

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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No. 24-ICA-183

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS
Plaintiff-Below, Petitioner

v.

OLYMPUS PAINTING CONTRACTORS, INC.
Defendant-Below, Respondent

PETITIONER'S BRIEF

*Appeal From Order of Circuit Court
of Kanawha County Civil Action No. 22-C-292*

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ASSIGNMENTS OF ERROR

1. THE CIRCUIT COURT ERRED BY GRANTING SUMMARY JUDGMENT MOTION OF OLYMPUS WITHOUT REQUIRING PROOF OF FRAUD, COLLUSION OR ABUSE OF DISCRETION BY THE STATE AGENCY

STATEMENT OF THE CASE

At issue in this appeal is the integrity of the competitive bidding process of a state government agency, Petitioner, the West Virginia Department of Transportation, Division of Highways, to solicit bids and analyze the bids to determine the lowest responsible bidder in accordance with the West Virginia Fairness in Competitive Bidding Act (“Act”). In early 2021 Petitioner published an advertisement seeking bids for a repair and repainting project known as the Veteran’s Memorial Bridge Project in Brooke County, West Virginia. Appendix Record pg. 1 (hereinafter cited as “A.R. _”). On March 9, 2021, Respondent Olympus Painting Contractors, Inc. submitted a bid in response to perform the work detailed in the bid invitation in the amount of \$5,606,316.34. A.R. 2. Bids were publicly opened on March 9, 2021, and Respondent was the apparent low bidder by more than \$1,600,000.00. A.R. 2. On March 15, 2021, Respondent emailed a letter to DOH seeking to withdraw its bid and/or have it rejected by Petitioner under the provisions of West Virginia Code §5-22-2 due to a claimed clerical error in the price of one item of their bid. A.R. 152.

While there is no provision in West Virginia law or State Regulations to allow for a bidder to withdraw their bids after bid opening has occurred, in this case Petitioner conducted additional analysis of Respondent’s bid to ensure the bid met the Petitioner’s guidelines for awarding construction contracts. A.R. 368 (Rumbaugh Depo. Pg. 16-17). Petitioner also analyzed the particular bid item specified by Respondent as incorrect against its own estimate and the price of other bids for that particular item. A.R. 368. Respondent’s Award Committee

determined that it could not deem the item in question “in error” since the item price submitted was more than that of some other bidders for that item and only 4% percent less than Petitioner’s estimated price for that item. A.R. 372 (Rumbaugh Depo. Pg. 31:7-19). On March 19, 2021, Petitioner notified Respondent of its decision to decline its request to reject its bid under §5-22-2 and awarded the construction contract for the Veterans Memorial Bridge Project to Respondent as the lowest responsible bidder. A.R. 209 & 213.

Respondent was given additional time beyond the twenty (20) days allowed by the Highways Standard Specifications Roads and Bridges §103.8 for the award winner to execute the performance contract. A.R. 161. Consequently, Respondent refused to sign the contract and refused to perform the work promised in its bid. Subsequently Petitioner notified Respondent, Great Midwest Insurance Company (Great Midwest), issuer of Respondent’s bid bond, of its request for payment of the bid bond to Petitioner due to Respondent’s failure to enter into the contract to perform the work as promised in its bid. A.R. 162. The investigation of Petitioner’s bond claim was assigned to Skyward Underwriters Agency, Inc. (hereinafter “Skyward”). Payment of the bond was not made by Great Midwest as requested by Petitioner. So, on April 18, 2022, Petitioner filed its *Civil Complaint* against Respondents Olympus, Great Midwest and Skyward alleging counts for breaches of contract and tortious interference of a contract. A.R. 16, 17.

Petitioner filed its Civil Complaint against the defendants below in an effort to enforce the contract formed with Respondent upon the Petitioner’s acceptance of their bid and awarded the contract. When Petitioner filed its *Complaint* the work on the Veterans Memorial Bridge had already begun by another contractor. As such, Petitioner did not seek specific performance of the construction work Respondent promised to perform, for which it claims would have resulted in

the loss of \$708,000.00, but sought only to enforce the liquidated damages provision of the contract requiring the forfeiture of Respondent's bid bond in the amount of 5% of the bid amount or \$280,315.82. A.R. 562 (Final Hearing Transcript P. 5).

On July 19, 2022, Respondent Great Midwest filed its *Answer to the Complaint*. A.R. 24. Then on July 22, 2022, Respondent Olympus filed its *Answer and Motion to Dismiss Pursuant to Rule 12(b)(6) Of The West Virginia Rules Of Civil Procedure* seeking to dismiss the claim of tortious interference. A.R. 19-23. Also, Olympus filed a *Memorandum of Law In Support of Its Motion to Dismiss Count II of Plaintiff's Complaint* on July 22, 2022. A.R. 35-39. On the same date Skyward filed a *Motion to Dismiss* with exhibits for the breach of contract claim alleged. A.R. 31-34.

Petitioner then filed its *Response to Motion to Dismiss of Defendant Skyward Underwriters Agency, Inc., the Partial Motion to Dismiss of Defendant Olympus Painting Contractors, Inc. and Motion to Amend Complaint* on August 31, 2022. A.R. 40-52. The Amended Complaint eliminated the claim of tortious interference against Olympus but then added a claim of tortious interference against Skyward. *See Id.* Olympus then filed its *Reply in Support of Motion to Dismiss Count II* on September 2, 2022. A.R. 53-55. Olympus filed its *Answer to Plaintiff's Amended Complaint* on September 6, 2022, A.R. 61-65, and Great Midwest and Skyward each filed their *Answer to Amended Complaint* on September 16, 2022. A.R. 66-79.

On October 13, 2022, Skyward filed a *Motion for Summary Judgment* A.R.80-91, and *Memorandum In Support Of Skyward Underwriters Agency, Inc.'s Motion for Summary Judgment* with exhibits. A.R. 92-100. On October 24, 2022, the Court entered an *Order Denying Defendant Skyward Underwriters Agency, Inc.'s Motion to Dismiss, Granting the Defendant Olympus Painting Contractors, Inc.'s Motion to Dismiss Count II of Plaintiff's Complaint, and*

Granting the Plaintiff's Motion to Amend Complaint Removing Its Count of Tortious Interference Against Defendant Olympus Painting Contractors, Inc. and Adding a Count of Tortious Interference Against the Defendant Skyward Underwriters Agency, Inc. A.R. 101-106. On December 15, 2023, Skyward filed *Skyward Underwriters Agency, Inc.'s Renewed Motion for Summary Judgment* with exhibits, A.R. 107-128, and its *Memorandum in Support of Skyward Underwriters Agency, Inc.'s Renewed Motion for Summary Judgment*. A.R. 129-137. On December 19, 2023, DOH filed *Plaintiff's Motion for Summary Judgment Against Defendant Olympus Painting Contractors, Inc. for Breach of Contract* A.R. 13-139, and *Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment*. A.R. 140-166. Subsequently, Respondent filed *Defendant Olympus Painting Contractors, Inc.'s Motion for Summary Judgment* on December 21, 2022, A.R. 167, and *Defendant, Olympus Painting Contractors, Inc.'s Memorandum of Fact and Law in Support of Its Motion for Summary Judgment*. A.R. 169-218. On January 5, 2024, Respondent filed *Defendant Olympus Painting Contractors, Inc.'s Response in Opposition to Plaintiff's Motion for Summary Judgment*. A.R. 219-268. Petitioner then filed on January 11, 2024, *Plaintiff's Response in Opposition to Defendant Olympus Painting Contractors, Inc.'s Motion for Summary Judgment*. A.R. 269-278.

On January 11, 2024, the Court entered the *Order* whereby Petitioner agreed to dismiss Count II of Plaintiff's Amended Complaint for tortious interference against Defendant Skyward, and consequently, dismissed Skyward as a party defendant in the case. A.R. 277. On January 25, 2024, a hearing was held on the parties Motions for Summary Judgment and, a *Final Order* was issued by the Court on March 29, 2024, granting the Motion for Summary of Defendant Respondent Olympus and denying the Motion for Summary Judgment of Petitioner DOH. From this Final Order Petitioner files this appeal.

SUMMARY OF THE ARGUMENT

Petitioner appeals the Circuit Court decision granting summary judgment to Respondent Olympus overruling the decision of the Petitioner to not reject Respondent's bid for a construction project, finding only that "all four conditions set out in West Virginia Code § 5-22-2 were met and should have done so." A.R. 2, Final Order Pg. 2. However, the standard established by the West Virginia Supreme Court of Appeals for review of decisions of a State Agency which awards public contracts is set forth in the case of *Pioneer Co. v. Hutchinson*, 159 W.Va. 276, 220 S.E.2d 894 (1975). In *Pioneer* this Court held that "Statutes and ordinances which require public officers or a public tribunal to award a contract to the 'lowest responsible bidder' vest wide discretion in officials." Syl. Pt. 5 *Pioneer Co. v. Hutchinson*, 159 W.Va. 276, 220 S.E.2d 894 (1975). In addition to the wide discretion public officials hold, the Court also held in *Pioneer* that a State Agency making a decision in regard to awarding a public contract is presumed to have properly discharged its duties and exercised its discretionary authority in a proper and lawful manner. *Id.* Syl. Pt. 6.

Given the presumption that the State Agency has acted properly in exercising its discretionary authority, this Court held that any party challenging the award of a contract must show that the decision of the State Agency was made through fraud, collusion, or such an abuse of discretion that it is shocking to the conscience. Syl. Pt. 6 *Pioneer Co. v. Hutchinson*, 159 W.Va. 276, 220 S.E.2d 894 (1975).

No evidence has been presented in this case and the Circuit Court's Final Order does not make any finding of fact that Petitioner's decision to not reject the bid submitted by Respondent and award the bridge painting contract to them was made arbitrarily, capriciously, or that DOH abused its discretion in any way.

Respondent argues that it should have been allowed to withdraw its bid or have its bid rejected by Petitioner after the opening of all bids because it notified Petitioner of its clerical error prior to the award of the project contract. A.R. 172. Respondent argues that the doctrine of equitable rescission has been applied by courts and legislatures across the country to this very set of facts to allow the bidder to withdraw its bid after the date of bid opening. A.R. 177. However, Respondent relies on older cases outside of the State of West Virginia to support its claim that doctrine of equitable rescission should apply in this case to allow Respondent to withdraw its bid before the award of the contract. A.R. 173-177. However, this Court need only to rely on the current law in West Virginia since the West Virginia Legislature has more recently codified the elements for equitable rescission that must be analyzed when evaluating the circumstances of a claimed error or mistake in bidding for a public entity. *See* West Virginia Code § 5-22-1 et. Seq. 2003.

In this case the Circuit Court properly held that the West Virginia Fairness in Competitive Bidding Act governs this matter, specifically, West Virginia Code § 5-22-2, which provides in pertinent part as follows:

(b) The provisions and requirements of this section, section one of article twenty-two of this chapter, the requirements stated in the advertisement for bids and the requirements on the bid form may not be waived by any public entity. The public entity may only reject an erroneous bid after the opening if all of the following conditions exist: (1) An error was made; (2) The error materially affected the bid; (3) Rejection of the bid would not cause a hardship on the public entity involved, other than losing an opportunity to receive construction projects at a reduced cost; and (4) Enforcement of the bid in error would be unconscionable. If a public entity rejects a bid, it shall maintain a file of documented evidence demonstrating that all the conditions set forth in this subdivision existed. If a public entity determines the bid to be erroneous, the public entity shall return the bid security to the contractor.

A.R. 2, Final Order pg. 4.

As the Code provision above establishes, the public entity charged with awarding contracts to the ‘lowest responsible bidder’ may only reject a bid if all four (4) conditions outlined are met. Significantly, the Legislature, through this Code provision, places the discretion to make the determination as to whether any or all of these conditions are met solely with the public entity.

Petitioner’s position is that their Award Committee, made up of experienced engineers and contract procurement specialists, made a proper decision to not reject the bid of Respondent. Petitioner’s decision to award the contract to Respondent was made after careful analysis of the facts. Petitioner’s determination that Respondent was the ‘lowest responsible bidder’ on the bridge project under these circumstances was appropriate, absent of any fraud, collusion or abuse of discretion that would shock one’s conscience. Upon acceptance of the bid by Petitioner, and awarding of the contract to Respondent, a contract was formed. Respondent made a willful decision to refuse to sign the award contract and refused to perform the work as promised through their bid. Such refusal constitutes a breach of that contract. Even after extensive discovery in this matter, Respondent could provide no evidence that any employee of Petitioner involved in the decision to award the bridge contract to Olympus acted fraudulently or abused their discretion in finding Respondent to be the ‘lowest responsible bidder’ for the project. As Such, the decision of the Petitioner’s Award Committee was rational and appropriate under the circumstances and not made arbitrarily nor capriciously.

Petitioner’s argument is that the Circuit Court improperly substituted its judgment for that of the Petitioner’s judgment ruling that an error had occurred in the bid without requiring Respondent to show sufficient documentary evidence to support its asserted error. Additionally,

the Circuit Court did not require Respondent to produce evidence to establish that enforcement of the contract with its claimed error would have been unconscionable.

Petitioner seeks the reversal of the Circuit Court's *Final Order* holding that Petitioner was required to reject the erroneous bid of Respondent, and hold that Respondent breached its contract with Petitioner for the Veterans Memorial Bridge, such that the liquidated damages clause of the contract should be enforced against Respondent for such breach.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is appropriate under the criteria set forth under Rule 18 and 20 of the West Virginia Rules of Appellate Procedure and is requested by Petitioner. Rule 20 oral argument will aid in the decision-making process. Additionally, this matter concerns the integrity of the bidding process by a State Agency which is a matter of fundamental public importance and arises from principles of settled law.

STANDARD OF REVIEW

It is well established in West Virginia that "[a] circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 190, 451 S.E.2d 755, 756 (1994). In conducting our de novo review, we apply the same standard for granting summary judgment that is applied by the circuit court. Under that standard, summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Id.* at 190, 451 S.E.2d at 756, syl. pt. 4. Further, we recognize that "the party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence' and must produce evidence

sufficient for a reasonable jury to find in a nonmoving party's favor." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 60, 459 S.E.2d 329, 337 (1995) (citation omitted).

Green v. McFarland, No. 23-ICA-121 (W. Va. ICA Feb 08, 2024)(2024 WL 493586).

ARGUMENT

1. THE COURT ERRED BY GRANTING SUMMARY JUDGMENT MOTION OF OLYMPUS WITHOUT REQUIRING PROOF OF FRAUD, COLLUSION, OR ABUSE OF DISCRETION BY THE STATE AGENCY

Petitioner’s decision to award the public construction contract for the Veterans Memorial Bridge to Respondent was made properly after careful analysis of the facts in an effort to maximize the value of the public funds and to ensure the fairness of the bidding process. A.R. 377-378 *Depo. Rumbaugh Pgs. 53-54*.

“A state agency which awards a public contract to the lowest qualified responsible bidder under the West Virginia Fairness In Competitive Bidding Act, West Virginia Code §§ 5-22-1 to -2 (2015), is clothed with the presumption that it has properly discharged its duties. Accordingly, the burden of proof in an action challenging the award of a contract by an unsuccessful bidder or a taxpayer is upon the challenger, who must show the agency’s actions were arbitrary, capricious, or an abuse of discretion. In conducting a review of the competitive bidding process, courts should consider whether there is a rational basis for the administrative decision. This standard requires courts to examine the bidding procedures utilized to ensure they provided a fair process and incorporated sufficient...” Sly. Pt. 5, *Wiseman Const. Co., Inc. v. Maynard G. Smith Const. Co., Inc.*, 236 W.Va. 351, 779 S.E. 2d 893 (2015).

Petitioner’s decision to not reject the bid proposal of Respondent as requested after all bids had been opened was rational, based upon factual analysis conducted and was not arbitrary, nor capricious. All bids submitted in response to an invitation to bid by Respondent for a project are analyzed upon opening to determine if they are within the guidelines of Respondent agency as set forth in its Award Manual publicly available on its website. A.R. 368-369 *Depo.*

Rumbaugh Pgs. 17:11-24, 18: 1-24, 19: 1-18. Respondent’s bid did not raise any red flags upon

opening of the bids because their bid, even though it was more than 20% below the DOH's Engineer's estimate, was found to be within the guidelines set forth in the Award Manual. A.R. 369 *Depo. Rumbaugh* Pg. 19:19-24.

After Respondent notified Petitioner of its claimed error in transposing the price of one item out of its 34-item bid into the computer program submitting its bid, Petitioner conducted additional analysis of Respondent's bid and, in particular, Item 150, Remove and Replace Expansion Joints. A.R. 368 *Depo. Rumbaugh* Pg. 16:15-24, 17, 18, 19:1-24. After extensive analysis and consideration of the evidence provided by Respondent of a claimed error in their bid, Petitioner concluded that there was no apparent error in the bid and subsequently awarded the contract for the bridge project to Respondent. A.R. 370 *Depo. Rumbaugh* 24:4-24.

The evidence presented in this matter demonstrates that Petitioner took action upon receiving the request of Respondent to withdraw their bid by conducting additional analysis of the bids. Petitioner also reviewed the information submitted by Respondent to support its claim of a clerical error in the bid. The evidence establishes that Petitioner's decision to award the construction contract to Respondent was rational and based upon the information developed through their analysis as well as the information provided by Respondent. Therefore, the decision of Petitioner's Award Committee to not reject the bid from Respondent due to a claimed clerical error was made on a rational basis after informed analysis of the facts. Additionally, Respondent provided no evidence that Petitioner acted fraudulently or abused its discretion in determining to not reject Respondent's bid as submitted.

Therefore, absent any showing of fraud or abuse on the part of the Petitioner, a State Agency, the Circuit Court did not have a basis to overturn the decision of Petitioner to award the construction contract to Respondent. Since Respondent failed to prove that Petitioner acted

arbitrarily, capriciously or abused its discretion, the presumption that Petitioner properly discharged its duties must be upheld by the Circuit Court.

A court will not ordinarily interfere with the action of a public officer or tribunal clothed with discretion, in the absence of a clear showing of fraud, collusion or palpable abuse of discretion. *Pioneer Co. v. Hutchinson*, 158 W.Va. 276, 220 S.E.2d 894 (1975) citing *State ex rel. Printing-Litho, Inc. v. Wilson* 147 W.Va. 415, 128 S.E.2d 449 (1962). Discretion in awarding a municipal contract is not abused when it is predicated upon ‘good faith and honesty.’ *Harrison v. City of Huntington*, 141 W.Va. 774, 92 S.E.2d 221 (1956).

However, in this case, the Circuit Court erred when it found that Respondent did, in fact, make a clerical error when submitting its bid for the Veterans Memorial Bridge Project substituting its judgment for that of the Petitioner.

“Based upon the undisputed facts and evidence submitted in the support of the motions filed in this matter, the Court concludes that Olympus made an inadvertent, clerical error when submitting its bid for the Veterans Memorial Bridge Project in Brooke County, West Virginia and that the error, totaling approximately 13% of the bid price, materially affected Olympus’s bid.” A.R. 4 *Final Order Pg. 4, P4.*

The Circuit Court substituted its discretion for the discretion of the State Agency in this matter without any evidence to support and without finding that such determination was an abuse of discretion, founded upon fraud or was made arbitrarily.

i. Olympus Failed to Present Documentation Showing Error in Its Bid

The burden of proof to show that Petitioner acted in some arbitrary way and abused its discretion in the awarding of the construction contract to Respondent rests solely with Respondent, as the party attacking the award of the state agency’s contract. The only evidence presented by Respondent to support its claimed clerical error was through the sworn affidavit and deposition testimony of Lisa Moran, its secretary. Ms. Moran claims she made the clerical error when entering the price of one item into the computer program utilized for bidding construction

projects by Petitioner (BidX). Ms. Moran avers that she inadvertently entered the figure of \$5,340.00 instead of \$9,340.00 for Item #150 in the bid package. A.R. 192 *Affidavit Lisa Moran*. Ms. Moran testified that she received the prices for all of the items listed in the Veteran Memorial Bridge bid written on paper from her boss, Leon Mavromatis, and then she inputs these prices into the computer for the bid. A.R. 298 *Depo. Lisa Moran Pg. 20:12-15*.

However, Ms. Moran also described how it was part of her job duties to collect bids from subcontractors and prices for material items for a project for which Respondent plans to bid on, and then compiles this information together on a computer spreadsheet using Excel. A.R. 297 *Depo. Lisa Moran Pg. 19:7-24*. Respondent did not provide the Court with any of those handwritten pages of item prices Ms. Moran received from her boss to input the prices into the BidX program for the Project. Presumably these handwritten pages would show a price of \$9,340.00 for Item #150, along with all other prices submitted in the bid, confirming the statements made in her affidavit. Likewise, Respondent did not produce the Excel spreadsheet developed by Ms. Moran for the Veterans Memorial Bridge Project bid which presumably would show the prices Respondent received from subcontractors, as well as, the price Respondent wanted to submit in its bid. The Circuit Court also made its decision to find a clerical error occurred in Respondent's bid without reviewing or requiring this evidence be produced to verify Respondent's claim of error. Instead, the Court improperly inserted its judgment for that of the trained professional of the State Agency charged with the decision-making authority to accept or reject bids after rational analysis has been conducted.

ii. Whether an Error in A Bid is Material to the Bid Depends on the Facts and Circumstances Surrounding the Claimed Error

The Circuit Court also held that since it found Respondent made a clerical error in its bid, the Court held that said error was of such magnitude that it materially affected the bid based

upon the amount of \$708,000.00 of its overall bid of \$5,606,316.34. A.R. 3. The *Final Order* includes a Finding that “During deposition testimony in the matter Stephen Todd Rumbaugh, at the time of the subject letting, Deputy State Highway Engineer and Chief Engineer of Construction, acknowledged that a \$708,000.00 error in the bid would have “drastically” raised Olympus’ intended bid. In addition, Mr. Rumbaugh confirmed that the enforcement of Olympus’ bid with a \$708,000.00 error would have been “unfair”. A.R. 3 *Final Order Pg. 3 P. 9.*

However, the question posed to Mr. Rumbaugh in his deposition was someone different than stated in the *Final Order*. The question posed to Mr. Rumbaugh was “If Olympus is telling the truth and they’ve got a 708,000 dollar error in their bid, would it be unfair to require them to complete the work and take that 708,000 dollar loss?” A.R. 373 *Depo. Stephen Rumbaugh Pg. 37: 6-9.* That question requires one to review of all of the items of Respondent’s bid, to wit; the prices quoted to Respondent for each item from subcontractors, the price to acquire materials, and the cost to pay its employees for labor in order to determine whether Respondent would suffer a financial loss overall after completing the entire project. Mr. Rumbaugh’s response to the question was “Sorry, if there was an error, it would have been.” *Id.*

Mr. Rumbaugh, and Petitioner’s position is that an error had not occurred in the bid submitted by Respondent such that it would justify a rejection of their bid for this project. A.R. 373 *Depo. Stephen Rumbaugh Pg. 35: P 7-24.* Petitioner’s Award Committee determination that the claim bid item in error cited by Respondent was merely 4% above the price of Petitioner’s Engineer’s estimate and higher than other bidders for the item, that the bid was in balance for all items and did not meet the requirements for rejection under West Virginia Code § 5-22-2. A.R. 368-369 *Depo. Stephen Rumbaugh Pgs. 17:19-24, 18:1-24, 19:1-24.*

"The determination of whether an error underlying the execution of a written instrument constitutes a mistake of fact or a mistake of law for the

purposes of setting aside of that instrument should be controlled by the circumstances of each case." *Syl. Pt. 3 Webb v. Webb*, 171 W.Va. 614, 301 S.E.2d 570 (W. Va. 1983).

"A party may not avoid the legal consequences on the ground of mistake, even a mistake of fact, where such mistake is the result of the negligence of the complaining party." *Syl. Pt. 4 Id.*

The circumstances surrounding the error, such as who made the error, how it was made, the documents compiled to constitute the completing of the bid prices for each item (such as invoices and subcontractor bids), as well as records made by Respondent in order to submit its bid, should all be carefully reviewed to analyze the mistake claimed. Determination of whether an error occurred in the bid and whether said error materially affects the bid is a determination that can only be made by reviewing the circumstances surrounding the bid submitted. In this matter Respondent admits to making the error in submitting its bid to Petitioner so the mistake in this matter is a unilateral mistake for which the responsibility rests solely with Respondent. A.R. 240. The Court erred by failing to require additional proof from Respondent of their error and how the error materially affects the bid to such extent that enforcement of the contract as formed would be unconscionable.

iii. *Time Provided to Olympus to Sign Contract for Project Work Resulted in Price Increases of Materials During Covid-19 Pandemic*

The Circuit Court also found that if Petitioner had accepted Respondent's representation and immediately rejected their bid and subsequently awarded the bridge contract to the next lowest bidder, no hardship would have been suffered by Respondent other than losing the opportunity to receive construction projects at a reduced cost. A.R. 4 *Final Order Pg.4, P. 4*. Again, the Circuit Court has substituted its judgment for the discretion of the public entity who made a rational determination after factual analysis of evidence provided by respondent.

However, in this case, Petitioner's Award Committee made a rational decision that there was not a basis for the rejection of Olympus' bid and awarded the contract to Respondent. Petitioner sent the award notification and contract documents to Respondent to complete within the requisite thirty (30) days. A.R. 154. Not receiving the signed contract back DOH again sent the award notification and allowed for an additional ten (10) days for the return of the executed contract. A.R. 161. Once Respondent clearly indicated that no contract would be signed and they would perform no work on the bridge project, Petitioner found the prices of materials had risen sharply such that the bids submitted for the project were no longer valid. Unfortunately, this project was originally bid out and let during the spring of 2021, as most painting contracts are to take advantage of weather conditions. However, due to the COVID virus hitting during that year prices of construction materials greatly increased. Petitioner subsequently placed the Veterans Memorial Bridge project out for new bids and relet the project in September 2021.

As a result of the delay in obtaining the new bids the costs rose significantly and the contract was awarded to Freyssinet, Inc. in the amount of \$7,496,014.10. A.R. 3 *Final Order Pg. 3, P. 8*. This delay in the bidding process and letting of the contract for the Veterans Memorial Bridge Project resulted in an increase in costs of \$1,889,697.76 to complete the work. Additionally, employees of Respondent were required to complete additional work that would not have been necessary if not for the delay caused by Respondent's refusal to execute the performance contract. Contract specialists spent time communicating with Respondent in efforts to resolve the conflict of the contract, engineers had to conduct additional reviews of the project and undertake to complete new project estimates, and additional work was undertaken to advertise for bids a second time, evaluate the new bids and review the bids to select the new lowest responsible bidder.

iv. *Olympus Failed to Produce Evidence to Support Its Claim that Enforcement of the Contract Would be Unconscionable*

The burden of proof to show that enforcement of the contract containing the bid in error would be unconscionable, as required under West Virginia Code § 5-22-2, forcing Petitioner to reject the bid rests with Respondent who is challenging the decision of Petitioner to award the contract.

A state agency which awards a public contract upon criteria other than price is clothed with a heavy presumption that the contracting agency has properly discharged its duties and exercised discretionary powers in a proper and lawful manner; accordingly, the burden of proof in any action challenging the award of a contract by an unsuccessful bidder or a taxpayer is upon the challenger who must show fraud, collusion, or such an abuse of discretion that it is shocking to the conscience. *Syl. Pt. 3 State ex rel. E.D.S. Federal Corp. v. Ginsberg*, 163 W.Va. 647, 259 S.E.2d 618 (1979).

While the Circuit Court clearly possess the authority to rule a contract or its terms to be unconscionable, so as to be unenforceable, such determination can only be made after a detailed inquiry of the facts and circumstances under which the contract was formed and the fairness of the contract as a whole.

"Unconscionability is an equitable principle, and the determination of whether a contract or a provision therein is unconscionable should be made by the court." *Syl. Pt. 1 Troy Min. Corp. v. Itmann Coal Co.*, 176 W.Va. 599, 346 S.E.2d 749 (W. Va. 1986).

"An analysis of whether a contract term is unconscionable necessarily involves an inquiry into the circumstances surrounding the execution of the contract and the fairness of the contract as a whole." *Syl. Pt. 3 Id.*

In the instant matter, the Circuit Court erred by failing to make an inquiry into the circumstances surrounding the execution of the contract. The Circuit Court did not inquire as to the fairness of the whole contract to determine if the contract would be unconscionable if enforced. Such inquiry would have required an evaluation of the entire contract's profitability

through analysis of each contract item, its costs and the costs of labor and overhead expenses as compared to the revenue expected. Here, the Circuit Court merely considered the range of bids for the project and Petitioner's own cost estimate for the project as compared to Respondent's mistaken bid to decide the contract was unconscionable, and therefore, unenforceable. A.R. 4 *Final Order Pg. 4-5, P. 5*. The Court failed to consider the overall mark up of each item of Respondent's 34 item bid, considering only the one item, Item #150, in determining if the contract as a whole would be unconscionable if enforced. Respondent did not provide evidence of its costs for the 33 other items in its bid to allow the Court to compare what price they included in their overall bid so that the Court could determine the overall profit or loss if Respondent were to complete the project.

In fact, the only evidence presented by Respondent contemplating the overall impact to Respondent if they were required to perform the work for the estimate amount they bid was from deposition testimony of Respondent's employees. A.R. 177. When asked about the overall impact to Respondent if they were forced to complete the project for the price bid, Leon Mavromatis, its Vice President, testified that the mistake would have been "catastrophic" and threaten the survival of the company. A.R. 361 *Depo. Mavromatis Pg. 33:16-19*. However, Mavromatis nor any other employee of Respondent analyzed the bid or conducted any calculations on their overall bid estimate after discovering the claimed error to determine what its actual loss or profit would have been if the project was completed. A.R. 355 *Depo. Mavromatis Pg. 27:6-13, Pg. 28:12-17*.

Paul Gladwin, who was the project manager for Respondent for the Veterans Memorial Bridge Project, also testified that the impact to Respondent would be lost profits and would impact their ability to obtain other jobs. A.R. 441 *Depo. Paul Gladwin Pgs. 41:14-24, 42:1-7*. He

also testified that such impact would not have been fatal to, or cause Respondent to shut down. A.R. 435 *Depo. Paul Gladwin Pgs. 35:32-33, 36:1-7*. However, Respondent did not provide any documentary evidence of the company's overall financial condition, (such as a profit and loss statement, tax returns, etc.) which would support their claim that a loss on the Veterans Memorial Bridge Project would have been catastrophic to the survival of the company. Respondent did not provide any documentary evidence of the costs of the other 34 items of their bid to allow the Circuit Court to determine if an overall profit or loss would result if Respondent completed the project. Nor did they provide their labor costs or ordinary overhead costs. Such information is necessary to make a full and proper analysis of the overall results for the project's bottom line.

Respondent's Project Manager Mr. Gladwin did provide some insight as to how the Court could analyze the impact to Respondent if it would have performed the work for the bridge project as promised. Mr. Gladwin testified that he has been involved in writing bids for construction projects for twenty-five (25) years and that he was familiar with the reasonable overhead and profit margin in the industry. *See App. Depo. Paul Gladwin Pg. 43:12-24, 44:1-2*. Mr. Gladwin testified that the reasonable overhead and profit margin that Respondent would put into their bid for the Veterans Memorial Bridge Project was sixteen (16%) percent.

Therefore, for Respondent's bid on the Veterans Memorial Bridge Project, including the claimed error, of \$5,606,316.34, a sixteen (16%) percent overhead and profit would have amounted to \$897,010.61. Deducting the claimed error loss of \$708,000.00 would leave \$189,010.61 positive return or profit to Respondent, which certainly cannot be considered catastrophic.

Additionally, Respondent complains of an expected loss of \$708,000.00 if they were forced to perform the work outlined in their bid even though they provided invoices from two (2)

subcontractors who supplied them bids for Item #150. One subcontractor bid \$9,478.00 per linear foot and another bid \$8,420.00 per linear foot. Respondent claims to have wanted to bid \$9,340.00 per linear foot for Item #150. *See App. Final Order* Pg. 2, P.4. When considering the subcontractor bid price of \$8,420.00 for Item #150, which Respondent certainly could have utilized in performing the work for the project, Respondent's claimed loss would be reduced by \$162,840.00.

In this case, Respondent's claimed error amounted to approximately 13% of the bid submitted. A.R. 2, *Final Order* Pg4, P3. That evidence alone indicates that Respondent actually would have made a profit by completing the project for the amount of their bid, failing to satisfy element number 4 of the Act. In fact, if Respondent had used the subcontractor that provided the lower of the two quotes for Item #150, their costs would have been reduced significantly and their claimed error would have amounted to only 9.72% of the bid amount.¹ Still, clearly less than the 16% overhead and profit respondent had built into its bid overall resulting in an even larger profit.

When analyzing Respondent's own evidence of prices listed in the bid for the bridge project, the invoiced prices for Item #150, and the testimony of their own employee as to the overhead and profit margin they seek when bidding a project, Respondent likely would have made a profit after completing the Veterans Memorial Bridge Project (for the amount they bid) of approximately \$351,850.61. Apparently, this profit margin was not sufficient for Respondent to

¹ Olympus obtained two bids from subcontractors for Item #150, \$9,478.00 and \$8,420.00. Olympus claims it's intended bid for Item #150 was \$9,340.00 but mistakenly bid \$5,340.00. Olympus' bid was \$945,180.00 but intended to be \$1,653,180.00 for Item #150. This difference of \$708,000.00 amounts to 12.63% of the total bid price of \$5,606,316.34. Had Olympus used subcontractor bid of \$8,420.00 for Item #150 the total (x177 feet) cost to Olympus would have been \$1,490,340, a difference of \$545,160.00 instead of \$708,000.00 or only 9.72% of the total bid price.

agree to complete the work promised on the Veterans Memorial Bridge, so they refused to sign the contract to perform the work for which they submitted their bid.

Lastly, Respondent, as the party attacking the State Agency awarding a contract for construction services, failed to provide evidence to support its claim that enforcement of the contract with the claimed error would have been ‘unconscionable’ as required. However, Petitioner sought only to enforce the contracts liquidated damages clause against Respondent, not specific performance of the construction work. *A.R. 576 Hearing Transcript Pgs. 19:19-24, 20:1*. Respondent, as required in bid invitation, provided a “bid bond” as security when submitting its bid on the Veterans Memorial Bridge Project in the amount of 5% of its bid or \$280,315.82. *A.R. 2 Final Order P. 2*.

Respondent argues that enforcement of a \$5,606,316.34 construction contract with an error of \$708,000.00 would be unconscionable to enforce. However, the evidence herein shows a contract was formed and breached by Respondent. Therefore, the enforcement of the liquidated damages provision to require the forfeiture of Respondent’s bid bond would not be unconscionable in this case. The payment of the bid bond amount as damages for failure to enter into the contract as promised is appropriate, and the amount of damages (5% of contract amount) for the breach of contract by Respondent would not be unconscionable in these circumstances.

Noticeably, the enforcement of the liquidated damages clause of the bid contract against Respondent would not have resulted in catastrophic harm to the company. As such, Respondent has failed to provide sufficient evidence in the record such that all four (4) of the required elements of West Virginia Code § 5-22-2 have been met to have required Petitioner to reject its bid.

CONCLUSION

For the foregoing reasons Petitioner requests that this Court reverse the Circuit Court's Final Order and direct the Circuit Court to find that Petitioner's award of the contract to Respondent was appropriate, and that Respondent Olympus breached the contract such that the liquidated damages clause be enforced against Olympus for such breach of contract.

**Respectfully submitted,
WEST VIRGINIA DEPARTMENT OF TRANSPORTATION,
DIVISION OF HIGHWAYS**

/s/ David A. Ford

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 24-ICA-183

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS
Plaintiff-Below, Petitioner

v.

OLYMPUS PAINTING CONTRACTORS, INC.
Defendant-Below, Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this **19th day of July, 2024**, I have served a true and complete copy of the attached **PETITIONER'S BRIEF** on the following counsel of record by electronic mail through the File&ServeXpress filing system:

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