

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

May 9, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**No. 00-2195**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**SCS OF WISCONSIN, INC.,**

**PLAINTIFF-APPELLANT,**

**V.**

**CITY OF OSHKOSH,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAWLEY, Judge. *Affirmed.*

Before Brown, P.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. SCS of Wisconsin, Inc. appeals from a judgment dismissing its claim against the City of Oshkosh that the City failed to comply with competitive bidding requirements in awarding a demolition contract. The circuit court ruled that SCS's claim was barred by the failure to comply with the

notice of claim statute, WIS. STAT. § 893.80(1) (1999-2000),<sup>1</sup> and that the City did not improperly award the contract to SCS's competitor. Although we do not agree with the circuit court's ruling that the action is barred, we affirm the judgment dismissing SCS's claim.

¶2 The City solicited bids for demolition of several downtown buildings. When the bids were opened on June 15, 1999, SCS was announced to be the low bidder. DeConstruction, Inc. had also submitted a bid for the project. An alternate bid included in DeConstruction's bid envelope was not discovered and was not read when the bids were publicly opened. After the bids were opened, a consultant to the City noticed that the bids submitted by DeConstruction were not on the amended form which had been provided to bidders by facsimile on June 8, 1999. DeConstruction was contacted and informed the City's consultant that it had not received the amended bid form. On June 16, 1999, DeConstruction submitted a bid on the amended form. The demolition contract was ultimately awarded to DeConstruction based on the low bid received by the City on June 16, 1999.

¶3 SCS commenced this action and sought a preliminary injunction to prevent the demolition work from proceeding under the contract awarded to DeConstruction. The injunction was denied.<sup>2</sup> SCS filed an amended complaint seeking damages. The City moved to dismiss the action asserting for the first time that SCS had failed to comply with the notice of claim statute, WIS. STAT.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

<sup>2</sup> On August 10, 1999, this court denied SCS's petition for leave to appeal the order denying the injunction.

§ 893.80(1).<sup>3</sup> The circuit court ruled that the City had actual notice of the claim but that the itemized statement of damages required by § 893.80(1)(b) had not been provided.

¶4 The dispositive argument made by SCS is that the City is estopped from asserting the notice of claim requirement as a ground for dismissal.<sup>4</sup> The City's conduct in this litigation is much like that of the City of Milwaukee (Milwaukee) in *Oliveira v. City of Milwaukee*, 2001 WI 27, \_\_\_ Wis. 2d \_\_\_, 624 N.W.2d 117. Oliveira and others sought declaratory and injunctive relief

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<sup>3</sup> WISCONSIN STAT. § 893.80(1) provides:

Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

<sup>4</sup> SCS also argues that it substantially complied with the statutory notice requirement and that because it sought injunctive relief, it was not required to comply with the notice requirement.

against Milwaukee to prevent the rezoning of a parcel of land to permit the construction of a Jewell/Osco store. *Id.* at ¶2. On appeal, Milwaukee argued that the complaint should be dismissed because Oliveira failed to comply with the notice of claim statute. *Id.* at ¶16. The court noted that at the beginning of the litigation, Milwaukee raised the notice of claim issue but asked the circuit court to decide the case anyway because Oliveira would merely re-file the action after complying with the notice requirement. *Id.* at ¶17. The supreme court held that Milwaukee was estopped from changing its position. It concluded that the “injustice caused to the plaintiffs if they were not allowed to pursue their claim outweighs the public’s interest in a formal claim.” *Id.* at ¶20.

¶5 Here, the City did not raise the notice of claim issue during the hearings on SCS’s request for a temporary restraining order or preliminary injunction. In fact, the City argued that injunctive relief should be denied because SCS had an adequate legal remedy by seeking monetary damages. This portion of the litigation lasted seven months. When SCS filed an amended complaint seeking monetary damages, the City raised the notice of claim issue for the first time.<sup>5</sup> The City’s suggestion that SCS could not seek monetary damages was contrary to its earlier position that damages were SCS’s adequate remedy. Here, like *Oliveira*, the City invited the continuation of the litigation. The injustice in barring SCS’s action outweighs the public interest in presentation of a formal claim. The City is judicially estopped from arguing that SCS’s action is barred by failure to comply with the notice of claim provision. We do not sustain the circuit court’s determination on this issue.

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<sup>5</sup> The city attorney appeared in the circuit court during the litigation of SCS’s request for injunctive relief. The answer to the amended complaint was filed by outside counsel retained by the City.

¶6 We turn to the circuit court’s summary judgment ruling dismissing SCS’s complaint on the merits.<sup>6</sup> We review the circuit court’s grant of summary judgment using the same methodology as the circuit court. *City of Beaver Dam v. Cromheecke*, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principle is that when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. *See id.*; WIS. STAT. § 802.08(2).

¶7 SCS does not dispute the historical facts regarding when the bids were due and opened, and how DeConstruction’s successful bid was solicited and faxed to the City.<sup>7</sup> It argues that WIS. STAT. § 62.15 limits the City’s power to reject a low bid which complies with the published specifications, especially when the bid accepted was not read during the opening process. It also claims that the circuit court applied the wrong legal standard by requiring proof of fraud to challenge the City’s decision to award the contract to DeConstruction. SCS contends that the facts give rise to an inference of favoritism such that the City’s decision, if imbued with discretion, was arbitrary, capricious and unreasonable.

¶8 While WIS. STAT. § 62.15 sets the parameters of a municipality’s obligations in the public bidding process, a municipality is also vested with discretion to act within its best interests. *See* § 62.15(5) (common council may reject bids “if it be of the opinion that any of the bids are fraudulent, collusive,

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<sup>6</sup> We need not address SCS’s claim that the circuit court should not have addressed the merits of the amended complaint after ruling that the failure to comply with the notice of claim statute barred the action.

<sup>7</sup> SCS’s brief largely ignores the historical facts to the point of hoodwinking this court as to the factual circumstances.

excessive or against the best interests of the city”). Indeed, the City’s invitation to bidders reserved the “right to reject in whole or in part any and all bids, to waive any formalities, to negotiate final costs, and to accept the bid determined to be the most advantageous to the City of Oshkosh.” The proper standard for reviewing the City’s exercise of discretion under this reservation to waive formalities is whether its decision to do so was “arbitrary or unreasonable.” *Glacier State Distr. Serv., Inc. v. DOT*, 221 Wis. 2d 359, 368, 585 N.W.2d 652 (Ct. App. 1998). This standard “fosters a ... balanced atmosphere, where courts, while still paying considerable deference to the authority’s exercise of discretion in administering the bidding process, would still retain the ability to ensure that the public is protected from unreasonable, capricious or biased actions.” *Id.* at n.8.

¶9 Here, the City chose to waive the formality that the bid be provided on the amended form and that certain totals be provided in the bid. DeConstruction was contacted to clarify the alternate bid, albeit that bid was not read at the public bid opening. Examination of the alternate bid was not arbitrary because the bid was not discovered by the City’s own oversight. Seeking clarification of that bid was deemed advantageous to the City and was within the City’s discretion to do so since it advanced the public interest in obtaining the most reasonable price possible. This is not a mark of favoritism but of negotiation for the City’s advantage. Once the bid was clarified and it was determined that DeConstruction was the low bidder, awarding the contract to DeConstruction was not a violation of the public bidding law. The City proceeded in neither an arbitrary nor an unreasonable manner.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE  
809.23(1)(b)5.

