

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

SCA EFiled: Mar 01 2024  
01:24PM EST  
Transaction ID 72219092

**Docket No. 23-565**

**RAZE INTERNATIONAL, INC.,  
Plaintiff,**

**v.**

**Appeal from a final order  
of the Circuit Court of Ohio County  
(Civil Action No. 23-C-119)**

**WHEELING HOSPITAL, INC.,  
CITY OF WHEELING, and  
WHEELING MUNICIPAL BUILDING COMMISSION,  
Respondents.**

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**PETITIONER'S REPLY BRIEF**

Respectfully submitted by:

**RAZE INTERNATIONAL, INC.**

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## **I. STATEMENT OF THE CASE**

This is a dispute over the respondents' failure to utilize competitive bidding to choose the petitioner, Raze International, Inc., who was the lowest qualified responsible bidder for a public demolition project to raze buildings antecedent to the construction of a new cancer center in the City of Wheeling. The lower court dismissed the case pursuant to Rule 12(b)(6) asserting the complaint fails to state a claim. The petitioner asserts that the lower court committed error in such ruling.

## **II. ARGUMENT**

### **A. Competitive bidding is required for the governmental demolition project**

This brief is in rebuttal to the briefs filed by both respondents, Wheeling Hospital, Inc. and the City of Wheeling (including the city's Building Commission). Both respondents assert that competitive bidding may be avoided as the cancer center project is "owned" by Wheeling Hospital, Inc. making it a private project rather than a governmental project. As this assertion was anticipated by the petitioner and prospectively rebutted in petitioner's brief, it is not necessary to dwell at length on this assertion. Nevertheless, in summary, the petitioner reminds that the phase of the project at issue is the demolition phase and not the construction phase of the project. The demolition contract awarded was to raze buildings owned by the City of Wheeling on real estate owned by the City of Wheeling, and using governmental funding provided by the City of Wheeling and other governmental entities. The respondents assert nevertheless that the demolition contract somehow loses identity as a governmental project by the landowner

city donating public monies to a private entity, thereby somehow obviating competitive bidding. Government construction and demolition projects require the use of competitive bidding. *W.Va.Code 55-22-1*.

To permit public entities to do indirectly, that which they are not permitted to do directly, by donating public monies to private organizations to award non-competitive construction contracts for work on public properties, would open a Pandora's box to create a means whereby any city, county, or state agency could simply employ a private entity to construct or raze public buildings while avoiding the clear legislative policy to require competitive bidding.

This Court has discussed analogous schemes in *Affiliated Construction Trades Foundation v. University of West Virginia Board of Trustees*, 210 W. Va. 456, 557 S.E.2d 863 (2001) (hereafter *ACT v Univ. Trustees*).

In *ACT v Univ. Trustees* the Court considered issues surrounding the construction of a center for WVU governmental use to house governmental employees. The WVU Foundation, a non-governmental foundation used public funds to build the center and then lease it to WVU. The two issues were whether it was a governmental project so as to require the payment of prevailing wages, and whether the construction required competitive bidding.

With respect to the competitive bidding component, the Court in *ACT v Univ. Trustees*, opined as follows:

Based on this Court's recognition that public funds are at issue when the state is obligated to make rental payments pursuant to a lease agreement, we find a sufficient public interest at stake to similarly require that a trial court examine certain factors to determine the applicability of the competitive bidding statute. *See Dial*, 198 W.Va. at 199-200, 479 S.E.2d at 709-10. Since the competitive bidding statute applies to the State, which necessarily includes state agencies, then the statute applies to WVU based on its status as a state agency. Thus, if WVU is determined to be intimately involved in the construction process in the same fashion discussed above with reference to the issue of prevailing wages, the use of a third-party to contract for construction projects cannot insulate WVU from application of the competitive bidding statute. In determining whether the State or its agencies is involved in a construction project sufficient to invoke the competitive bidding protections of West Virginia Code § 5-21-1, a trial court should examine: (1) whether the State or its agency initiated the construction project; (2) the extent of control retained by the State or its agency during the development and construction phases; (3) the extent to which the project will be used for a public purpose; (4) whether public funds are used either directly for the costs of construction or indirectly by means

of a lease arrangement which contemplates payments essentially covering the amount of the construction; and (5) all other relevant factors bearing on the issue of whether the construction is properly viewed as government construction.

**Through this opinion, we wish to emphasize that when a public entity such as the State, or its agencies, initiates a construction project, which upon completion will serve the interests of the State, its agencies, or the public in general, it is incumbent upon the State and/or its agencies to require that the project complies with the requirements of the competitive bidding statute. See W.Va. Code § 5-22-1. The State or its agencies cannot escape the requirements of the bidding statute by involving a third-party for the purpose of general construction responsibilities or for the purposes of obtaining the necessary funding.** (Emphasis supplied).

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**B. WVU Health Systems is not exempt from competitive bidding and the statute that provides such is not absurd.**

Next, the respondents assert that WVU Health Systems is exempt from competitive bidding despite the clear statutory language that only projects on University owned property in Monongalia County are granted such exemptions by the legislature. Because this language is clear, they call it absurd and urge a construction contrary to the statutory language set forth at *W.Va.Code* §18-11C-5 and §18-11C-1(l).. See Petitioner’s initial brief for a detailed discussion of this issue.

In support of absurdity, the respondents cite black letter law to the effect that where the literal language of a statute begets an absurd result, courts will seek an alternative reading. While this may be true, the only absurdity they can point out is that the statutory language indicates an intent that new WVU Health facilities will benefit “the citizens of the state” (§18-11C-2) and that it is to be “liberally construed” (§18-11C-10). It is not absurd that the legislature envisioned and commissioned new facilities on University property in Monongalia County which would yet serve

“the citizens of the state.”

The lower court’s finding of absurdity is to be given no weight as this appellate court’s consideration is *de novo*. Moreover, there is nothing absurd about the legislature limiting the bidding exemption to Monongalia projects, as it was likely only contemplating construction of new projects on WVU property in Monongalia County at the time the statutes were enacted. Rather than seeking statutory amendment for almost 40 years, WVU Health System now urges a non-literal construction of the statute to meet its wishes.

### III. CONCLUSION

The ruling of the circuit court was erroneous and should be reversed and the case remanded.

Respectfully submitted by:

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**CERTIFICATE OF SERVICE**

A copy of the PETITIONER'S BRIEF was served upon the respondents via the West Virginia Supreme Court e-filing system, to the following:

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