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

RESPONDENT'S BRIEF

Appeal from Order of Circuit Court
of
Kanawha County, West Virginia
Civil Action No.: 22-C-292

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COUNTERSTATEMENT OF FACTS

In early 2021 the Plaintiff, West Virgina Department of Transportation, Division of Highways ("DOH" or "Division") published an advertisement seeking bidders for a bridge cleaning and painting project known as the Veteran's Memorial Bridge, Contract Id: 1021607R3; Project No.: S305-22-0.04 00/NHPP-0022(064) D, in Brooke County, West Virginia. Bids for the Project were opened on March 9, 2021.

Olympus electronically submitted a bid for the Project using the Division's BidX electronic bidding system along with bid security in the form of a bid bond issued by Defendant Great Midwest Insurance Company. Olympus' bid totaled the sum of $5,606,316.34. Its 5% bid bond was in the penal sum of $280,315.82.

Upon opening, Olympus' bid was the apparent low bid by more than 1.6 million dollars. The second low bid, submitted by Freyssinet, Inc. in the amount of $7,216,143.40 was 28.71% higher than Olympus' bid. The Division's own engineer's estimate in the amount of $7,354,356.80 was 31.18% higher than Olympus' bid. Other bids submitted for the Project ranged from 7.8 million dollars to 8.8 million dollars. *Division of Highways, Vendor Ranking*, App. p. 181.

Within days after the bid opening, and prior to notice of bid acceptance and award of the contract by the Division, Olympus discovered that a clerical error had been made when transcribing handwritten unit prices into the Division's BidX system. Leo Mavromatis, an owner of the company and its chief estimator, prepared prices for each line item in the bid. These prices were written down by Olympus employee, Paul Gladwin, and were relayed to Olympus employee, Lisa Moran, who was responsible for entering the numbers into the BidX system. Having received quotes from subcontractors of $8,420.00 and $9,478.00 per unit foot for item 150 62701-001, "removing and replacing expansion joints", Mr. Mavromatis quoted a unit price for that item of $9,340.00. Mr. Gladwin wrote down the quoted price and passed it to Ms. Moran. Ms. Moran mistook the 9 in $9,340.00 for a 5 and input a unit price of $5,340.00 for that item. The Project included 177 units of this work, so this mistake resulted in an error in a total amount of $708,000.00 (177 units x $4000=$708,000). *Deposition Transcript of Paul Gladwin,* App. pp.416-432;

Deposition Transcript of Lisa Moran, App. pp. 312-315 and 323-326; *Affidavit of Lisa Moran,* App. p. 192; *Quote of Structural Tech and affidavit of Bob Sward,* App. pp. 193-200; *Quote of Advantage Steel and affidavit of Zachary Rosswog,* App. pp. 201-205.

Three business days after bid opening, on the 15th of March 2021, Mr. Gladwin submitted a letter to the Division advising of its error and seeking the withdrawal or rejection of Olympus' bid pursuant to W.Va. Code § 5-22-2. *March 15, 2021, Letter of Paul C. Gladwin,* App. p. 206. The Division acknowledged receiving the notification of the error prior to awarding the contract. *Deposition Transcript of Adam Gonzales,* App. p. 469.

On March 19, 2021, the Division corresponded with Olympus via email denying the request for rejection of its bid and sending notice of contract award. App. pp. 209-214.

Olympus subsequently reiterated its request to withdraw its bid and requested a hearing in letters from Olympus and its counsel dated March 24, March 26, and April 15. Supp. App. pp. 598-606. Olympus also provided the affidavit of Lisa Moran, the person who actually input the bid, confirming her error in entering the bid price as well as affidavits from the subcontractors who provided quotes for the subject line item confirming that their quotes were much higher than the submitted unit price. App. pp. 240-253.

By letter dated May 14, 2021, App. p. 160, without granting the requested hearing, the Division advised that it had determined that Olympus' bid was not in error and not unrealistically low and, therefore, denied its request to withdraw its bid. Olympus nevertheless declined to enter into a contract based on the erroneous bid. By letter dated May 29, 2021, the Division submitted a claim to the surety seeking payment under the bid bond. Ultimately, the Division failed to award to the second lowest bidder. Instead, the Division rejected all bids and rebid the project. Bids were opened on October 19, 2021, and the project was awarded to Freyssinet, Inc., the second low bidder at the original letting, for a total bid price of $7,496,014.10.

During deposition testimony in this 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 error in the bid would have "drastically" raised Olympus' intended bid. *Deposition*

Transcript of Stephen Todd Rumbaugh, p. 36, App. p. 373. In addition, Mr. Rumbaugh confirmed that the enforcement of Olympus' bid with a $708,000 error would have been unconscionable. *Deposition Transcript of Stephen Todd Rumbaugh, p. 37,* App. p. 373. Finally, Mr. Rumbaugh stated that he was not completely sure whether there was or was not an error in Olympus' bid. *Deposition Transcript of Stephen Todd Rumbaugh, p. 54,* App. p. 378.

At the hearing of the parties' competing motions for summary judgment before the Honorable Judge, David Hardy, the Division acknowledged that the case was covered by W.Va. Code § 5-22-2(b). *January 25, 2024, Transcript of Summary Judgment Hearing,* App. pp. 565-566. The Division further acknowledged that the error claimed by Olympus in the amount of approximately 14% of its total bid would have been sufficient to have material effect on its bid, as follows:

> MR. FORD: We believe that - - that - - yes, Your Honor. We believe that - - that, again, 14 percent is enough of an amount to be a material effect of a bid.

January 25, 2024, Transcript of Summary Judgment Hearing, App. p. 571.

Finally, the Division further conceded that rejection of Olympus' bid would not have resulted in no harm to the Division other than the loss of the opportunity to receive the work at a lower price, as follows:

THE COURT:	Element No. 3: Rejection of the Bid would not cause a hardship on the public entity involved, other than the fact that the project would - - might cost more. The project ended up getting done correctly, correct?
MR. FORD:	And we agree - - we agree with that. Your Honor.
THE COURT:	Yeah, it got done and it - - you paid more for the project. I believe it's pled.
MR. FORD:	Right.
THE COURT:	But the project did get done?

MR FORD: Correct. And we - - we agree with that - - with that factor. We don't believe that there would be any additional harm to the Department.

January 25, 2024, Transcript of Summary Judgment Hearing, App. P. 572.

SUMMARY OF ARGUMENT

In its Brief, the Petitioner, makes several arguments that are presented for the first time upon appeal. First, the Division argues that the Circuit Court erred in granting Respondent's Motion for Summary Judgment because the Division's refusal to grant relief under W.Va. Code § 5-22-2(b) was not, it argues, arbitrary and capricious or did not constitute an abuse of discretion. However, at the Trial Court the Division agreed that the dispute among the parties was covered by application of the aforementioned Code provision and argument was limited to whether the four elements of the statutory test were present. Second, Petitioner raises, for the first time upon appeal, an argument that Olympus' bid error did not have a material effect on its bid. Not only was this point not argued by the Division, it was conceded at the hearing on the matter. Additionally, the Division likewise conceded the existence of a third element of the statutory test, that rejection of Olympus' bid would not have caused harm to the Division other than the loss of the opportunity to receive the contract work at a lower price. These arguments, not addressed to the Circuit Court, cannot now be raised upon appeal and should be disregarded.

Nevertheless, the undisputed facts of this case and applicable law make clear that each element of the four-part test set out in W.Va. Code § 5-22-2(b) were met and that the Petitioner's failure to acknowledge the existence of a bid error and to grant appropriate relief was arbitrary or constituted an abuse of discretion. Olympus submitted uncontroverted evidence to explain and demonstrate the clerical error present in its bid in the form of affidavits from its employees and sub-bidders, copies of the sub-bids it received for the item of work in question, and deposition testimony all of which was countered only by the Division's insistence that it found no "obvious" or "apparent" error based solely on its comparison of Olympus' bid to other bidders.

Further, Olympus' error in the amount of $708,000.00, constituting approximately 14 percent of its total bid, clearly had a material effect on its bid. It is also clear that if the Division had granted the relief requested upon notice of the error it would have been in a position to award the contract to the second low bidder and would not have suffered harm other than the loss of the opportunity to receive the work at a windfall price.

Finally, under the circumstances of this case, enforcement of Olympus' erroneous bid would have been unconscionable. The applicable Code provision does not define the term "unconscionable" but its ordinary meaning and usage in the context of this case is a result that is unreasonable or unjust. Here, Olympus gave notice and clear evidence of its mistake prior to award of the contract when the status quo could have been maintained, the requested relief granted, and an award made to the second low bidder without delay or harm to the Division. Instead, the Division chose to enforce the Contract seeking to require Olympus to enter into a contract at a price of $708,000.00 less than its intended bid price for the work. This would have resulted in an unfair, unjust and unreasonable result and a disproportionate impact on Olympus. The Division should not be entitled to receive a windfall at Olympus' expense. For these reasons, the Final Order of the Circuit Court should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Respondent agrees that oral argument is appropriate under Rules 18 and 20 of the West Virginia Rules of Appellate Procedure as the case appears to turn on an issue of first impression.

ARGUMENT

I. THE PETITIONER'S ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL SHOULD NOT BE CONSIDERED.

The Division makes several arguments that it did not present to the Trial Court in support of its Motion for Summary Judgment or in opposition to Respondent, Olympus', Motion. First, the Division did not argue to the Trial Court, as it has in its appeal brief, that a ruling by the Court

in favor of Olympus would require a finding that the Division's actions were arbitrary and capricious or constituted an abuse of discretion. As this case was being briefed and argued in the Circuit Court, the Division agreed that the dispute was governed by application of W.Va. Code § 5-22-2(b) which, among other things, imposes a burden on a public agency to perform a quasi-judicial function in determining whether an error existed. The Division did not, however, argue that its judgment in making that determination could only be reviewed upon a finding that its conduct was arbitrary or capricious or that it abused its discretion.

In addition, the Division did not challenge the existence of second and third elements of the four-part test set out in W.Va. Code § 5-22-2(b) in its arguments to the Circuit Court. In fact, the Division acknowledged that these elements, pertaining to the materiality of the claimed error and the lack of harm to the Division that would result from rejection of the erroneous bid other than loss of the opportunity to obtain the work at a lower price, had been satisfied.

The general rule applied by the West Virginia Supreme Court of Appeals is that non-jurisdictional questions not raised at the circuit court level will not be considered for the first time on appeal. Syl. Pt. 3, *State v. Jessie*, 225 W.Va. 21, 689 S.E.2d 21 (2009); Syl. Pt. 2, *State v. Salmons*, 203 W.Va. 561, 509 S.E.2d 842 (1998). The Court explained its reasoning as follows:

> The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issues refined, developed, and adjudicated by the trial court, so that we may have the benefit of its wisdom.

Id. at 28, quoting *Whitlow v. Bd of Educ. Of Kanawha County*, 190 W.Va. 223, 226, 438 S.E.2d 15, 18 (1993). The Court continued as follows:

> Thus, our guiding precept in this regard is that the trial court must be provided with an opportunity to rule on issues properly before it and that it would be improper for this Court to rule on an issue on which the trial court had not first passed judgment.

State v. Jessie, *supra*, at 27.

The Division did not argue to the Trial Court that its conduct should be reviewed only on an arbitrary or capricious standard. Rather, it acknowledged that the four-part test set out in W.Va. Code § 5-22-2(b) covered the dispute among the parties and that the only issues to be reviewed by the Court were the first and last elements of that test, whether Olympus' bid contained an error and whether, under the circumstances of the case, enforcement of its bid in the presence of that error would have been unconscionable. For that reason, the Division's arguments as to the arbitrary and capricious nature of its conduct or whether it abused its discretion, and its arguments concerning the second and third elements of the four-part test set out in the applicable statute as to the materiality of the claimed error and the lack of harm resulting from rejection of the erroneous bid, should be disregarded. Nevertheless, Respondent will address each of the Petitioner's arguments as set out hereinbelow.

II. THE RIGHTS AND DUTIES OF THE PARTIES IN THIS ACTION ARE CONTROLLED BY W.VA. CODE § 5-22-2(b) WHICH REQUIRES RETURN OF OLYMPUS' BID SECURITY UNDER THE FACTS OF THIS CASE.

Petitioner has repeatedly acknowledged that W.Va. Code § 5-22-2 provides a basis for relief in the event of an erroneous bid when the conditions established by that section are met. *Defendant Olympus Painting Contractors, Inc.'s Memorandum of Fact and Law in Support of Its Motion for Summary Judgment*, App. pp 169-180; *Plaintiff's Response in Opposition to Defendant, Olympus Painting Contractor, Inc.'s Motion for Summary Judgment*, App. p. 269; and the *January 25, 2024, Transcript of Summary Judgment Hearing*, App. pp. 564-566. The Petitioner has sought to draw a distinction between a request to withdraw a bid after opening and a request for a rejection of the bid. At the very least, the applicable provision is ambiguous on that point as the title of the section is "Designation of time and place for opening a bid; right to reject *or withdraw* bid; bid resubmission" (emphasis added). In any case, however, it is clear that the applicable provision is intended to provide relief to contractors who have submitted an erroneous bid in appropriate circumstances and since it is remedial in nature, where ambiguity exists, the provision's language

should be liberally construed to achieve its intended purpose. Syl. Pt. 17, *McElroy Coal Co. v. Schoene*, 240 W.Va. 475, 813 S.E.2d 628 (2018).

It has long been the law in West Virginia that, under appropriate circumstances, a mistake of fact by one of the parties to a contract can entitle that party to rescind the agreement.

> That deeds and instruments may be cancelled on the ground of mistake, when a mistake is clearly shown, is one of the familiar duties of a court of equity. *Wilson v. McConnell,* 72 W.Va. 81; Isner v. Nydegger, 63 W.Va. 677, 60 S.E.793; Taylor v. Godfrey, 62 W.Va. 677, 59 S.E. 631. The same rule applies when the mistake is unilateral.

Virginian Exp. Coal Co. v. Rowland Land Co., 100 W. Va. 559, 575-76, 131 S.E. 253, 260 (1926).

> As a general rule, one who enters into a contract or performs some act while laboring under a mistake of material fact is entitled to have the transaction or the act set aside in a court of equity; however, an individual should not be permitted to avoid obligations he undertook while laboring under a mistake of law.

Spitznogle v. Durban, 233 W.Va. 398, 405, 738 S.E.2d 562, 569 (2013), quoting Web v. Web, 161 W.Va. 614, 301 S.E.2d 570, 574 (1983), citing *Harner v. Price,* 17 W.Va. 523, 544 (1880).

This doctrine of equitable rescission has been applied by courts and legislatures across the country. The Supreme Court of Alabama held that a contractor whose bid contained a $68,000 error was entitled to withdraw its bid where it made a mistake in submitting the bid, the mistake resulted in a bid amount which was out of all proportion to the value of the bid, and where the public agency soliciting bids had notice of the mistake prior to awarding the contract. *Water Works Bd. v. Jones Env'l Constr., Inc.*, 533 So. 2d 225 (Ala. 1988). The Court held that since the contractor was entitled to withdraw its bid and no enforceable contract was formed, then by implication, there could be no breach and there could be no reason to forfeit the bid bond. *Id.* at 227.

In *Mississippi Building Commission v. Becknell Construction, Inc.,* 329 S.E.2d 27 (1976), the Court addressed a situation where a contractor submitted a bid for a public works construction project and mistakenly failed to include the cost of necessary steel sheet piling. The Court noted that despite the mistake it remains the obligation of a court of equity to determine whether it would

be inequitable and fundamentally unjust not to grant relief from that honest but negligent mistake. *Id*. at 60-61, citing *Cataldo Constr. Co. v. City. of Essex*, 110 N.J. Super. Court 414, 265 A.2d 842 (1971). The Court in *Becknell* found that equitable relief was appropriate where the mistake was promptly called to the attention of the contracting agency before the contract was awarded and at a time when the status quo could have been restored without substantial injury to the parties. The Court further noted that the loss of a windfall to the agency arising from a mistake that is neither willful nor gross, does not preclude equitable relief. *Id*.

In reaching its conclusion the Mississippi Court was persuaded by the opinion of the Oregon Court in *State by State Highway Com. v. State Constr. Co.*, 203 Or. 414, 280 P.2d 370 (1955), another case involving an honest, clerical error in a bid submitted for a competitively bid, public works contract. The Oregon Court stated as follows:

> But where the mistake is of so fundamental a character, that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension; and there was no *gross negligence* on the part of the plaintiff, either in falling into the error, or in not sooner claiming redress; and no intervening rights have accrued; and the parties may still be placed *in status quo*; equity will interfere, in its discretion, in order to prevent intolerable injustice. This is the clearly defined and well-established rule upon the subject, in courts of equity, both in England and America."

Id. at 435, 380.

In *Terrebonne Parish Police Jury v. A.L. Sizeler Construction Company*, 491 S.E.2d 409 (Ct. App. La.1986). The Court of Appeals of Louisiana held that a contractor was entitled to present evidence of an error in its bid, and where the error was shown, was entitled to withdraw its bid without loss of bid surety. The contractor failed to include the cost of its in-house labor and the cost of securing security bonds. It notified the contracting agency of its error and requested an opportunity to present evidence of its error. The agency refused to hear the evidence and awarded the contract despite notice of the error. The Court held that the agency's refusal to hear the contractor's evidence was arbitrary and allowed the contractor to withdraw its bid without forfeiture of its bid bond. *Id*.

In a similar case, *Emma Corp. v. Inglewood Unified School Dist.,* 114 Cal. App. 4th 1018, 8 Cal. Rptr. 3d 213 (2004), the California Court of Appeals, applying California's bid relief statute, estopped a local school district from enforcing a contract awarded to a bidder who had submitted an erroneous bid. The contractor discovered that it made a clerical error when totaling its bid price and sent the district a letter withdrawing its bid prior to award. In holding for the contractor, the California Court noted that bid withdrawal statutes are remedial in nature and are designed to permit bidders to withdraw mistaken low bids. The Court noted that taxpayers do not have an interest in lowering the cost of public projects by unfairly cheating mistaken bidders out of a portion of the project's true cost. *Id* at headnote 2.

In *James Cape & Sons Co. v. Mulcahy, 28*5 Wis. 2d 200, 700 N.W.2d 243 (2005), the Wisconsin Court noted that Wisconsin's bid relief statute was an attempt to codify the equitable rescission doctrine as follows:

> Traditionally, the most common characteristics of the equitable rescission doctrine are: (1) timeliness of bidder's notification; (2) whether the terms of the contract as offered would be unconscionable; (3) whether the mistake is material; (4) whether the other party has been prejudiced by the mistake; and (5) whether the bidder is free from negligence.

Id at 227, 256, citing *Marana Unified Sch. Dist. No. 6 v. Aetna Cas. & Sur. Co.*, 144 Ariz. 159, 696 P.2d. 711, 717 (Ariz. Ct. App. 1984). In *James Cape*, after bids for a highway project were opened the low bidder realized that it had failed to include a last-minute change from one of its subcontractors in its bid. The contractor immediately notified the DOT of the error and explained how it occurred. The Court noted that this was the kind of honest mistake that could happen to a conscientious bidder and that the bidder was entitled to relief without forfeiture of its bid bond. *Id*.

The West Virginia Legislature has also adopted a statutory provision addressing a contractor's right to reject or withdraw its bid as a result of an error. W.Va. Code § 5-22-2 "Designation of time and place for opening a bid; right to reject or withdraw bid; bid resubmission" provides, in part, as follows:

> (b) The provisions and requirements of the section, Section 1 [§ 5-22-1] of Article 22 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 the public entity determines the bid to be erroneous, the public entity shall return the bid security to the contractor.

This provision is a reflection of the common law doctrine of equitable rescission and is clearly intended to provide relief to a contractor that has submitted a bid for a public works project that contains a material, clerical error. It is remedial in nature and, therefore, should be liberally construed to achieve its intended purpose Syl. Pt. 17, *McElroy Coal Co. v. Schoene*, 240 W.Va. 475, 813 S.E.2d 628 628 (2018). The provision imposes a duty upon the awarding agency to determine whether a contractor claiming a bid error has met the elements required for relief. In making such a determination, the agency should not be permitted to act arbitrarily or in the absence of good faith. It must exercise a quasi-judicial role in its review of the evidence provided by the contractor to support its claim. Once a contractor has been able to demonstrate that an error was, in fact, made, the Code allows no discretion regarding the contractor's bid bond, and requires that it be returned to the contractor.

III. OLYMPUS SUPPLIED UNCONTROVERTED EVIDENCE OF THE CLERICAL ERROR IN ITS BID.

The first, and most obvious, element of the standard for relief from bid error under the Code is a determination that an error was made. In its argument on this point the Division stated that "DOH employees re-examined the bid of Olympus to determine if their bid contained any *apparent* error and concluded that no *obvious* error existed". (Emphasis added). *Plaintiff's Memorandum in Support of Its Motion for Summary Judgment, page 5, App. p. 142*. The Division noted that its representatives compared Olympus' price for the subject bid item to the bids submitted for that item by other bidders and states, "DOH could not determine an error was

apparent in the Olympus bid. (Emphasis added). See, *Plaintiff's Memorandum in Support of its Motion for Summary Judgment, page 10, App. p. 147.* In other words, the Division concluded that there was no *patent* error in Olympus' bid. This, however, is not the standard set out in W.Va. Code § 5-22-2(b). The Code does not provide that the bidder's error must be apparent on the face of the bid or that it be obvious. It requires only a determination that an error was made. The Division's refusal to consider Olympus' explanation and the evidence it presented as proof of its error, its refusal to grant Olympus' request for a hearing on the issue, and stubborn insistence that there was no error because it was not "obvious" or "apparent" on the face of the bid, was arbitrary and an abuse of discretion. The Division's response to Olympus' notice of bid error reflected a abdication of its *quasi-judicial* role in determining whether the elements of W.Va. Code § 55-22-2(b) were met in the interest of obtaining a windfall at Olympus' expense.

As argued by Olympus in its Memorandum in Support of its own Motion, it promptly reported its error and provided the Division with uncontroverted evidence supporting, and explaining, its existence. Olympus provided evidence in the form of affidavits from Lisa Moran, the person who entered Olympus' bid in the BidX system, along with affidavits from Olympus' sub-bidders reflecting sub-bids for the item of work in question that far exceeded the erroneous item quoted by Olympus for that item. In addition, the deposition testimony of Ms. Moran as well as Olympus' owner and estimator, Leo Mavromatis, and its project manager, Paul Gladwin, who wrote down and relayed Mr. Mavromatis's prices for all items of work to Ms. Moran, shows that the mistake occurred when Ms. Moran misread one of the numbers relayed resulting in an inadvertent, clerical error. Mr. Mavromatis, Mr. Gladwin, and Ms. Moran all testified that the intended bid price for Item 150 "remove and replace expansion joints" was $9,340 per linear foot. This figure represents a 12% markup on the lower of the two sub-bids received by Olympus for the item in question. As she was inputting the price for that item in the BidX system Ms. Moran mistakenly read Mr. Gladwin's handwritten 9 as a 5 and erroneously priced the item in question at $5,340. This resulted in an error of $4,000 per linear foot thereby making Olympus' total bid price $708,000 less than intended. This information was provided to the Division on multiple occasions,

along with the affidavits of Ms. Moran and the quotes received from sub-bidders supported by affidavits of the sub-bidders.

W.Va. Code § 5-22-2(b) imposes an obligation upon the Division to make a determination as to whether an error occurred and in so doing the Division has an obligation to exercise a quasi-judicial role in its review of evidence provided by the contractor in support of its of error. Instead, the Division entirely disregarded Olympus' evidence, ignored its request for a hearing, and confined its review to a search for patent error on the face of the bid. The Division acknowledges in its Memorandum in Support of its Motion for Summary Judgement (App. p. 138) that there can be a variety of reasons why a contractor's price for a given item might vary from another bidder's. This might include contractors placing a higher price on items of work to be performed earlier in order to maximize cash flow early in the project. But such a motive seems unlikely with respect to Olympus' bid in light of the fact that it was more than $1.6 million dollars below the second lowest bidder. The Division's failure to evaluate and consider Olympus' evidence supporting its claim for bid error violated its obligation to make a good faith determination and was arbitrary and erroneous. The undisputed evidence presented in this case reflects that Olympus did, in fact, make a clerical error while entering its bid into the Division's BidX system, an error that, in the exercise of good faith, should have been acknowledged by the Division.

IV. OLYMPUS' BID ERROR MATERIALLY AFFECTED ITS BID.

As argued above, Petitioner has not previously argued that the bid error claimed by Olympus would not have materially affected its bid. Olympus' error amounted to an understatement of its intended bid by the amount of $708,000, approximately 14 percent of its total bid. Leo Mavromatis, an owner and Olympus' Chief Estimator, gave sworn deposition testimony that the mistake was "catastrophic" to its bid. See, *Deposition Transcript of Leon Mavromatis*, pp. 33-34, App. pp. 361-362.

Further, at the hearing of this matter before the Honorable Judge Hardy, the Division conceded that such an error would be material, as follows:

> MR. FORD: We believe that - - that - - yes, Your Honor. We believe that - - that, again, 14 percent is enough of an amount to be a material effect of a bid.

January 25, 2024, Transcript of Summary Judgment Hearing, App. p. 571.

Therefore, the materiality element of the four-part test was clearly established and undisputed and Petitioner's argument to the contrary, first presented upon appeal, should be disregarded.

V. REJECTION OF OLYMPUS' BID WOULD NOT HAVE CAUSED HARDSHIP TO THE DIVISION OTHER THAN LOSING AN OPPORTUNITY TO RECEIVE THE PROJECT AT A REDUCED COST.

The facts of this case are undisputed that when Olympus discovered its error it promptly gave notice to the Division prior to award of the contract. It was clear, and undisputed, that if the Division had granted the relief requested by Olympus prior to award it could have then awarded the contract to the second lowest bidder without causing hardship to the Division other than losing its opportunity to obtain the work for a windfall price. Instead, after avoidable delay, the Division chose to reject all bids and rebid the project. At the second letting, the Division ultimately awarded the project to Freyssinet, Inc., the second lowest bidder at the original letting.

The Division did not argue to the contrary prior to perfecting its appeal and, in fact, conceded to the point at the hearing in circuit court.

> THE COURT: Element No. 3: Rejection of the bid would not cause hardship on the public entity involved, other than the fact that the project would - - might cost more. The project ended up getting done correctly, correct?
>
> MR. FORD: And we agree - - we agree with that, Your Honor.
>
> THE COURT: Yeah, it got done and it - - you paid more for the project. I believe its pled.
>
> MR. FORD: Right.
>
> THE COURT: But the project did get done?

MR. FORD: Correct. And we - - we agree with that - - with that factor. We don't believe there would be any additional harm to the Department.

January 25, 2024, Transcript of Summary Judgment Hearing,, App. p. 572.

Thus, this element was likewise conceded by the Petitioner in the Circuit Court and its argument now to the contrary, again first made upon appeal, should be disregarded.

VI. UNDER THE CIRCUMSTANCES OF THIS CASE, THE ENFORCEMENT OF OLYMPUS' ERRONEOUS BID WOULD HAVE BEEN UNCONSCIONABLE.

The fourth element considered by the Circuit Court was whether "enforcement of the bid in error would be unconscionable." Most cases addressed by the West Virginia Court involving issues of unconscionability involve a question as to whether a contract or a specific term in a contract is "unconscionable" and therefore should not be enforced. Here the question is not whether a term of the contract is unreasonable or unfair and should, therefore, not be enforced but whether it would be unreasonable or unfair to require Olympus to perform given the facts and circumstances of this case and the "catastrophic" error in Olympus' bid.

The West Virginia Court has said that "the primary object in construing a statute is to ascertain and give effect to the intent of the legislature." Syl. Pt. 2, *United Bank, Inc. v. Stone Gate Homeowners Association,* 220 W.Va. 375, 647 S.E.2d 811 (2007). The Court has further stated that "in the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used." *Id*. at Syl. Pt. 4, quoting Syl. Pt. 1, *Miners in General Group v. Hicks*, 123 W.Va. 637, 17 S.E.2d 810 (1941), overruled on other grounds by *Lee-Norse Company v. Rutledge*, 170 W.Va. 162, 291 S.E.2d 477 (1982). The term "unconscionable" is defined in the Merriam-Webster's Collegiate Dictionary, Eleventh Ed. (2020) as "not guided or controlled by conscience", "excessive, unreasonable", or "shockingly unfair or unjust." The Oxford American Dictionary (Oxford University Press, 2008) defines it as "not right

or reasonable", or "unreasonably excessive." Thus, the issue is one of equity and fairness under the facts of the case.

In this case, upon discovering the error after bid opening, Olympus acted reasonably and promptly to notify the Division of its mistake and requested relief as contemplated in W.Va. Code § 5-22-2(b) prior to the award of the contract. The Division, upon learning of the error, was in a position to immediately award the contract to the second low bidder, avoiding delay and unnecessary cost. Instead, the Division ignored the explanation and evidence presented by Olympus and relied entirely on the lack of a patent or obvious error on the face of the bid. The Division even refused Olympus' request for a hearing on the issue.

During deposition testimony taken in this case, Leo Mavromatis, Olympus' chief estimator and an owner of the company, described the $708,000 mistake that occurred in Olympus' bid as "catastrophic". He testified that performing the work at the erroneously quoted price would have put the entire company in a compromising situation and may have threatened the company's survival. Mr. Mavromatis testified as follows:

> It would have been unfair because it would have put us in a very compromising situation to our entire companies. That is a huge loss. And I don't think they're in the business of putting contractors out of business. That is what is so confusing to me here. But it would have been completely unfair. We perform in West Virginia and we perform very well, even when we're very low. We had other items in this bid that were extremely lower than other bidders but those were not issues. This is the issue.

Deposition Transcript of Leon Mavromatis, page 34, App. p. 362.

Even the Division's primary witness, Stephen Todd Rumbaugh, Deputy State Highway Engineer and Chief Engineer of Construction, testified during his deposition in this matter that a $708,000 error in Olympus' bid would have "drastically" raised Olympus' intended bid and, further, acknowledged that enforcement of Olympus' bid with an error of that magnitude would have been unconscionable. *Deposition Transcript of Stephen Todd Rumbaugh, pp. 36 & 37,* App. p. 373.

In its argument to the contrary, the Division relies heavily on the testimony of Olympus employee, Paul Gladwin. In response to questioning by the Division's counsel Mr. Gladwin testified that, based on his experience in the industry and the Division's Standard Specifications, he believed that a reasonable amount for overheard and profit on the subject project would have been 16%. But Mr. Gladwin also testified that he was not involved with and has no knowledge of the Company's practices with respect to estimating or finances. He stated that he does not know how much overhead and profit was included in the bid submitted in this case. *Deposition Transcript of Paul Gladwin, pp 43-44 and 52-53, App. pp. 443-444 and 452-453*. The Division then leapt to the conclusion that Olympus could have performed the work without harm using the lower of two sub-bids, without markup, because the error was less than 16% of its total bid. Its argument is based entirely on an assumption, unsupported by evidence, that Olympus included 16% of overhead and profit in its bid and that it would be unharmed by performing the project at cost. This also assumes that Olympus would encounter no unexpected additional costs that it would be required to bear, a rarity in construction projects, and that it would be unharmed by failing to recover any of its overhead attributable to the project or by filling its operational and bonding capacity with unprofitable work. Obviously, this is not the case and the Division's argument should be disregarded as not supported by the evidence or by logic. As Mr. Rumbaugh confirmed, it was unconscionable to require Olympus to perform given the catastrophic nature of the error in its bid.

Here, the Division did not dispute at the Circuit Court that the mistake had a material effect on Olympus' bid. Therefore, the minds of the parties never met and enforcement of Olympus' erroneous bid would have resulted in "an unconscionable advantage" to the Division. Further, Olympus gave notice of its error before the award of the Contract when the parties could still have been placed in status quo. In such cases, "equity will interfere, in its discretion, in order to prevent intolerable injustice. This is the clearly defined and well-established rule upon the subject, in courts of equity, both in England and in America." *State by State Highway Commission v. State Construction Company*, 203 Or. 414, 435, 280 P.2d 370, 380 (1955). As noted by the California Court of Appeals, taxpayers do not have an interest in lowering the cost of public projects by

unfairly cheating the mistaken bidders out of a portion of the project's true costs. Headnote 2, *Emma Corp. v. Inglewood Unified School District*, 114 Cal. App. 4th 1018, 8 Cal. Rptr. 3d 213 (2004). The Circuit Court was correct under the undisputed facts and applicable law when it refused to allow such a result in this case. For those reasons the Final Order of the Circuit Court should be affirmed.

CONCLUSION

Under the undisputed facts and evidence in the record in this case, it is clear that Olympus submitted a bid for a bridge painting job to the West Virginia Division of Highways that contained an inadvertent, clerical error. The error occurred when an Olympus employee misread a unit price, interpreting a 9 as a 5, resulting in a $4,000.00 understatement of the unit price for an item that included 177 units. This error resulted in an understatement of Olympus' intended total bid price in the amount of $708,000.00, approximately 14 percent of its entire bid. Olympus presented evidence of its error, including the affidavits and deposition testimony of its employees confirming and explaining the error and copies of sub-bids and affidavits from sub-bidders demonstrating that the cost to Olympus of performing subject item of work would have been far higher than its mistaken bid price.

In the Circuit Court, the Petitioner agreed that W.Va. Code § 5-22-2(b) covers the dispute among the parties but did not argue that a ruling by the Circuit Court in favor of Olympus would require a finding that the Division's conduct was arbitrary and capricious, though it certainly was. Neither did the Division argue that Olympus' error was not material to its bid or that, if it had granted the relief requested, the Division would have suffered a loss other than the ability to receive the work at a lower price. Therefore, the Petitioner's arguments as to those issues in its Brief should be disregarded. In any case, however, the undisputed facts in the record are clearly sufficient to satisfy each of these elements.

Finally, under the facts of this case enforcement of Olympus' bid, in error, would have resulted in an unconscionable, unfair windfall to the Division at the expense of a bidder who made

an honest, clerical mistake in the preparation of their bid. This is exactly the kind of circumstance that the doctrine of equitable rescission and West Virginia's version of that doctrine, as codified in W.Va. Code § 5-22-2(b), are intended to avoid. For these reasons, under the undisputed facts of this case, the ruling of the Circuit Court as reflected in the "Final Order" of the Circuit Court of Kanawha County, should be affirmed.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NO. 24-ICA-183

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

v.

OLYMPUS PAINTING CONTRACTORS, INC.
Defendant – Below, Respondent

CERTIFICATE OF SERVICE

I, Johnson W. Gabhart, hereby certify that on this 3rd day of September 2024, I have served a true and complete copy of the attached **"RESPONDENT'S BRIEF"** on the following counsel of record by electronic mail through the File&ServeExpress filing system:

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