

NO. 100126

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

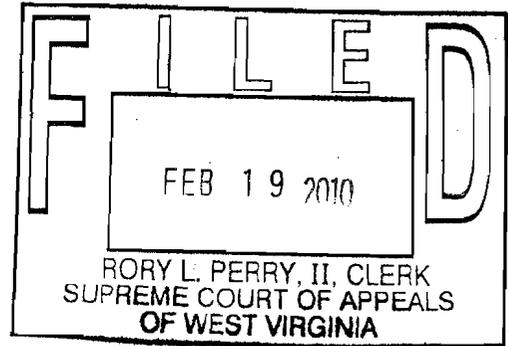
MAPLE CREATIVE, LLC,

Petitioner,

v.

DAVID TINCHER, DIRECTOR OF
PURCHASING DIVISION,
DEPARTMENT OF ADMINISTRATION,

Respondent.



**RESPONSE IN OPPOSITION TO
PETITION FOR WRIT OF MANDAMUS**

To the Honorable, The Justices
Of The Supreme Court of Appeals of West Virginia:

Comes now the Respondent, David Tinchler, by counsel, Barbara H. Allen, Managing Deputy Attorney General, and files the within Response to the Petition for Writ of Mandamus.

The Issues Presented

Stripped to its essence and putting aside its rhetorical flourishes, the Petition presents four issues for resolution by the Court:

First, whether the time limits governing protests of purchase order or contract awards made by the Purchasing Division for and on behalf of state agencies, 148 C.S.R. 1-8.1.1 and 1-8.1.2, apply during the Christmas - New Years holiday season;

Second, whether W. Va. Code § 5A-3-37(a) and/or 148 C.S.R. 1-6.4.4 require the resident vendor preference to be applied to the cost component of a bid where the resident vendor is already the low bidder;

Third, whether W. Va. Code § 5A-3-37(a) and/or 148 C.S.R. 1-6.4.4 require the resident vendor preference to be applied to all components of a bid, not just the cost component; and

Fourth, whether the Respondent's failure to consider the Petitioner's Protest despite the procedural default, or the Respondent's failure to apply the resident vendor preference to some or all of the components of this bid, constitutes a failure to perform a nondiscretionary duty.

Facts

This case involves Request for Proposal TOR3676, issued on May 29, 2009 by the Respondent acting on behalf of the West Virginia Division of Tourism. (Exhibit 1.)

Bid proposals were due by September 8, 2009, and the Petitioner timely submitted its proposal along with an executed Vendor Preference Certificate. (Exhibit 2) Three other companies, Charles Ryan Associates, Ogilvy & Mather, and Stonewall Marketing, submitted proposals as well.

The Petitioner's bid contained the lowest cost proposal.

On December 9, 2009, a properly constituted Evaluation Committee¹ "... achieved a final consensus decision regarding the qualifications, oral and strategic/creative technical criteria and cost . . .," and recommended Stonewall Marketing to be the successful bidder. (Exhibit 3.)

¹Committee members were Jon Amores, Deputy Secretary of the Department of Commerce; Betty Carver, Commissioner of the Division of Tourism; Les Smith, Agency Procurement Officer; and Emily Fleming Assistant to the Director of the Division of Natural Resources. Non-voting members were Oshel Craigo, Chairman of the Tourism Commission; and Sharon Cruikshank, President of the WV Convention & Visitors Bureaus Association.

The Committee's decision was based not only on the bidders' cost proposals, but also on the scores received for their "Qualifications, Strategic/Creative Capabilities." (Exhibit 4.)

On December 11, 2009, the Division of Tourism issued its Buyer Review Certification, concurring with the recommendation of the Evaluation Committee. (Exhibit 5.)

On December 21, 2009, a Bid Tabulation was issued, erroneously reporting that the Petitioner had not requested a resident vendor preference. (Exhibit 6.)

On December 21, 2009, Purchase Order TOR3676 was printed; it was signed by the Purchasing Division's authorized representative on December 23, 2009, approved as to form by the Attorney General on December 28, 2009, and certified encumbered on December 29, 2009. (Exhibit 7.)

On December 29, 2009, the Petitioner, Charles Ryan Associates and Ogilvy & Mather were notified by fax transmission that their respective bids were not successful. (Exhibit 8.)

On January 8, 2010, ten days (and six working days) later, the Petitioner sent a one-sentence letter to the Respondent:

Please accept this letter as notice of our firm's intent to contest the recent purchase order award related to RFQ (sic) Number **TOR3676**.

(Exhibit 9, emphasis in original.)

On January 19, 2010, eleven days (and six more working days) later, the Petitioner filed its Protest, raising five grounds of alleged error. (Exhibit 10.) One of the alleged errors involved information contained in two Cost Evaluation documents prepared by the Division of Tourism. (Exhibits 11A & B.)

On January 20, 2010, the Respondent denied the Petitioner's Protest on the ground that the Petitioner's January 8, 2010 "notice of intent to contest" was untimely, as it had not been

filed within five working days of the date on which the subject contract was awarded, certified encumbered, and mailed; and that the notice of intent was insufficient to be considered a Protest in any event, as it lacked the specificity required by law. The Respondent denied the Protest on the further ground that the actual Protest of January 19, 2010, was untimely. (Exhibit 12).

Argument

1. Whether the time limits governing protests of purchase order or contract awards made by the Purchasing Division for and on behalf of state agencies, 148 C.S.R. 1-8.1.1 and 1-8.1.2, apply during the Christmas - New Years holiday season.

This case contains a critical threshold issue which the Petitioner discusses only indirectly, the effect of the Petitioner's failure to timely file its Protest and whether the Respondent abused his discretion in denying the Protest on this basis.

Code of State Rules 148 C.S.R. 1-8.1.1 provides in relevant part as follows:

Protest of a purchase order or contract awards must be submitted no later than five (5) working days after the award. The vendor is responsible for knowing the bid opening and award dates. Protests received after these dates may be rejected at the option of the Director.

Code of State Rules 148 C.S.R. 1-8.1.2 provides as follows:

All protests shall be submitted in writing to the Purchasing Division and contain the following information:

- (a) the name and address of the protestor;
- (b) the requisition, purchase order or contract numbers;
- (c) a statement of the grounds of protests;
- (d) supporting documentation, if necessary; and
- (e) the resolution or relief sought.

Failure to submit this information shall be grounds for rejection of the protest by the Director.

The relevant facts of this matter are undisputed. The contract was certified encumbered on December 29, 2009. The latest date on which a Protest could be timely filed would be January 7, 2010, five working days after the award. The Petitioner sent a one-sentence letter on January 8, 2010, giving notice of its intent to contest the award; the letter contained none of the information required by 148 C.S.R. 1-8.1.2. On January 19, 2010, the Petitioner finally filed its Protest.

The following day, the Respondent denied the Protest as untimely, a decision completely within his discretion pursuant to 148 C.S.R. 1-8.1.1: "Protests received after these dates may be rejected at the option of the Director."

The Petitioner weaves several excuses for its non-compliance with 148 C.S.R. 1-8.1.1 & 1-8.1.2 throughout its argument, all without addressing the timeliness issue directly. First, the Petitioner recites that the contract was awarded and encumbered on December 29, 2009, during a week in which Petitioner's employees were all out of the office for the holidays. There are two problems with this excuse: it doesn't cover January 3 - 7, 2010, the five working days during which a Protest could have been timely filed; and, in any event, the time limit rules apply even during a holiday season. The Petition for Writ of Mandamus cites no statutory or case law to support a Christmas-New Year exception to the provisions of 148 C.S.R. 1-8.1.1 and 1-8.1.2.

The Petitioner's second excuse is that while the Respondent faxed a letter on December 29, 2009, informing unsuccessful bidders that Stonewall had been awarded the contract, the Respondent did not follow up with a copy of the letter sent by first class mail. The problem with this excuse is that the Respondent has no duty whatsoever to fax or mail a letter or to notify

unsuccessful bidders in any fashion; 148 C.S.R. 1-8.1.1, which governs Protests, clearly states that “[t]he vendor is responsible for knowing the bid opening and award dates.” Thus, the letter transmitted by fax to the Petitioner was purely a courtesy, and the Respondent’s failure to follow-up with a copy of the letter sent by mail did not extend, extinguish or otherwise affect the time limit for filing a Protest.

Finally the Petitioner does not even address the fact that its letter of January 8, 2010, was not only untimely, but also clearly insufficient to constitute a Protest because it did not comport with the requirements of 148 C.S.R. 1-8.1.2 (a) - (e). Pursuant to that Rule, which the Petitioner itself argues has the force and effect of law,² the Respondent had discretion to reject the two-line “notice of intent to contest” for this reason.

The Petitioner did not file its actual Protest until January 19, 2010, which wasn’t just one (business) day late; it was seven (business) days late. Again, the Respondent had discretion to reject this Protest as untimely, which is exactly what he did. This discretionary call is not reviewable by mandamus.

2. Whether W. Va. Code § 5A-3-37(a) and/or 148 C.S.R. 1-6.4.4 require the resident vendor preference to be applied to the cost component of a bid where the resident vendor is already the low bidder.

During the course of evaluating the bids in this case, two Cost Evaluation documents were prepared, one showing resident vendor preference for both the Petitioner and Charles Ryan

²See Memorandum in Support of Petition for Writ of Mandamus, p.8. Citing *Smith v. West Virginia Human Rights Comm’n*, 216 W. Va. 2, 602 S.E.2d 445 (2004) and W. Va. Code § 29A-1-2(d), the Petitioner writes that “[e]very legislative rule, when effective, is determinative on any issue affecting private rights, privileges or interests.”

Associates (Exhibit 11A), and one showing no preference (Exhibit 11B).³ The cost component scores shown on Exhibit 11A, if correct, would result in the bid going to the Petitioner, while the scores shown on Exhibit 11B would result in the bid going to Stonewall.

The problem with the Cost Evaluation (With Preference) form, Exhibit 11A, is that the scrivener thereof (not a Purchasing employee) failed to take into account the provisions of W. Va. Code § 5A-3-37(a)(1) - (6), which describe the situations in which the resident vendor preference may be applied. Every such situation requires, as a condition precedent to application of the preference, that “. . . the vendor’s bid does not exceed the lowest qualified bid from a nonresident vendor by more than [2½ % - 5 %] of the latter bid. . . .”

In the instant case, because the Petitioner’s bid was already the lowest of the four bids submitted, the resident vendor preference did not apply since the Petitioner was entitled to the maximum point score on the cost component of the bid without application of a preference. Thus, the scrivener of the Cost Evaluation (With Preference) form, Exhibit 11A, erred in adjusting the non-resident vendors’ bids before applying the formula for allotting cost scores.⁴

(The fact that the Petitioner was the low bidder, irrespective of any resident vendor preference, effectively negated any RVP for Ryan as well, because the preference does not apply between resident vendors. 110 C.S.R 12C-7.)

³Both of these documents contain errors, but they were maintained in the Respondent’s file nonetheless as part of the historical record. At the time the Petitioner’s representative reviewed the file, prior to filing a Protest, he was informed that these documents contain errors and should not be relied upon.

⁴ In a case where the resident vendor’s bid is not the lowest bid, the non-resident vendors’ bids are multiplied by 1.05%; the respective bids are then awarded cost scores using a standard Purchasing Division formula.

In summary, in this case the issue isn't whether the Petitioner applied for resident vendor preference: it did, notwithstanding the language contained in the Bid Tabulation (Exhibit 6) which everyone acknowledges to be an error. The issue in this case is whether the Petitioner was entitled to the preference when it was already the lowest bidder, and the clear answer is that it was not. W. Va. Code § 5A-3-37(a) (1) - (6).

3. Whether W. Va. Code § 29A-1-2(d)(3) and/or 110 C.S.R. 12C-4.1 through 4.3 require the resident vendor preference to be applied to all components of a bid, not just the cost component.

The Petitioner devotes a substantial portion of its argument to the general legal proposition that it is entitled to claim a resident vendor preference when bidding on state contracts, because it satisfies the residency criteria set forth in 148 C.S.R. 1-6.4.4 (a) - (e).

In this regard, the Petitioner implies, although it does not directly state, that it was denied the preference because the Respondent erroneously believed that it (the preference) hadn't been requested. This part of the Petitioner's argument is a gotcha!, specifically, an attempt to capitalize on the fact that the December 21, 2009 Bid Tabulation (Exhibit 6) erroneously reports that Maple Creative did not request a resident vendor preference.

The argument is a complete red herring because the Petitioner knows that this language in the Bid Tabulation is a simple error. It acknowledged as much in its Protest of January 19, 2010:

It is clear that the Committee and Purchasing Division applied the resident vendor preference to the cost component of the bid only, and not the entire bid.

(Exhibit 10 at p. 4.)

What the Petitioner argued in its Protest, and continues to argue, is not that it didn't receive a resident vendor preference, but rather that because Purchasing Rule § 148-1-6.4.4

provides that “. . . all purchases of . . . services . . . made upon competitive bids . . . are subject to a resident vendor preference . . . ,” and because the Legislature did not limit or restrict the application of resident vendor preference to the cost component of a competitive bid, the Respondent must apply the preference to all components of a bid. The Petitioner’s argument is insupportable for three reasons.

First, utilizing ordinary rules of grammar and syntax, the word “all” in § 148-1-6.4.4 refers to the universe of services required to be purchased through a competitive bid process, not to the various components of a bid.

Second, there is no rule of statutory construction that requires legislative silence to be interpreted as legislative mandate. The Petitioner argues that since neither W. Va. Code § 5A-3-37(a) nor 148 C.S.R. 1-6.4.4 specifically limit or restrict the application of resident vendor preference to the cost component of a competitive bid, then as a matter of law these provisions mandate the opposite. Nothing in the text of either the statute or the rule permits, let alone compels, such a conclusion.

Third, the Vendor Preference Certificate that Petitioner signed (Exhibit 2), and submitted with its bid, clearly states:

Certification and application is hereby made for Preference in accordance with West Virginia Code, §5A-3-37. (Does not apply to construction contracts). West Virginia Code, §5A-3-37, provides an opportunity for qualifying vendors to request (at the time of bid) preference for their residency status. **Such preference is an evaluation method only and will be applied only to the cost bid in accordance with the West Virginia Code.** This certificate for application is to be used to request such preference. The Purchasing Division will make the determination of the Resident Vendor Preference, if applicable.

(Emphasis supplied.)

Thus, the Petitioner knew how the preference would be applied at the time it submitted its bid; it's not as though the Respondent's interpretation of the resident vendor preference was an after-the-fact surprise.

4. Whether the Respondent's failure to consider the Petitioner's Protest despite the procedural default, or the Respondent's failure to apply the resident vendor preference to some or all of this bid, constitutes a failure to perform a nondiscretionary duty.

The Petitioner's argument with respect to its entitlement to a writ of mandamus is based wholly on its contention that 148 C.S.R. 1-6.4.4 (what the Petitioner designates as "the 2009 Rule") mandates that the resident vendor preference be applied to all components of a competitive bid.

The Respondent again invites the Court's attention to the actual language of § 148-1-6.4.4, in its entirety:

Vendor Preference – All purchases of commodities, services or printing made upon competitive bids, with the exception of construction services, are subject to a resident vendor preference in accordance with the rules promulgated by the Secretary of the Department of Revenue. In addition, all purchases of commodities, services or printing made upon competitive bid are subject to reciprocity preference equal to the amount of preference applied or granted by another State. A resident vendor is one who:

- (a) Is authorized to transact business within the State by appropriate authorities;
- (b) Maintains an office in the State;
- (c) Has actually paid, and not just applied to pay, personal property taxes on equipment used in the regular course of supplying services of the general type offered;
- (d) Has actually paid, and not just applied to pay, business taxes; and

- (e) When selling tangible personal property, has available for delivery a stock of materials of the type being offered and of a reasonable quantity.

Finally, the Director shall apply all vendor preferences set forth in W. Va. Code § 5A-3-37.

Nothing in this text supports the Petitioner's argument that the resident vendor preference must be applied to every component of a bid, including the technical component, and in fact logic and common sense dictate the opposite conclusion. Although it is always perilous to pronounce on legislative intent, it seems clear that the Legislature was expressing a willingness to pay a little more – up to 5% more – in order to give work to West Virginia businesses and workers. Nothing in either the statute, W. Va. Code § 5A-3-37(a)(1) - (6), or the regulation, 148 C.S.R. 1-6.4.4, evidences a legislative intent to take a little less in terms of technical competence, quality, prior experience, or any other non-economic component of an RFP, in order to achieve that goal.

Further, not only has the Respondent uniformly applied the resident vendor preference solely to the cost component of competitive bids, but also he has uniformly applied the preference to the cost component only in situations where the resident vendor is not otherwise the low bidder. See W. Va. Code §5-3-37(a) and Argument 2, *infra*. Nothing creates a non-discretionary duty on the Respondent's part to revisit or revise this application of the statute and regulations.

Finally, by its express terms 148 C.S.R. 1-8.1.1 makes the Respondent's acceptance or rejection of an untimely protest discretionary: "Protests received after these dates may be rejected at the option of the Director." There is no question that the Petitioner's "notice of intent to contest" was both untimely and insufficient; and no question that its Protest, when finally filed

on January 19, 2010, was untimely. The Respondent was within his discretion in rejecting the Protest, and his discretion is not reviewable in mandamus.

Conclusion

In this case, the Petitioner has utterly failed to make out either the first or the second elements of entitlement to a writ of mandamus, namely, a clear right in the Petitioner to the relief sought, or a legal duty on the part of the Respondent to the thing which the Petitioner seeks to compel. Syl. Pt. 2, *State ex rel. Gregory Burdette v. Zakaib*, 658 S.E.2d 903 (W. Va. 2009).

The Petitioner's underlying Protest was rejected as untimely, and this exercise of discretion by the Respondent is not reviewable in mandamus.

The Petitioner did not receive the benefit of a resident vendor preference for the simple reason that it was already the low bidder, a condition precedent to application of the preference pursuant to W. Va. Code § 5A-3-37(a)(1) - (6). The Petitioner has no clear right, and the Respondent has no clear duty, to re-write the statute.

Nothing in the applicable statutes or regulations requires a resident vendor preference (assuming its applicability) to be applied to any components of a bid other than the cost component; the longstanding practice of the Respondent has been to apply the RVP only to the cost component; and the Petitioner was on clear notice of the Respondent's practice since the practice was clearly spelled out in the Vendor Preference Certificate signed by the Petitioner:

Such preference is an evaluation method only and will be applied only to the cost bid in accordance with the West Virginia Code.

(Exhibit 2.)

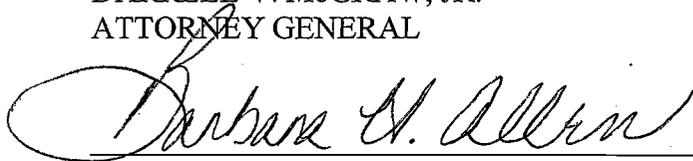
For all of these reasons, and all of the reasons apparent on the face of the record, the
Petition for a Writ of Mandamus should be denied.

Respectfully submitted,

DAVID TINCHER, DIRECTOR OF PURCHASING
DIVISION, DEPARTMENT OF ADMINISTRATION

By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

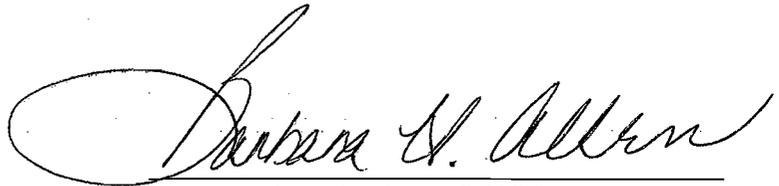
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BARBARA H. ALLEN, WWSB #1220
MANAGING DEPUTY ATTORNEY GENERAL
State Capitol, Room 26-E
Charleston, WV 25305
304-558-2021

CERTIFICATE OF SERVICE

I, Barbara H. Allen, counsel for Respondent, David Tincher, hereby certify that a true copy of the within "Response in Opposition to Petition for Writ of Mandamus" was served on counsel for the Petitioner by first-class mail, postage prepaid, on the 19th day of February, 2010, addressed as follows:

Edward P. Tiffey, Esq.
Tiffey Law Practice, PLLC
205 Capitol Street, 4th Floor
P.O. Box 3785
Charleston, WV 25337-3785

A handwritten signature in cursive script, reading "Barbara H. Allen". The signature is written in black ink and is positioned above a horizontal line.

BARBARA H ALLEN

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE
