

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-3251

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

NORTH AMERICAN MECHANICAL, INC.,

PLAINTIFF-APPELLANT,

V.

DIOCESE OF MADISON,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Deininger, JJ.

DEININGER, J. North American Mechanical, Inc. (NAMI) appeals a summary judgment dismissing its misrepresentation and promissory estoppel claims against the Catholic Diocese of Madison. NAMI, a commercial heating and air conditioning contractor, had bid on a portion of a major renovation project undertaken by the Diocese. NAMI alleges that the Diocese, by designating NAMI

as a “prequalified” subcontractor, misrepresented and promised that the Diocese would not object to NAMI’s participation in the renovation. The Diocese, however, objected to NAMI’s participation in the project because NAMI was not unionized, and the mechanicals subcontract was awarded to another company. We conclude that the Diocese neither misrepresented nor promised that it would not object to NAMI’s participation because the materials inviting bids expressly reserved to the Diocese the right to refuse any bids. Accordingly, we affirm the summary judgment dismissing NAMI’s claims.

BACKGROUND

The Diocese undertook to renovate property it owned on the west side of Madison, which had formerly been used as the Holy Name Seminary. The Diocese, with the assistance of its architect, determined that it would enter into a single contract with a general contractor, who would in turn contract with the necessary subcontractors. The architect prepared a list of prequalified general contractors and subcontractors who were invited to bid on the project. The subcontractors submitted their bids to the general contractors, who incorporated the subcontractors’ bids into their bids to the Diocese. Information about the project and the bidding process was provided to the bidders in a “Project Manual” prepared by the architect. The Project Manual provided that (1) bids would be accepted only from invited bidders; (2) the Diocese reserved the right to reject any and all bids; and (3) the Diocese could raise reasonable objections to particular subcontractors even after the general construction contract was signed.

NAMI was one of the prequalified subcontractors invited to bid on the heating, ventilation and air conditioning (HVAC) portion of the project. NAMI’s bid was among the lowest, and NAMI’s bid was incorporated into the bid

of Tri-North Builders, Inc., the low-bidding general contractor. NAMI learned, through its contacts with Tri-North, that Tri-North expected to be awarded the general contract for the Diocese project, and that Tri-North expected to use NAMI for the HVAC work. NAMI alleges that on the basis of this information from Tri-North, it reserved the capacity to perform the HVAC work on the Diocese project, and that it abandoned the pursuit of other contracts that would have interfered with its ability to perform the Diocese work.

The Diocese awarded the contract to Tri-North, but it objected to NAMI performing the HVAC work. At some point early in the bidding process, the Diocese had determined that, absent “special circumstances,” it intended to employ only union-affiliated contractors. NAMI was not unionized, and the Diocese informed Tri-North that it had selected another subcontractor for the HVAC work.

NAMI sued the Diocese, alleging strict responsibility misrepresentation, misrepresentation in violation of § 100.18, STATS., and promissory estoppel, as well as two other claims no longer at issue on appeal.¹ The basis for the misrepresentation and promissory estoppel claims is NAMI’s contention that “by pre-qualifying NAMI, the Diocese represented that if NAMI successfully competed for that subcontract, the Diocese would not disqualify NAMI from receiving it.” Both parties moved for summary judgment. The trial court granted summary judgment for the Diocese on all claims, and NAMI appeals.

¹ NAMI also alleged breach of contract and tortious interference with prospective business relationships, but it does not appeal the dismissal of these claims.

ANALYSIS

We review the trial court's grant of summary judgment using the same methodology as the trial court. *See M&I First Nat'l Bank v. Episcopal Homes Management, Inc.*, 195 Wis.2d 485, 496, 536 N.W.2d 175, 182 (Ct. App. 1995). That methodology is well known, and we need not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See id.* at 496-97, 536 N.W.2d at 182; *see also* § 802.08(2), STATS. We conclude that NAMI's misrepresentation and promissory estoppel claims can be decided as a matter of law on the basis of the Project Manual, whose express terms are not in dispute. Because we decide this appeal on the basis of the Project Manual, any remaining factual disputes, such as those regarding the customary practices in the construction industry, or the point at which the Diocese decided to prefer union contractors, are immaterial.

Each of NAMI's three causes of action requires NAMI to show that the Diocese either made a false statement of fact or broke a promise to NAMI regarding NAMI's participation in the renovation project.² NAMI contends that

² The strict responsibility misrepresentation claim requires that that NAMI show five elements:

- (1) a representation of fact; (2) that is untrue; (3) based either on personal knowledge or under circumstances where the speaker necessarily ought to have known the truth or untruth of the statement; (4) claimant's economic interest in the transaction; and (5) claimant's belief in the representation.

Skrupky v. Elbert, 189 Wis.2d 31, 46, 526 N.W.2d 264, 270 (Ct. App. 1994) (citing WIS J I—CIVIL 2402).

(continued)

the Diocese's designation of NAMI as a prequalified contractor constitutes a representation of fact that the Diocese had no objection to NAMI performing the HVAC work on the renovation project, and a promise that the Diocese would not later object to NAMI on the grounds that NAMI was not unionized. Thus, although each of NAMI's causes of action has different elements, NAMI's claims rise or fall together, depending on the meaning of the Diocese's designation of NAMI as a prequalified contractor.

NAMI contends that under the bidding procedure established in the Project Manual, the Diocese could exercise absolute control over the choice of subcontractors only by deciding whether to prequalify subcontractors and invite them to bid. Once bids were opened, the general contractor who won the contract from the Diocese "received the right to select the subcontractors with which it would contract to complete the work." Thus, NAMI contends, the Diocese represented via the Project Manual that it had no objection to NAMI, and it promised that should the general contractor select NAMI for the HVAC work, the Diocese would not then object to NAMI's participation in the project on the basis of anything the Diocese knew at the time NAMI's bid was invited.

NAMI's misrepresentation claim under § 100.18, STATS., requires that NAMI show, among other things, that the Diocese made or disseminated an "advertisement, announcement, statement or representation contain[ing] any assertion, representation or statement of fact which is untrue, deceptive or misleading." Because we conclude that the Diocese did not make a false statement of fact in the materials inviting NAMI's bid, we need not consider the Diocese's argument that § 100.18 is inapplicable to the transaction at issue in this case.

The three elements of promissory estoppel are: (1) a promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee; (2) actual inducement of such action or forbearance, and (3) the need to enforce the promise to avoid injustice. See *Hoffman v. Red Owl Stores*, 26 Wis.2d 683, 698, 133 N.W.2d 267, 275 (1965).

NAMI further asserts that the Diocese decided early in the bidding process not to engage non-union contractors, and that the Diocese knew that NAMI was not unionized when it invited NAMI to bid. NAMI argues that the Diocese solicited NAMI's bid only to use the NAMI bid to get the union contractors to lower their bids, through a process known as "bid shopping." Thus, according to NAMI, the Diocese's designation of NAMI as prequalified constituted a false statement, and then a broken promise, because the Diocese knew when bids were invited that it would not allow NAMI to do the HVAC work on the renovation project.

The Diocese contends that "prequalified" meant only that, in the initial judgment of the Diocese and its architect, the contractor appeared to have the capacity to perform the work and was therefore invited to submit a bid.

We reject NAMI's interpretation of the term "prequalified" because it contradicts the plain language of the Project Manual, which expressly reserved to the Diocese the right to reject any bid and to object to subcontractors selected by the general contractor. The "Instructions to Bidders" section of the Project Manual provided that bids would be accepted only from prequalified, invited bidders. The "Invitation to Bid" section of the Project Manual provided that "The Owner reserves the right to accept or reject any or all bids and waive irregularities in a bid." The "Instructions to Bidders" section also provided that "Owner reserves right to accept or reject any or all bids and waive irregularities in a bid."

The Project Manual also specified that the ultimate contract between the Diocese and the general contractor would incorporate "The General Conditions for the Contract of Construction," a form document prepared by the American Institute of Architects. Section 5.2.1 of the General Conditions provided that after

the contract with the general contractor is signed, the owner may, after “due investigation,” raise a “reasonable objection” to any proposed subcontractor.³ Section 5.2.2 provided that the general contractor shall not contract with subcontractors to which the owner has a reasonable objection.⁴ We note that these provisions of the General Conditions were not brought to bear in this case, because NAMI’s bid was rejected by the Diocese before Tri-North signed the contract with the Diocese. Nevertheless, these provisions provided further notice to bidding subcontractors that the Diocese retained the right to object to their participation in the renovation project, even if the general contractor would have selected them.

NAMI offers two arguments why, in spite of the statements in the Project Manual that the Diocese reserved the right to reject bids and object to subcontractors, the Project Manual nevertheless constitutes a statement or promise that the Diocese would not object to NAMI.

³ Section 5.2.1 of the General Conditions provided:

5.2.1 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after the award of the Contract, shall furnish in writing to the Owner through the Architect the names of persons or entities (including those who are to furnish materials or equipment fabricated to a special design) proposed for each principal portion of the Work. The Architect will promptly reply to the Contractor in writing stating whether or not the Owner or the Architect, after due investigation, has reasonable objection to any such proposed person or entity. Failure of the Owner or Architect to reply promptly shall constitute notice of no reasonable objection.

⁴ Section 5.2.2 of the General Conditions provided, in relevant part:

5.2.2 The Contractor shall not contract with a proposed person or entity to whom the Owner or Architect has made reasonable and timely objection.

NAMI argues first that the provisions in the Project Manual allowing the Diocese to reject bids and object to subcontractors do not apply to prequalified subcontractors. NAMI argues that the bids of prequalified subcontractors could not be rejected by the Diocese, because the subcontractors did not actually submit their bids to the Diocese. Only the general contractors submitted bids directly to the Diocese; the subcontractors submitted quotes or bids to the general contractors. Thus, according to NAMI, the Diocese could reject the bid of a general contractor for any reason, but the Diocese could not reject a prequalified subcontractor selected by the general contractor who won the contract, because the subcontractors were not “bidders” within the meaning of the Project Manual. We disagree.

NAMI’s argument again contradicts the plain language of the Project Manual. The “Instructions to Bidders” section provided that “The following list of Contractors are the only Contractors qualified to submit bids for this Project.” NAMI was among six subcontractors invited to submit bids for the HVAC portion of the work. Because the Project Manual expressly designated NAMI as one of the contractors qualified to submit a bid for the project, we reject NAMI’s contention that it was not a “bidder” subject to rejection by the Diocese.

Furthermore, under NAMI’s interpretation of the Project Manual, “prequalified” must have had two meanings, one for general contractors and another for subcontractors. According to NAMI, the Diocese could reject the bid of a general contractor for any reason, even though the general contractors were “prequalified.” On the other hand, the Diocese could not reject the bid of a prequalified subcontractor at all. Nothing in the Project Manual suggests that meaning of “prequalified” differs according to whether it is applied to a general or a subcontractor, and we reject NAMI’s interpretation of the term as unreasonable. We conclude that under the “Invitation to Bid” and “Instructions to Bidders”

sections of the Project Manual, the Diocese retained the right to reject the bids of prequalified subcontractors as well as those of prequalified general contractors.

As for the subcontractor approval provisions in section 5.2 of the General Conditions, NAMI argues that these likewise do not apply to prequalified subcontractors. NAMI points out that section 5.2.1 does not apply to the construction contract if “otherwise provided in the ... bidding requirements.” NAMI contends that the Diocese had the opportunity to object to subcontractors before prequalifying them, thus the prequalification process amounted to an alternative subcontractor approval mechanism provided in the bidding requirements that superseded the provisions of section 5.2. NAMI also argues that the Diocese’s objection to NAMI on the grounds that NAMI was non-union could not be a “reasonable objection” within the meaning of section 5.2 because the Diocese knew NAMI was non-union when it prequalified NAMI and invited its bid.

We disagree with NAMI’s argument regarding the applicability and interpretation of section 5.2 to prequalified contractors. The basic premise of NAMI’s argument on this point is that the Diocese exhausted all reasonable objections to subcontractors in the prequalification process, and thus it could have had no reasonable objection to any of the subcontractors it chose to prequalify. As we explained above, however, this is an unreasonable interpretation of the meaning of the concept “prequalified,” in light of the provisions in the Project Manual expressly reserving the right of the Diocese to reject any bid. We conclude, therefore, that section 5.2 of the General provisions provided another opportunity for the Diocese to exercise its right to disqualify a subcontractor after the subcontractor was chosen by the general contractor. We emphasize again that section 5.2 was not directly brought to bear on NAMI’s participation in the

project. The importance of section 5.2 in the current dispute is that it provided notice to the bidding subcontractors that their participation in the project was subject to approval by the Diocese even after the general construction contract was signed.

NAMI's second argument why the Project Manual constitutes a false statement that the Diocese would not object to NAMI is that the Diocese had a duty to disclose its preference for union contractors. NAMI argues that information regarding the Diocese's strong preference for union contractors was known only to the Diocese, and that NAMI had no way of independently discovering that information. Therefore, NAMI contends, "the Diocese had a duty to disclose its true decision to disqualify and object to NAMI." In support of this argument, NAMI cites a passage from *Ollerman v. O'Rourke Co.*, 94 Wis.2d 17, 30-31, 288 N.W.2d 95, 102 (1980), stating that "courts have held that the rule [of non-disclosure] does not apply ... where the facts are peculiarly and exclusively within the knowledge of one party to the transaction and the other party is not in a position to discover the facts for himself" (citations omitted).⁵

NAMI's analysis is incomplete, however, and we are not persuaded. NAMI's error is in asserting that the Diocese had a duty to disclose its preference for union contractors simply because the Diocese had this information and NAMI had no way of discovering it independently. NAMI is correct that the failure to disclose information may constitute a misrepresentation, if one has a duty to disclose that information. There is, however, no general rule that a party to a

⁵ The supreme court held in *Ollerman v. O'Rourke Co.*, 94 Wis.2d 17, 288 N.W.2d 95 (1980), that a seller of real estate has a duty, under certain circumstances, to disclose facts relating to the condition of the property to a seller who cannot discover those facts for him- or herself.

business transaction must disclose any fact that he or she knows and that the other party has no means of discovering. As explained in the RESTATEMENT (SECOND) OF TORTS § 551 cmt. a (1977):

Unless he is under some one of the duties of disclosure stated in Subsection (2), one party to a business transaction is not liable to the other for harm caused by his failure to disclose to the other facts of which he knows the other is ignorant and which he further knows the other, if he knew of them, would regard as material in determining his course of action in the transaction in question.

The circumstances under which one has a duty to disclose information relating to a business transaction are limited, and they are set out in the RESTATEMENT (SECOND) OF TORTS § 551(2) (1977), which Wisconsin courts have regularly cited. *See, e.g., Omernik v. Bushman*, 151 Wis.2d 299, 303, 444 N.W.2d 409, 411 (Ct. App. 1989). Two such circumstances seem pertinent in this case.

First, one has a duty to disclose “matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading.” RESTATEMENT (SECOND) OF TORTS § 551(2)(b) (1977). NAMI suggests that its designation as a prequalified contractor is a misleading partial statement, because the Diocese knew that it expected to disqualify NAMI because it was a non-union contractor. Comment g clause (b) explains that a partial statement of the truth is misleading “when it purports to tell the whole truth and does not.”

The Diocese’s designation of certain contractors as prequalified, however, did not purport “to tell the whole truth” regarding the Diocese’s criteria for evaluating their bids because the Project Manual notified bidders that the Diocese reserved the right to reject any bids. The only reasonable interpretation of the multiple provisions in the Project Manual providing for the Diocese’s approval

of subcontractors is that the strengths and weaknesses of the prequalified contractors would be evaluated in light of their bids. A favored candidate might have been rejected because its bid was too high, and conversely, a contractor who might have initially been considered a weak competitor could ultimately prevail on the strength of its bid. In other words, the Project Manual did not purport to be a complete statement of the criteria by which bids would be evaluated; it expressly warned prospective bidders that it was not.

Second, one has a duty to disclose “facts basic to the transaction” if the other party “would reasonably expect a disclosure of those facts.” RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1977). As Comment j clause (e) explains, a fact basic to the transaction

is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with. Other facts may serve as important and persuasive inducements to enter into the transaction, but not go to its essence. These facts may be material, but they are not basic. *If the parties expressly or impliedly place the risk as to the existence of a fact on one party or if the law places it there by custom or otherwise the other party has no duty of disclosure.*

(Emphasis added.)

We conclude that the criteria by which the Diocese would evaluate the bids of the contractors is not a fact basic to the transaction which the Diocese had a duty to disclose, especially given the provisions set forth in the Project Manual. We acknowledge that those criteria might be material to the transaction. To the extent they were known at the time bids were let, the bid selection criteria might encourage or dissuade a contractor from submitting bids. We cannot conclude, however, that the Diocese had a duty to fully disclose its selection criteria at the time it invited bids. Were we to do so, we would effectively re-write the Project Manual by emasculating the provision that the Diocese reserved the

right to reject any bid. That provision effectively notifies prospective bidders that additional, unstated criteria may be used to evaluate their bids, much like an “as is” clause in a real estate purchase contract notifies a buyer that he or she assumes the risk of non-disclosure of defects in the property. *See Omernik*, 151 Wis.2d at 303, 444 N.W.2d at 411. Given the Diocese’s reserved right to reject any bid, a prospective bidder could weigh the risk that some unstated selection criterion might auger against it, and then choose whether to submit a bid in light of that risk.

NAMI has pointed to no other authority to support its contention that the Diocese had a duty to disclose its preference for union contractors, and we have found none. We conclude, therefore, that the Diocese had no duty to disclose that it preferred union contractors, no matter when it adopted this preference.

CONCLUSION

We conclude that the Project Manual did not constitute a statement of fact that the Diocese would have no objection whatsoever to NAMI’s participation in the renovation project, nor did it constitute a promise that it would not later object on the grounds that NAMI was not unionized. The undisputed facts show that NAMI cannot establish an essential element of its misrepresentation and promissory estoppel claims, and accordingly we affirm the summary judgment in favor of the Diocese.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

