

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-0635

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; and

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

Respondents/Defendants Below.

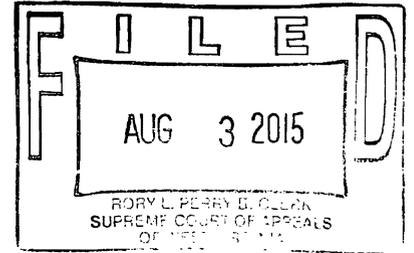
**SUMMARY RESPONSE ON BEHALF OF DAVID TINCHER,
WEST VIRGINIA LOTTERY COMMISSION, JOHN C.
MUSGRAVE, JASON PIZATELLA AND ROBERT S. KISS**

COMES NOW, Respondents, David Tincher, West Virginia Lottery Commission, John C. Musgrave, Jason Pizatella and Robert S. Kiss (or collectively referred to hereinafter as the “State Respondents”), by counsel, Kelli D. Talbott, Senior Deputy Attorney General, and Greg S. Foster, Assistant Attorney General, and submit their Summary Response to Petitioner’s Brief.

I.

INTRODUCTION

The State Respondents take no position on the legal merits of the Circuit Court’s ruling, and, based on the facts of this case, do not support overturning the ruling. At this time, the State Respondents do not wish to re-hash the issues raised in this case, and are willing to concede that



the original Request for Proposals used to solicit bids for this project contained a number of errors. Those errors created some confusion among the bidders. The State Respondents did not appeal the Circuit Court's Ruling because it is critical for construction to commence immediately, and also, because the Circuit Court found that the State Respondents acted in good faith in the bidding process, despite the flaws in the bidding documents. In sum, the State Respondents determined they could accept the Circuit Court's exercise of its discretion in deciding this case.

The construction project at issue in this case was expected to begin in May of 2015 and was to be completed in approximately eight months. The delay in construction due to the underlying litigation has been very problematic to the State on numerous fronts as explained in the State Respondents' Motion for Reconsideration filed on June 17, 2015, [App. 321-327], prior to entry of the Circuit Court's Final Order on June 22, 2015.

Wiseman filed this appeal and requested expedited relief but did not request a stay of the Circuit Court's Final Order, which remains in full force and effect. The State Respondents proceeded as ordered to mitigate the additional damage that would result if the project was delayed pending appeal. In compliance with the Circuit Court's order, a Notice to Proceed was issued to Maynard C. Smith Construction Company, Inc. ("Smith") to commence construction on July 23, 2015. [App. 331]

Consequently, construction by Smith will be well underway by the time this appeal is resolved. The relief requested by Wiseman – to be awarded the contract – is rendered moot. It is impractical to remove Smith and insert Wiseman in the midst of construction.

II.

STATEMENT OF THE CASE

Underlying Facts and Dispute

On January 20, 2015, the Purchasing Division of the Department of Administration (“Purchasing”), on behalf of the West Virginia Lottery Commission (the “Lottery”), solicited bids for a construction project to renovate the Lottery’s headquarters located at 900 Pennsylvania Avenue in Charleston West Virginia. The subject bid solicitation, designated as CRFQ_LOT1500000004, closed on March 3, 2015.

The Bidding Documents that prospective vendors were required to submit included terms, conditions and instructions for submitting bids. At the forefront of the Bidding Documents were the “Instructions to Vendors Submitting Bids.” The first two instructions provided as follows:

1. **REVIEW DOCUMENTS THOROUGHLY:** The attached documents contain a solicitation for bids. Please read these instructions and all documents attached in their entirety. These instructions provide critical information about requirements that if overlooked could lead to disqualification of a Vendor’s bid. All bids must be submitted in accordance with the provisions contained in these instructions and the Solicitation. Failure to do so may result in disqualification of Vendor’s bid.
2. **MANDATORY TERMS:** The Solicitation may contain mandatory provisions identified by the use of the words “must,” “will,” and “shall.” Failure to comply with a mandatory term in the Solicitation will result in bid disqualification.

[App. 72 ¹] Included within the Bidding Documents and identified in the Table of Contents, was “Section 00100 Instructions to Bidders.” [App. 73] Contained in Section 00100 Instructions to Bidders, was the following requirement under the subheading “1.07 Qualification Statement”:

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, doors 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 owners familiar with the work completed by the Contractor. The Proposal Form includes a section in which these references should be listed.

[App. 74]

Unfortunately, the qualification statement above was not specifically directed to this project. Rather, the original template used in the Bidding Documents applied more specifically to replacing doors than to the renovation contemplated by the remainder of the Bidding Documents. [App. 189, 199] Additionally, the “Proposal Form” referred to in Section A did not include a section for contractors to list references. [App. 201-202] As a result, not all contractors submitted references. [App. 262-263]

Purchasing received six (6) bids in response to the solicitation. Smith submitted the lowest bid in the amount of \$7,630,800, while Wiseman submitted the second lowest bid in the amount of \$7,786,000. Upon the Lottery’s initial review of the bids on or about March 4, 2015, it was recommended that the contract be awarded to Smith. [App. 75] By letter dated March 10,

¹ All appendix references are to the Joint Appendix prepared and submitted by Wiseman.

2015, Purchasing informed Smith that it was the “apparent successful bidder” and requested additional documents from Smith. However, the March 10, 2015 letter instructed that Smith “not initiate any work on this contract until you receive an official signed purchase order from the Purchasing Division.” [App. 76-77] The official purchase order for Smith was never executed.

On or about March 19, 2015, Purchasing received an email from Wiseman that alerted Purchasing to a defect in Smith’s bid. Specifically, Smith did not submit a Qualification Statement of three (3) references as required in Section 00100 of the Bidding Documents. [App. 78] Upon review of Smith’s bid, the Lottery confirmed that Smith’s bid failed to include three (3) references.

The Qualification Statement was described in the Bidding Documents as a mandatory requirement for bid submission. Wiseman, the second lowest bidder, did include three (3) references in accordance with the Qualification Statement, and satisfied all other mandatory requirements for qualification. Accordingly, on or about March 24, 2015, after a supplementary review of the bid submissions, Smith’s bid was disqualified and the contract was awarded to Wiseman as the lowest qualified bidder. [App. 79] On March 27, 2015, the Lottery executed an Award Justification, explaining that the contract was awarded to the second lowest bidder because the lowest bidder, Smith, was disqualified because it did not include mandatory references with its bid. [App. 80] On March 30, 2015, Purchasing executed a Purchase Order awarding the contract to Wiseman. [App. 80-82]

By letters dated April 7, 2015, and April 15, 2015, Smith protested the purchase order to Wiseman. [App. 83-104] By letter dated April 21, 2015, Respondent David Tincher (“Tincher”),

the Director of Purchasing, denied Smith's protest and explained the grounds therefor. [App. 105-108]

On April 22, 2015, Smith filed a Verified Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief, requesting the Circuit Court to compel the State Respondents to award the contract to Smith. [App. 15-56] By Order entered April 22, 2015, the Circuit Court issued a Rule to Show Cause and Order for Injunctive Relief, therein granting a preliminary injunction and ordering the parties to appear for hearing on April 30, 2015. [App. 59-60]

The April 30, 2015 Hearing

At the April 30, 2015 hearing, all parties were in agreement that the facts were uncontroverted and a speedy resolution to the dispute was necessary and in the best interest of all parties. The Circuit Court determined to take evidence at the hearing.

The State Respondents called two witnesses, Respondent Tincher, the Director of Purchasing, and Danielle Boyd ("Boyd"), Lottery's general counsel. Tincher and Boyd both testified that Smith's bid was disqualified because the bid did not comply with the mandatory requirement to submit three (3) references pursuant to the Qualification Statement. [App. 188-234 (Tincher); App. 234-269 (Boyd)]

The Circuit Court advised that it would take the matter under consideration.

Events Subsequent to the April 30, 2015 Hearing and the Final Order

On or about May 4, 2015, counsel for Smith advised all counsel via email that he received a telephone call from the Circuit Court's law clerk informing that the Circuit Court will grant the Writ of Mandamus and compel the State to award the contract to Smith. Smith's counsel was instructed to prepare and submit a proposed order with findings of fact and

conclusions of law. [App. 326.] Smith's counsel was not informed or advised by the Circuit Court of the specific factual or legal basis for the Court's ruling, only that the Writ would be granted and to submit a proposed order. In accordance with the Circuit Court's instructions and pursuant to TCR 24.01(c), Smith submitted a proposed "Judgment Order" on or about May 5, 2015. [App. 283-294]

On or about May 11, 2015, the State Respondents filed their Objections to Smith's Proposed Judgment Order. The primary objections were that the proposed order was legally deficient because it failed to conduct the proper legal analysis necessary to grant relief in accordance with *State ex rel. E.D.S. Federal Corp. v. Ginsberg*, 259 S.E.2d 618 (W. Va. 1979). [App. 295-300] On or about May 11, 2015, Wiseman filed its Motion for Amendment of Judgment, which likewise advised that Smith's proposed order was legally deficient under *Ginsberg*. [App. 301-305]

On or about May 11, 2015, Smith filed a Response to Wiseman's Motion for Amendment of Judgment. Smith acknowledged that its proposed order merely incorporated Smith's legal arguments from its initial pleading and at oral argument. There was no indication that the Circuit Court had advised Smith or any other party as to the specific legal and/or factual justification of its ruling at that time. [App. 306-307]

On June 17, 2015, the State Respondents filed a Motion for Reconsideration to inform the Circuit Court of the ongoing harm affecting the State as a result of the delay in the construction project, and requested an Order be entered permitting the State to rebid the contract in fairness to all parties. [App. 321-327]

On June 22, 2015, the Circuit Court entered its Final Order and awarded the contract to Smith, on the grounds that the State Respondents' decision to disqualify Smith was "irrational." [App. 2-14]

Importantly, the Final Order notes that the parties are to bear their own costs, and that the State Respondents acted in good faith. [App. 12, 14]

CONCLUSION

Not only is the relief sought by Wiseman moot, but to re-award the contract to Wiseman would create an additional delay which will create additional costs, not only for this project, but will increase logistical costs in planning for additional state office space [App. 321-327]. The State Respondents believe that irregularities in the Bidding Documents created problems in fairly awarding the contract in this instance. While the State Respondents believe that Director Tincher exercised his discretion appropriately in not waiving the reference requirement set forth in the bid specifications in this case, they accept the Circuit Court's determination and discretion to the contrary. There is no need to set a precedent based on this exceptional set of facts. Rather, the taxpayers of the State of West Virginia are best served by allowing the Circuit Court's Final Order to stand.

Respectfully Submitted,

DAVID TINCHER, Director of the Purchasing
Division of the Department of Administration;
WEST VIRGINIA LOTTERY COMMISSION,
public corporation; JOHN 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

By counsel

PATRICK MORRISEY
ATTORNEY GENERAL



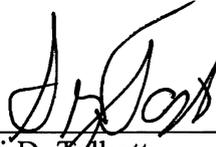
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CERTIFICATE OF SERVICE

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 *Summary Response on Behalf of David Tincher, West Virginia Lottery Commission, John C. Musgrave, Jason Pizatella and Robert S. Kiss* was served by depositing the same in the United States Mail, postage prepaid, this **3rd day of August, 2015**, addressed as follows:

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