]ny or all bids received in response to a request for bids . . . may be rejected" upon determination "that any such bidder is not responsive or responsible or that the quality of the services, supplies, materials, equipment or labor offered does not conform to requirements or if the public interest would be served by such a rejection." *See* 2019 Nev. Stat., ch. 140, § 13, at 773.

In its order, the district court concluded that the City had the right to cancel RFP 1 because NRS 332.075 gave it statutory authority and the City had expressly retained the right to cancel in the request. But NRS 332.075 plainly applies only to bids: the statute furnishes the framework for rejecting bids but is silent as it pertains to proposals. Because the City solicited for proposals and not bids, NRS 332.075 is inapplicable and the district court erred in concluding the City had authority under that statute to cancel RFP 1.

Even though the district court erred in applying NRS 332.075, the City had authority to cancel RFP 1 under NRS 332.115(1)(g). NRS 332.115(1)(g) exempts contracts for "[h]ardware and associated peripheral equipment and devices for computers" from competitive bidding—thereby giving the City discretion in how to award such contracts. Thus, it was within the City's discretion to retain the right to reject any or all of the proposals when determining the contract award. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010)

(recognizing that the district court's decision may be affirmed on appeal "if the district court reached the correct result, even if for the wrong reason").

Next, we consider whether the district court erred in concluding that Elan failed to exhaust its administrative remedies by not participating in RFP 2 because it was for the same services as RFP 1. Elan argues it was not required to participate because RFP 2 was a completely new request for services different than RFP 1. Elan further argues that even if it was required to participate, its failure is excusable because any effort would have been vain and futile. The City counters that RFP 1 and RFP 2 were for the same services and that the change in title (from MFD's to peripheral equipment) was merely for specificity.[2]

"Ordinarily, before availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies." *Malecon Tobacco, LLC v. State ex rel. Dep't of Taxation*, 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002). The failure to exhaust administrative remedies can render a lawsuit nonjusticiable. *Mesagate Homeowners' Ass'n v. City of Fernley*, 124 Nev. 1092, 1099, 194 P.3d 1248, 1252 (2008). However, a party need not exhaust administrative procedures when those efforts would be "vain and futile." *Benson v. State Eng'r*, 131 Nev. 772, 777, 358 P.3d 221, 224 (2015) (internal quotation marks omitted); *see also Engelmann v. Westergard*, 98 Nev. 348, 353-54, 647 P.2d 385, 388-89 (1982) (concluding that the expiration of statute of limitations precluded the

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[2]Elan also contends that this issue is not within this court's jurisdiction because the City failed to argue exhaustion of remedies before the district court. To the contrary, we find significant evidence in the record demonstrating that exhaustion of remedies was argued below and thus reject Elan's contentions on this point.

requirement to exhaust administrative remedies because a request for administrative review would be considered "untimely and futile").

To support its first argument, Elan notes that RFP 1 and RFP 2 were issued under different proposal numbers and RFP 2 was for "peripheral equipment." However, the mere assignment of different proposal numbers does not mean that RFP 2 was materially different than RFP 1. Moreover, at least arguably, by NRS 332.115(1)(g)'s own language the term "peripheral equipment" is sufficiently broad to encompass MFDs because it is equipment used in conjunction with computers.

Elan also failed to demonstrate that participating in RFP 2 would have been "vain and futile." Elan argues that because the City followed an allegedly improper process in connection with RFP 1, it would also have followed a flawed process in connection with RFP 2. However, the record does not support this assertion. Elan protested RFP 1 and voiced its concerns of unfairness and impropriety. The City did not ignore the protest, but instead initiated an investigation and ultimately cancelled RFP 1. The City then proceeded to begin the process anew in RFP 2, which was for the same services but included a new committee and a different evaluation process for all participants. RFP 2 was thus a new solicitation process that differed from the previous process associated with RFP 1, yet Elan chose not to participate and thereby did not avail itself of the administrative procedures for those services.

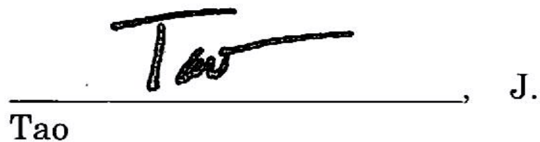
Finally, we consider Elan's argument that the district court erred by failing to make specific findings regarding Lloyd-Leakos, Holder, and Martin when it entered summary judgment. While the district court did fail to make findings for the claims against Lloyd-Leakos, Holder, and Martin, we conclude that the lack of findings alone does not warrant

reversal. Under a de novo review, the record and evidence demonstrate that there is no genuine issue of material fact for those claims and thus those defendants are also entitled to summary judgment as a matter of law. *See e.g., Griffin v. Westergard*, 96 Nev. 627, 632, 615 P.2d 235, 238 (1980) ("Where the record and evidence therein is clear as to the required specific findings, the court will examine the decision and record and imply the findings.").

Based on the foregoing, we conclude that the district court did not err in granting summary judgment in the City's favor on all of Elan's claims and we

ORDER the judgment of the district court AFFIRMED.

_______________, C.J.
Gibbons



_______________, J.
Tao

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cc: Hon. Timothy C. Williams, District Judge
Alverson Taylor & Sanders
Las Vegas City Attorney
Eighth District Court Clerk