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

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OF WEST VIRGINIA

Workman, J., dissenting:

Maple Creative, Inc., a West Virginia business, submitted a bid to the Respondent, David Tincher, Director of the Purchasing Division, Department of Administration ("the Director"), to contract with the West Virginia Division of Tourism for public relations and advertising services. Despite well-established West Virginia law providing a preference to West Virginia businesses in such contract bids, the Director refused to apply the preference to Maple Creative. Instead, the Director awarded the contract to an out-of-state company, Stonewall Retail Marketing. The Director then refused to consider Maple Creative's protest despite the fact that the Assistant Director of the Purchasing Division ("Assistant Director"), had informed Maple Creative that the Purchasing Division would review the award. Left with no other recourse, Maple Creative filed a petition for a writ of mandamus.

Unfortunately, the majority does not evaluate the Director's substantive decision to not apply the resident vendor preference to Maple Creative's bid and, thus, fails to address the most significant legal issue in the case. Instead, ignoring the clear tenor and intent of the "Jobs for West Virginians Act of 2009," West Virginia Code § 5A-3-37 ("the Act"), the statute creating a preference for West Virginia businesses, the majority holds that,

because Maple Creative filed its protest several days late, it forfeited its opportunity to contest the Director's application of the Act.

Unfortunately for Maple Creative and the other businesses bidding on the tourism contract, the Director announced the decision to award the contract to Stonewall Retail Marketing on December 29, 2009, during the week between the Christmas and New Years holidays. Maple Creative, however, did not learn of the contract award until the next week, on January 7, 2010. The following day, January 8, 2010, Maple Creative promptly notified the Director that it intended to file a protest.

Under the legislative rule explaining and clarifying the operative procedures for the Purchasing Division, Maple Creative had five business days to file a protest of the contract award. *See* 148 CSR § 1-8.1. Importantly, although January 8, 2010, was technically one day after the close of the deadline for filing a protest, the Assistant Director informed Maple Creative on that day that the Division "will look at it and if we are wrong, we will reverse it, if we are right, it will stay the way it is." The Assistant Director was well within his authority to make such a promise because the legislative rule clearly permits the Director to consider protests which are filed after the five day time period. *See* 148 CSR § 1-8.1.1 ("Protests received after these dates *may* be rejected at the option of the Director."). Thus, by informing Maple Creative on January 8, 2010, that the Purchasing Division would

review the award, the Assistant Director, in effect, agreed to accept Maple Creative's late-filed protest.

As expected, Maple Creative submitted its formal protest several days later, on January 19, 2010. Despite the Assistant Director's promise, however, the Director rejected Maple Creative's protest without reviewing the matter or issuing a written opinion as required under 148 CSR § 8.2.1. Maple Creative, therefore, has received no substantive review of its protest and the Director has not issued a written opinion explaining its decision to deny Maple Creative the resident vendor preference.

Because of the Assistant Director's January 8, 2010 promise, under the doctrine of equitable estoppel, the Director should have reviewed Maple Creative's protest. Alternatively, the Director should have exercised the discretion afforded him by 148 CSR § 8.1.1 to consider Maple Creative's protest, given the circumstances under which it was filed. In either case, such review would have resulted in a written opinion either explaining the Director's decision to deny Maple Creative the resident vendor preference or applying that preference and awarding the contract to Maple Creative.

Importantly, review of Maple Creative's protest would have focused all parties on the substantive issue of whether, as a West Virginia business, Maple Creative was entitled

to receive a vendor preference. Instead, the Director elevated a mere procedural issue above this substantive question. To do so under these facts, where Maple Creative had a reasonable basis for filing its protest several days after the five-day time frame, and where the Associate Director promised to review the matter anyway, was an abuse of discretion.

Moreover, pursuant to the plain language of the Act, Maple Creative was entitled to the maximum resident vendor preference on the cost portion of its bid. Maple Creative undisputedly fits the definition of a "resident vendor," *see* 110 CSR § 12C-2.14, and has the requisite number of employees who are West Virginia residents, *see id.* § 12C-4.2, to qualify for the maximum five percent vendor preference. *See id.* § 12C-4.5. The Act applies the preference to resident vendors, or those with the requisite number of West Virginia employees, if "the vendor's bid does not exceed the lowest qualified bid from a nonresident vendor by more than two and one-half percent of the latter bid. . . ." W. Va. Code § 5A-3-37(a)(1) & (2). Because Maple Creative's bid was the lowest, it necessarily did "not exceed the lowest qualified bid from a nonresident vendor" by any amount and, thus, Maple Creative was entitled to the resident vendor preference pursuant to the plain language of the statute.

The Director, however, contends that Maple Creative was not entitled to a preference because its bid was the lowest submitted. According to the Director, the resident

vendor preference does not apply to a resident vendor's bid when that bid is already the lowest in cost. As support for this interpretation, the Director cites solely to the Act. The plain language of the Act, however, merely states that, to qualify for the preference, the resident vendor's bid cannot exceed, by more than two and one-half percent, the lowest qualified bid from a non-resident vendor. Nothing in the Act limits the application of that language when the resident vendor's bid is actually the lowest bid. Accordingly, pursuant to the plain language of the Act, Maple Creative was entitled to the resident vendor preference. *See* W. Va. Code § 5A-3-37(a).

Importantly, pursuant to the Director's own calculations as set forth in Division of Tourism Form TOR 3676, had the resident vendor preference been applied, Maple Creative's bid would have had the highest final score and, thus, Maple Creative would have been awarded the contract. The Director's decision not to apply the preference, therefore, directly resulted in the loss of a contract to a West Virginia company.

By refusing to apply the resident vendor preference to Maple Creative's bid despite the plain language of West Virginia Code § 5A-3-37, and by refusing to consider Maple Creative's protest after indicating that it would review the issue, the Director has abused his discretion and acted in a manner that is arbitrary and capricious. In so doing, the

Director has ignored the Legislature's clear intent to encourage the award of State contracts to West Virginia businesses when reasonable. For these reasons, I respectfully dissent.