

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**Astar Abatement, Inc.,
Petitioner Below, Petitioner**

vs) No. 12-0135 (Cabell County 11-C-264)

**Marshall University Board of Governors
and Stephanie Smith, Director of Purchasing,
Respondents Below, Respondents**

FILED

May 17, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Astar Abatement, Inc. (“Astar”), by counsel Charles M. Johnstone, II and Sarah A. Stewart, appeals the Circuit Court of Cabell County’s “Final Order,” entered December 28, 2011, that denied Astar’s petition for a writ of mandamus against respondents, the Marshall University Board of Governors and Stephanie Smith, Director of Purchasing (together denoted “MU”), for their alleged failure to find Astar to be the lowest responsible and responsive bidder for a contract to provide asbestos abatement and demolition services at Marshall University. MU, by counsel Jendonnae Houdyschell, filed a response in support of the circuit court’s order. Astar filed a reply.

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Rules of Appellate Procedure.

On November 29, 2010, respondents issued a “Request for Bids” (“RFB”) for an open-ended “Asbestos Abatement Contract MU” (“contract”) worth more than \$25,000. The RFB stated that MU sought “to establish an open-ended contract for on-call service, to be used on an as-needed basis, to remove and/or encapsulate Asbestos Containing Materials and to provide building/structural component demolition.” The contract was for a period of one year, with the option to extend for up to five years.

The RFB required bidders to submit unit prices for 302 bid items within twenty-seven categories. The RFB apprised bidders that MU would evaluate the bids based on “unit price.” Both Astar and Master Mechanical Insulation, Inc. (“MMI”)¹ timely submitted their bids in December of 2010. Astar claims that it submitted the lowest unit price bid for 205 of the 302

¹ Astar contends that MMI ceased to exist on December 22, 2010, and, from that date forward, became Atlantic Plant Services, Inc. and/or Burmeck Industries, Inc.

required items and had a total unit price bid of \$4,092.54. Astar claims that MMI had the lowest unit price on 97 of the 302 items and had a total unit price bid of \$7,039.29.

MU states that its RFBs are governed by West Virginia Code §§ 18B-5-3 to -7 and its purchasing policy, Policy No. FA-9. MU adds that it follows the guidelines found in the West Virginia Higher Education Policy Commission's *Purchasing Procedures Manual*, although it is not required to do so.

MU evaluated the bids two ways: first, by evaluating the unit-prices within categories; and second, by applying the unit prices to nine scenarios that represented actual, past MU projects. Six of the nine scenarios involved asbestos remediation; the remaining three involved demolition. Respondent Stephanie Smith and Brian Carrico, Marshall University's Director of Health and Safety, found MMI to be the lowest responsible and responsive bidder. On January 7, 2011, MU notified all bidders it was recommending that MMI be awarded the contract.

Astar filed a protest on January 14, 2011. At a February 1, 2011, meeting on Astar's protest, Astar was told that the award to MMI would be upheld and that 75% of the work under the contract would be demolition-related.

On February 4, 2011, Astar notified MU that it would continue to protest the award. Thereafter, Astar made a "Request for Appeal and Hearing." A formal reconsideration hearing was held on March 29, 2011. Thereafter, Karen Kirtley, Marshall University's Senior Vice-President of Finance and Administration, advised Astar that she was upholding the decision to award the contract to MMI.

On April 19 or 20, 2011, MU awarded the open-ended contract to MMI. On April 21, 2011, MU notified all bidders of the award.

Astar filed its "Verified Petition For Writ Of Mandamus and Injunctive Relief" in the circuit court on April 27, 2011. Following a May 2, 2011, hearing, the circuit court denied Astar's motion for injunctive relief but issued a rule to show cause against MU. Thereafter, two hearings were held on the matter.

On December 28, 2011, the circuit court ruled that a writ of mandamus should not issue because (1) Astar had failed to prove the elements required for the writ and (2) had not met its burden of showing "fraud, collusion, or such an abuse of discretion that it is shocking to the conscience" in MU's award of the contract to MMI pursuant to Syllabus Point 3 of *State ex rel. E. D. S. Fed. Corp. v. Ginsberg*, 163 W.Va. 647, 259 S.E.2d 618 (1979).

On appeal, Astar argues that the circuit court erred in denying its petition for a writ of mandamus.

"Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or

to correct errors they have made.” Syllabus Point 1, *State ex rel. Buxton v. O'Brien*, 97 W.Va. 343, 125 S.E. 154 (1924).

Syl. Pt. 6, *State ex rel. Affiliated Const. Trades Found. v. Vieweg*, 205 W.Va. 687, 520 S.E.2d 854 (1999).

“A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.” Syllabus Point 1, *State ex rel. Billy Ray C. v. Skaff*, 190 W.Va. 504, 438 S.E.2d 847 (1993); Syllabus Point 2, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969).” Syllabus point 2, *Staten v. Dean*, 195 W.Va. 57, 464 S.E.2d 576 (1995).

Syl. Pt. 2, *Ewing v. Bd. of Educ. of Cnty. of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998).

Pursuant to *Ewing*, Astar argues that (1) it had a clear legal right to be awarded the contract because it was the lowest responsible and responsive bidder; (2) MU had a legal duty to award the contract to Astar; and (3) a writ of mandamus requiring MU to award the contract to Astar is the only adequate legal remedy for the damages Astar sustained as a result of MU’s failure to award Astar the contract.

“A *de novo* standard of review applies to a circuit court’s decision to grant or deny a writ of mandamus.” Syl. Pt. 1, *Harrison Cnty. Comm’n v. Harrison Cnty. Assessor*, 222 W.Va. 25, 658 S.E.2d 555 (2008). We review a circuit court’s underlying factual findings and conclusions of law in a mandamus case under a clearly erroneous standard. *O’Daniels v. City of Charleston*, 200 W.Va. 711, 715, 490 S.E.2d 800, 804 (1997) (citing *Staten v. Dean*, 195 W.Va. 57, 62, 464 S.E.2d 576, 581 (1995)).

Our review of the record reflects no clear error by the circuit court in denying petitioner’s motion for a writ of mandamus. The circuit court reviewed MU’s bid evaluation process, the reasons MU used that particular bid process, and the results of the process, and correctly determined that Astar had failed to meet the *Ewing* standard for the issuance of a writ of mandamus. Having reviewed the circuit court’s “Final Order” entered on December 28, 2011, we hereby adopt and incorporate the circuit court’s well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court’s order to this memorandum decision.

For the foregoing reasons, we affirm the circuit court’s order.

Affirmed.

ISSUED: May 17, 2013

CONCURRED IN BY:

Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

DISSENTING:

Chief Justice Brent D. Benjamin
Justice Robin Jean Davis

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

ASTAR ABATEMENT, INC.,
a West Virginia Corporation,

Petitioner,

v.

Civil Action No. 11-C-264
Hon. F. Jane Husted, Judge

MARSHALL UNIVERSITY BOARD OF
GOVERNORS, STEPHANIE SMITH, MARSHALL
UNIVERSITY DIRECTOR OF PURCHASING,
MASTER MECHANICAL INSULATION, INC.,
BURMECK INDUSTRIES, INC., AND
ALTANTIC PLANT SERVICES, INC.,

Respondents.

FILED
2011 DEC 28 A 11: 22
ADELL GRANDLER
CIRCUIT CLERK
CABELL CO., WV

FINAL ORDER

On a previous day came the parties, by their respective counsel, and came on for hearing pursuant to Petitioner's request that the Court grant it a Writ of Mandamus.

The Court has reviewed the Petition, the written submissions and oral arguments of counsel, together with all exhibits and testimony presented.

Accordingly, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On or about, November 29, 2010, Marshall University (Marshall) made a "Request for Bids" for an open ended "Asbestos Abatement Contract Marshall University", bid number MU11-Abatement in accordance with the applicable West Virginia state law.
2. Marshall's bidding process is governed by W. Va. Code §18B-5-3 through 18B-5-7; West Virginia Purchasing Procedures Manual; and Marshall University Board of

Governors Policy No. FA-9, Purchasing Policy. (6/23/2011 Tr. p. 57:6-20; 8/12/2011 Tr. p. 13:3-4; 13:21-14:5; Petitioner's Exhibits L & M and Respondent's Exhibit 1).

3. Further as Mr. Richard Donovan, Chief Financial Officer and Chief Procurement Officer, of the West Virginia Higher Education Policy Commission testified, West Virginia Code §5-22-1, et. seq. is not the one that is used by Higher Education. (8/12/2011 Tr. p. 21:3-14.). Therefore, it would not apply to this bidding process.
4. According to the "Request for Bids", the purpose of the RFB "is to establish an open-ended contract for on-call service, to be used on an as-needed basis, to remove and/or encapsulate Asbestos Containing Materials (ACM) and to provide building/structural component demolition. (See Petitioner's Exhibit A.) (Emphasis added.)
5. Demolition was part of the contract to be bid. As noted by Mr. Donovan, "clearly, demolition was part of this bid, because there is a section in this bid that the bidders had to fill in their prices for demolition." (8/12/2011 Tr. p. 30:11-13.) And as Mr. Brian Carrico, Director of Health and Safety, Marshall University testified, the contract was for demolition and this was stated in the "purpose of the contract." (6/23/2011 Tr. p. 109:18-22).
6. Thereafter, and in accordance with the "Request for Bids", the bids received were opened and recorded in the Office of Purchasing. (See Petitioner's Exhibit A.)
7. Marshall, in accordance with the "Requests for Bids", evaluated the responses they received to the "Request for Bids" in two ways.
8. Mr. Carrico evaluated the bids by taking the unit prices provided and applying them to

actual prior jobs or scenarios actually done by Marshall. "These scenarios were taken from actual jobs that were performed. And these nine scenarios were the best relative scenarios of the kind of work that actually happened under the contract." (6/23/2011 Tr. p. 112:20-23.)

9. Included were six (6) typical asbestos abatement projects and three (3) typical demolition projects. (6/23/2011 Tr. p. 125:11-12.)
10. The evaluation of these nine projects showed that Master Mechanical Insulation, Inc. (Master Mechanical) was the overall low bidder. (See Petitioner's Exhibit D.)
11. At the hearing on August 12, 2011, Mr. Donovan with over 30 years of experience in higher education purchasing testified, that he believed that "the use of the nine scenarios was an appropriate way to [evaluate the bids]." (8/12/2011 Tr. p. 16:18-19.)
12. Mr. Donovan further testified that there was nothing that legally required Marshall to include these scenarios in the bid document and although there is a reference in the Higher Education Purchasing Procedures Manual to include how you evaluate bids, it does not mandate their inclusion. (8/12/2011 (Tr. p. 17:4-16).
13. In addition, Stephanie Smith, Marshall University Director of Purchasing, testified she evaluated the bids by unit prices within categories. (6/23/2011 Tr. p. 35:21-24.)
14. Ms. Smith further testified that the alternate evaluation method was "just protocol." (6/23/2011 Tr. p. 36:6.) Based upon the purchasing department evaluation, they also concluded that Master Mechanical was the "lowest responsible and responsive bidder." (6/23/2011 Tr. p. 38:17-18.)
15. Mr. Donovan likewise testified there was no law that required Marshall to disclose that

they were going to review the bids based upon "categories." (8/12/2011 Tr. p. 19:6-8.)

16. In short, Marshall simply took the unit price responses provided and used the scenarios and categories to compare the pricing and get a true assessment of the contract.
17. In addition, Ms. Smith testified as follows with respect to only evaluating the contract based upon unit prices:

It is not an appropriate way to evaluate the contract [just looking at unit prices], because this is such a diverse project. There [are] so many units and pieces to the project that we have to look [at] it as an overall category basically and look at the prices they gave us and determine who is the low bidder.

(6/23/2011 Tr. p. 64:7-11.)

18. Based upon these evaluations, Mr. Carrico and Ms. Smith recommended that Master Mechanical Insulation, Inc. (Master Mechanical)¹ be awarded the contract as the lowest responsible and responsive bidder as required by the applicable purchasing procedures.
19. Mr. Donovan further testified that based upon his review, he found no legal reason why Master Mechanical should not have been awarded the contract or that it should have been awarded to Petitioner. (8/12/2011 Tr. pp. 22:19-23:2.)
20. Upon reviewing the bids, Marshall did find where the bid form had an erroneous unit of measure being cubic yard when it should have been a cubic ton. Marshall contacted Master Mechanical and pursuant to the laws, rules and regulations regarding Higher Education bids clarified that the price reflected cubic tons rather than cubic yards.

¹ The contract is now with Master Mechanical acquired by Atlantic Plant Services. (6/23/2011 Tr. p. 70:9-10.)

(6/23/2011 Tr. p. 119:13:16.)

21. The pre-printed unit of measure on the form was clearly erroneous, as Mr. Donovan testified, because that is not the way municipal waste is measured and disposed of. (8/12/2011 Tr. pp. 32:24-33:2.)
22. Further as provided in the Higher Education Policy Commission Purchasing Manual and in the Marshall University Board of Governors, Policy No. FA-9, Purchasing policy Marshall has the right to waive informalities or irregularities. (6/23/ 2011 Tr. pp. 43:16-19, 44:3-8, 58:10-59:2; 8/12/2011 Tr. p. 35:5-8; Petitioner's Exhibit M p. 24; and Respondent's Exhibit 1 p. 19.)
23. Accordingly, by email dated January 7, 2011, the vendors were notified that Master Mechanical was the successful bidder and that Marshall intended to award them the contract.
24. Thereafter, by letter dated January 14, 2011, Petitioner submitted its formal "Protest of Award" to Marshall University. On February 1, 2011, a hearing on Petitioner's protest was heard and he was advised that the award to Master Mechanical would be upheld. By email dated February 4, 2011, Roger Pritt, President of Petitioner, advised that he was continuing to protest the award.
25. Further by letter dated February 22, 2011, Petitioner, by counsel, contacted Mary Ellen Heuton, Interim Director of Purchasing, and made a "Request for Appeal and Hearing".
26. Pursuant to this request, a hearing was held on March 29, 2011, before Karen Kirtley, Senior Vice-President of Finance and Administration, at which time, Petitioner appeared with Counsel to put forth its arguments with respect to why it believed Master Mechanical

should not be awarded the contract.

27. By letter dated, April 14, 2011, Ms. Kirtley advised Petitioner that she was upholding Marshall's decision to award the contract to Master Mechanical. (See Petitioner's Exhibit H.)
28. On April 19, 2011, the open ended contract was awarded to Master Mechanical. (See Petitioner's Exhibit J.)
29. Petitioner then filed the instant Petition for Writ of Mandamus to require Marshall to rescind its contract with Master Mechanical and have it awarded to Astar. Thereafter, both parties submitted various documents in support of their positions and this Court held a total of two (2) hearings on the competitive bidding issues raised in Astar's petition.

DISCUSSION

A writ of mandamus will not issue unless three elements coexist - (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy at law. . . . (Citations omitted.) In other words, when reviewing a petitioning party's entitlement to the remedy of mandamus, we examine whether "the party seeking the writ [has] show[n] a clear legal right thereto and a corresponding duty on the respondent to perform the act demanded. . . ." (Citations omitted.)

Ewing v. Bd. of Educ. Of County of Summers, 202 W. Va. 228, 234, 503 S.E. 2d 541, 547

(1998). (Citations omitted.)

[The Supreme Court of Appeals of West Virginia has] characterized the purpose of the writ as the enforcement of an established right and the enforcement of a corresponding imperative duty created or imposed by law. See State ex rel. Bronaugh v. City of Parkersburg, 148 W.Va. 568, 136 S.E.2d 783 (1964). "Mandamus is a proper remedy to require the performance of a nondiscretionary duty by various governmental agencies or bodies." Syllabus Point 1, State ex rel. Allstate Insurance Co. v. Union Public Service District, 151

W.Va. 207, 151 S.E.2d 102 (1966); See State ex rel. Board of Education v. Miller, 153 W.Va. 414, 168 S.E.2d 820 (1969); Delardas v. County Court of Monongalia County, 155 W.Va. 776, 186 S.E.2d 847 (1972); State ex rel Anderson v. Bd. of Ed. of Mingo Cty., 160 W.Va. 208, 233 S.E.2d 703 (1977). Finally, “[m]andamus lies to control the action of an administrative officer in the exercise of his discretion when such action is arbitrary or capricious.” Syllabus, Beverly Grill, Inc. v. Crow, 133 W.Va. 214, 57 S.E.2d 244 (1949); See also Syllabus Point 1, State ex rel. Payne v. Board of Education of Jefferson County, 135 W.Va. 349, 63 S.E.2d 579 (1951)(“Mandamus does not lie to control a board of education in the exercise of its discretion, in the absence of caprice, passion, partiality, fraud, arbitrary conduct, some ulterior motive, or misapprehension of law upon the part of such board.”); State ex rel. McLendon v. Morton, 162 W.Va. 431, 249 S.E.2d 919 (1978); State ex rel. Withers v. Board of Educ. of Mason County, 153 W.Va. 867, 172 S.E.2d 796 (1970); State ex rel. Board of Education v. Miller, *supra*; State ex rel. Waller Chems. v. McNutt, 152 W.Va. 186, 160 S.E.2d 170 (1968).

State ex rel. Affiliated Const. Trades Found. v. Vieweg, 205 W. Va. 687, 693, 520 S.E.2d 854, 860 (1999).

Mandamus is a proper remedy to compel tribunals and officers exercising discretionary powers to act, when they refuse to do so, in violation of their duty, but is never employed to prescribe in what manner they shall act, or to correct errors they have committed.” Point 1 of the syllabus in County Court v. Holt, Judge, 61 W. Va. 154, 56 S. E. 205; Miller v. County Court, 34 W. Va. 285, 12 S. E. 112; State v. County Court, 33 W. Va. 589, 11 S. E. 72; State v. Herralld, 36 W. Va. 721, 15 S. E. 974; Marcum v. Commissioners, 42 W. Va. 263, 26 S. E. 281, 36 L. R. A. 296; Wilder v. Kelley, Judge, 88 Va. 281, 13 S. E. 483

State ex rel. Buxton v. O'Brien, 97 W. Va. 343, 125 S.E. 154, 157 (1924). (Emphasis added.)

Therefore, simply identifying possible errors in the process does not rise to the level of meeting the requirement of a Writ of Mandamus. In other words, even if this Court had found there were errors or that the process could have been done better this does not give Astar the right to have a Writ of Mandamus issued to correct these errors. Astar must prove that it, above all

other bidders, had a "clear legal right" to the contract or that Marshall had a "clear legal duty" to award the contract to it. The fact that the process was flawed or hypothetically could have been done better is not the standard for the issuance of the Writ.

In examining the three elements required for the issuance of a Writ of Mandamus, the court finds the Petitioner has failed to meet his burden.

i. Issue- The existence of a clear right in the Petitioner to the relief sought

Petitioner has no legal right to be awarded the contract. Marshall's purchasing requirements are governed by West Virginia Code §18B-5-3 through West Virginia Code §18B-5-7. In addition, Marshall University has special competitive bidding authority pursuant to West Virginia Code §18B-5-4(d). In accordance with West Virginia Code §18B-5-4 (d), Marshall promulgated its purchasing policy, Policy No. FA-9. (See Respondent's Exhibit 2). Marshall, although not required, also follows the guidelines in the West Virginia Higher Education Policy Commission Purchasing Manual. (See Petitioner's Exhibit M.)

In this case, based upon Marshall's integration and evaluation of the unit prices and corresponding scenarios, Petitioner was not the lowest responsible and responsive bidder to the request.

The Court must note that Marshall also avers that even if Petitioner had been the lowest responsible and responsive bidder a review of Petitioner's bid documents indicates that Petitioner failed to disclose in response to Section VI, question 2 "all incidents in which Bidder's firm was cited for non-compliance with WVRTIA and/or WVDEP and/or US EPA and/or OSHA regulations in the past 5 years." (See Petitioner's Exhibit B.) Although Petitioner did not disclose any violations, Marshall learned of at least five such incidents. (Respondent's Exhibit 2.)

Further according to Ms. Smith's testimony, the fact of these undisclosed violations would have been an "automatic disqualification" for not being responsive. (6/23/2011 Tr. p. 64:24 -65:7.)

In its response to Astar's Verified Petition, Marshall asserted, for the first time, that Astar had not disclosed all citations that it received for non-compliance with WVRTIA and/or WVDEP and/or US EPA and/or OSHA over the past five (5) years. (Marshall's Memo. of Law (05/02/2011), p.8-9.)

Marshall's Request for Bids contained conflicting and ambiguous language with regard to the disclosure of past citations. In the specifications section, the language instructed bidders to identify all citations received during the last five (5) years. However, on the bid form, the document that bidders actually submitted to Marshall, the language instructed bidders to identify all citations received during the past twenty-four (24) months. (See Petitioner's Exhibit A.)

Astar received a citation from the WV DEP on August 28, 2007. This citation was within the past five (5) years; however, it was issued well over twenty-four (24) months ago. (See Marshall's Memo. of Law (05/02/2011), Exhibit 2.)

While Marshall contends that such violations would result in automatic disqualification of Petitioner, during the June hearing, Mr. Carrico testified that the receipt of a citation would not result in the automatic disqualification of a bidder. (06/23/2011, Tr. P. 44:1-24.) Also, Respondent's expert, Richard Donovan, echoed Mr. Carrico's testimony during the August hearing by also stating that there was no law or policy that would require the Respondents to disqualify Astar. (08/12/2011 Tr. P. 44:1-23)

Therefore, the Court does not rely on this factor to deny the Writ of Mandamus.

"Statutes and ordinances which require public officers or a public tribunal to award a

contract to the 'lowest responsible bidder' vest wide discretion in officials." West Virginia Medical Institute v. West Virginia Public Employees Insurance Board, et. al., 180 W. Va. 697, 700, 379 S. E.2d 501, 504 (1989), citing, Syl. pt. 5, Pioneer v. Hutchinson, 159 W.Va. 276, 220 S.E. 2d 894 (1975). In addition, Section 8.4 of Marshall's purchasing policy states, in pertinent part, "[i]n determining the lowest responsible and responsive vendor, consideration will be given to such factors as quality (meeting specifications), price, time of delivery, cost of delivery, and other terms and conditions considered prudent." In other words, price is only one factor to be used in determining the "lowest responsible and responsive vendor". See also, W.Va. Code §18B-5-4(g). The Supreme Court of Appeals of West Virginia in deciding the case of E.D.S. Federal Corp. v. Ginsberg, 163 W.Va. 647, 259 S.E.2d 618 (1979) which also involved a rational but complex contracting procedure found that:

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 or a taxpayer is upon the challenger who must show fraud, collusion, or such an abuse of discretion that it is shocking to the conscience.

Id., citing, Syl. pt. 3, E.D.S. Federal Corp. v. Ginsberg, 163 W.Va. 647, 259 S.E.2d 618 (1979).

Petitioner again, has failed to show it was clearly entitled to the contract or that Marshall's decision was based upon fraud, collusion, or such an abuse of discretion that it is shocking to the conscience. Mr. Donovan on cross examination summarized this situation best when he testified as follows:

And I think Marshall and the methods they used to evaluate bid did [award to the lowest qualified bidder]. . . . I don't think Marshall has an obligation to use the method most favorable to [Astar] or any

other contractor. They did what they thought was reasonable and appropriate for Marshall.

(8/12/2011 Tr. p. 37:4-11.)

ii. Issue- The existence of a clear right in the Petitioner to the relief sought

In order for mandamus to be granted, the Petitioner must also show that Respondents have a legal duty to do the thing the relator seeks. Again for the aforementioned reasons, Respondents have no legal duty to award Petitioner the contract.

Petitioner has failed to show a single West Virginia statute that would have required Marshall to award it the contract or that the award of the contract to Master Mechanical was illegal.

Petitioner has raised numerous issues with the bid and the evaluation process; however none of these issues demand that the contract be awarded to Astar. Rather the issues it has raised, if correct, show that the process was equally impaired for all the bidders. Again, the law is clear that mandamus is not the appropriate relief to correct errors. The Petitioner must show Marshall had a clear legal duty to award the contract to Astar. This has not been established.

Petitioner has failed to show that Marshall committed fraud, collusion, or such an abuse of discretion that it is shocking to the conscience. Granted, the Court finds that Marshall could have conducted the process better, but that is not the standard. There has been no evidence presented of fraud, collusion or such an abuse of discretion that it would shock the conscience.

iii. Issue- The absence of another adequate remedy at law

Marshall asserts that the Petitioner has a remedy at law, in that it could seek monetary damages in the Court of Claims to the extent it should be legally compensated. While the Court

does not accept this assertion as true, the Court does find that the Petitioner has failed to meet its burden of establishing how it has no other adequate remedy at law, as well.

Therefore, the Writ of Mandamus should not issue against Marshall and Marshall should not be required to rescind its contract with Master Mechanical. Astar has failed to meet its burden of showing why it should be awarded the contract pursuant to the requirements of a Writ of Mandamus.

CONCLUSIONS OF LAW

In the case at bar, a writ of mandamus should not issue because Petitioner has failed to prove the three elements required for a Writ of Mandamus and Petitioner has not met its burden of showing "fraud, collusion, or such an abuse of discretion that it is shocking to the conscience."

WHEREFORE, it is hereby ORDERED that the request that a Writ of Mandamus be issued against the Respondents is DENIED. The Court preserves the parties' objections and exceptions to its ruling.

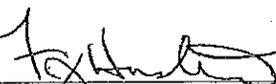
The Clerk is directed to forward an attested copy of this order to Charles M. Johnstone, II, Esq., Counsel for Petitioner, JOHNSTONE & GABHART, LLP, P. O. Box 313, Charleston, WV 25321 and to Counsel for Respondents, Jendonae L. Houdyschell, Senior Assistant Attorney General, West Virginia Higher Education Policy Commission, Legal Division - 8th Floor, 1018 Kanawha Boulevard, East, Charleston, WV 25301. The Clerk shall further DISMISS and REMOVE this action from the docket of this Court.

ENTERED on this the 23rd day of December, 2011.

STATE OF WEST VIRGINIA
COUNTY OF CABELL

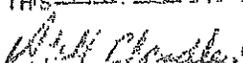
I, ADELL CHAMBERS, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT

ENTERED ON _____
GIVEN UNDER MY HAND AND SEAL OF SAID COURT


Honorable F. Jane Hustead, Judge

12

THIS _____


ADELL CHAMBERS, CLERK
CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA

ENTERED Circuit Court Civil Order Book

No. _____ Page _____ this