

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY PLAN DEVELOPMENT, INC., A
NEVADA CORPORATION, AND
ERNESTO SAVINO, INDIVIDUALLY,
Appellants,

vs.

COUNTY OF CLARK, A POLITICAL
SUBDIVISION OF THE STATE OF
NEVADA; ERIN KENNY, YVONNE
ATKINSON-GATES, DARIO HERRERA,
MARY J. KINCAID, CHIP MAXFIELD
AND MYRNA WILLIAMS, IN THEIR
CAPACITY AS COMMISSIONERS OF
CLARK COUNTY,
Respondents.

No. 38236

FILED

FEB 04 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant City Plan Development's (CPD) petition for a writ of mandate, which sought to compel respondents to award CPD a construction contract based on its status as lowest bidder.

CPD was the lowest bidder on a Clark County public works project involving the renovation and construction of Americans With Disabilities Act compliant restrooms. The Clark County Board of Commissioners (Board) placed the bid proposal on the agenda of its regularly scheduled meeting on January 16, 2001. Prior to the meeting, CPD received notice that the Board had problems with CPD's violations of prevailing wage laws on prior county projects. CPD did not make a formal protest with the Board in accordance with provisions of the bid documents, but did inform the county that CPD's counsel would address the Board at the meeting.

At the January 16, 2001 meeting, several persons spoke to the Board regarding CPD's violation of prevailing wage laws on two prior county projects. The Board denied CPD's bid proposal and awarded the bid to the second lowest bidder. CPD applied to the district court for a writ of mandate. The district court denied the petition on March 26, 2001. CPD appeals.

A writ of mandate is an extraordinary remedy that will not issue if the petitioner has a plain, speedy, and adequate remedy at law.¹ Whether to consider a petition for mandate is entirely within the discretion of the district court.² The writ is generally issued "to compel [the] performance of an act" that the law requires as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion.³

The arbitrary and capricious standard applies when a court is reviewing a discretionary act of a lower office or tribunal.⁴ If the discretionary act is supported by substantial evidence, there is no abuse of discretion.⁵ "Substantial evidence is that which 'a reasonable mind might

¹See NRS 34.170; NRS 34.330.

²See County of Clark v. Doumani, 114 Nev. 46, 53, 952 P.2d 13, 17 (1998); Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991).

³NRS 34.160; see Wardleigh v. District Court, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995); Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

⁴Doumani, 114 Nev. At 53, 952 P.2d at 17.

⁵Clark County Liquor v. Clark, 102 Nev. 654, 658, 730 P.2d 443, 446 (1986).

accept as adequate to support a conclusion.”⁶ Further, “[t]he review of administrative decisions by the district court and this court is limited to the record made before the administrative tribunal.”⁷

CPD argues that the Board acted arbitrarily and capriciously and without substantial evidence in denying its bid proposal.⁸ Specifically, CPD argues it submitted the lowest responsive bid to the Board (i.e., \$33,000.00 lower than the second lowest bidder). Further, CPD contends that no party asserted that CPD was incapable of completing the bid proposal project and, in fact, CPD had a history of successfully completing several county projects. CPD contends that the Commissioners based their denial of CPD’s bid on the basis of untrue and unsupported allegations made against CPD at the Board meeting of January 16, 2001.

The Board argues CPD has failed to establish a manifest abuse of discretion on the part of the Board in awarding the bid proposal

⁶Secretary of State v. Tretiak, 117 Nev. 299, 305, 22 P.3d 1134, 1138 (2001), cert. denied, Tretiak v. Secretary of State of Nevada, 122 S. Ct. 372 (2001).

⁷State ex rel. Johns v. Gragson, 89 Nev. 478, 482, 515 P.2d 65, 68 (1973); see also McKenzie v. Shelly, 77 Nev. 237, 242, 362 P.2d 268, 270 (1961); Nev. Tax Com. v. Hicks, 73 Nev. 115, 124, 310 P.2d 852, 856 (1957).

⁸CPD also argues it was denied due process of law where an adversarial hearing was conducted under the guise of a meeting, the Nevada Administrative Procedures Act (APA) applies to the Board, and that the Board violated various provisions of the Nevada APA. We have considered these arguments and conclude they are without merit.

to the second lowest bidder. The Board asserts NRS 338.143(4)⁹ vests the Board with the discretion to determine whether a bidder is responsive or responsible as well as whether or not public interest would be served by rejection of a bid. Thus, the Board argues the information provided during the meeting provided substantial evidence to support the Board's decision which was neither arbitrary or capricious. We agree.

NRS 332.065(1) grants a governing body the discretion to determine the lowest responsive and responsible bidder on the basis of a variety of factors, including the "best interest of the public."¹⁰ Further,

⁹NRS 338.143(4) (2001) states:

Any bids received in response to an advertisement for bids may be rejected if the person responsible for awarding the contract determines that:

(a) The bidder is not responsive or responsible;

(b) The quality of services, materials, equipment or labor offered does not conform to the approved plan or specifications; or

(c) The public interest would be served by such a rejection.

¹⁰NRS 332.065(1) (2000) provided in pertinent part:

If a governing body or its representative has advertised for or requested bids in letting a contract, the award must, except as otherwise provided in subsection 2, be made to the lowest responsive and responsible bidder. The lowest responsive and responsible bidder must be judged on the basis of price, conformance to specifications, qualifications including the bidders' past performance, quality and utility of services,

continued on next page . . .

NRS 338.143(4), pertaining to public works projects, grants local government discretion to reject a bid if the person responsible for awarding the bid determines that the bidder is not responsive or responsible.¹¹ Moreover, this court has concluded that it is proper for a public agency to obtain information regarding a bidder after a bid has been opened but prior to the award of the bid.¹² In particular, the acts of executive officers are presumed to be in the public's best interests absent proof that the agency engaged in fraud, bad faith or careless attention to business.¹³ Thus, the Clark County Board of Commissioners had ample discretion to award or deny the lowest bidder, provided that substantial evidence was presented to support a rejection as provided for in the statutory language.

Substantial evidence was presented at the regularly scheduled Board meeting allowing the Commissioners to make an informed decision regarding CPD's status as a potential contractor for the bid proposal. In particular, the Commissioners heard statements from Ted Olivas, Purchasing Manager for the Clark County General Services Department,

... continued

supplies, materials or equipment offered and adaptability to the required purpose and the best interest of the public.

¹¹See NRS 338.143(4)(a) and (c) (where the public interest would be served by a rejection).

¹²State, Purchasing Div. v. George's Equipment, 105 Nev. 798, 805-06, 783 P.2d 949, 953-54 (1989); see also Douglas Co. Board v. Pederson, 78 Nev. 106, 369 P.2d 669 (1962).

¹³Id.

who stated that, in reviewing the bids, CPD had previously violated prevailing wage laws¹⁴ on prior Clark County projects. Olivas told members of the Board that CPD's actions constituted a breach of contract and gave CPD an unfair advantage in the bidding process (i.e., by being able to underbid its costs). While CPD disputes the validity of some of the accusations, the record contains substantial evidence supporting the Board's conclusion that CPD had problems complying with the prevailing wage laws, and its award of the contract to the next lowest bidder.

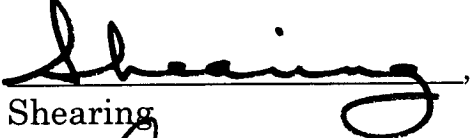
Accordingly, CPD has failed to demonstrate the district court erred in denying its writ petition since substantial evidence was presented to support the Board's denial of CPD's bid proposal. We therefore

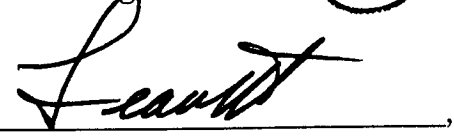
¹⁴See NRS 338.020(1)(a), which states in relevant part:

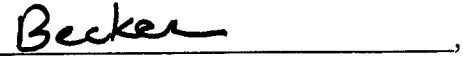
(1) Every contract to which a public body of this state is a party, requiring the employment of skilled mechanics, skilled workmen, semiskilled mechanics, semiskilled workmen or unskilled labor in the performance of a public work, must contain in express terms the hourly and daily rate of wages to be paid each of the classes of mechanics and workmen. The hourly and daily rate of wages must:

(a) Not be less than the rate of such wages then prevailing in the county in which the public work is located, which prevailing rate of wages must have been determined in the manner provided by NRS 338.030 . . .

ORDER the judgment of the district court AFFIRMED.

 J.
Shearing

 J.
Leavitt

 J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Orin G. Grossman
Clark County District Attorney David J. Roger/Civil Division
Clark County Clerk