

No. 15-0635

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**WISEMAN CONSTRUCTION COMPANY, INC.**

A West Virginia Corporation, et. al.,

Appellant herein, a Defendant/Respondent below,

v.

**MAYNARD C. SMITH CONSTRUCTION COMPANY, INC.,**

a West Virginia Corporation, Appellee herein, the Plaintiff/Petitioner below;

**DAVID TINCHER**, Director of the Purchasing Division of the Department of

Administration; **WEST VIRGINIA LOTTERY COMMISSION**, a Public Corp;

**JOHN C. MUSGRAVE**, Director of the West Virginia Lottery; **JASON PIZATELLA**,

Cabinet Secretary of the Department of Administration; and **ROBERT S. KISS**,

Cabinet Secretary of the Department of Revenue, Defendants Below, Respondents.

---

**SEPARATE REPLY TO BRIEF OF  
MAYNARD C. SMITH CONSTRUCTION CO., INC.**

---

Submitted by:

James M. Cagle (WV Bar No. 580)

1018 Kanawha Boulevard, East

1200 Boulevard Tower

Charleston, West Virginia 25301

Email: [caglelaw@aol.com](mailto:caglelaw@aol.com)

Phone: (304) 342-3174

Fax: (304) 342-0448

*Counsel for Appellant Wiseman*

*Construction Co., Inc.*

**TABLE OF CONTENTS**

Argument ..... 1

    1. Maynard C. Smith submitted Its Bid For The Lottery Commission Job In  
    Contravention Of W.Va. Code §21-11-6(a) ..... 1

    2. Maynard C. Smith Erroneously Argues That It Had A Mandatory Right To  
    The Award ..... 3

    3. The Review Process Employed Was Rational ..... 4

Conclusion ..... 4

Certificate of Service ..... 5

**TABLE OF AUTHORITIES**

Cartwright v. McComas, \_\_ W.Va. \_\_, 672 S.E. 2d 297 (2008); syl. pt. 1. .... 2

Mid Atlantic Storage Systems, Inc. v. City of Milton, 903 F. Supp. 995 (S.D. W.Va. 1995) .. 3,4

Personnel Temporary Servies, A Division of Personnel, Inc. v. West Virginia Division of Labor Contractor Licensing Board, 197 W.Va. 149, 475 S.E. 2d 149 (1996) ..... 1

State ex rel. E.D.S. Federal Corp. v. Ginsberg, 163 W.Va. 647, 259 S.E. 2d 618 (1979) ..... 3,4

State ex rel. Underwood v. Silverstein, 167 W.Va. 121, 278 S.E. 2d 886 (1981) ..... 1

State v. Myers, 2004 W.Va. 449, 513 S.E. 2d 676 (1998) ..... 2

**Statute**

W.Va. Code §21-11-6(a) ..... 1,2

## Argument

### **1. Maynard C. Smith Submitted Its Bid For The Lottery Commission Job In Contravention Of W.Va. Code §21-11-6(a).**

Maynard C. Smith Construction Company, Inc. (Smith) has summarized its argument as follows:

“When specified construction services are sought from *licensed*, bonded contractors, the State must make the award to the low cost bidder,” Smith Brief p. 5.

While there is more than one flaw in Smith’s foregoing argument the first flaw is that Smith was not licensed at the time it bid on the Lottery Commission job. Its license had previously expired, JA219-220, 76(item no. 8).

W.Va. Law is very specific concerning this deficiency:

**“No person may engage in this State in any act as a contractor, or submit a bid to perform work as a contractor, as defined in this article, unless such person holds a license issued under the provisions of this article. . .” W.Va. Code §21-11-6(a).**

There is no question but that Smith’s bid should have been thrown out. Without debate the record shows: first, Smith had no legal right to submit their bid; second, Smith failed to adhere to the mandatory bid requirements. If Smith should succeed in getting this nearly \$8 million contract it will send the wrong message to other contractors. Those West Virginia contractors who, like Wiseman, take care to follow the requirements both of the law and of the mandatory bid requirements will receive the message that those requirements no longer matter.

There is also no question but that Code 21-11-6(a) is clear and unambiguous and the legislative intent is plain. Consequently, it is the duty of the courts to apply the statute, Personnel Temporary Servies, A Division of Personnel, Inc. v. West Virginia Division of Labor Contractor Licensing Board, 197 W.Va. 149, 475 S.E. 2d 149 (1996); State ex rel. Underwood v. Silverstein, 167 W.Va. 121, 278 S.E. 2d 886 (1981). It is therefore respectfully submitted that

this Court find that the illegally submitted bid of Smith should have been rejected as a matter of law, thus for that reason also Wiseman was properly awarded the contract in question.

It is acknowledged that the legal significance of this default was not addressed below.

The Circuit Court however did inquire of witness Tincher:

“The Court: . . .for example, all of these people have to have a contractor’s license, right?”

The Witness: Right.

.....

The Court: I take it if you don’t have a contractor’s license, a West Virginia Contractor’s license, you should have been thrown out of the bidding process?

The Witness: That would be a mandatory condition and disqualification would happen,” JA219.

This Court may sua sponte, in the interest of justice, notice plain error, Cartwright v. McComas, \_\_\_ W.Va. \_\_\_, 672 S.E. 2d 297 (2008); syl. pt. 1.; State v. Myers, 2004 W.Va. 449, 513 S.E. 2d 676 (1998). In the instant matter the failure to reject Smith as a bidder due to its lack of a valid West Virginia contractor’s license represents a disqualifying law violation and the Circuit Court’s failure to so find is error. Due to the clarity of Code §21-11-6(a) that error is plain. Substantial rights of Wiseman and other bidders who possessed valid licenses have been affected. Wiseman confronts a substantial economic loss if Smith succeeds. As stated elsewhere, contractors who do adhere to requirements in bid submissions can justifiably question the fairness and integrity of the proceeds below if the judgment below is sustained in the face of Smith’s glaring omissions, see Cartwright syl. pt. 2. Standing alone, this justifies reversal.

## **2. Maynard C. Smith Erroneously Argues That It Had A Mandatory Right To The Award.**

While presented somewhat subtly Smith is arguing that the decision in State ex rel. E.D.S. Federal Corp. v. Ginsberg, 163 W.Va. 647, 259 S.E. 2d 618 (1979) does not control the decision in this case. Smith begins by criticizing “Wiseman’s wholesale reliance on Ginsberg,” Smith Brief p. 5. Of course all counsel below relied upon Ginsberg as the seminal decision on the subject. The Circuit Court’s judgment order mentions Ginsberg throughout its conclusions of law, JA11-12. So did the District Court in the Mid Atlantic Storage Systems case which the Circuit Court cited, JA13. Wiseman argues that while paying lip services to Ginsberg and certain of the requirements of the syllabus points the Circuit Court did not correctly apply that decision to the facts presented and the facts as presented do not support the Circuit Court’s decision. Smith argues that Ginsberg doesn’t really matter in that there exists a factual difference which involves design-build and non design-build projects, Smith Brief pp. 7-8.

Smith erroneously seeks to limit Ginsberg. Smith asserts in effect that in the circumstances here State officials do not have wide discretion. Instead Smith urges that by being low bidder “with a contractor’s license” that requires that they win the award of the contract. On the contrary not only is there no basis to limit Ginsberg as Smith suggests but also such a rule would negate mandatory bid requirements.

Smith closes its first argument with the citation of a 2004-2005 decision made by Judge Paul Zakaib of the Kanawha County Circuit Court, Smith Brief pp. 9-10. That case referred to a party named Schindler and provides no authority whatsoever. The contractor in Schindler had been disqualified due to the absence of a corporate seal on some document. There is nothing about that case which bolsters Smith’s argument or rebuts the arguments made by Wiseman.

### **3. The Review Process Employed Was Rational.**

Smith argues that the decision to disqualify Smith was irrational. The language cited by Smith in support as lifted from Ginsberg and Mid Atlantic Storage Systems, Inc. v. City of Milton, 903 F. Supp. 995 (S.D. W.Va. 1995) emphasizes that the *process* of making decisions should be rational, Smith Brief p. 13. In this case the process employed in making the decision was rational as the record fully supports.

There was nothing irrational in requiring references about prior similar work. There was nothing irrational in selecting three individuals to review the bids of the two lowest bidders when questions were raised. There is certainly nothing irrational by employing the standard in review which is taught that a mandatory requirement means just that. The only thing irrational was a mistake from which Smith has thus far benefitted. That is erroneously waiving the absence of a valid contractor's license which is contrary to the applicable law.

### **Conclusion**

For the foregoing reasons and those previously submitted in Appellant's brief the judgment of the Circuit Court of Kanawha County should be reversed.



James M. Cagle (WV Bar No. 580)  
1018 Kanawha Boulevard, East  
1200 Boulevard Tower  
Charleston, West Virginia 25301  
Email: caglelaw@aol.com  
Phone: (304)342-3174  
Fax: (304) 342-0448  
*Counsel for Appellant Wiseman Construction Co.,  
Inc.*

No. 15-0635

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

WISEMAN CONSTRUCTION COMPANY, INC.

A West Virginia Corporation, et. al.,

Appellant herein, a Defendant/Respondent below,

v.

MAYNARD C. SMITH CONSTRUCTION COMPANY, INC.,

a West Virginia Corporation, Appellee herein, the Plaintiff/Petitioner below;

DAVID TINCHER, Director of the Purchasing Division of the Department of

Administration; WEST VIRGINIA LOTTERY COMMISSION, a Public Corp;

JOHN C. MUSGRAVE, Director of the West Virginia Lottery; JASON PIZATELLA,

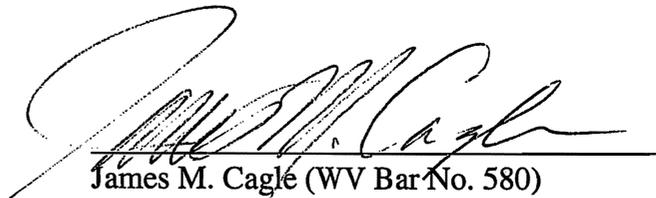
Cabinet Secretary of the Department of Administration; and ROBERT S. KISS,

Cabinet Secretary of the Department of Revenue, Defendants Below, Respondents.

**CERTIFICATE OF SERVICE**

The undersigned, Counsel for the Appellant Wiseman Construction Company, Inc., does hereby certify that a true and correct copy of the *Separate Reply to Brief of Maynard C. Smith Construction Co., Inc.* was served via e-mail and U.S. Mail to John P. Melick, Esq., Kelli D.

Talbott, Senior Deputy Attorney General and Greg Foster, Assistant Attorney General, on this the 10<sup>th</sup> day of August, 2015.



James M. Cagle (WV Bar No. 580)

1018 Kanawha Boulevard, East

1200 Boulevard Tower

Charleston, West Virginia 25301

Email: caglelaw@aol.com

Phone: (304)342-3174

Fax: (304) 342-0448

*Counsel for Appellant Wiseman Construction Co., Inc.*