

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Dec 26 2023

12:36PM EST

Transaction ID 71687709

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.**

PETITIONER'S BRIEF

Respectfully submitted by:

RAZE INTERNATIONAL, INC.

/s/ Thomas E. White
Thomas E. White (W.Va. Bar no. 4022)
White Law Office
604 Sixth Street
Moundsville, WV, 26041
twhite@white-law.com

/s/ Edmund J. Rollo
Edmund J. Rollo (W.Va. Bar no.6370)
Rollo Law Offices
44 High Street
Morgantown, WV 26505
edrollo@rollolawoffices.com

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. ASSIGNMENTS OF ERROR	1
II. STATEMENT OF CASE	1
A. Procedural History	1
B. Facts	2
III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	3
IV. SUMMARY OF ARGUMENT	4
V. ARGUMENT	4
VI. CONCLUSION	11
CERTIFICATE OF SERVICE	13

TABLE OF AUTHORITIES

CASES

<i>Appalachian Regional Healthcare, Inc. v. W.Va. Dep't of Health and Human Resources,</i> 232 W.Va. 388, 752 S.E.2d 419 (2013)	5
<i>Bluestone Paving, Inc. v. Tax Commissioner of State of West Virginia,</i> 214 W.Va. 684, 591 S.E.2d 242 (2003)	11
<i>Chapman v. Kane Transfer Co.,</i> 160 W.Va. 530, 236 S.E.2d 207 (1977)	5
<i>Farley v. Buckalew,</i> 186 W.Va. 693, 414 S.E.2d 454 (1992)	10
<i>Lodge Distrib. Co., Inc. v. Texaco, Inc.,</i> 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978)	6,7
<i>Miners in General Group v. Hix,</i> 123 W. Va. 637, 17 S.E.2d 810 (1941).	11
<i>Newhart v. Pennybacker,</i> 120 W.Va. 774 (1938)	10
<i>Sizemore v. State Farm Gen. Ins. Co.,</i> 202 W.Va. 591, 596 (1998).	11
<i>State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.,</i> 194 W.Va. 770, 461 S.E.2d 516 (1995).	4

STATUTES

<i>W.Va.Code</i> §5-22-1	1, 5
<i>W.Va.Code</i> §5-22-1(b)(5)	5
<i>W.Va.Code</i> §5-22-1(c)	5
<i>W.Va.Code</i> §18-11C-1 <i>et seq</i>	1, 8

<i>W.Va.Code</i> §18-11C-1(l)	9
<i>W.Va.Code</i> §18-11C-5	8, 9
41 CFR 105-71.136	7

I. ASSIGNMENTS OF ERROR

- A.** The lower court failed to abide by the required criteria in ruling on motions to dismiss for failure to state a claim in that it did not construe the complaint in the light most favorable to the plaintiff, accepting all the allegations in the complaint as true.
- B.** The lower court erred in considering matters outside the complaint in granting the motion to dismiss for failure to state a claim.
- C.** The lower court erred in ruling that the West Virginia Fairness in Competitive Bidding Act, *W.Va.Code* §5-22-1, does not apply to the factual scenario alleged in the amended complaint.
- D.** The lower court erred in ruling that *W.Va.Code* §18-11C-1 *et seq.* exempted the demolition project from required competitive bidding, where the clear unambiguous language only exempted projects in Monongalia County, West Virginia.
- E.** The lower court erred in ruling that the project was solely that of Wheeling Hospital, Inc., in order to avoid application of public bidding procedures, where the demolition project was distinctly for demolishing city owned buildings, and using governmental funds from the city and others.

II. STATEMENT OF THE CASE

A. Procedural History

This is a dispute over the respondents' failure to choose the petitioner, Raze International, Inc., who was the low bidder for a public demolition project.

On August 8, 2023, the petitioner filed its amended complaint for declaratory and other relief alleging the respondents were mandated to follow competitive bidding law such that the award of a bid for the demolition of buildings on a defunct hospital site owned by the City of Wheeling should have been awarded to the petitioner as the lowest qualified responsible bidder. A.R. 1-14.

On August 16, 2023, all respondents filed motions to dismiss with memoranda A.R. 15-24 and A.R. 23-50.

On August 18, 2023, the petitioner filed a response to the motions to dismiss. A.R. 51-57.

On August 21, 2023, the court conducted a hearing where arguments were heard solely on the motions to dismiss. No evidence was adduced.

On August 25, 2023 the Honorable Michael J. Olejasz, Judge of the Circuit Court of Ohio County, entered the court's [final] Order, finding that the petitioner's complaint did not state a claim upon which relief could be granted, and dismissed the case. A.R. 58-64.

B. Facts

The facts in this matter are largely undisputed. Their legal significance is.

The former Ohio Valley Medical Center ceased operations several years ago and the City of Wheeling now owns the property and the buildings. A.R. 6. In its place, officials from the city, county, and WVU Medicine, announced plans for a regional cancer center to be constructed and operated at the site. A.R. 6. The respondents, the City of Wheeling and the Wheeling Municipal Building Commission are public corporations and political subdivisions. A.R. 5. Wheeling Hospital, Inc. is a non-profit corporation owned and operated by West Virginia University Health System. A.R. 5. Raze International, Inc., is a profit corporation operating for twenty-three (23) years, with its principal office in Shadyside, Ohio, a short distance from Wheeling, West Virginia. A.R. 4-5.

In June, 2023, Wheeling Hospital solicited bids to raze the structures on the site owned by the City of Wheeling. A.R. 6. It is undisputed that the bid was awarded to a New Jersey company which was not the lowest bidder. A.R. 7. The petitioner, Raze International, Inc., was the lowest bidder. A.R. 7. Additionally there is no dispute that Raze International, Inc. was a qualified and responsible bidder, as the respondents did not dispute the same and was alleged in petitioner's complaint to be taken as true. A.R. 7.

The cancer center construction project, is being publicly funded as follows:

1. \$500,000 from a federal grant.
 2. \$2 million from the City of Wheeling.
 3. \$2 million from the Ohio County Commission.
 4. \$20 million from the issuance of City of Wheeling municipal bonds.
- A.R. 5,7,52.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument may be deemed unnecessary pursuant to the criteria in Rule 18(a), as the dispositive issue or issues have been authoritatively decided; and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

IV. SUMMARY OF ARGUMENT

The petitioner asserts that the respondents were required to comply with governmental competitive bidding requirements and award the bid to petitioner as the lowest qualified responsible bidder. The respondents defend in their motions to dismiss arguing that the construction project is solely the non-governmental project of Wheeling Hospital, Inc. The petitioner's position is that the City of Wheeling cannot deny the joint-venture nature of the project and simply give away governmental funds to a non-governmental entity in order to avoid complying with public competitive bidding requirements, especially where the project is the demolition of city-owned buildings on city-owned property.

V. ARGUMENT

The standard for assessing motions to dismiss is a familiar one. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2,

State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Appalachian Regional Healthcare, Inc. v. W.Va. Dep't of Health and Human Resources*, 232 W.Va. 388, 752 S.E.2d 419 (2013); *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977). Furthermore, "[f]or purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true." *Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978).

A. Governmental Funding Requires Competitive Bidding

The West Virginia Fairness in Competitive Bidding Act is set forth at *W.Va.Code* §5-22-1.

W.Va.Code §5-22-1(c) provides in pertinent part:

The state and its subdivisions shall, except as provided in this section, solicit competitive bids for every construction project exceeding \$25,000 in total cost.

The City of Wheeling is a political subdivision of the State of West Virginia. A "construction project" includes "...demolishing of a building, structure, facility, ..." *W.Va.Code* §5-22-1(b)(5). The construction project well exceeds \$25,000 in total cost.

As noted above, the City of Wheeling has committed substantial government funds to this demolition project. The city cannot circumvent its obligations to ensure fair competitive bidding

under Section 5-22-1 by using another entity as a conduit to pay for the construction project. In this case it should not matter if the City of Wheeling remits its governmental funds to Wheeling Hospital with the direction that Wheeling Hospital pay the cost of the demolition project. The demolition project will always be a public construction project on the City of Wheeling's property for a cost in excess of \$25,000. It is without dispute that the real property subject to the demolition project is solely owned by the City of Wheeling. While the respondents asserted in the lower court that "Wheeling Hospital . . . is identified in the bidding documents as the Owner of the Project" (whatever that means), the fact remains that the demolition project is for the demolition of buildings entirely owned by the City of Wheeling. The City of Wheeling cannot circumvent West Virginia's Fairness in Competitive Bidding Act by outsourcing the competitive bidding process to Wheeling Hospital. This demolition project is a public project on public lands and is subject to the Fairness in Competitive Building Act.

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.

B. Federal Funding Requires Competitive Bidding

The City of Wheeling is the grantee of a five hundred thousand dollar (\$500,000) federal grant awarded for the cancer center project. The award document indicates as follows:

Recipient Name: City of Wheeling; Project Director: Robert Herron, City Manager;
Authorized Official: Nancy Prager, Director of Development

The City cannot deny that it is the sole recipient and administrator of the grant. Wheeling Hospital was not awarded any part of this grant. The grantor of the grant is the United States Department of Health and Human Services (DHHS), through its Health Resources and Services Administration (HRSA), administered by its Health Systems Bureau (HSB). A.R. 52. This is a federal grant and is consequently subject to various federal regulations set forth in the Code of Federal Regulations (CFR). Moreover, in the bid documents for the demolition project, the bidders were notified and required to comply with various conditions that are required when federal funding is utilized, like compliance with Title IV of the Federal Civil Rights Act, the Copeland Anti-Kickback Act, the Davis-Bacon Act prevailing wage rates, the HUD 4010 Federal Labor Standards, and more. AR. 36.

Title 41 of the Code of Federal Regulations (CFR) provides the framework and requirements where federal grants are awarded.

41 CFR 105-71.136 provides in pertinent part:

(b) Procurement standards.

(1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

Thus, the use of federal funds circles back to require compliance with this State's Fairness in Competitive Bidding Act.¹

¹ The respondents asserted orally at the hearing on the motions to dismiss that federal funding would not be used for the demolition phase of the cancer construction project. However, nothing to this affect appears in any pleading or exhibits to pleadings such as bid documents.

C. Wheeling Hospital is Also Not Exempt from Competitive Bidding

The respondents' assertions that the cancer center project somehow wholly belongs to Wheeling Hospital, Inc., a private non-profit corporation, does not save them. Even if the City of Wheeling or no other governmental entity donated monies for the cancer center project, Wheeling Hospital, Inc. would nevertheless be required to employ competitive bidding. It is undisputed that Wheeling Hospital, Inc., is now a wholly owned subsidiary of West Virginia University Health System, and that once the cancer center is constructed, will be leased and operated by WVU Health System. A.R. 6. WVU Health System is a public entity. The respondents will argue that construction projects of WVU Health System have been exempted from complying with the Fairness in Competitive Business Act. Their assertions are a result of a total mis-construction of the applicable statutes.

W.Va.Code §18-11C-1 et seq. provides the law applicable to the operations of West Virginia University Hospital and West Virginia Health System.

The respondents will cite *W.Va.Code* §18-11C-5 which provides in pertinent part:

In order, as expeditiously as possible, to cease operation of the existing facilities by the board, to transfer the operations of the existing facilities and the assets and liabilities to the corporation, which will construct the **new facilities**, at the same time maintaining the educational services of an operating hospital facility, **the transactions provided by this article** shall be exempt from the bidding and public sale requirements, from the approval of contractual agreements by the department of finance and administration or the Attorney General and from the requirements of chapter five-a of this code. (Emphasis added.)

Consequently, in order for the project to be exempt from competitive bidding it must be a "transaction[s] provided by this article...." Moreover, this provision specifically contemplates and covers construction of "new facilities."

As can be seen, the statute clearly provides that the construction of new facilities are transactions provided by the article. So, facially, it appears at first blush, that the construction of all "new facilities" are exempt from competitive bidding. However, "new facilities" is a term of art limited by its definition for the purposes of this article of the code. The term "new facilities" is defined in §18-11C-1(l) as follows:

"New facilities" means a new hospital facility and out-patient clinics, appurtenant facilities, equipment and necessary services to be acquired, built, operated or contracted for by the corporation **on property leased from the board within Monongalia County, West Virginia**, pursuant to the agreement[.]

Therefore, the "new facilities" that are contemplated under this article are only those that are located "within Monongalia County, West Virginia," and "on property leased from the board." The board refers to the West Virginia University Board of Governors. *W.Va.Code* §18-11C-1(c). No part of the article contemplates any exemption from the Fairness in Competitive Bidding Act for the construction of "new facilities" outside of Monongalia County or off property leased from the Board of Governors. The instant demolition project is located in Ohio County on property owned by the City of Wheeling. The project is not part of a "new facility" as the term is specifically defined by this article as having to be on property leased from WVU in Monongalia County.

In the final analysis, the Demolition Project is not a "transaction provided by this article...." As a result, the demolition project is not exempt from the Fairness in Competitive Bidding Act under Section 18-11C-5. Therefore, even if this were solely a project of Wheeling Hospital as argued by both defendants, competitive bidding is required.

The respondents will argue that the statute is somehow ambiguous. It is not. The respondents will urge a construction of the statute to the effect that the legislature really intended to exempt all transactions and new construction statewide. Statutes which are not ambiguous must be applied without construction. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992). Even if we might think it odd that the legislature only exempted construction of facilities on WVU property in Monongalia County from competitive bidding, that is unambiguously what the statute says. Unless and until the statute is amended to permit statewide construction for WVU Health System without competitive bidding, it currently says what it says.

The lower court nevertheless construed the unambiguous statute. This was error. The lower court relied on a part of the statute that indicated legislative intent as follows:

"The citizens of the state are best served by the creation of a coordinated, integrated, efficient and effective health science and health care delivery system which is accountable to the citizens of the state, responsive to the health care and health science education needs of the citizens of the state, and responsible to the pressures of a dynamic healthcare environment." W.Va. Code § 18-11C-2(b)(4).

The lower court concluded that because the cited provision indicated an intent to serve “citizens of the state,” the language indicating exemption of only Monongalia County projects would be absurd. The lower court cited *Newhart v. Pennybacker*, 120 W.Va. 774 (1938) for the proposition “[w]here a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made.” While this may be a true statement in a vacuum, it has been misapplied by the lower court. “A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Sizemore v. State Farm Gen. Ins. Co.*, 202 W.Va. 591, 596 (1998).

Moreover, “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.” *Bluestone Paving, Inc. v. Tax Commissioner of State of West Virginia*, 214 W.Va. 684, 591 S.E.2d 242 (2003); *Miners in General Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941). Here there is legislatively supplied definition of “new facilities” being only those to be constructed in Monongalia County on property leased from the Board of Governors, such that there need be no interpretation of its meaning.

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. A review of *W.Va.Code* §18-11C-1 *et seq.*, reveals that the overall aim of the collective statutes was to transfer the health function of WVU to the new corporation and permit projects on university property. It is not absurd to provide exemptions from competitive bidding on university property, yet require compliance elsewhere. The statutes being construed were enacted in 1984. 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. Absurdity is apparently in the eye of the beholder. Petitioner asserts that the absurdity would be to exclude competitive bids for a project where the statutory exemption literally does not apply.

VI. CONCLUSION

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

Respectfully submitted by:

RAZE INTERNATIONAL, INC.

/s/ Thomas E. White
Thomas E. White (W.Va. Bar no. 4022)
White Law Office
604 Sixth Street
Moundsville, WV, 26041

twhite@white-law.com

/s/ Edmund J. Rollo
Edmund J. Rollo (W.Va. Bar no. 6370)
Rollo Law Offices
44 High Street
Morgantown, WV 26505

edrollo@rollolawoffices.com

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:

Kenneth E. Webb, Jr.; Rosemary Humway-Warmuth; Robert P. Fitzsimmons.

/s/ Thomas E. White
Thomas E. White
Counsel for Petitioner

Thomas E. White
White Law Office
604 Sixth Street
Moundsville, WV 26041
(304) 845-7008
(304) 845-7016 (fax)
twhite@white-law.com
WV Bar #4022