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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

VALLEY SLURRY SEAL COMPANY, Plaintiff and Appellant, v. CITY OF SANTA BARBARA, Defendant and Respondent.	2d Civil No. B229542 (Super. Ct. No. 1341521) (Santa Barbara County)

Valley Slurry Seal Company (VSSC) appeals a judgment in favor of defendant City of Santa Barbara (City) on VSSC's petition for writ of mandate. (Code Civ. Proc., § 1085.) VSSC alleged that City violated state law requirements (Pub. Contract Code, § 3400) for bid specifications on City's road construction contracts.[1]

VSSC claimed that a VSSC competitor influenced City to adopt road material standards to unlawfully preclude it from using its asphalt emulsion product and to prevent it from successfully bidding on City contracts.

We conclude, among other things, that: 1) the trial court did not err by reaching the merits of VSSC's claims after a competitor had successfully bid for the City project and had completed the road construction work, and 2) substantial evidence supports the trial court's findings that City did not violate state law and had valid

[1] All further statutory references are to the Public Contract Code.

justifications to question the suitability of VSSC's product and its performance. We affirm.

FACTS

VSSC is a road construction contractor. In March 2009, City published its bid specifications for a road maintenance project called the "Zone 3 Slurry Seal Project" (Zone 3 Project). City required that "the asphalt emulsion to be used in the project [had] to be a polymer modified rejuvenating emulsion with a latex polymer" known as a "PA-AS-1[,] a product of Polymer Science of America or Equal." The bids opened on April 16, 2009. VSSC was the "apparent low bidder."

VSSC requested City to accept its product, StyraFlex, "as an equal substitute for PA-AS-1" on the Zone 3 Project. An assistant city attorney wrote to VSSC's counsel stating, '"The City is not interested in the use of alternative products which a contractor may assert are "equal to" the specifications contained in the bid at this time.'" He advised VSSC that if it would provide an assurance that it would "adhere to the bid specifications," the City's public works department would recommend to the City Council that the Zone 3 Project contract be awarded to VSSC. City awarded VSSC the Zone 3 Project contract after VSSC promised to comply with its specifications. VSSC completed that project and was "paid in full."

In December, City published its bid specifications for the "ARRA Road Maintenance Project" (ARRA Project). It again included the requirement for the use of a PA-AS-1 or an equivalent product. But City made changes. For the Zone 3 Project, City had precluded the use of styrene butadiene rubber (SBR) in the polymer. VSSC's StyraFlex product contains SBR. The specifications for the ARRA Project eliminated the SBR exclusion. But City required a "polymer modified asphalt testing" procedure to determine the "resistance to swelling" by the product used and "the specific gravity of the latex" materials for "quality control purposes." It set forth requirements for the "specific gravity of the asphalt blend."

VSSC submitted a bid for the ARRA Project. It also filed "bid protests" with City regarding its requirements for the ARRA Project. The City Council scheduled a hearing on VSSC's bid protest for March 16, 2010.

Prior to that hearing date, VSSC filed a petition for writ of mandate against City and sought a temporary restraining order to prevent the City Council from accepting bids on the ARRA Project. It alleged: 1) the "Zone 3 specifications [were] influenced in large part by Western Emulsions, a competitor company to [VSSC]"; 2) "Western Emulsions was actively lobbying the City to orchestrate a scheme where its products, commonly known as 'PASS CR' and "PA-AS-1' would be the only products that could be used on the City's project"; and 3) "there was, and is, a large effort on behalf of the City to specifically exclude equal products like StyraFlex." In support of its ex parte request for a temporary restraining order (TRO), VSSC attached a two-page declaration from Sallie Houston, a VSSC technical manager. She said City was using a "WE-EM-100-2" test, which was "not a performance test" and VSSC's "products . . . will function as well, or better than the products called for by name in the City's specifications (i.e. 'PA-AS-1')." The trial court denied the request for the TRO.

The bids for the ARRA Project "opened as scheduled." Bond Blacktop submitted the lowest bid; VSSC was "the second-lowest bidder."

The City Council Hearing on VSSC's Bid Protest

On March 16, 2010, VSSC did not appear at the City Council hearing on its challenge to City's bid specifications.

City's engineering department filed a report with the City Council requesting that it deny VSSC's bid for the ARRA Project because: 1) VSSC had not submitted the lowest bid; 2) VSSC failed to present documentation to verify "the performance of the [VSSC] binder emulsion"; and 3) after a review, City engineering staff concluded that the StyraFlex product was not equal to the product in City's specifications.

City staff submitted photographic evidence to support their claim that VSSC's StyraFlex product was not suitable.

Eric Flavell, a consultant to City, told the City Council members that they had reviewed the work previously performed by VSSC with StyraFlex and there were defects, which included: 1) "cracking," 2) the presence of "loose chips," 3) "streams" of material that contained gaps, 4) problems with bonding to the surface, 5) deficient performance in cold weather areas, and 6) product deterioration after a few months. Consequently, this product failed to meet City's standards.

The City Council also received written reports from engineering companies and other municipalities about the long endurance and superior performance of the PA-AS-1 product.

After the presentation of the evidence, the City Council rejected VSSC's bid and its bid protest noting that VSSC made "bald" assertions about its product without providing "detailed information." City certified an administrative record of these proceedings.

The Hearing on the Mandamus Petition

At the mandamus hearing, VSSC's counsel presented the administrative record and additional documents, which he sought to add to the record.

City objected to the inclusion of additional documents that were not introduced at the City Council hearing and were not part of the administrative record. The trial court overruled the objection, but stated that it would "consider only those documents relevant and admissible as to the issues presented."

City also objected to the trial court reaching the merits of VSSC's petition. City claimed the case should be dismissed as moot because it awarded the contract to another company that submitted the lowest bid and had completed the ARRA Project. The court reached the merits because the issues raised were matters of "continuing public interest" and were "likely to recur."

The trial court denied the writ. It ruled that City did not violate section 3400. It rejected VSSC's claim that City's requirements were a subterfuge to favor Western Emulsions' products over other equal products. It found that City had valid

justifications for not using VSSC's product on public road projects and the City Council acted reasonably in concluding the PA-AS-1 product was superior.

DISCUSSION

Mootness

"A writ of mandate will not issue to enforce an abstract right, when the occurrence of an event subsequent to the commencement of the proceeding makes the issuance of the writ of no practical benefit to the petitioner." (*Clementine v. Board of Civ. Ser. Commrs.* (1941) 47 Cal.App.2d 112, 114.)

In its prayer for relief in its petition, VSSC requested a "temporary stay" to prevent City "from continuing the bidding process for the Project." The trial court denied the request for the stay. Later, at the hearing on the peremptory writ of mandate, the court found that City had approved the bid of another contractor and the work had been completed on that project.

The trial court recognized that VSSC's claims were technically moot for that project. But it decided to reach the merits because challenges to City's standards for road construction materials are "likely to recur and [are] a matter of continuing public interest." The court did not err. "If an action involves a matter of continuing public interest and the issue is likely to recur, a court may exercise an inherent discretion to resolve that issue, even though an event occurring during its pendency would normally render the matter moot." (*Liberty Mutual Insurance Co. v. Fales* (1973) 8 Cal.3d 712, 715-716.) VSSC had previously bid on City projects and was likely to do so again.

Standards for Accepting Bids on Public Contracts

Section 3400, subdivision (b) provides, "No agency of the state, nor any political subdivision, municipal corporation . . . shall draft or cause to be drafted specifications for bids, in connection with the construction, alteration, or repair of public works, (1) in a manner that limits the bidding, directly or indirectly, to any one specific concern, or (2) *calling for a designated material, product, thing, or service by specific brand or trade name unless the specification is followed by the words 'or equal'* so that bidders may furnish any equal material . . . ." (Italics added.)

Where a contract bidder intends to use an equal product not mentioned in the city's designation of suitable materials, the city must allow "for submission of data substantiating a request for a substitution of 'an equal' item." (§ 3400, subd. (b).)

VSSC claims City drafted the asphalt polymer specifications to eliminate the use of its StyraFlex product in City projects. It argues that the trial court erred by not ruling that City had violated state law. We disagree.

City's specifications provide, "The polymer shall be a PA-AS-1 a product of Polymer Science of America *or Equal*." (Italics added.) As the trial court noted, "This specification calls for a designated material by specific trade name, but includes the words 'or equal.' On its face, this text complies with section 3400, subdivision (b)." The court correctly found this specification does not preclude the use of another product of equal quality.

VSSC suggests that the use of the PA-AS-1 was arbitrary or capricious without any scientific foundation. But the trial court found otherwise. It noted that there was a study performed by Flowers & Associates, civil engineers. In that report, they concluded that "research performed on the requested material" showed that "the PASS rejuvenating project for use on city of Santa Barbara surface streets would be in the City's interests from an economic and performance stand point . . . ." The trial court found that the use of this benchmark product was based on a scientific study. VSSC has not shown that this finding is unsupported by the record.

Substantial Evidence for the Findings of No Unlawful or Bad Faith Conduct

VSSC contends City acted to limit "project bidding specifications to unlawfully sole source Western Emulsions' products." (Boldface & italics omitted.) It claims City had no valid justifications for its actions.

City responds that VSSC erroneously draws its conclusions about alleged unlawful City conduct based on "self-serving" evidence. It claims the standard of review is substantial evidence. We agree.

"A public entity's 'award of a contract, and all of the acts leading up to the award, are legislative in character.'" (*Mike Moore's 24-Hour Towing v. City of San Diego*

(1996) 45 Cal.App.4th 1294, 1303.) "Review of a local entity's legislative determination is through ordinary mandamus under section 1085. 'Such review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support.'" (*Ibid.*) "[T]he applicable standard of review is the substantial evidence test." (*Taylor Bus Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331, 1340.) "A presumption exists that an administrative action was supported by substantial evidence." (*Id*. at p. 1341.) "The burden is on the appellant to show there is no substantial evidence whatsoever to support the findings . . . ." (*Ibid.*) VSSC has not met its burden.

VSSC has not produced a complete record on appeal. It included an appellant's appendix without the pleadings the parties filed and City's opposition documents. "A fundamental principle of appellate practice is that an appellant '"must affirmatively show error by an adequate record. . . . Error is never presumed. . . . 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent . . . ."'" (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532.) "To the extent the record is incomplete, we construe it against" appellant. (*Sutter Health Uninsured Pricing Cases* (2009) 171 Cal.App.4th 495, 498.) But even from the record we have, VSSC has not shown grounds for reversal.

VSSC claims City does not have a valid test to determine whether VSSC's materials are equal to the materials in City's specifications. It argues that: 1) City's "WE-EM-100-2" test is "not a performance test"; it is an "unlawful use of an ingredients-based test" to favor Western Emulsions' products; and 2) VSSC's products are equal or better than City's specified benchmark product.

City responds that VSSC is making these representations "almost exclusively on extra-record and self-serving evidence never submitted to the City Council and never subject to detailed critical and public examination." City is correct. The facts upon which VSSC draws these conclusions in its appellate brief are from Houston's two-page declaration which VSSC submitted to support its ex parte application for a

temporary restraining order. The declaration was conclusory and did not set forth her educational qualifications to render an expert opinion on the test. The declaration was not part of the City Council administrative proceeding and Houston did not appear and testify before the City Council.

"An unbroken line of cases holds that, in traditional mandamus actions challenging quasi-legislative administrative decisions, evidence outside the administrative record (extra-record evidence) is not admissible." (*Carrancho v. California Air Resources Board* (2003) 111 Cal.App.4th 1255, 1269.) Moreover, the trial court implicitly rejected the conclusory assertions in the declaration when it denied the request for theTRO. Although Houston claimed the test was a subterfuge, at the peremptory writ hearing, the trial court specifically rejected that claim. The trial judge is "the sole judge" of Houston's credibility. (*Church of Merciful Saviour v. Volunteers of America, Inc.* (1960) 184 Cal.App.2d 851, 856; see also *Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1647.)

But even so, the issue now is not whether VSSC can point to documents to support its position, it is whether substantial evidence supports the judgment. City suggests that VSSC has waived all challenges to the trial court's factual findings because it cites only the facts supporting its position and ignores the evidence supporting the judgment. We agree. An appellant must cite to the evidence supporting the trial court's findings; citation to only the evidence most favorable to appellant does not suffice. (*Hauselt v. County of Butte* (2009) 172 Cal.App.4th 550, 563.) We look to the evidence supporting the findings. (*Griffith Co. v. San Diego Col. for Women* (1955) 45 Cal.2d 501, 507-508.) From our review of the record, we conclude substantial evidence supports the judgment.

In the trial court, VSSC contended that City's testing requirements made it impossible for it to show that its products were equal. But the trial court said, "[VSSC] does not present any evidence that it could not meet the documentation requirement . . . . *The evidence presented by [VSSC] to the City* . . . is that [it] believed that it could meet the specification. There is no evidence presented by [VSSC] that compliance . . . was

impossible, or that the specification [was improper]." (Italics added.) VSSC has failed to show that these findings are erroneous.

VSSC did not appear before the City Council to support its bid challenge. Consequently, it did not take advantage of the opportunity to make an oral presentation to City and answer questions about its claims. The only presentations to the City Council in the administrative hearing transcript were from a City staff person and a City consultant. Moreover, VSSC did not set its mandamus action for trial. Instead, the peremptory writ hearing essentially proceeded as a typical law and motion matter. VSSC called no witnesses. It relied on oral argument and submitted hearsay declarations that could not be cross-examined and were properly objected to by City. Those declarations were not an adequate substitute for submitting admissible evidence at trial, nor did they excuse the failure to make an adequate presentation at the administrative hearing. City's objection to the "extra record" declaration "evidence" cited in VSSC's brief is well taken. Admitting such evidence would circumvent the administrative process and improperly "encourage interested parties to withhold important evidence at the administrative level so as to use it more effectively to undermine the agency's action in court." (*Carrancho v. California Air Resources Board, supra*, 111 Cal.App.4th at p. 1271.)

Moreover, the trial court found that one of the reasons why VSSC's product did not meet City's standards was because of VSSC's failure to provide adequate information. It said, "[VSSC] did not comply with the documentation requirement of the specifications in order for the City to validate the equality of StyraFlex. The absence of complete documentation is itself substantial evidence supporting the City's decision."

These findings are supported by the record. The trial court cited to a portion of the administrative record before the City Council. John Ewasiuk, the principal civil engineer of City's public works department, told the City Council that in 2009 VSSC "submitted a request for their product to be considered equal . . . . [T]hey submitted documentation that consisted of two laboratory certificates asserting that their binder emulsion was equal. [But, one] of their certificates was from their own laboratory, which they own." VSSC submitted a list of agencies for references. City staff "attempted to

contact these agencies and . . . were unable to get any product performance verification from these agencies. In fact, only one of the agencies replied and they replied with no acknowledgement of the example project . . . that was listed." The transcript of the City Council hearing does not reflect any bias by the City Council members against StyraFlex. Their concern was that VSSC had made "bald" assertions about its product without providing sufficient "detailed information." VSSC is not in a position to claim that the City Council would ignore its claims because it did not even appear at the hearing to defend its product.

VSSC claims that when City published specifications for asphalt "polymer modified emulsion" in 2009, it provided, among other things, that "[l]atex polymer using Styrene Butadiene Rubber (SBR) is not acceptable and shall not be used on the project." (Underscoring omitted.) VSSC's StyraFlex product contains SBR. VSSC contends that prior to the publication of these specifications, Bob McCrea of Western Emulsions sent an e-mail to Alan Chierici, a consultant to City, to encourage him to use the PA-AS-1 product, and not to use StyraFlex. In that e-mail he said, "[H]ere is a possible solution for now: Meets requirements of the current law (3400) and will eliminate StyraFlex." (Underscoring omitted.) VSSC notes that in a subsequent e-mail, Eric Flavell, a City consultant stated, "SBR (Styraflex) is written out of the spec." Thomas Conti, an employee of City replied, "[T]his will ensure the product we want is used." (Underscoring omitted.)

VSSC claims that this evidence shows that City was not concerned with the equal or superior quality of other products that could be used on these contracts. It only was attempting to "unlawfully sole source Western Emulsions' products." (Boldface & italics omitted.) It suggests that it did not receive the ARRA Project contract because of the specifications against the use of SBR. But VSSC omits the fact that those 2009 specifications were for the Zone 3 Project contract and City subsequently changed the requirements. The specifications for the ARRA Project did not contain the language about excluding SBR. Moreover, VSSC selectively quotes from only limited portions of the e-mails. The portions it does not cite refer to valid and reasonable concerns about the

viability of the products used, the duration, the history of inferior performance on previous contracts, and the need to avoid products that will fail and be costly to City.

VSSC attempts to draw inferences from the extra-record e-mails to support its position, but that does not preclude the trial court from drawing other inferences from the entire record. Here the court rejected VSSC's claims that City was unlawfully "sole sourc[ing]" the Western Emulsions' product. It found City's actions were for the proper purpose of preventing an inferior product to be used on its streets. It specifically rejected VSSC's claims that City's testing and specification requirements were a "subterfuge" or were being used in bad faith. VSSC has failed to set forth a complete factual statement sufficient to challenge these findings. (*Hauselt v. County of Butte*, *supra*, 172 Cal.App.4th at p. 563.) It assumes that City engineers who did not want to use StyraFlex did so solely out of a motive to help VSSC's competitor. But the record reflects that they had concerns about StyraFlex's poor performance on previous public road projects.

Moreover, City claims that VSSC is improperly using statements not in the record by people who are not on the City Council to impeach the validity of the City Council's official actions. It claims the trial court could not accept VSSC's attempt to ask the court to assume, without evidence, that the City Council had an ulterior motive to promote Western Emulsions' products. We agree.

"[D]eclining to inquire into legislative thought processes or motives is consistent with the limited scope of review in ordinary mandamus proceedings of legislative decisions." (*Mike Moore's 24-Hour Towing v. City of San Diego*, *supra*, 45 Cal.App.4th at p. 1305.) Here VSSC alleged in its petition that "the [City] Council is responsible for complying with California law, namely the California Public Contract Code." The individuals who sent the correspondence are not on the City Council. There was no evidence presented at the mandamus hearing, and none in the administrative record, to show that any City Council member had a bias against VSSC, a corrupt motive, or was part of any "scheme" to unlawfully promote Western Emulsions' products.

VSSC claims the assistant City attorney who wrote the Zone 3 Project letter and McCrea of Western Emulsions had improper motives. But they were not named as

parties and not called as witnesses. They were not given an opportunity to respond because the issue of their intent never proceeded to trial and could not be tried on isolated extra-record hearsay in a law and motion mandamus proceeding. Contested factual claims in the petition which are not part of the administrative proceedings are not assumed to be true and must be tried as in any other civil action. (*California StandardBred Sires Stakes Com., Inc. v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 751, 763; *Lotus Car, Ltd. v. Municipal Court* (1968) 263 Cal.App.2d 264, 269.) Moreover, the claim about their motives side steps the fact that they were not the ultimate decision makers and that VSSC presented no evidence to show that the City Council violated its legal duties. Had VSSC attended the administrative hearing, it could have asked the City Council to rule on its claims about these individuals, and that response would have been part of the administrative record. Having not done so, VSSC was not in a position to ask the trial court to rely on speculation.

In addition, substantial evidence supports the trial court's findings that City had valid justifications to question the suitability of VSSC's product and its performance. A reasonable inference is that VSSC's product was inferior and not suitable. The engineering division of the public works department filed a report with the City Council. It determined that "the [VSSC] product *is not equal* to the product specified in the Project specifications." (Italics added.) In addition, City consultant Flavell, in his oral report to the City Council, said they had reviewed the work previously performed by VSSC with StyraFlex and there were documented defects. He noted that after only four months following its application there were problems with "cracking" and the presence of "loose chips." This material came out in "streams" and one could "see in between the streams." There were problems with VSSC's product bonding or adhering to the surface. He noted that StyraFlex was not a product that performed well in cold weather areas. By contrast, the material specified by City did not have these problems and its duration was superior. The City Council also had photographic evidence to substantiate the conclusions reached by Flavell and City staff.

We have reviewed VSSC's remaining contentions and conclude it has not shown error.

The judgment is affirmed. Costs on appeal are awarded in favor of respondent.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

COFFEE, J.*

*Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Colleen K. Sterne, Judge

Superior Court County of Santa Barbara

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