

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 23-565

SCA EFiled: Feb 09 2024
10:05AM EST
Transaction ID 72001516

RAZE INTERNATIONAL, INC.,

Petitioner,

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.

RESPONDENT WHEELING HOSPITAL, INC.'S BRIEF

Respectfully submitted by:

WHEELING HOSPITAL, INC.,

By Counsel,

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I. STATEMENT OF THE CASE

A. Procedural History

Petitioner, Raze International, Inc. (“Petitioner”), filed its original Complaint for Injunction, Declaratory Judgment and Writ of Mandamus on August 2, 2023. A.R. 1-14. Petitioner filed its First Amended Complaint for Injunction, Declaratory Judgment and Writ of Mandamus on August 8, 2023. A.R. 1-14. Petitioner, in its First Amended Complaint, alleged that the award of the contract to demolish the former Ohio Valley Medical Center (“OVMC”) to FR Beinke Wrecking Inc. (“FR Beinke”) was subject to and violated West Virginia’s Fairness in Competitive Bidding Act, as contained in West Virginia Code § 5-22-1 *et seq.* A.R. 1-14. Petitioner alleged that it should have been awarded the contract for the demolition work (“Project”). A.R. 1-14. Petitioner sought a preliminary injunction to enjoin FR Beinke from being awarded the Project (Count I), declaring that Petitioner is the bidder entitled to be awarded the Project (Count II), and ordering that Petitioner be awarded the Project (Count III). A.R. 1-14.

On August 16, 2023, Respondent, Wheeling Hospital Inc. (“Wheeling Hospital”), as well as the other respondents, the City of Wheeling and the Wheeling Municipal Building Commission, filed their Motions to Dismiss with accompanying Memoranda. A.R. 15-50. On August 18, 2023, Petitioner filed its Response to the Motions to Dismiss. A.R. 51-57. On August 21, 2023, the Circuit Court of Ohio County, with the presiding Honorable Michael J. Olejasz, conducted a hearing where arguments were heard on the motions to dismiss. A.R. 65-122. On August 25, 2023, the Honorable Michael J. Olejasz entered the court’s Order, finding that Petitioner failed to state a claim upon which relief could be granted under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure and dismissed the case. A.R. 58-64.

B. Factual History

Wheeling Hospital seeks to develop a cancer treatment center in Ohio County, to be owned and operated by Wheeling Hospital, which joined West Virginia United Health System, Inc. d/b/a West Virginia University Health System (“WVUHS”) in 2021. To affect the construction of this cancer treatment center, Wheeling Hospital, who is identified in the bidding documents as the Owner of the Project, solicited bids for the Project. A.R. 27, 36-38. Additionally, in its Advertisement for Bids, Wheeling Hospital expressly reserved the right to “reject any and all bids and to waive informalities and irregularities. A.R. 27, 37. Interested bidders submitted bids on the project. The bids were opened on July 13, 2023 at 10:00 a.m. Petitioner and FR Beinke were the two lowest bidders.¹ Petitioner bid \$6,949,000.00 and FR Beinke bid \$6,988,000.00, making Petitioner the lowest bid by \$39,000.00. A.R. 28, 39. On July 18, 2023, Wheeling Hospital and the design team conducted a scope review with both Petitioner and FR Beinke to determine which bid best met the requirements for the project. A.R. 28, 40-44.

Based upon the bids and scope review, the Project architect recommended to Wheeling Hospital that FR Beinke be awarded the Project. Importantly, based upon the scope review, the Project architect concluded that:

- FR Beinke had the right equipment and better experience for the job;
- FR Beinke had a better approach to the demolition process;
- FR Beinke had a better approach to dust control;
- FR Beinke made a better team presentation;
- FR Beinke had a better site security plan;

¹ Reclaim was actually the lowest bidder but its bid was disqualified as being non-responsive because it failed to submit a required bid bond with its bid.

- FR Beinke had a better plan for demolition along 20th Street in Wheeling; and
- FR Beinke was interested in demolishing an adjacent garage.

A.R. 28, 45-46. FR Beinke was selected for the Project. A.R. 29, 47. In response to the selection of FR Beinke, Petitioner hired counsel and sent Wheeling Hospital a protest letter dated July 28, 2023, which recited the same issues Petitioner complained of in the First Amended Complaint. A.R. 29. Petitioner filed suit before Wheeling Hospital or its architect could discuss the protest letter with Petitioner. A.R. 29.

Because Wheeling Hospital is not subject to the state bidding and purchasing laws, it is not bound to take the lowest bid or to require proof of licensure at the time of bidding. Wheeling Hospital is – as it did in this case – allowed to evaluate the low bids and determine which bid is in its best interest. The decision to choose FR Beinke over Petitioner was not done in an arbitrary or capricious manner but was based upon meaningful differences in how each company would prosecute the Project as was disclosed in the scope review.

II. 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.

III. SUMMARY OF ARGUMENT

The Project is owned by Wheeling Hospital, under and as a member institution of WVUHS, which is exempt from the competitive bidding requirements of West Virginia Code § 5-22-1. Petitioner argues that the City of Wheeling, by providing certain economic incentives to Wheeling Hospital to place the cancer center in the area, has initiated enough connection with the Project to

convert such into a public construction project subject to the competitive bidding requirements. Factually and legally, the City of Wheeling is not intimately connected enough with the Project to subject it to the competitive bidding requirements. Funding, alone, is not enough to convert the Project to a public construction project. Petitioner further argues that Wheeling Hospital's exemption to the competitive bidding requirements, as provided by West Virginia Code § 18-11C-5, only applies to new facilities constructed in Monongalia County. Such interpretation is absurd and contradicts the intent of the West Virginia Legislature to allow WVUHS to operate as a not-for-profit corporation to serve the healthcare needs of the citizens of the State.

IV. ARGUMENT

A. Standard of Review

As noted by this Court:

When a circuit court dismisses a complaint under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, we review the decision de novo on appeal . . . When assessing whether a complaint states a valid claim, we take its allegations as true and construe them in the light most favorable to the plaintiff. 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.

Edwards v. Stark, 247 W. Va. 415, 419-20, 880 S.E.2d 881, 885-86 (2022).

B. The Project Is Owned by Wheeling Hospital, Not the City of Wheeling, Meaning the Project is Not Subject to Competitive Bidding

The West Virginia Fairness in Competitive Bidding Act, as set forth in W. Va. Code § 5-22-1 *et seq.* provides in relevant 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.” W. Va. Code § 5-22-1(c). While the City of Wheeling is a political subdivision of the State of West Virginia, the Project is not the construction project of the City of Wheeling. Instead, the Project Owner is Wheeling Hospital. A.R. 36.

Petitioner argues that the use of “substantial” government funds from the City of Wheeling converts the Project from the project of a private not-for-profit corporation to a public construction project. Pet’r’s Brief at 5-6. This is factually and legally inaccurate. The City of Wheeling is using the economic tools in its control to partially support the cost of the Project. Petitioner cites no authority to support the argument that the use of these economic tools converts the Project to a public construction project. Notably, Petitioner failed to name the Ohio County Commission as a party, despite it also providing capital to incentivize the Project within Ohio County. The fact that public entities are partially funding the Project, and that the Project is occurring on public land, are not dispositive factors converting the Project to a public one.

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.

Affiliated Constr. Trades Found. v. Univ. of W. Va. Bd. of Tr’s, 210 W. Va. 456, 472, 557 S.E.2d 863, 879 (2001). Examining these five factors indicates that the Project is not bound by West Virginia Code § 5-21-1.

First, the City of Wheeling did not initiate the Project. WVUHS, through Wheeling Hospital, initiated the project in order to place a cancer treatment center in the area. Second, the City of Wheeling has, has had, and will have no control over the development and construction phases of the Project. Wheeling Hospital advertised for bids for the Project. A.R. 36-38. Wheeling Hospital procured the architect for the Project. Wheeling Hospital evaluated the bidders for the Project. A.R. 42-46. Wheeling Hospital selected FR Beinke’s bid. A.R. 47. Wheeling

Hospital will oversee the construction of the Project. The City of Wheeling has no control of the development or construction of the Project. Third, while the construction of a cancer center does benefit the public, the purpose of the Project is primarily for a private not-for-profit corporation. Wheeling Hospital, as part of WVUHS, is a private not-for-profit corporation that will attain the most benefit from the cancer center, as it will be the one operating the cancer center and reaping its benefits directly. This is a private, corporate purpose, not a public one.

Fourth, certain public funds are contributing to the costs of construction for the Project. However, these funds do not essentially cover the amount of the construction. Fifth, as to all other relevant factors, it is important to understand the factual context in which these factors were developed. In *Affiliated Constr. Trades Found. v. Univ. of W. Va. Bd. of Tr's*, West Virginia University planned the construction of an office building to be known as the "University Services Center." *Affiliated Constr. Trades Found.*, 210 W. Va. at 460-61, 557 S.E.2d at 867-68. West Virginia University, through the West Virginia University Foundation, entered into various agreements concerning the design, construction, and lease/purchase of the Center. *Id.* at 461, 557 S.E.2d at 868. The West Virginia University Foundation then sought proposals for third party construction and financing of the project, selecting Platinum Properties Limited Liability Company to provide site evaluation and selection, site acquisition, engineering and design, construction, and contract administration for the Center. *Id.*, 557 S.E.2d at 868.

The West Virginia University Foundation had to approve the site for the Center, the initial plans for construction, and mandated that it must approve of any change, amendment, refinement, or addition to the approved plans. *Id.*, 557 S.E.2d at 868. West Virginia University intended to enter into a lease-purchase agreement with Platinum Properties Limited Liability Company,

wherein West Virginia University would lease the Center for thirty years, after which West Virginia University would take ownership of the Center. *Id.* at 462, 557 S.E.2d at 869.

Unlike in *Affiliated Constr. Trades Found.*, the City of Wheeling has no ability to review or approve the construction plans or any modifications to the plans. The City of Wheeling does not intend to lease, own, or operate the cancer center. In fact, Wheeling Hospital will be leasing the property from the City of Wheeling. This case represents the polar opposite of *Affiliated Constr. Trades Found.* This is not a case where the State is utilizing a third party to construct its own facility for its own use. Instead, WVUHS is utilizing the State as an asset to construct and operate its own facility. Thus, the City of Wheeling is not intimately involved enough with the Project to convert the Project to a public construction subject to West Virginia Code § 5-22-1.

C. Federal Funding Does Not Convert the Project to a Public Construction Project, as None of the Federal Funding Will Be Used for the Project

In addition to the arguments, *supra*, indicating that the funding of the Project does not, by itself, convert the Project to a public construction subject to West Virginia Code § 5-21-1, the federal grant the City of Wheeling received has no bearing on whether the Project is a public construction project. As Wheeling Hospital argued below, none of this federal funding is being used on the Project. A.R. 76-77. The grant money is going to be dedicated by WVUHS, pursuant to the authority of the grant, to the design phase of the overall construction project, not the demolition Project itself. A.R. 76-77. Thus, the federal funding is a red herring and does not convert the Project to a public construction project subject to West Virginia Code § 5-21-1.

D. Wheeling Hospital is Exempt from Competitive Bidding

Wheeling Hospital, as a subsidiary of WVUHS, is exempt from West Virginia Code § 5-21-1. Pursuant to West Virginia Code § 18-11C-5:

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.** The transactions provided by this article shall be subject to an audit by an independent auditor mutually agreed upon by the board and the corporation.

W. Va. Code § 18-11C-5 (emphasis added).

While this statute straightforwardly exempts WVUHS, and by extension Wheeling Hospital, from competitive bidding, Petitioner argues that the definition of “new facilities” subjects the Project to the competitive bidding statute. Pet’r’s Brief at 9. Under West Virginia Code § 18-11C-1(l), “‘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.” W. Va. Code § 18-11C-1(l). What Petitioner ignores is the legislative history of the statute, as well as the overall purpose of the statute.

The Parties agree that there is no guiding case law concerning the interpretation of the statute in this instance, meaning the Court must turn to the rules of statutory construction “to ascertain and give effect to the intention of the Legislature.” Syl. pt. 8, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953). “Where a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made.” Syl. pt. 2, *Newhart v. Pennybacker*, 120 W. Va. 774, 200 S.E. 350 (1938). “‘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, 505 S.E.2d 654, 659 (1998) (quoting *Hereford v. Meek*, 132

W. Va. 373, 386, 52 S.E.2d 740, 747 (1949). Here, the dual nature of the statute leads to an ambiguity as to the applicability of the exemption. To avoid absurdity, the Court must interpret the exemption to apply to WVUHS projects outside of Monongalia County.

In 1984, the West Virginia Legislature determined that it was desirable to separate the West Virginia University Hospital (“Hospital”) from the University – a state agency – and to allow the Hospital to incorporate as a not-for profit corporation so that the Hospital could more efficiently operate by utilizing “ . . . contemporary legal, management and procedural structures utilized by similarly situated private entities throughout the nation:” *See, e.g.*, W. Va. Code § 18-11C-2(a). In 1996, the West Virginia Legislature authorized the creation of the “West Virginia Health System as a not-for-profit corporate structure to serve as the parent corporation” of “an integrated health care delivery system which may be comprised of one or more affiliated institutions.” The Legislature likewise determined that the West Virginia Health System would be more effective and efficient to compete in and respond to “the financial pressures of a dynamic health care environment.” *See, e.g.*, W. Va. Code § 18-11C-2(b). Since its incorporation in 1996, WVUHS has grown into the integrated health care delivery system envisioned by the Legislature.

Importantly, when the Legislature amended the 1984 statute in 1996, creating the WVUHS as a not-for-profit corporation, it made a variety of findings. These findings include, *inter alia*:

(a)(1) The purposes of the existing facilities are to facilitate the clinical education and research of the health science schools and to provide patient care, including specialized services not widely available **elsewhere in West Virginia**. The eventual termination of the services in lieu of replacement or modernization would create an unreasonable hardship on patients in the area **and throughout the state**; . . .

(a)(6) **The interests of the citizens of the state** will be best met by the board's entering into and carrying out the provisions of the agreement as soon as possible, to provide independence and flexibility of management and funding while enabling the state's tertiary health care and health science education needs to be better served . . .

(b)(1) **The interests of the citizens of the state** will be best served by ensuring the continued vitality and viability of the West Virginia based health care institutions which are devoted to addressing the state's tertiary health care and health science education needs and which possess the flexibility and resources to effectively and efficiently compete in a rapidly changing health care environment;

(b)(3) **The citizens of the state** are best served by requiring representative governance by the board while maintaining flexibility so that the West Virginia health system may, over time, authorize and stimulate the creation of an integrated health care delivery system **which may be comprised of one or more affiliated institutions;** and

(b)(4) **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 responsive to the financial pressures of a dynamic health care environment.

W. Va. Code § 18-11C-2 (emphasis added).

What is evident from examining the findings of the 1996 statute is the intent of the Legislature to expand WVUHS from a single hospital in Monongalia County to an integrated health system that could serve the interests of the citizens of the state, not just Monongalia County. The Legislature was evolving the statute to evolve West Virginia University Hospital into WVUHS. The Legislature clearly intended WVUHS to operate as a not-for-profit corporation to avoid certain restrictions placed on state entities so that it could expand rapidly, outside of Monongalia County, to meet the healthcare needs of the citizens of the state. Therefore, the statute, taken as a whole, indicates the Legislature intended for the exemption in West Virginia Code § 18-11C-5 to apply to all new facilities of WVUHS, not just those in Monongalia County. Limiting the exemption only to facilities in Monongalia County would lead to an absurd result and defeat the intent of the Legislature to allow WVUHS to operate as a functional not-for-profit corporation free from the competitive bidding process.

Petitioner’s argument that the competitive bidding exemption is limited to Monongalia County contradicts the Legislative purpose. Pursuant to West Virginia Code § 18-11C-10, “This article, being necessary for the health, safety, convenience and welfare of **the people of the state**, shall be liberally construed to effectuate the purposes hereof.” W. Va. Code § 18-11C-10 (emphasis added). Thus, the intent of the Legislature is for the statute to be liberally construed to allow WVUHS to serve the needs of the people of the state, not just the people of Monongalia County. As indicated by the findings in West Virginia Code § 18-11C-2, the Legislature intended to allow WVUHS to expand outside of Monongalia County to serve the citizens of the state. Further, the Legislature intended WVUHS to be exempt from certain restrictions applicable to public entities so that it could operate in a more efficient and expeditious manner, resulting in the Legislature creating WVUHS as a not-for-profit corporation. To then labor WVUHS with competitive bidding requirements for any project outside of Monongalia County is an absurd result. The ambiguity latent in the statute, due to the vestigial nature of the “new facilities” definition, must be resolved in Wheeling Hospital’s favor in order to effectuate the intent of the Legislature.

V. CONCLUSION

Wherefore, the ruling of the Circuit Court was proper and should be affirmed.

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CERTIFICATE OF SERVICE

I, Kenneth E. Webb, Jr., counsel for Wheeling Hospital, Inc., hereby certifies that on the **9th day of February, 2024** I served a true and exact copy of the foregoing ***Respondent Wheeling Hospital, Inc.’s Brief*** via the West Virginia Supreme Court e-filing system upon the following:

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