

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 REPLY BRIEF

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ARGUMENT

A. RESPONDENT ARGUES THE STANDARD REQUIRED TO OVERTURN DECISION OF PUBLIC AGENCY AWARDED PUBLIC CONSTRUCTION CONTRACTS BUT FAILS TO PROVIDE EVIDENCE TO MEET THE STANDARD

Respondent's Brief alleges that Petitioner raises new arguments in its Appeal Brief when Petitioner simply outlined the standard argued by Respondent and the standard that is required to be met by a party attacking the decision of a State Agency charged with awarding public construction contracts. This matter commenced upon the filing of a Civil Complaint in Kanawha County Circuit Court by Petitioner alleging that Respondent breached a contract to perform public road construction work Respondent agreed to perform for a stated price. A.R. 6 *Summons and Complaint*. Petitioner's allegations are based upon the fact that Petitioner placed in public advertisements a detailed invitation for bids for road construction work. Respondent Olympus responded to the invitation by submitting a bid to perform the construction work described in the invitation. A.R. 170 *Defendant, Olympus Painting Contractors, Inc.'s Motion for Summary Judgment*. After review and analysis of all the bids, Respondent was determined to be the lowest responsible bidder, and, as such, was awarded the contract. Respondent refused to sign the contract to perform the road construction work outlined in its bid proposal. A.R. 171 *Defendant Olympus Painting Contractors, Inc.'s Motion for Summary Judgment* Pg. 3. Consequently, Petitioner filed its Complaint against Respondent for breach of contract seeking the payment of the stated liquidated damages in the contract (Bid Bond 5% of Bid Amount), not specific performance of the work, as the road construction project had already been undertaken by another contractor. A.R. 6, *Summons and Complaint*.

Respondent defended the allegations of the Complaint by asserting a right to withdraw its bid under the Fairness in Competitive Bidding Act, West Virginia Code §5-22-2, and Petitioner's

decision regarding Respondent's request to reject its bid after the opening of bids. A.R. 20 *Defendant Olympus Painting Contractors, Inc.'s Answer and Motion to Dismiss*. Respondent was clearly aware of, and plead, the standard required in order to prove that Respondent's decision to not allow Respondent to withdraw its bid or reject its bid pursuant to West Virginia Code §5-22-2 was not proper. In its Motion for Summary Judgment, Respondent argued that the Fairness in Competitive Bidding Act should govern this matter, and that a duty is placed upon the Petitioner to make a decision regarding the request of a bidder to withdraw its bid.

"The provision imposes a duty upon the awarding agency to determine whether a contractor claiming a bid error has meet 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." A.R. 177 *Defendant Olympus Painting Contractors, Inc.'s Motion for Summary Judgment* Pg. 9.

Further, in its Motion for Summary Judgment Respondent argues that:

"The only issue, then, is whether the Division should have, in the exercise of good faith, considered the explanation and evidence submitted by Olympus and determined that an error was made." A. R. 178 *Defendant Olympus Painting Contractors, Inc.'s Motion For Summary Judgment* Pg. 10.

In its defense to the allegation of breach of contract against it, Respondent clearly seeks to attack the decision made by Petitioner, the Public Agency, to deny its request to withdraw its bid by claiming a right to withdraw its bid.

Petitioner, in its Motion for Summary Judgment argued that the decision it (A Public Agency) made in awarding the construction contract to Respondent was proper and, as such, a contract was formed when the award was made to Respondent as the lowest responsible bidder. A.R. 149 *Plaintiff's Motion for Summary Judgment*. Citing a holding in the case of *Wiseman Const. Co., Inc. v. Maynard C. Smith Const. Co., Inc.*, in which the West Virginia Supreme Court cites its earlier decision in *State ex. rel. E. D. S. Fed. Corp. v. Ginsberg* 163 W.Va. 647,

259 S.E.2d 618 (1979), Petitioner asserted its position that its decision to award the contract to Respondent was properly made.

“A state agency which awards a public construction contract to the lowest qualified responsible bidder, under the Fairness in Competitive Bidding Act, is clothed with the presumption that it has properly discharged its duties.” Wiseman Const. Co., v. Maynard C. Smith Const. Co., Inc., 779 S.E.2d 893, 236 W.Va. 351 (2015).

A.R.145 *Plaintiff’s Motion for Summary Judgment Pg. 8.*

Consequently, asserting that its decision to not reject the bid submitted by Respondent was properly made based upon rational analysis of the facts, Petitioner argued a contract was formed and Respondent breached said contract. As the party attacking that decision of Petitioner, a State Agency, Respondent bears the burden of proof to show that the decision of Petitioner was made arbitrarily, capricious, or was an abuse of its discretion such that it is shocking to the conscience.

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 controls to safeguard against abuses. Syl. Pt. 5 *Wiseman Const. Co., v. Maynard C. Smith Const. Co., Inc.*, 779 S.E.2d 893, 236 W.Va. 351 (2015), citing *State ex rel. E.D.S. Federal Corp. v. Ginsberg*, 163 W.Va. 647, 259 S.E.2d 618 (1979).

When responding to Petitioner’s Motion for Summary Judgment Respondent argued:

“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.” A.R.225 *Olympus Painting Contractors, Inc.’s Response In Opposition To Plaintiff’s Motion For Summary Judgment* Pg. 8.

Under the “Conclusion” section of Respondent’s “*Olympus Painting Contractors, Inc.’s Response to Plaintiff’s Motion for Summary Judgment*” Respondent clearly sets forth the argument of its defense to the breach of contract claim by attacking the decision of Petitioner Agency using the very standard Petitioner outlined in its brief.

“In conclusion, the undisputed evidence in this case demonstrates that the Division failed to evaluate the evidence presented by Olympus in a good faith manner and arbitrarily failed to consider the evidence presented and make a determination that an error existed in Olympus’ bid.” A.R. 225 *Id.*

Respondent, while clearly aware of the standard required by a party attacking the decision of a Public Agency charged with a duty to award public construction contracts, failed to meet that standard in this case. While Respondent plead the standard required it has failed to produce evidence to show that the decision of Petitioner to deny the request of Respondent to reject its bid was in any way arbitrary, capricious, or an abuse of its Agency discretion.

Petitioner provided clear evidence that its decision to deny Respondent’s request to reject its bid was based upon rational analysis of the facts and evidence presented by Respondent, as well as an analysis of the competing bids. Petitioner met the standard required of a Public Agency making the decision to award a contract for public construction projects. *Id.* Petitioner’s Complaint alleges a breach of contract by Respondent before the trial court and Respondent defended the claim by asserting that Petitioner’s decision to deny its request to withdraw its bid was made in bad faith, arbitrary, and erroneous. A.R. 22. *Defendant Olympus Painting Contractors, Inc.’s Answer and Motion to Dismiss.*

As the party attacking the decision of a Public Agency, Respondent has failed to provide evidence that the decision by Petitioner to deny the request of Respondent to reject its bid in this matter was arbitrary, capricious, or was an abuse of its discretion. Therefore, Respondent must be found in breach of the contract with Petitioner and the ruling of the Circuit Court overturning the decision of the Petitioner must be reversed.

B. EVEN ASSUMING ERROR WAS MADE IN BID, RESPONDENT'S EVIDENCE DOES NOT MEET ALL FOUR CRITERIA OF THE FAIRNESS IN COMPETITIVE BIDDING ACT REQUIRE FOR THE REJECTION OF BID

The parties agreed and advised the Circuit Court of their positions that the Fairness in Competitive Bidding Act (W.Va. Code §5-22-1 et seq.) governed the dispute in this matter. A.R. 565 *Summary Judgment Hearing Transcript*. The Fairness in Competitive Bidding Act codifies the four key elements for the doctrine of equitable recession of a contract by a Public Agency charged with awarding public construction contracts. *See W.Va. Code §5-22-2*. Under the Fairness in Competitive Bidding Act, West Virginia Code §5-22-2(b), DOH may reject an erroneous bid after the letting or opening of bids if **all four (4)** stated requirements are met. That is 1) an error was made; 2) the error materially affected the bid; 3) rejection of the bid would not cause a hardship on the DOH, other than losing an opportunity to receive construction projects at a reduced cost; and, 4) enforcement of the bid in error would be unconscionable. See West Virginia Code §5-22-2(b).

If one assumes that a material error was made in Respondent's bid for the construction project, that alone is not sufficient to meet all of the requirements under the Fairness in Competitive Bidding Act, which would require Petitioner to reject its bid. Respondent must provide sufficient evidence, not only of the claimed error in their bid price, but also must produce evidence sufficient to meet the elements of the remaining three requirements.

Petitioner's position is that there was no error made in the bid that was apparent through the ordinary review of the bid upon opening of the bids.

Q: "Do you recall any reaction to or thought about the prices received at that letting?"

A: "No, I don't recall having anything out of the ordinary at the time we had the letting." A.R. 367 *Depo. Stephen Rumbaugh* Pg. 13:23,14:1.

However, after being advised of Respondent's claimed clerical error in its bid, additional analysis was conducted by Petitioner's employees to determine if an error was made in the Respondent's bid.

"...However, we went ahead and evaluated it to see if we felt it was an error or it had to be an error in order-and we had to consider it an error before we should-" A.R. 368 *Depo. Stephen Rumbaugh* Pg. 16:10-12.

Petitioner provided evidence of the Public Agency's rationale for its decision to deny Respondent's request to reject its bid proposal due to a claimed clerical error, that no error was determined after the analysis of bids. Respondent's objection to that decision by the Public Agency requires it to prove that such decision was made arbitrarily or under an abuse of discretion. *See Wiseman Const. Co., v. Maynard C. Smith Const. Co., Inc.*, 779 S.E.2d 893, 236 W.Va. 351 (2015).

Therefore, the burden of proof is upon Respondent (who is attacking Petitioner's decision to deny Respondent's request to reject its bid) to produce sufficient evidence of its claimed error, as well as evidence of how that claimed error not only materially effects its bid but, that enforcement of the contract as written would be unconscionable. *Id.* Respondent's evidence of its claimed error consists of only an affidavit from its own employee who claimed she made an error inputting the figures into the computerized bid application, and copies of two subcontractor's bids for the one item claimed to be incorrect. Respondent failed to produce any

of the handwritten documents they claim contained the prices for all of the individual items of the bid they wanted to submit, nor any of the Excel spreadsheets Respondent's witness indicated that she kept as a record for tabulating the bid prices. A.R. 297 *Depo. Lisa Moran* Pg. 19:7-24.

C. ASSUMING A 14% ERROR IN BID MATERIALLY AFFECTS THE BID, ALONE, IS NOT SUFFICIENT TO REJECT RESPONDENT'S BID UNDER THE FAIRNESS IN COMPETITIVE BIDDING ACT

Similar to the discussion before the Circuit Court at the Summary Judgment Hearing on January 25, 2024, we can assume here that a clerical error was made by Respondent upon submitting its bid for the Veterans Memorial Bridge Project.

“THE COURT: For the sake of discussion—for the sake of discussion, if there was an error made, do you think the error materially affected the bid?” A.R. 571 *Summary Judgment Hearing Transcript* Pg. 14:13-15.

Likewise, as Counsel for Petitioner responded to the Court at the hearing, that if assuming that a clerical error of 14% was made in Respondent's bid, it is fair to assume that such an error is large enough to materially affect a bid.

“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.” A.R. 571 *Summary Judgment Hearing Transcript* Pg. 14:16-18.

As stated in Petitioner's Brief, whether an error in a bid materially affects the bid itself must be determined by analyzing the facts and circumstances surrounding the bid and error. *See Petitioner's Brief* Pg. 12. In the instant matter, Respondent submitted a bid with a claimed error, under line item #150, \$708,000.00 less than intended when it bid \$5,606,316.34 for the project, which is 12.6 % under its intended bid. A.R. 2, *Final Order* Pg. 4 (Approx. 13%). As asserted in Petitioner's Brief, if Respondent had chosen to use the lower of the two subcontractors that

submitted bids to them for Item #150, Respondent's bid would have only been 9.72% less than their actual bid. *See Petitioner's Brief* Pg. 19, Footnote 1.

The manner and significance of how the claimed error in the Respondent's bid materially affects the bid depends upon the facts and circumstances surrounding the bid and the claimed error. Even considering that the claimed error in Respondent's bid was significant enough to materially affect the overall bid, such evidence alone is not enough to rule that Petitioner's decision to deny Respondent's request to reject their bid was arbitrary, capricious, or was an abuse of its discretion as all four (4) elements of the statute must be met.

D. ASSUMING A 14% ERROR IN RESPONDENT'S BID IMMEDIATE REJECTION OF BID WOULD NOT HAVE CAUSED A HARDSHIP ON PETITIONER BEYOND RECEIVING CONSTRUCTION PROJECTS AT A REDUCED COST

The Circuit Court continued its questioning of Petitioner's Counsel regarding the issue of the third element of the Fairness in Competitive Bidding Act, "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." *See West Virginia Code §5-22-2(b)*. Counsel for Petitioner agreed with the Court's assertion that assuming a clerical error of 14% was made in Respondent's bid, that if Petitioner had rejected Respondent's bid upon request and awarded the construction contract to the next lowest bidder Petitioner would not have suffered any additional harm, other than the increase in the cost of the project to the public. A.R. 572 *Summary Judgment Hearing Transcript* Pg. 15, L:2-16.

Likewise, Petitioner's witness Stephen Rumbaugh agreed that, assuming Respondent made a clerical error of \$708,000.00 in their \$5.6 million bid and that Petitioner rejected said bid upon Respondent's request and awarded the contract to the second lowest bidder, no harm would

have been suffered by Petitioner other than the increase in the cost of the project. A.R. 373 *Depo. Stephen Rumbaugh*, Pg. 36:9-24, 37:1-2.

Again, causing a hardship to the public entity other than the increase in costs for the project is just one of the four factors that Respondent must meet to prove all the elements of the Fairness in Competitive Bidding Act to require a State Agency to reject a bid.

E. EVEN ASSUMING A CLERICAL ERROR IN BID, ENFORCEMENT OF CONTRACT WOULD NOT BE UNCONSCIONABLE SINCE DAMAGES ARE CAPPED AT 5% OF BID AMOUNT IN CONTRACT

Respondent argues enforcement of the contract containing its claimed clerical error of \$708,000.00 below the bid price of \$5,606,316.34 would be unconscionable if they were required to perform the construction work. Respondent alleges that “under the circumstances of this case, enforcement of Olympus’ erroneous bid would have been unconscionable.” *See Respondent’s Brief* Pg.5. Once again, the burden to show that enforcement of the contract would be unconscionable rests with Respondent who asserts such claim. *See Syl. Pt. 5 Wiseman Const. Co., v. Maynard C. Smith Const. Co., Inc.*

Toward that end, Respondent’s only evidence provided to show that enforcement of the contract containing the assumed clerical error would be ‘unconscionable’ is the declaratory statement of Olympus’ Vice President Leon Mavromatis, stating that it would be “catastrophic” to his company. A.R. 361 *Depo. Leon Mavromatis* Pg. 33:16-19. Further, Mr. Mavromatis testified that it would be unfair to require Olympus to perform the work for the price Olympus bid on the contract “because it would have put us in a very compromising situation to our entire companies. That’s a huge loss. And I don’t think they’re in the business of putting contractors out of business....” A.R. 362 *Depo. Leon Mavromatis* Pg. 34:7-11.

Respondent could have sought to prove this point through documentation of the price and/or cost of each item contained in its bid, as well as its labor costs. Such evidence would clearly show the extent of the effect of the claimed error on the overall bid or cost of the construction project. Such information would support Respondent's claim of actual harm or hardship should they be required to perform the construction work outlined in the bid proposal. However, the burden that Respondent is required to meet under the statute is that enforcement of the contract containing the error would have been "*unconscionable*", not merely harmful to the company. See *West Virginia Code §5-22-2(b)* (*emphasis added*).

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.*

Respondent has failed to provide sufficient evidence to allow the Court to conduct a review to determine the overall impact of the consequences of their bid error should Olympus perform the construction work described in their bid proposal. Since Respondent failed to prove by a preponderance of the evidence that enforcement of the contract as proposed by its bid containing the claimed error would have been unconscionable, Respondent has failed to meet the

requirements of all four (4) elements of the Fairness in Competitive Bidding Act to require Petitioner to reject its bid.

After Respondent refused to perform the work set forth in the bid proposal for the Veterans Memorial Bridge Project, Petitioner filed its Civil Complaint alleging breach of contract by Respondent for failing to perform the work it promised through its bid. A.R. 16 *Complaint*. Through this Civil Complaint, Petitioner sought merely the enforcement of the liquidated damage clause of the contract, and not specific performance as such work had already been undertaken by another contractor. A.R. 562 *Transcript Summary Judgment Hearing* Pg. 5:1-20, A.R. 576 *Transcript Summary Judgment Hearing* Pg. 19:19-24, 20:1.

Therefore, enforcement of the contract provisions as written would only require Respondent to pay damages of 5% of the bid amount, in this case \$280,315.82, for its breach of the contract. This contract provision caps the total amount of damage that Respondent, as bidder, would be exposed to should they be found to have breached the contract.

Liquidated damages are “the sum a party to a contract agrees to pay if he breaks some promise, and ... is legally recoverably as agreed damages if the breach occurs.” *Wasserman's v. Twp. of Middletown*, 137 N.J. 238, 248, 645 A.2d 100 (N.J. 1994) (quoting *Westmount Country Club v. Kameny*, 82 N.J. Super. 200, 205, 197 A.2d 379 (App. Div. 1964)). Such clauses “specify damages payable in the event of breach,” *id.* and damages specified by the clause need only be “reasonably related to,” not actually based upon, actual damages, *Metlife Capital Fin. Corp. v. Wash. Ave. Assocs. L.P.*, 159 N.J. 484, 493, 732 A.2d 493 (N.J. 1999).

See, *Churchill Downs, Inc. v. Ribis*, 499 F. Supp. 3d 82, 94 (D.N.J. 2020).

Respondent agreed to the liquidated damages clause of the contract when it submitted its bid in response to Petitioner’s advertisement for the construction project as the advertisement required that any proposal include a bid bond of 5% of the total bid amount. A.R. 170.

Respondent, by submitting its bid bond, agreed that the limit of damages for a breach of contract would be capped at 5% of the bid amount or, in this case, \$280,315.82. A.R. 346 *Depo. Leon Mavromatis* Pg. 18:11-24, 19:1-3.

Petitioner merely sought the forfeiture of Respondent's 5% bid bond as damages for Respondent's breach of contract when it failed to perform the work outlined in its bid for the Veterans Memorial Bridge Project. Petitioner has not sought specific performance of the contract by Respondent, to which Respondent claims it would lose \$708,000.00. Petitioner has only requested enforcement of the contract Respondent entered and that Respondent be held liable for its breach of contract. As such, Petitioner has pleaded that Respondent be required to forfeit its bid bond in the amount of \$280,315.82, as damages, for its breach of contract in refusing to perform the work outlined under its bid.

Clearly the payment of the bid bond amount of \$280,315.82 as liquidated damages for Respondent's breach of contract would not be unconscionable since Respondent agreed to the sum upon entering its bid for the construction project. Also, the forfeiture of the \$280,315.82 bid bond in this case would not result in "catastrophic harm" to Respondent as claimed, a company that's been in the construction business since 1990. A.R. 355 *Depo. Leon Mavromatis* Pg. 27:15-17.

Therefore, Respondent Olympus failed to provide sufficient evidence of its claimed error in its bid and has failed to provide sufficient evidence to show that enforcement of the contract containing the claimed error would be unconscionable, since the contract caps the damages for breach of contract at 5% of the bid amount. As such, Respondent has failed to meet the requirements of ALL four (4) elements of the Fairness in Competitive Bidding Act to require Petitioner to reject its bid. In other words, Respondent has breached the contract with Petitioner

and must be held liable for such breach which, per the contract, requires the forfeiture of its bid bond.

CONCLUSION

As alleged in the Petitioner's Civil Complaint, a contract was formed when Respondent submitted its bid for the Veterans Memorial Bridge construction project and was awarded the contract as the lowest responsible bidder. When Respondent failed to accept the award and refused to enter into a contract to perform the construction work outlined in its bid, Respondent breached said contract. Petitioner sought enforcement of the terms of the contract, including the liquidated damages clause, which limits the damages of either party who breaches the contract, not specific performance of the construction work, after awarding the project to another contractor. Respondent claims to have a right to withdraw its bid based upon a claimed clerical error in its bid. However, Respondent has failed to provide sufficient evidence to meet the requirements of all four elements of the Fairness in Competitive Bidding Act, which would require Petitioner to reject the bid of Respondent. As such, the Circuit Court of Kanawha County erred when it denied Petitioner's breach of contract claims and granted summary judgment to Respondent thereby substituting its judgment for that of the Petitioner without requiring proof that Petitioner's decision to deny Respondent's request to reject its bid was made arbitrarily, capricious, or under an abuse of discretion.

Therefore, the **ORDER** of the Circuit Court of Kanawha County granting Respondent's Motion for Summary Judgment and dismissing Petitioner's Complaint for breach of contract must be reversed, and judgment granted to Petitioner requiring the forfeiture of Respondent's bid bond as liquidated damages for said breach of contract.

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

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Plaintiff-Below, Petitioner

v.

OLYMPUS PAINTING CONTRACTORS, INC.
Defendant-Below, Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this **20th day of September, 2024**, I have served a true and complete copy of the attached **PETITIONER'S REPLY BRIEF** on the following counsel of record by electronic mail through the File & ServeXpress filing system:

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