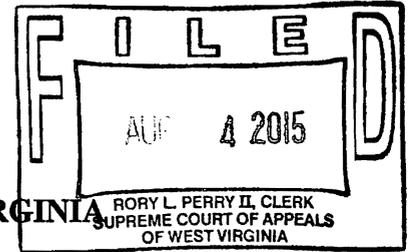


No. 15-0635



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
STATE'S SUMMARY RESPONSE**

Submitted by:

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1. The Response of Respondents West Virginia Lottery Commission, Tincher, Musgrave, Pizatella and Kiss is Both Spiritless in Substance and Inaccurate Concerning the Applicable Law.

A.

The Response is Spiritless

The response filed on behalf of Respondents Lottery Commission, individual officials, and cabinet members begins with “State Respondents take no position on the legal merits of the Circuit Court’s ruling.” It concludes with the inaccurate statements that the relief sought is moot, that “there is no need to set a precedent” and they now posit some new found belief “that irregularities in the Bidding Documents created problems in fairly awarding the contract.”

These Respondents seems to have forgotten that they actually awarded the contract in question to Wiseman Construction Co., Inc. It was their acts which were questioned in Circuit Court, not Wiseman’s. The State officials chose the language and the requirements which were set forth in the bid documents. Wiseman adhered, Maynard C. Smith Construction Co., Inc. did not. Seemingly forgotten also in its timid response, State officials including Respondent Tincher himself testified under oath in defense against Maynard C. Smith’s mandamus action.

The quest for justice can be messy. It is always attended by uncertainties and delays. These circumstances do not however convert an erroneous court decision into a correct one. Nor do the circumstances cleanse a mistake which is clear by accepting the bid in the first instance. The State’s “throw in the towel” attitude justified as designed to best serve West Virginia taxpayers ignores several important things. First, the taxpayers of West Virginia include Wiseman. Second, taxpayers including any construction company should expect uniformity and reasonable certainty when awarding public contracts. Third, all citizens expect that not only will a court’s decision correctly reflect the law as will the acts of State officials, but also that those

affected by these decisions shall have the right to challenge a decision if and when they believe it is not correct. Parties just don't quit because the process is messy or uncomfortable.

The Case is Not Moot

The State inexplicably argues that the matter is moot. Apparently counsel for the State equates mootness or non-mootness with the presence of absence of an order granting a stay of execution. Simply stated these matters are not the same. Indeed, if a stay appears to be needed Wiseman will so move. The law regarding mootness is as found in the decision of Bluestone Coal Corp. v. Mazzone, 226 W.Va. 148, 697 S.E. 2d 740, 747 (2010):

“Whether a case has been rendered moot depends upon an examination of the particular facts of a case. ‘Simply stated, a case is not moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.’ ” Powell v. McCormick, 395 U.S. 486 (1969).

The facts are that this case is on an expedited appeal track. Construction was delayed more time by Maynard C. Smith's action coupled with the Circuit Court's delay in ruling than anything which Wiseman has done by filing this appeal. The final brief is due by Monday August 10. Moreover, as shown in the argument which follows Maynard C. Smith's bid was not only deficient in content it was submitted and passed upon favorably in violation of W.Va. Code §21-11-6(a). Therefore, Wiseman continues to have a legally cognizable interest in the outcome.

2. The Bid of Maynard C. Smith Construction Co., Inc. was Submitted in Violation of W.Va. Code §21-11-6.

The record shows that Maynard C. Smith did not possess a valid contractor's license when it submitted its bid for the Lottery Commission job. The letter from the Purchasing Division to Smith on March 10, 2015 contains the following notation:

“8. WV Contractor's License (License submitted with the bid has expired),” JA 76.

In pertinent part W.Va. Code §21-11-6(a) states that:

“No person may engage in this state in any act as a contractor, or submit a bid to perform work as a contractor. . . unless such person holds a license issued under the provisions of this article.”¹

When the subject of a license came up at the Circuit Court proceedings this exchange appears:

“The Court: Okay. So this says Number 8, its S, West Virginia contractor’s license. License submitted with the bid has expired. So you were giving this vendor an opportunity to renew a West Virginia contractor’s license to become the successful bidder, correct?”

[Tincher] The Witness: I assume so, yes.

The Court: But you couldn’t give them the opportunity to supply three references that was missing from their contract?

The Witness: I can’t explain that, other than the contractor’s license may not have been a mandatory. I think it is.

The Court: The contractor’s license - -

The Witness: I don’t know. I would have to review documents,” JA 219-220.

Based on the foregoing the record shows the following. Maynard C. Smith’s bid was made and reviewed contrary to statute. The director of purchasing would “have to review documents” in order to determine the significance of this omission. Smith also failed to comply with the other requirements of the Bid Documents. If this is “irrational” as the Circuit Court states, it was also illegal. Case law is clear as is the statute. As the statutory language is plain it requires application, not interpretation, West Virginia Medical Institute v. West Virginia Public Employees Insurance Board, et al, 180 W.Va. 697, 379 S.E. 2d 501 (1989). No license means no job and under the statute it means an invalid bid was presented, Personal Temporary Services, a

¹Wiseman’s reply to Maynard C. Smith’s brief is due by Monday, August 10. In their submission Smith argues that their contractor’s license together with the low bid was alone enough to entitle them to the Lottery job. W.Va. Code §21-11-6 will be further addressed in Wiseman’s reply to Smith’s argument.

Division of Personnel, Inc. v. W.Va. Division of Labor Contractor Licensing Board, 197 W.Va. 149, 475 S.E. 2d 149 (1996). While Smith could have access to the Courts as it did its bid should have been rejected as being illegal as a matter of law, see Timber Ridge Inc., v. Hunt Asphalt & Paving, LLC, __ W.Va. __, 671 S.E. 2d 789 (2008).

Accordingly, even if the Circuit Court's decision passes review in the first instance it is clear that Maynard C. Smith Construction Co., Inc. was by law an illegal bidder under West Virginia law. The argument made by those representatives of the State who now want to give up by disavowing their earlier decision as well as their sworn testimony must be rejected.

Conclusion

For the foregoing reasons together with submissions made previously and to be made in reply to Maynard C. Smith's brief the decision of the Circuit Court of Kanawha County should be reversed with judgment to Wiseman Construction Company Inc.



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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 State's Summary Response* was served via e-mail to John P. Melick, Esq., Kelli D. Talbott, Senior Deputy Attorney General and Greg Foster, Assistant Attorney General, on this the 4th day of August, 2015.



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