

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

THE AFFILIATED CONSTRUCTION
TRADES FOUNDATION, A DIVISION
OF THE WEST VIRGINIA STATE BUILDING
AND CONSTRUCTION TRADES COUNCIL,
AFL-CIO,

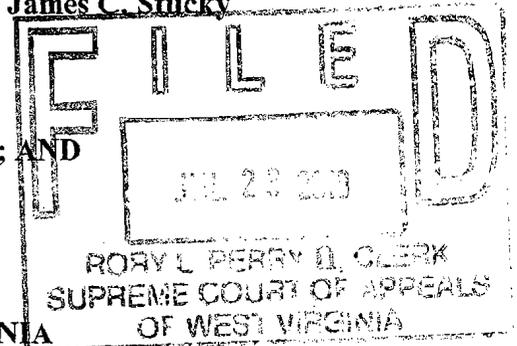
Petitioner,

v.

Appeal No. _____
Kanawha County Circuit Court
Civil Action No. 04-C-3189
Judge James C. Stucky

WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF HIGHWAYS;
THE WEST VIRGINIA BOARD OF EDUCATION;
THE MINGO COUNTY REDEVELOPMENT AUTHORITY; AND
NICEWONDER CONTRACTING, INC.

Respondents.



RESPONSE OF THE WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS
TO THE PETITION [FOR APPEAL] OF THE AFFILIATED CONSTRUCTION
TRADES COUNSEL, A DIVISION OF THE WEST VIRGINIA STATE BUILDING AND
CONSTRUCTION TRADES COUNCIL, AFL-CIO, FROM THE ORDER OF THE
CIRCUIT COURT OF KANAWHA COUNTY THAT GRANTED DEFENDANT
NICEWONDER CONTRACTING, INC.'S MOTION FOR SUMMARY JUDGMENT
BASED ON PLAINTIFF'S LACK OF STANDING

Presented by:

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Respondent the West Virginia Department of Transportation, Division of Highways (“WVDOH”) concurs in and adopts the arguments and authorities contained in Respondent Nicewonder Contracting, Inc’s Response to the Petition for Appeal of the Affiliated Construction Trades Foundation. WVDOH writes separately to emphasize the importance of the project at the center of the dispute, the unique nature of the opportunity presented, and the extraordinary costs savings realized by the defendants below, the U.S. Department of Transportation, Federal Highway Administration, and the citizens of Mingo County, the State of West Virginia and the United States.

FACTS

At its simplest, the case below involved Mingo County dirt being where it was *not* wanted, and not being where it *was* wanted. Nicewonder Contracting, Inc. wanted dirt comprising overburden over otherwise economically unmineable coal in Mingo County to be moved from off the coal seams. The Mingo County Redevelopment Authority wanted flat land for development where originally there were steep slopes and narrow ravines. The state Board of Education wanted a flat site available for new school facilities. The West Virginia Department of Transportation, Division of Highways (“WVDOH”) and the United States Department of Transportation, Federal Highways Administration (“FHWA”)¹ wanted cuts and fills along an alignment that would be suitable for completion as part of a state and federal four-lane APD highway.²

¹ FHWA was dismissed in the federal action after removal and no claims against that agency were remanded to the Circuit Court of Kanawha County in the action below.

² In addition, the citizens and taxpayers of Mingo County and the state want tax revenues from the incidental production of coal that would otherwise largely be uneconomical to remove, and electric utility users want the electricity generated from the coal.

At issue is an agreement for work that will in part become a portion of the King Coal Highway ("KCH"), a planned four-lane partially controlled access highway that will extend some 93 miles from Williamson, West Virginia to Bluefield, West Virginia. Specifically, the case below concerned work preliminary to the final construction of an 11.3 mile section of the KCH between Taylorville and Horsepen Mountain in Mingo County, West Virginia. The KCH has been in planning and preliminary design for over sixteen years. An Environmental Impact Statement was commenced for the highway in 1993, resulting in a Final Environmental Impact Statement in June of 2000 and approval of a Record of Decision in August 2000. The Record of Decision approved a 1000 ft. wide corridor within which the King Coal Highway would largely be built, although the Record of Decision contemplated consideration of alignment shifts within and outside of the 1000 ft. wide corridor to minimize environmental impacts and to achieve the most cost effective result. However, because the estimated construction cost for the highway approached \$1.6 billion dollars, only limited construction of the facility was undertaken.

After federal approval of the Record of Decision, West Virginia Division of Highways began more detailed design of certain segments of the King Coal Highway. During design of the sections between Horsepen Mountain and Gilbert in Mingo County, it became apparent that the construction of the road would impact and be impacted by the coal removal operations of Premium Energy, a coal operator then operating in the area. While in the course of meetings with representatives of the company to determine how the coal removal operations would effect the eventual placement of the roadway, WVDOH was approached by the owner of Premium Energy with a proposal to utilize excess overburden material from the coal removal operations as roadway fill for the more proximate section of the KCH. After conferring with the Federal Highway Administration ("FHWA"), WVDOH began discussions concerning the proposal early

in 2003 with representatives of the owner of Premium Energy and with the Mingo County Redevelopment Authority, which was also interested in the post-mining use of lands served by and abutting the KCH in the area of Premium Energy's operations.

Premium Energy proposed to use material from its operations to construct approximately 3-miles of the KCH subgrade at no cost to WVDOH and create a large area of flat land near the highway for commercial development. WVDOH would purchase the road right-of-way in the future as funding became available, and the commercial development site would be deeded at no cost to the Mingo County Redevelopment Authority. WVDOH and FHWA accepted the basic proposal after satisfying itself and FHWA through independent testing and analysis that the methods for construction of the subgrade proposed to be used by Premium Energy would produce a satisfactory result. Premium Energy then obtained approval from the U.S. Army Corps of Engineers of an amended Section 404 permit allowing work on the 3-mile section to go forward.

Thereafter, late in 2003, Premium Energy and the Mingo County Redevelopment Authority came to WVDOH and FHWA with a proposal to expand the approach used for the 3-mile section to another, longer section of the KCH. Premium Energy determined that an 11-mile section of the KCH between Taylorville and Horsepen Mountain (the "Red Jacket" Section) could be constructed in the same manner as the 3-mile section if the WVDOH and FHWA could contribute toward part of the cost of excavation³. Based upon available information, and subject to confirmation through core borings, Premium Energy believed that a project could be developed that would allow it to mine the coal, while providing the fills needed to construct a highway.

³ Due to previous mining in the area, not enough coal remained to entirely offset the cost of removal.

It became clear during the discussions with the coal operator that some shifting of the proposed alignment would be needed to maximize the savings from the coal recovery. However, these modifications were determined by WVDOH and FHWA not to pose a detrimental impact to the overall design and location of the KCH. Comparison of the preliminary cost information prepared by the Premium Energy with WVDOH's historical cost data for similar subgrade earthwork indicated that the proposal had the potential to save tens of millions of dollars over the traditional contracting process, while allowing for completion of the 11-mile segment of the highway many years sooner than would otherwise be possible. At the encouragement of WVDOH and FHWA, Premium Energy developed an "at risk" draft proposal. If the project failed to materialize, no costs would be reimbursed.

While Premium Energy worked to develop acceptable preliminary design plans and an excavation and coal availability estimate for its cost proposal submission, WVDOH and FHWA worked to develop a framework to address issues that arose during the preliminary discussions and within which to evaluate any cost proposal that might be submitted.⁴ In order to determine whether a public interest finding was supported, WVDOH and FHWA undertook an extensive cost effectiveness analysis, performed an environmental evaluation of minor alignment shifts outside the approved KCH corridor, reviewed proposed design criteria for the work, and assembled independent cost data to confirm the cost data supplied by the contractor. Notably, WVDOH and FHWA also obtained two reports by an independent mining engineer confirming the validity of the estimates of recoverable coal presented by the contractor.

⁴ The product of this comprehensive evaluation and review process is contained in the Decision Document and the Administrative Record filed by FHWA in the case below upon removal to the U. S. District Court for the Southern District. *Affiliated Construction Trades Foundation v. West Virginia Department of Transportation*, et al., CA No. 2:04-1344.

In addition, WVDOH and FHWA obtained testing and review under the direction of geotechnical experts to confirm that what Plaintiff below has characterized as a "relaxed" method of constructing fills proposed by the contractor would produce an acceptable result for highway purposes.

With respect to cost effectiveness and the unusual opportunity presented by the project as proposed by the contractor, WVDOH and FHWA found the following:

If traditional contracting procedures were to be used for this project, it is estimated the total cost to complete the grade and drain phase of construction for the mainline and access roads is approximately \$290 million. This \$290 million includes cost estimate to complete all design activities, purchase all the necessary right of way, relocate utilities and construct the roadway cuts/fills and major drainage features for both the mainline and major access roads at to Horsepen and WV 65. The final paving, signing, markings, roadway drainage, etc. is estimated to cost approximately \$49.4 million, bringing the total overall estimated cost for this 11-miles of mainline and various access roads to approximately \$339 million.

The cost estimate contained in the fully executed agreement with Nicewonder Contracting states the cost to complete engineering and construction for the same section of project are estimated to be between \$92 and \$115 million. These figures do not reflect the costs for right of way and utilities, which are approximately \$4.7 million. Therefore, to provide a valid review, the estimates in the contractor's proposal were upwardly adjusted to obtain a true comparison. The revised figures for all work (including right of way, utilities, pavement, roadway drainage, etc.) is \$146 to \$169 million.

(chart follows)

COST COMPARISON

Contracting Method	Estimated Cost for Engineering/ Construction	Estimated Cost for R/W & Utilities	Estimated Costs for Pavement & Minor Drainage	Total Cost Estimate
Traditional	\$285	\$4.7 million	\$49.4 million	\$339.1 million
Negotiated Contract (low)	\$92 million	\$4.7 million	\$49.4 million	\$146.1 million
Negotiated Contract (high)	\$115 million	\$4.7 million	\$49.4 million	\$169.1 million

...

This project is the **only** example where the WVDOH has requested Federal-aid reimbursement for a negotiated construction contract. Therefore, it is rare. This project is also very unusual and unique. Many factors merged (coal mine operation, acceptable fill construction techniques, marketable coal reserves) which allow for the construction of this much needed and supported project while minimizing the cost to the taxpayers. Given the convergence of these factors, it is unlikely to recur with any regularity in West Virginia (although there may be additional opportunities for significant cost savings at other locations which would warrant further investigation and discussion).

FHWA Administrative Record, Decision Document, Public Interest Finding, Section II.

CONCLUSION

This project, the major earth-moving and subgrade of which is nearing completion, has already resulted in tens of millions to over one hundred million dollars in savings to the State and its taxpayers and has provided a site for the Mingo County Board of Education where construction of a new school is well underway. Uncounted millions of dollars of benefit to the economy of Mingo County and the State will result from the completion of the eleven mile segment, which simply would not have been built in the foreseeable future but for the

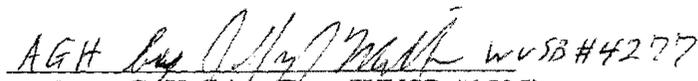
extraordinary opportunity presented to the defendants below to work together for their common good and that of the citizens and taxpayers of Mingo County, the State and the nation.

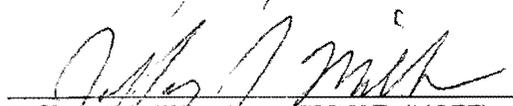
For the foregoing reasons and those asserted in Respondent Nicewonder Contracting, Inc's Response to the Petition for Appeal of the Affiliated Construction Trades Foundation, the Petition for Appeal should be denied.

Respectfully Submitted,

**WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF
HIGHWAYS,**

By counsel


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CERTIFICATE OF SERVICE

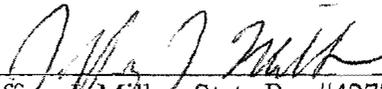
I, Jeff J. Miller, counsel for the West Virginia Division of Highways, do hereby certify that I have served a true and correct copy of **Response of the West Virginia Department of Transportation, Division of Highways to the Petition [for Appeal] of the Affiliated Construction Trades Council, a Division of the West Virginia State Building and Construction Trades Council, AFL-CIO, from the Order of the Circuit Court of Kanawha County that granted Defendant Nicewonder Contracting, Inc.'s Motion for Summary Judgment based on Plaintiff's Lack of Standing** by depositing same in the United States mail, postage prepaid, this 23rd day of July, 2010, addressed as follows:

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