

No. 35504 - *State of West Virginia ex rel. Maple Creative, LLC, v. David Tincher, Director of Purchasing Division, Department of Administration*

FILED

June 18, 2010

**RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Ketchum, J., dissenting:

Maple Creative submitted a proper bid proposal for the advertising and public relations services contract at issue in this case. This proposal included a resident Vendor Preference Certificate. It is clear that under our law, the Legislature intended to require the State to give *preference* to companies residing in West Virginia and who employ West Virginians. This is a legitimate goal for the use of our tax dollars – to spend them in our state and benefit our citizens and economy.

In the case before us, the State conducted a dual analysis, one with and one without the resident vendor preference. In the spreadsheet giving Maple Creative the appropriate resident vendor preference, Maple Creative received the highest score. In the spreadsheet not giving Maple Creative the resident vendor preference, an out-of-state vendor received the highest score. As the majority noted, the State used the spreadsheet that did not give Maple Creative the resident vendor preference and, by such, awarded the contract to the out-of-state vendor. This makes little sense to me and I believe that it clearly defeated the legislature's intent that businesses residing in our state – businesses that pay taxes in our state, grow our economy and provide good decent jobs for our citizens – be given preference over out-of-state companies that do little to benefit our tax revenue or grow our state's economy.

The resident preference issue aside, I also dissent because I believe that the State abused its discretion when finding that Maple Creative’s protest was untimely. As the majority opinion notes, the State is permitted to use discretion in allowing a late protest. 148 C.S.R. 1-8.1.1. (. . . “Protests received after these dates may be rejected at the option of the Director.”). In the present case, we are not confronted with a flagrant delay in filing a protest – a few days at most. Moreover, it was the Respondent’s Assistant Director that led Maple Creative to believe that the contract award was going to be reviewed based upon Maple Creative’s oral protest after seeing the bid file. The Assistant Director informed Maple Creative that the State “will look at it and if we are wrong, we will reverse it, if we are right, it will stay the way it is.”

It was abundantly clear to the State, before the protest period expired, that Maple Creative was protesting the State’s having failed to give it a resident vendor preference. The respondent’s Assistant Director – an employee of the State – created confusion in the steps Maple Creative needed to take to preserve its right of protest when it told Maple Creative, in response to Maple Creative’s oral protest, that “we will look at it and if we are wrong, we will reverse it . . .” Under these circumstance, Maple Creative was not flagrant in the delay of filing its protest. Conversely, the State’s failure to use sound discretion and allow Maple Creative’s protest – under these facts – was a flagrant abuse of discretion.

I believe that my prior decisions have made clear that I am not prone to fanciful interpretations of our statutes and rules and my dissent today does not indicate a departure from that judicial philosophy. Instead, it is very clear to me that the legislature intended to give West Virginians a preference in awarding public service contracts involving the expenditure of our tax dollars. It is equally clear that the legislature intended to – and did – give the State the discretion to accept protests to bid awards that may not have been timely filed. In the present case, the State failed to give Maple Creative a resident preference and compounded that error when it then abused its discretion by rejecting Maple Creative’s protest as being untimely made.

For these reasons, I would grant the Writ of Mandamus and remand this matter with directions that Maple Creative’s protest be considered on the merits.