

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CONTRACTOR ENTERPRISE, INC.,
A West Virginia corporation,

Appellant,

v.

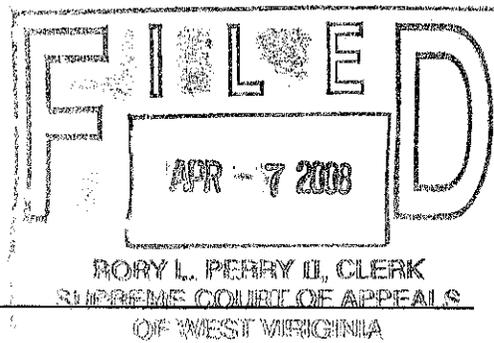
WEST VIRGINIA DEPARTMENT OF
TRANSPORTATION, DIVISION OF HIGHWAYS,
A West Virginia agency,

Appellee.

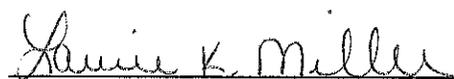
APPEAL NO. 33869

Appeal from the Circuit Court of
Logan County, West Virginia

Civil Action No. 06-C-366



**BRIEF *AMICUS CURIAE* ON BEHALF OF THE
CONTRACTORS ASSOCIATION OF WEST VIRGINIA**



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I. INTEREST OF AMICUS CURIAE

The Contractors Association of West Virginia ("CAWV") is a West Virginia Corporation that represents roughly 500 members employing more than 25,000 people in the construction industry in West Virginia. Approximately 50 of CAWV's members undertake the construction of highways and bridges, and another 200 are suppliers, materialmen, and associates who provide goods and/or services in connection with highway projects such as the one that is here involved. This Honorable Court's decision in this proceeding will necessarily impact the policies, practices, and procedures of the West Virginia Department of Transportation, Division of Highways ("DOH") in the future, and the substance and implementation of those policies, practices, and procedures are of critical importance to the members of the CAWV and their employees who are involved in highway construction. The CAWV thus has a substantial interest in the outcome of this proceeding.

II. FACTUAL BACKGROUND

In early 2006, the DOH conducted a bidding process with respect to the construction of an additional portion of Route 10 in Logan County, West Virginia ("Project"). Heeter Construction, Inc. ("Heeter"), a sister corporation of appellant, Contractor Enterprise, Inc. ("CEI"), was the low bidder on that Project. At the time of the bid letting, CEI was the owner of the property that is at issue in this proceeding ("Property"), which Heeter intended to use as a waste site if it was awarded the contract by the DOH. Although Heeter was the low bidder by a significant margin, the DOH, because the low bid was well above its estimate for the project, pursuant to its procedures and formulas in place and in accord with its discretion to do so, refused all bids.

Thereafter, having reviewed all bid documents submitted, DOH undertook to condemn the Property and rebid the Project without any significant change in its scope, but with the Property being made available "for a potential waste site to be used if the contractor so desires." See plans for the Project quoted in paragraph 6 of the Circuit Court's Order Awarding Preliminary Injunction. That condemnation effort is the subject of the decision below.

III. POSITION OF THE CONTRACTORS ASSOCIATION OF WEST VIRGINIA

While the CAWV acknowledges and fully supports the right of the DOH to condemn private property for public use, it is informed, understands, and believes that the DOH had not before this instance attempted to do so with respect to property that was to be used as a waste site in connection with a highway construction project. Instead, the agency had always required that the contractor on the project provide the waste site. This practice, and the compelling reasons underlying it, were explained by Fred VanKirk, former Secretary of Transportation, in his testimony (which is part of the record in this case) before the Circuit Court during the condemnation hearing in this matter:

- Q. ...Looking at that which is Exhibit 6 and particularly the language that begins under potential waste site. Is that the kind of taking that historically was done by Highways or the Department of Transportation?
- A. The wording in the first sentence there does not appear to be. It says, "provide for potential waste site to be used if the contractor so desired", which implies that there are alternative sites to be used or could be used. Therefore, it is not expressly needed, the particular site might not be expressly needed for the highway project.
- Q. Was the taking of a waste site that the contractor could use if they so desired, does that differ from what was the custom and practice as you knew it within Highways relative to condemnation proceedings?
- A. During my tenure with the Department of Transportation, Division of Highways, either one, I don't recall the Highways Department ever condemning a site for waste or a piece of property for a waste site.

Q. Was there a particular reason why that was the pattern, practice and custom?

A. Well, it was a policy that as far as I know is still in the Division of Highways. We required the contractor to obtain the waste sites. There are economic reasons as well as liability issues involved with obtaining waste sites which we put that responsibility onto the contractor.

* * * *

Q. Was there any other rationale that supported the practice and custom of not condemning waste sites? In other words, you've identified a couple. Is there any other?

A. Well, with regard to the permitting process, the Division of Highways put that responsibility onto the private contractor simply because one reason would be the liability issue.

The holder of the permit is responsible for anything that happens to that site even after the construction project is over with. The other bigger reason for the policy was economics. Highway contractors are innovative. They're entrepreneurs. They can go out and they can find different waste sites. They can cut a deal, so to speak, if you want to use that language, with a property owner in a waste site. The Highways Department would have to go through an appraisal and purchasing process and hold title to that property after the project is over. With having the contractors do it, they can go out, they can lease it, they can buy it. They can work with the property owner to improve their property, and all of that boils down to economics in the bidding process to the Division of Highways.

Q. Does it have an economic impact then? Was that part of the rationale?

A. Well, you would have an economic impact with the bidding process. The contractor can choose his waste site which is the most economical and fits his plan for construction of the project, and therefore resulting in lower bids to the Division of Highways, as well as, I think the issue came up earlier about taxation.

If the State or Division of Highways owns property, it's taken off the tax rolls, and if the contractor owns it, he would still have to pay taxes, property taxes.

* * * *

Q. Let me show you that which is -- --

* * * *

- Q. That which is Exhibit 5. Are you familiar with that reference and where it came from?
- A. This would come from what the Department of Highways calls their Standard Specifications, and what you have in front of me here is Paragraph 206, 207, 16.3, waste, which applies to the waste from highway construction projects.
- Q. Is that a publication of the State?
- A. That is a publication of the Division of Highways which states the policy regarding waste sites.
- Q. And what was the policy as stated in that publication?
- A. In the very first sentence, "The contractor shall locate and furnish all sites for disposition of waste and surplus property, except those sites shown on the plans."
- Q. And is it my understanding that at least in your tenure, the practice and custom was to have the contractor furnish the site?
- A. Absolutely, yes, sir.

(Tr. at pp. 77-78; 80-83.) (*See also*, Affidavit of Fred VanKirk at ¶6.)¹

The CAWV represents to this Honorable Court that its members who are involved in the construction of highways have understood this to be the practice of the DOH, and the fact that the contractor must make arrangements for a waste site in connection with its bidding for a highway project is taken into account by each contractor in accord with its own individual needs,

¹ In all my years of employment with the Department of Transportation, Division of Highways or the predecessor agencies I recall no condemnation ever having been undertaken for the purpose of taking private property for use as a waste site. The agency practice was always to require that the contractor must provide the waste site. The reasons include the following:

- a. By requiring that the contractor provide the waste site the agency allowed the contract to have the flexibility to use the particular waste site which best fits his/its operation;
- b. the contractor would properly have a competitive edge if the contractor already had a waste site available for use;
- c. The agency would incur fewer overhead costs because the agency would not have to expend public funds to purchase, maintain or to upkeep the site;
- d. There are environmental considerations which, if avoided, would reduce potential agency liability. It also eliminates the requirement for the State agency to meet any permit requirements of the Corps of Engineers;
- e. It promotes the public good by having private ownership in that the purchase by a State agency would eliminate the property from the County tax rolls. By requiring that the contractor own the property the property remains subject to assessment for taxes.

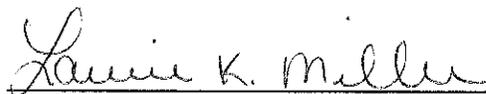
options, mode of operation, assets, and capabilities. Although some risk is involved in doing so, it has not been uncommon for prospective bidders on anticipated projects to secure a waste area through purchase from or agreement with the property owner in advance of the bid letting. This is called entrepreneurship, and is to be encouraged.

The CAWV respectfully submits that the practice and procedure outlined immediately above, which we are informed, understand, and believe has been known and adhered to historically both by the DOH and the highway contractors who submit bids to it, has served the State of West Virginia well. It has achieved the laudable goals set forth in Mr. VanKirk's affidavit, and at the same time has allowed maximum competitive flexibility among those contractors who choose to bid on highway projects. While the CAWV does not question the right of the DOH to alter or change its practices, policies, and procedures in accordance with law, and certainly fully supports its right of eminent domain in appropriate circumstances, we respectfully submit that such change should be considered in the light of discussion involving all interested parties, most importantly including those contractors and other businesses who will be directly impacted by that change. We also respectfully submit that if a practice, procedure, or policy of condemning property for possible use as a waste site in connection with highway projects is to be adopted, then such condemnations ought to occur before the project is first advertised for bid. It is not good policy to put a project out to bid, review the bids, refuse the bids, condemn property that would have been used as a waste site by the low bidder and was owned by a sister corporation of the low bidder, then rebid the project with that property available to all bidders as a waste site. Such an approach does not serve the goals outlined by Mr. VanKirk, nor does it encourage entrepreneurship and competition. Most important, it does

not evidence the kind of fundamental fairness that all should expect when dealing with government agencies.

IV. CONCLUSION

Upon the merits of this condemnation proceeding, the CAWV agrees with the position of appellant, CEI. The CAWV respectfully submits that the merits simply underscore the validity of the CAWV's position that the DOH ought to continue to follow its customary practice for the reasons set forth in Mr. VanKirk's affidavit. CAWV, its members, and the Division of Highways all share the paramount goal of building suitable highways for the citizens of West Virginia at the lowest cost practicable. Maintaining a bidding process that is not only fair and predictable, but also that our members and the public perceive as being fair and equitable, and one that empowers the private sector and encourages the most flexible competitive environment possible among those bidding for such projects, is critical to achieving that goal. It is the overall fairness of the bidding process and the competition it enhances that will produce the highest quality work at the lowest possible cost to the taxpayers of West Virginia. For these reasons, the CAWV as *amicus curiae* respectfully supports the position of appellant, Contractor Enterprise, Inc. in this matter.



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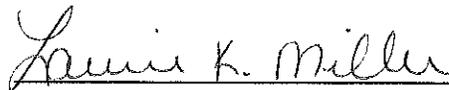
Appellee.

CERTIFICATE OF SERVICE

I, Laurie K. Miller, counsel for the Contractors Association of West Virginia, do hereby certify that service of the foregoing *Motion for Leave to File a Brief Amicus Curiae on Behalf of the Contractors Association of West Virginia* and *Brief Amicus Curiae on Behalf of the Contractors Association of West Virginia* has been made upon counsel of record by depositing true and exact copies thereof in the United States Mail, first class, postage prepaid, at the addresses listed below on this 4th day of April, 2008:

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