

33809

~~Exhibit 1~~

In the West Virginia Supreme Court of Appeals

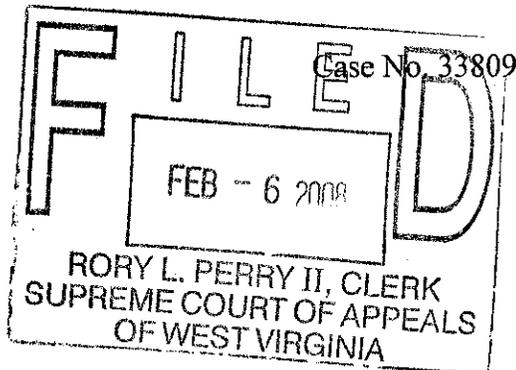
State *ex rel.* The Tucker County Solid
Waste Authority,

Petitioner,

v.

West Virginia Division of Labor,

Respondent.



**Amicus Brief of the Kanawha Valley Builders Association
in Opposition to the Petition for Writ of Prohibition**

Comes now, the Kanawha Valley Builders Association ("Kanawha Valley Builders") and files this *Amicus Brief of the Kanawha Valley Builders Association in Opposition to the Petition for Writ of Prohibition* filed in this matter. The Kanawha Valley Builders urges this Court to reject the *Petition* and in support thereof states as follows.

The Kanawha Valley Builders has reviewed and agrees with the West Virginia State Building and Construction Trades Council *Memorandum of Law* filed in this matter.

The Kanawha Valley Builders, however, will briefly address one of the issues that appears not to have been considered by the parties in this matter - the importance of competitive bidding and the interaction of the competitive bidding law with the West Virginia prevailing wage law.

The law of West Virginia is clear - it is the law of this State that, with limited exceptions, *all* public construction projects exceeding \$25,000 in total cost *must be put out for public bid*. W.

Va. Code § 5-22-1, *et seq.* The wording of the law could not be more clearly stated:

(c) The state and its subdivisions shall, except as provided in this section, solicit competitive bids for every construction project exceeding twenty-five thousand dollars in total cost. W. Va. Code § 5-22-1(c)

The referenced exceptions are clearly stated:

(i) Nothing in this section shall apply to:

(1) Work performed on construction or repair projects by regular full-time employees of the state or its subdivisions;

(2) Prevent students enrolled in vocational educational schools from being utilized in construction or repair projects when the use is a part of the student's training program;

(3) Emergency repairs to building components and systems. For the purpose of this subdivision, the term emergency repairs means repairs that if not made immediately will seriously impair the use of building components and systems or cause danger to those persons using the building components and systems; and

(4) Any situation where the state or a subdivision thereof reaches an agreement with volunteers, or a volunteer group, whereby the governmental body will provide construction or repair materials, architectural, engineering, technical or any other professional services and the volunteers will provide the necessary labor without charge to, or liability upon, the governmental body. West Virginia Code § 5-22-1(i)

The public policy underlying competitive bidding statutes is equally clear, the statutes have been enacted for the protection and benefit of the public and the public's coffers. (Pioneer Co. v. Hutchinson, 159 W.Va. 276, 220 S.E.2d 894 (1975) overruled on other grounds by State ex rel. E.D.S. Fed'l Corp. v. Ginsburg, 163 W.Va. 647, 259 S.E. 2d 618 (1979)).

While the record in this matter is limited, it appears that none of the clearly stated exemptions to the competitive bidding statute apply to the instant matter. It is clear, however, that the employees involved in the construction at issue were “at all times employed by the TCSWA [the Petitioner] on a temporary basis.” (See, Joint Stipulation of Facts at ¶ 12). Therefore, there were no “regular full-time employees” involved in the construction at issue. In addition, there is nothing in the record to indicate that the construction work at issue was in some other way exempt from State’s competitive bidding law.

Thus, it appears that the State’s competitive bidding law applied to the public construction work at issue in this matter and that the Petitioner violated the state’s competitive bidding law by not putting the construction at issue out to bid. By instead hiring temporary employees to undertake the work, the Petitioner is arguing that the project was therefore never “let to contract” and, therefore, the prevailing wage law does not and cannot apply. Given the above, however, it appears that the work at issue was *improperly* not let to contract due to the fact that the work at issue does not fall within any of the exceptions to the competitive bidding law as evidenced by the fact that the Petitioner admittedly utilized temporary employees who were newly hired to undertake the specific work at issue in this matter and were terminated after the completion of the work. Considered in the context of the competitive bidding law, the impact of granting the pending Writ would be to allow the Petitioner to avoid the prevailing wage law due to the fact that the Petitioner violated the competitive bidding law.

In that the parties in this matter have failed to consider, brief or present to this Court the critical issue related to the role of this State’s competitive bidding statute (W. Va. Code § 5-22-1, *et seq.*) on the issues before this Court, unless and until these issues of fact are determined and

the application of the competitive bidding law is considered this Court cannot fully consider this matter. The Court therefore should Deny the pending Writ of Prohibition.

Conclusion

Therefore, for the reasons set out by the State Building Trades Council and those discussed above, the Kanawha Valley Builders Association urges this Court to Deny the *Petition for Writ of Prohibition* in this matter.

Respectfully submitted this 5th day of February, 2008.

Kanawha Valley Builders Association
By Counsel,



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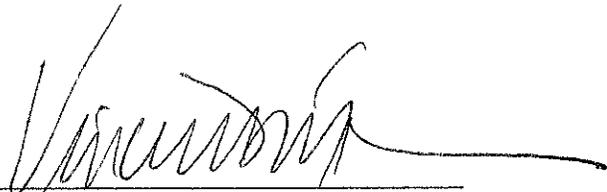
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on February 5th, 2008 a true and correct copy of the **Motion for Leave of the Court to File a Brief as an *Amicus Curiae*** was served upon the following via U.S. Mail, postage prepaid, and addressed as follows:

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