

15-0635

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CATHY S. GATSON, CLERK PC
KANAWHA COUNTY CIRCUIT COURT

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MAYNARD C. SMITH CONSTRUCTION COMPANY, INC.,
a West Virginia corporation,
Plaintiff,

v.

Civil Action No. 15-P-157
(Judge Bailey)

DAVID TINCHER, Director of the Purchasing Division of the
Department of Administration;
WEST VIRGINIA LOTTERY COMMISSION, a public corporation;
JOHN C. MUSGRAVE, Director of the West Virginia Lottery;
JASON PIZATELLA, Cabinet Secretary of the Department of Administration;
ROBERT S. KISS, Cabinet Secretary of the Department of Revenue; and
WISEMAN CONSTRUCTION CO., INC., a West Virginia corporation,
Defendants.

ORDER

Pursuant to the April 22, 2015, Rule to Show Cause and Order, the parties appeared on Thursday, April 30, 2015. Plaintiff Maynard C. Smith Construction Company, Inc. ("MCS") was represented by John Philip Melick and Nicklaus A. Presley, Jackson Kelly PLLC; defendants Tincer, Musgrave, Pizatella, Kiss, and the West Virginia Lottery Commission (collectively "State") were represented by Kelli D. Talbott, Senior Deputy Attorney General; and defendant Wiseman Construction Co., Inc. ("Wiseman") was represented by James M. Cagle.

The parties agreed that many of the facts proffered through the verified complaint were uncontroverted. MCS suggested that the remaining issues to be developed were principally the provenance of the bidding instructions and forms and the use, if any, made of references. Upon further discussion with the parties, each of whom expressed a desire for prompt resolution, the Court determined to take evidence. The State called two witnesses, defendant Tincer and Danielle E. Boyd, Managing General Counsel to the defendant Lottery, each of whom was examined by the parties and the Court. As this testimony substantially resolved the outstanding issues of fact, and no party requested the opportunity to present additional evidence, the Court advised that it would take the matter under advisement and rule promptly.

Thereafter, on May 1, 2015, the Court directed its staff to advise all of the parties of its determination that the plaintiff should prevail. As routinely practiced, the prevailing party was also requested to submit a "proposed order" with findings of fact and conclusions of law in a format for revision by the Court. The proposed order was submitted on May 5, 2015 pursuant to Trial Court Rule 24.01(c), giving opposing parties 5 days to submit objections.

On May 11, 2015, the State Defendants filed objections to the proposed order, including five typewritten pages citing at least 19 exceptions to the "proposed order". The Defendant Wiseman filed a Motion for Amendment of Judgment which the Court has considered as objections since there was no judgment to "amend". At least 12 objections were raised in that pleading.

Upon further reflection, and in considering the magnitude of the issues and objections raised by opposing counsel to the "proposed order", the Court determined to carefully consider the testimony and arguments presented at the April 30 hearing and to review all statutes, legislative rules and case law relevant to any and all arguments advanced by the parties. The Court has also listened to the recording of the nearly four (4) hour hearing before the Court.

Indeed, the Court has proceeded cautiously to determine whether its initial determination, that the record was totally devoid of any rational basis upon which the State Defendants made a decision to "disqualify" the lowest responsible bidder in response to the bid solicitation in issue in this proceeding, was supported by both the evidence and the applicable law.

As set forth below, after thorough review and deliberation, the Court is of the opinion that the State Defendants have engaged in a decision making process that has no rational basis in fact and is, therefore, contrary to the laws of this State.

Findings of Fact

1. MCS is a West Virginia corporation with its principal place of business in Charleston, Kanawha County.

2. Defendant Tincher is now and at all material times has been Director of the Purchasing Division of the Department of Administration, State of West Virginia (“Purchasing”), appointed under W. Va. Code § 5A-1-2, authorized and responsible to conduct procurements under W. Va. Code §§ 5A-3-3, *et seq.*

3. Defendant Lottery is a public agency established and subject to W. Va. Code §§ 29-22-1, *et seq.*, authorized to enter into the contract at issue pursuant to W. Va. Code § 29-22-5(a)(10).

4. Defendant Musgrave is now and at all material times has been the Director of the Lottery, appointed under W. Va. Code § 29-22-6.

5. Defendant Pizatella is now and at all material times has been the Cabinet Secretary of the Department of Administration, State of West Virginia, and has control and supervision over Purchasing and is responsible for the work of each of its employees, including defendant Tincher.

6. Defendant Kiss is now and at all material times has been the Secretary of the Department of Revenue, State of West Virginia, and has control and supervision over the defendants Lottery and Musgrave pursuant to W. Va. Code § 5F-2-1(j)(3).

7. Defendant Wiseman is a West Virginia corporation with its principal place of business in Charleston, Kanawha County.

8. Purchasing, on behalf of the Lottery, solicited competitive proposals for the provision of specified construction work on the Lottery’s headquarters at 900 Pennsylvania Avenue, Charleston, which it designated as CRFQ LOT1500000004.

9. Pursuant to CSR § 148-1-6.2.2 (“Bidders shall submit their bids or proposals prior to the date and time of the bid opening on the Request for Quotation (‘RFQ’) forms provided by the Director to the bidders.”), each of six bidders submitted bids using the specified “BID FORM” published by Purchasing for CRFQ_LOT1500000004. MCS timely submitted the lowest responsive proposal, with the next-lowest, that of Wiseman, exceeding MCS’s by \$174,000.

10. After having Rebecca Jones, Lottery Procurement Officer, review the proposals submitted, defendant Musgrave signed a written memorandum recommending an award to MCS.

11. On March 9, 2015, Ms. Jones sent to Evelyn Melton, Purchasing’s assigned Buyer for the project, a copy of defendant Musgrave’s written memorandum, confirming Lottery’s recommended award to Smith.

12. On March 10, 2015, Ms. Melton wrote a letter to MCS, stating, “You are the apparent successful bidder on the requisition listed above, and you will be issued a contract provided all the necessary documents are forwarded to the Purchasing Division and the purchase order is approved by the proper authorities.” The letter requested nine specific items, including performance, maintenance, and payment bonds, insurances, and a current contractor’s license, but made no mention of the need for any references.

13. MCS submitted all of the specified items requested by Purchasing in its March 10, 2015 letter, and received no additional requests or communication from Purchasing until April 6, 2015, when it received in the mail Purchasing’s April 3, 2015, correspondence stating that the contract would instead be awarded to Wiseman.

14. Between the March 10, 2015 initial award letter from Purchasing to MCS, and its April 6, 2015 receipt of the notice of its “disqualification”, MCS later learned:

(a) On March 19, 2015, Wiseman sent electronic correspondence to Ms. Melton “to formerly [*sic*] request that the bid from [Smith] (attached) be disqualified. MCS did NOT submit a Qualification Statement per the Instructions to Bidders (attached).”

(b) On March 23, 2015, three Lottery employees, but not including Ms. Jones, were asked by defendant Musgrave to “review all bidding documents to identify mandatory requirements and subsequently review the responses submitted by the bidders to identify the bidder meeting all mandatory requirements for the lowest cost.” Each of the three separately completed and signed a comparative analysis of the MCS and Wiseman bids using an *ad hoc* form prepared for that purpose, and all three then signed page 2 from a document entitled “Instructions for RFQ Review.” The three individuals concluded that, “Wiseman is recommended for contract award unless the Purchasing Division advises otherwise.” Several days later these three individuals signed a “Certification of Non-Conflict of Interest” which was submitted to Purchasing. On March 30, 2015, Ms. Jones added her signature, even though she had already signed the same form on March 4 in conjunction with the recommended award to MCS and was not involved in the comparison of the MCS and Wiseman proposals.

(c) On March 24, 2015, defendant Musgrave sent a “MEMORANDUM” to Ms. Melton, copied to defendant Tinchler and Purchasing’s General Counsel, concerning “[t]he Lottery’s supplementary review of the six (6) bid submissions ... and recommends the contract be awarded to” Wiseman.

(d) On March 27, 2015, Ms. Melton signed an “Award Justification”¹ stating that, [MCS] submitted the lowest bid but upon review by the Agency the Vendor failed to include the mandatory References with their bid.

¹ Under § 7.2.17 of Purchasing’s VENDOR PROCUREMENT GUIDE (September 2014), “After a proper evaluation, if an award is made to other than the lowest responsible bidder, a thorough written justification signed by the evaluator(s) must be inserted into the file and retained for public record and inspection.”

...

[Wiseman] submitted the second lowest bid that meets all required specifications. Since the lowest bidder, [MCS] was disqualified, the Agency's recommendation is to award the contract to [Wiseman].

(e) On April 3, 2015, Purchasing issued a notice of award and purchase order to Wiseman. All bidders except MCS received notifications on that day by facsimile. MCS received the correspondence by mail on April 6, 2015.

15. On April 7, 2015, MCS delivered a protest and FOIA request to defendant Tincher, Purchasing, and the Lottery. MCS requested that the notices of award, purchase orders, and encumbrances to Wiseman be rescinded, and then reissued to MCS. MCS further requested a hearing on its protest at the earliest opportunity, in the event that its protest was not granted immediately, and all other relief to which MCS might be entitled.

16. On April 7, 2015, defendant Tincher requested Wiseman to cease and desist further work until further notice, noting MCS's protest.

17. On April 15, 2015, MCS supplemented its protest, reiterating its request for a hearing in the event the protest was not granted on its face.

18. On April 21, 2015, defendant Tincher denied MCS's protest without a hearing, and advised Wiseman that it could proceed.

19. MCS instituted this action on April 22, 2015, upon review of which the Court issued that day its Rule to Show Cause and Order.

20. Purchasing's January 16, 2015, Bidding Documents, § 00100 ("Instructions to Bidders") stated at page 00100-3 in § 1.03.C that "Bidders shall use complete sets of Bidding Documents in preparing Bids." The Instructions to Bidders also included at page 00100-5:

1.07 Qualification Statement

A. The qualified Contractor shall have completed a minimum of three (3) projects consisting in part or in whole of building entrance and door replacement including selective demolition, carpentry, installation of replacement door frames, door and door hardware, remedial room finishing, and other related construction operations similar to those required on this project. **All bidders** shall include at least three (3) references indicating their having completed the three projects as detailed above. References should include the name, location, ownership, and use of the building in addition to the name, address and telephone number of a contact person with the building's owner familiar with the work completed by the Contractor. The Proposal Form includes a section in which the references should be listed.

21. Notwithstanding Purchasing's instruction, neither "SECTION I" nor "SECTION II" of Purchasing's specified "BID FORM" (pages 00300-1 through -3) included a "section in which the references should be listed," nor any other place where such information was invited or could reasonably have been provided. Nor was any information concerning references among the specified "REQUIRED DOCUMENTS" or otherwise addressed in Purchasing's published requests for quotations.

22. Both MCS and Wiseman, as well as the four other bidders on this project -- The Neighborgall Construction Company, Jarrett Construction Services, Inc., BBL-Carlton, L.L.C., and Danhill Construction Company -- are experienced contractors who have bidding histories with the State.

23. Wiseman, Neighborgall, and Jarrett submitted references on documents which were not a part of the mandatory bid form or required documents provided by Purchasing. Wiseman included a list of Reference ## 1, 2, and 3 on a form not familiar to the Director of Purchasing but apparently taken from page "6" of some form of bid package, listing the names and contact numbers of several architects associated with other projects on which Wiseman had worked. Such a form was *not* included, either as page "6" or otherwise, in the Bidding Documents published by Purchasing for the subject CRFQ LOT1500000004 and did not contain

all of the information requested in the Qualification Statement. Neighborgall and Jarrett provided references on their own stationery. MCS, Danhill, and Carlton submitted their proposals with the specified "BID FORM" without any information concerning references.

24. Wiseman's "Reference #1" concerned a project involving "Exterior Historical Renovation / Restoration incl. Roofing," and not a project for "building entrance and door replacement including selective demolitions, carpentry, installation of replacement door frames, door and door hardware, remedial room finishing, and other related construction operations" as described in the instructions for the subject CRFQ_LOT1500000004.

25. In evaluating the bids and in determining the lowest responsible bidder, the State did not even notice its mistake in the mandatory bid package forms, or the omission of references from half of the bid submissions, until the issue was raised by Wiseman after the apparent successful bidder was MCS.

26. Though perhaps laudable on its face to have "references", it is significant that neither Purchasing nor the Lottery or anyone else has ever contacted the "references" submitted by Wiseman or otherwise made any use of that information other than in response to Wiseman's request to disqualify MCS.

27. According to the Defendant Tincher, the request for references is not typically practiced but may be used to assure a "qualified" bidder for a project in issue.

28. Defendant Tincher could recall no other vendors being disqualified for not including references in a bid package, but since it was requested by the Lottery, who was also tasked with reference checks, in his opinion it was a mandatory requirement and not a "minor irregularity" which he had authority to waive.

29. Defendant Tincher agreed that a bad reference may not disqualify a vendor.

30. None of the “references” listed by Wiseman in the bid package were ever contacted, even during the “review process”.

31. The only “reference” ever consulted by any of the State Defendants was the Project Architect, Rodney Pauley, of ZMM, who worked on the project manual and other documentation (over 700 pages) which was part of the bid package. Mr. Pauley, consulted on March 23, 2015 (during the “review” process) indicated he was familiar with the work of both MCS and Wiseman, and they were both qualified to do the work required for the project.

32. Neither the Lottery nor Purchasing could specifically explain who requested that the 3 references be placed in the bid documents or why they were requested for this project.

33. Neither of the other two of the three vendors who did not include references, including BBL Carlton Construction, the third lowest bidder, were disqualified.

34. Neither State Defendant asserts and the Court finds no need for references in evaluating competitive, fixed priced proposals for an architect-designed and supervised, specification-based construction project to be performed by a license contractor, subject to performance, maintenance, and payment bonding.

35. Upon the Court’s inquiry, the State advised through Defendant Tincher at the April 30, 2015 hearing that any rebidding of the project could take six or up to eight weeks.

Conclusions of Law

1. This Court has subject matter jurisdiction pursuant to W. Va. Code §§ 53-1-2, 53-5-4, and 55-13-1, and venue is proper pursuant to W. Va. Code § 56-1-1.

2. To invoke the extraordinary remedy of mandamus the plaintiff must show (1) a clear right to the relief sought; (2) a legal duty on the part of the respondent to do the thing the relator seeks; and (3) absence of another adequate remedy. Syl. Pt. 2, Myers v. Barte, 279 S.E. 2d 406 (W. Va. 1981).

3. It has long been recognized that “(a)n unsuccessful bidder, who has been unlawfully deprived of a contract by agency action under state purchasing statutes has standing to prosecute an action in mandamus to require that the contract be awarded to him or for an injunction to enjoin violation of the requirement that contracts be awarded to the lowest responsible bidder.” Syll. Pt. 1, State ex rel. EDS Fed. Corp. v. Ginsberg, 163 W. Va. 647, 259 S.E.2d 618 (1979).

4. A state agency which awards a public contract upon criteria other than price is clothed with a heavy presumption that the contracting agency has properly discharged its duties and exercised discretionary powers in a proper and lawful manner; accordingly, the burden of proof in any action challenging the award of a contract by an unsuccessful bidder of a taxpayer is upon the challenger who must show fraud, collusion, or such an abuse of discretion that is shocking to the conscience. Syll. Pt. 2, Ginsberg.

5. A bidder who expends time, effort and resources to respond to a complex proposal created and offered by state agencies “has a right to rely upon both the contracting authority’s integrity and intelligent use of discretion”. Ginsberg 163 W. Va. 647, 659.

6. In reviewing the process by which State agencies review bids and determine who is the rightful, lowest responsible bidder the Court is guided by “the rationality of the process by which the results are determined and the fidelity with which the contracting authority is following statutory directives.” Ginsberg 163 W. Va. 647, 660.

7. The West Virginia Supreme Court of Appeals has emphasized that the process of making decisions on bids for public contracts should be a rational one. This Court has determined that the process by which MCS was disqualified was not rational, as it was based upon an ambiguous “requirement” set forth in the bid documents that was of no consequence in

the stated goal of the State Defendants which was to assure the work was performed by a qualified, responsible vendor.

8. In considering the Ginsberg factors, this Court, (as previously indicated to the parties after hearing testimony), does not find fraud or collusion on the part of the defendants; however, the State Defendants have failed to take any responsibility for the fact that they created a “requirement” in the bid solicitation documents that has no rational explanation and no form for such information was provided in the mandatory bid documents for the vendors to properly complete. The only basis given for the “reference” requirement is that it was “mandatory” and that “shall” means “shall”.

9. The Legislature has not statutorily authorized, nor has Purchasing promulgated rules, under which references are to be sought or utilized in the evaluation of competitive bidding on construction projects. *Cf.*, W. Va. Code §§ 5A-3-3 to -5; CSR §§ 148-1-1, *et seq.* There is no mention of “ references” in the “Vendor Procurement Guide” (September 2014), “Agency Master Terms and Conditions” or AIA A101-2007 and A201-2007 mentioned therein (04/13/2015), or “Purchasing Master Terms and Conditions” (04/13/2015), each published on Purchasing’s website.

10. It is fundamentally unfair for State agencies to pit qualified, sophisticated well-established businesses against one another to argue about the purpose of language in bid documents that no one in charge can explain where the language came from or why it was there or how vendors were supposed to furnish it, and even upon the review of bids, was never utilized or relied upon. It is indeed this conduct that is shocking to the conscience of the Court.

11. The plaintiff in this case has clear right to the relief sought as set forth in Ginsberg. The plaintiff has established through the uncontroverted and overwhelming weight of

the evidence that the process utilized by the State Defendants in disqualifying the plaintiff as a bidder for the construction project in issue was fatally flawed.

12. Further, the State Defendants have a legal duty to assure that the processes by which bid documents are reviewed and awards are made are done in a manner that assures the integrity of the process without an abuse of discretion that results in an outcome not supported by any factual rationale or legal authority.

13. The Code of State Rules governing the Purchasing Division of the Department of Administration, CSR §§ 148-1-1, et seq. “is an explanation and clarification of operative procedures” of the agency.

14. Specifically, CSR §148-1-4.6 authorizes the Director to “waive minor irregularities in bids or specifications when the Director determines such action to be appropriate”. In this case, the Director determined he had “no authority” to determine that the “mandatory requirement” for references to be waived as he deferred to the Lottery’s discretion to include that “requirement”. Based upon the evidence, and the lack of any rationale in requiring vendors to include three references for this project, this Court finds it was indeed within the discretion of the Director to waive this unexplained anomaly in the bid documents.

15. This is not a matter of a Court deciding what would best suit the needs of a state agency, in this case, the Lottery. This Court finds that the State Defendants’ decision to disqualify MCS and to award the contract to Wiseman is completely irrational and has no support in the statutory law, the enacted code of the state rules or any precedent in any state or federal court. See generally, Mid Atlantic Storage Systems, Inc. v. Town of Milton, et al., 903 F. Supp. 995 (S. D. W. Va. 1995).

16. MCS is a qualified, responsible and disappointed bidder whose proposal conformed to all lawful, rational requirements of the bidding process.

17. This Court finds that the proper remedy for a procedural defect as occurred in the underlying facts of this case is to restore the parties to the position they were in before the chain of events resulted in the disqualification of MCS. There is no other adequate remedy at law. Rebidding of the project is not in the public's best interest and does not provide an adequate remedy to the prevailing party in this action.

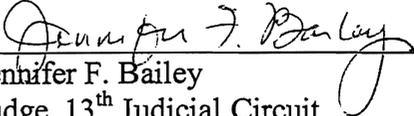
Accordingly, it is hereby ORDERED that the State Defendants are mandated, as soon as practicable, to take the necessary and proper steps to award the purchase order and contract for CRFQ_LOT1500000004 to MCS. Any notice of an award, purchase order or contract to any other vendor respecting the subject bid solicitations shall be void and of no force and effect.

This is a final order. The objections and exceptions of the defendants are noted and preserved.

Each party is to bear their own costs and attorneys' fees associated with this action.

The clerk shall forward certified copies of this Order to all counsel of record.

ENTERED this 22nd day of June, 2015.



Jennifer F. Bailey
Judge, 13th Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 22nd
DAY OF JUNE 2015

Cathy S. Gatson, Clerk
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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MAYNARD C. SMITH CONSTRUCTION
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Petitioner/Plaintiff,

v.

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(Judge Bailey)

DAVID TINCHER, Director of the Purchasing
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WEST VIRGINIA LOTTERY COMMISSION,
a public corporation; JOHN C. MUSGRAVE,
Director of the West Virginia Lottery; JASON
PIZATELLA, Cabinet Secretary of the Department
of Administration; ROBERT S. KISS, Cabinet
Secretary of the Department of Revenue; and
WISEMAN CONSTRUCTION CO., INC., a
West Virginia Corporation,

Respondents/Defendants.

**DEFENDANT WISEMAN CONSTRUCTION CO., INC'S
MOTION FOR AMENDMENT OF JUDGMENT**

Comes now the Defendant Wiseman Construction Co., Inc and moves the Court pursuant to Rule 59(a) and (c) to amend its judgment and make new findings and conclusions and direct the entry of a new judgment in this action. As grounds Wiseman submits the following:

1. The Defendant has received the Petitioner/Plaintiff's proposed Judgment Order. Said order was submitted under the provisions of Trial Court Rule 24.01(c).

Accordingly, counsel is uncertain whether the Court directed the findings as written or the Plaintiff by its counsel has chosen to interpret a favorable ruling in the most favorable way i.e. by adopting language and conclusions which counsel, not the Court, has chosen.

2. At the hearing undersigned counsel made known that a dispute exists concerning the law to be applied. This Defendant asserts that the decision in State ex rel E.D.S. Federal Corp. v. Ginsberg, 259 S.E. 618 (1979) controls the outcome of this matter. More particularly, the public officials who made the decision to award Wiseman this contract were vested with wide discretion, Ginsberg, syl. p. 2. And, in order to prove that the State has not acted properly in discharging its discretionary duties the Plaintiff must show fraud, collusion, or such an abuse of discretion that shocks the conscience, Ginsberg, syl. pt. 2.

3. The Court stated at the conclusion of the April 30 hearing that the Court found “no suggestion of collusion or fraud.”

4. The proposed order makes no mention of a finding that the instant decision by State Officials was an abuse of discretion that shocks the conscience. Counsel submits that there is no evidence which would support such a finding and conclusion and the record as it would exist upon the entry of the proposed order contains no such finding.

5. The basis for this Court’s ruling as it is currently proposed is that the decision to award the contract to Wiseman was not “rational,” Plaintiff’s paragraphs 34, 35 (quotation marks included).

6. The further basis for this Court’s ruling as it is currently proposed is also said to be W.Va. Code §29A-5-4, Plaintiff’s paragraph 34. This statute governs appeals from contested cases. Those appeals follow administrative hearings and therefore has no application to the instant case.

7. While the proposed order cites cases in paragraph 34, neither of which is binding precedent and one is a Circuit Court decision, these cases are inapposite. In Mid Atlantic

Storage Systems, Inc., v. City of Milton, 903 F. Supp. 995 (1995), what the Court determined was “irrational” was the City’s decision to require rebidding. Moreover, the Court ordered that the City of Milton should determine whether to award the contract based on original specifications or reject all bids. The City was not ordered to select the Plaintiff as the current order proposes. In the Schindler case the decision was based on the *failure to have a raised corporate seal on its bid bond*. Further, while not determinative in this case, the order as entered in Schindler notes that W.Va. Code §29A-5-4 was not considered, but was offered as an alternative theory.

8. The testimony of Lottery Commission counsel Danielle Boyd was clear and convincing that the Lottery Commission viewed the requirement of three references to be **mandatory**, that mandatory is considered a basic tenet of purchasing, and that it is designed to promote the integrity of the process, therefore it cannot be waived. Further, Ms. Boyd’s testimony was that the Lottery representatives had spoken to the architect for the project before selecting Wiseman and the architect had confirmed his familiarity with Wiseman and verified Wiseman’s experience.

9. It was also the testimony of Ms. Boyd that the term “qualified” as used in the context of a qualified bidder means a bidder who satisfies all of the mandatory requirements for the bid. In the instant case under these facts the Plaintiff was not a qualified bidder as argued by Plaintiff.

10. In the proposed order, paragraph 35 the Plaintiff offers as a ruling by this Court that the burden was on the State to prove a rational basis for requiring a list of three references. In offering this ruling Plaintiff cites the West Virginia Contractor’s Licensing Act. It

is neither the State's burden under the applicable law, even as relied upon by the Plaintiff, nor is it factually accurate. The reason for the mandatory requirement in this case was to determine the bidder's experience in similar projects. The reason was so indicated in the bid documents.

11. The proposed order does not refer to whether the order is intended to be one which is an injunction, whether preliminary or permanent, or mandamus, or both. Further, the order does not reflect that it is intended to be a final order as it omits the language which so states.

WHEREFORE, the Defendant Wiseman Construction Co., Inc moves the Court to amend its order as proposed to address the following:

1. Whether this Court's decision finds an abuse of discretion which shocks the conscience as required by Ginsberg.
2. How the decision to award the contract was not rational.
3. Whether the rational standard is the sole basis for the decision.
4. Whether and how W.Va. Code §29A-5-4 applies as a basis for the decision.
5. Whether the State has the burden of proving that its decision was rational.
6. And alternatively enter an order which denies relief to this Plaintiff as failing to satisfy the burden of proof under Ginsberg.

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CERTIFICATE OF SERVICE

The undersigned, Counsel for the Defendant Wiseman Construction Company, Inc., does hereby certify that a true and correct copy of the *Defendant Wiseman Construction Co., Inc's Motion for Amendment of Judgment* was served via e-mail to Kelli D. Talbott, Senior Deputy Attorney General and John P. Melick, Esq. on this the 11th day of May, 2015.

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Def
COPY

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**STATE DEFENDANTS' OBJECTIONS TO
PETITIONER'S PROPOSED JUDGMENT ORDER**

Come now the State Respondents/Defendants, by counsel, Kelli D. Talbott, Senior
Deputy Attorney General, and Greg S. Foster, Assistant Attorney General, pursuant to TCR Rule
24.01, and hereby submit their objections to the Proposed Judgment Order submitted by
Petitioner on May 5, 2015 (hereinafter "Proposed Order").

OBJECTIONS

1. **Paragraph 13** of the Proposed Order provides that "MCS submitted all of the
specified items requested by Purchasing..." The State Defendants object to this language
because it does not accurately reflect the facts. It is undisputed that Petitioner failed to include

three (3) references as required by the Qualification Statement. However, the Court ruled that Petitioner's noncompliance did not justify disqualification in this instance. The State Defendants request that this language be removed or revised for accuracy.

2. **Paragraph 28** should be removed in its entirety because it is immaterial. A statement regarding Wiseman's "Reference #1" is entirely irrelevant to the Court's ruling. It is unclear what purpose is served by including this in the order.

The State Defendants also take issue with the last sentence in Paragraph 28 which provides that "[i]n any event, at no time has Purchasing, the Lottery, or anyone else contacted the 'references' submitted by Wiseman or otherwise made any use of that information other than to rationalize the disqualification of MCS." Whether or not Wiseman's references were contacted is immaterial to the Court's ruling, as the State Defendants are not required to contact references. At a minimum, the State Defendants request that the last half of the last sentence, where it provides "or otherwise made any use of that information other than to rationalize the disqualification of MCS", be removed. This language is unnecessary, inflammatory and unfairly representative of the State Defendants' actions. The State Defendants did not "rationalize" the disqualification of Petitioner. The State Defendants, acting in good faith, disqualified Petitioner due to a noncompliant bid.

3. **Paragraph 30** should be removed because it is an overly broad statement on the materiality of references for State construction projects. The issue decided by the Court should be limited to the unique facts of this case. A broad statement which provides that references are never material in similar bid proposals is improper and erroneous. Indeed, references may be very relevant and properly required for similar projects, and the State has a right to require

bidders to provide references. Whether references are material should be limited to a case-by-case analysis.

4. **Paragraph 31** incorrectly states that David Tincher testified that any rebidding would take “at least two months.” This should be corrected to reflect Mr. Tincher’s actual testimony, that rebidding would take six (6) to eight (8) weeks.

5. **Paragraph 34** is problematic on a procedural and decisional level. It is unclear in the Proposed Order what legal basis and procedural/statutory vehicle is being utilized to award the contract to Petitioner. This troublesome ambiguity permeates throughout the entire Proposed Order. Pursuant to *State ex rel. E.D.S. Federal Corp. v. Ginsberg*, 259 S.E.2d 618 (W. Va. 1979), the “the burden of proof in any action challenging the award of a contract by an unsuccessful bidder...is upon the challenger who must show fraud, collusion, or such an abuse of discretion that it is shocking to the conscience.” *Ginsberg* at Syl. Pt. 3. There is no evidence or allegation of fraud or collusion in this case, nor does the Proposed Order make a finding that the actions of the State Defendants were “such an abuse of discretion that it is shocking to the conscience.” As such, the Proposed Order fails to apply the appropriate legal standard required to grant relief.

Paragraph 34 also erroneously includes a reference to the State’s Administrative Procedures Act in W. Va. Code § 29A-5-4. This is not a judicial review of a contested case and thus W. Va. Code § 29A-5-4 is inapplicable. This language should be removed.

Petitioner filed this action seeking a Writ of Mandamus to compel the State to award Petitioner the contract. Yet, the Proposed Order fails to provide that the Court is granting a Writ of Mandamus. Without issuing a Writ of Mandamus, it is unclear what statutory authority this

Court is acting under to compel the State to award the contract to Petitioner. In this respect, the Proposed Order is fundamentally flawed.

In sum, the statutory authority used by this Court to grant relief and the legal justification therefor is ambiguous in the Proposed Order. The Court's ruling on these issues must be clear and decisive, and the Proposed Order should be revised accordingly.

6. **Paragraph 35** is objectionable for the same reasons as Paragraph 30 (see ¶ 3, *supra*) and Paragraph 34 (see ¶ 5, *supra*). Paragraph 35 is an overly broad statement regarding the materiality of references for State construction projects. Any holding related to the materiality of references should be limited to the unique facts of this case.

Also, Paragraph 35 states that there is no rational basis for requiring references. This is not the proper legal standard that is set forth in *Ginsberg, supra*. The Proposed Order should be revised to comply with *Ginsberg*.

7. **Paragraph 36** cites to CSR § 148-1-4.6, which provides that Mr. Tincher (as Purchasing Director) shall waive minor irregularities. The relevancy of Paragraph 36 is unclear. Is the Court holding that the Petitioner's failure to submit references should be waived as a minor irregularity? Or is the ruling based on the *Ginsberg* standard? Are these two intertwined? It is unclear what legal standard the Court is applying and which facts the Court is relying upon to support its ruling. The Proposed Order merely provides a potpourri of Petitioner's arguments without specifically identifying the actual legal basis for the Court's ruling.

8. **Paragraph 37** is objectionable and should be removed because it is irrelevant to the Court's ruling. It is unclear what purpose is served by including this paragraph in the Proposed Order.

9. **Paragraph 39** is objectionable and should be removed because it overreaches and conclusively assumes that rebidding would harm the public interest. No evidence was presented that rebidding would be harmful to the public interest. Further, Paragraph 39 again includes overly broad language that assumes that references are always immaterial for State construction projects. Any holding related to the materiality of references should be limited to the unique facts of this case.

The last sentence in Paragraph 39 incorrectly asserts that re-bidding will “deprive the State of the benefit of good faith competition...” No evidence was submitted to support this assertion, and in fact, the State would argue that rebidding helps promote good faith competition and is beneficial to the taxpayers.

10. **Paragraph 40** is objectionable because it implies that Mr. Tincher willfully disobeyed his duties as purchasing director. There is no evidence to suggest that Mr. Tincher did not perform his duties in good faith. Further, Paragraph 40 is conclusory and fails to clarify why Petitioner’s protest should have been granted. It is another example of the Proposed Order’s ambiguity with respect to the legal justification for awarding the contract to Petitioner.

11. Finally, the State Defendants request that the Proposed Order be revised to specifically provide that each party is to bear their own costs and attorneys’ fees associated with this action.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Kelli D. Talbott, Senior Deputy Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing *State Defendants' Objections to Petitioner's Proposed Judgment Order* was served by hand delivery this 11th day of May, 2015, addressed as follows:

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