

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

**State of West Virginia, *ex rel.*
West Virginia Citizen Action Group,
an incorporated association of State
citizens and taxpayers,**

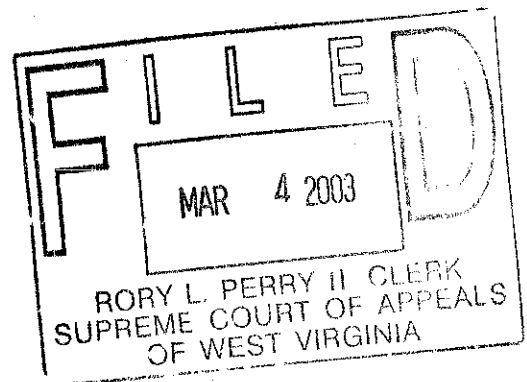
Petitioner,

v.

Case No. 31125

**West Virginia Economic
Development Grant Committee; City
of Wheeling (including its Urban
Renewal Authority), a
municipal corporation; and
WVOC Associates, L.P., a private
partnership and corporation,**

Respondents.



**BRIEF OF THE AFFILIATED CONSTRUCTION TRADES FOUNDATION
AS AN AMICUS CURIAE**

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I. Introduction

On February 20, 2003 this Court granted the *Motion* of the Affiliated Construction Trades Foundation to file a Brief as an Amicus Curiae in this matter. The Affiliated Construction Trades Foundation, a division of the Building and Construction Trades Council, AFL-CIO (ACT) is a labor organization that represents thousands of construction workers in West Virginia. In order to protect its members and the public, ACT monitors compliance with statutory requirements including competitive bidding (West Virginia Code section 5-22-1 *et seq.*), design-build (West Virginia Code section 5-22A-1 *et seq.*) and prevailing wages on the construction of public improvements (West Virginia Code section 21-5A-1 *et seq.*).

In its Order of January 21, 2003, the Circuit Court of Kanawha County stated in this matter:

10. Pursuant to W.Va. Code section 29-22-18a(d)(3), revenue bond proceeds shall be expended as authorized by this section “in accordance with the requirements and provisions of article five-a, chapter twenty-one of this code [21-5A-1 *et seq.* (Wages for Construction of Public Improvements)] and either article twenty-two or article twenty-two-a, chapter five of this code [5-22-1 *et seq.* (Government Construction Contracts) or 5-22A-1 *et seq.* (Design-Build Procurement Act)] as the case may be:...”

11. Pursuant to W.Va. Code 29-22-18a, all projects that receive funding from the revenue bond proceeds must pay a wage which is no less than the prevailing hourly wage for work of a similar character in the locality in the state in which the construction is performed. See W.Va. Code section 21-5A-2.

Thus, ACT has a direct interest in the outcome of the matter in that the outcome has the potential for the creation of thousands of prevailing wage construction jobs and the resulting economic stimulus. This is ACT's *Brief as an Amicus Curiae*.

II. Argument

The fundamental reason for the filing of this *Brief* is to provide the Court with background information regarding the positive economic development impact that is achieved through the funding of prevailing wage construction jobs.

In establishing the "state excess lottery fund" the Legislature clearly stated (at West Virginia Code section 29-22-18a(a)) that, "The revenue shall be disbursed in the manner provided in this section for the purposes stated in this section." With regard to the manner of distributing said funds at issue in this matter, the Legislature clearly established that the funds are to be distributed to "promote economic development in the State of West Virginia." Specifically, the Legislature declared:

The Legislature finds and declares that in order to attract new business, commerce and industry in this state, to retain existing business and industry providing the citizens of this state with economic security and to advance the business prosperity of this state, it is necessary to provide the public financial support for constructing, equipping, improving and maintaining economic development projects, capital improvement projects and infrastructure which promote economic development in this state.
(West Virginia Code section 29-22-18a(d))

The Legislature placed certain restrictions on the expenditure of the funds in order to ensure that the funds, in fact, have a positive economic development on West Virginia. Specifically, the Legislature placed a prevailing wage and competitive bidding requirement on the expenditure of the bond proceeds that form the basis of the public funds at issue. The Legislature stated,

Provided, that the bond proceeds shall be expended in accordance with the requirements and provisions of article five-a, chapter twenty one of this code and either twenty-two or article twenty-two-a, chapter five of this code, as the case may be.¹

(West Virginia Code section 29-22-18a(d)(3))

That is, the funds can only be expended on projects that comply with the prevailing wage and competitive bidding or Design-Build Act.

With regard to the prevailing wage law of West Virginia, the Legislature of the State of West Virginia has declared that it is the policy of this State that:

wage of no less than the prevailing hourly rate for wages of work of a similar character in the locality in this State in which the construction is performed, shall be paid to all workman employed by or on behalf of any public authority engaged in the construction of public improvements.

(West Virginia Code section 21-5A-2)

The competitive bidding requirements work to ensure that the funds at issue are expended in a manner that products the public's money (Pioneer Company v. Hutchinson, 159 W.Va. 276 (1975)) and the prevailing wage requirement ensures economic benefit to the local area and the state.

The amount of economic benefit derived from the expenditure of these funds – and the additional funds that will result from the commitment of public funds – is tangible and extensive. For example, with regard to just some of the six projects that ACT understands were approved by the Grant Committee by the time of the final hearing

¹ West Virginia Code section 21-5A-1 *et seq.*, provides for the payment of prevailing wages on public construction projects. West Virginia Code section 5-22-1 provides for competitive bidding on public construction projects. West Virginia Code section 5-22A-1 *et seq.*, is the Design-Build Procurement Act that, briefly stated, provides for competitive procurement of public design/build projects. The Circuit Court of Kanawha County in its Order of January 21, 2003 correctly stated that, "Pursuant to W.Va. Code section 29-22-18a, all projects that receive funding from the revenue bond proceedings must pay a wage which is no less than the prevailing hourly wage for work of a similar character in the locality in the state in which the construction is performed. See W.Va. Code section 21-5A-1."

before the Circuit Court,² the applicants estimate the following construction jobs: Charleston Baseball Project: 400 construction jobs; The I-79 Technology Park Development Project: 450 construction jobs; and The Wheeling Victorian Outlet Center: 380 construction jobs.

In fact, if the six projects approved prior to the time of the hearing at the lower Court are permitted to proceed and the prevailing wage is paid for all the construction jobs on the entirety of each of the projects, the economic benefit of the construction portion of the six projects – including the entire cost of each project³ will be just the type of economic security and development envisioned by the Legislature when they created the Grant Committee and established the parameters for the distribution of the funds at issue in this matter.

The benefits of construction projects are both direct and indirect: The direct benefits are the sales and wages of the construction projects themselves. The indirect benefits come from *multiplier effects*, that is, the construction companies buy supplies and building materials, and the suppliers spend the money they obtain from the projects on a wide variety of other goods and services. Workers employed by all these companies spend their pay, creating more jobs and business. It is possible to estimate these expenditures using sophisticated and reliable economic models.

² The six are: Project #30, the Putnam County Development Authority; Project #8, City of Wheeling; Project # 138, West Virginia DHHR; Project #1 City of Charleston; Project #23 Eastern West Virginia Regional Airport Authority; and Project #16, West Virginia High Tech Consortium.

³ Based on information and belief, the total amount of the Grant Committee commitments for the six projects is \$98,814,056 and the amount of additional funding leveraged for the same six projects is \$136,380,909.

Using IMPLAN, an input-output model developed by the U.S. Forest Service and maintained by the Minnesota Implan Group, the impact of the six projects alone would be as follows.⁴

Total business sales over two years in West Virginia are estimated to be \$536 million in the construction phase. Of this, \$352 million comes directly from construction. The construction companies will buy another \$70 million in building materials from state companies and their suppliers in turn, such as steel bars made by area steel mills. Workers and construction company owners, as well as the workers in the supplier companies, will make \$117 million in purchases from state businesses. In other words, these six projects will account for over a half billion dollars of business over two years. This measures the business activity of various industries, but includes a double counting of sales as one business sells to another.

The total new jobs during the construction phase of the development will total 1,767 a year. Construction employment is estimated to be 855 a year and another 311 jobs will be created in supplier companies and 616 in providing consumer goods and services for the various workers and business owners affected.

Workers will receive \$227 million in wages and benefits over two years. Of that, \$170 million will go to construction workers, \$22 million to workers in supplier business and \$36 million to workers making consumer goods and services to support these workers.

Business owners will receive \$22 million in income over the two years of construction. Construction contractors, who are often sole proprietors or partners, will

⁴ The information that follows was developed by the Center for Labor and Community Research for ACT. Not having been a party at the Circuit Court this information is not part of the record of the lower Court.

receive \$14 million. Another \$8 million will flow to owners of supplier companies and those providing goods and services for consumer purchases of workers.

Corporations will receive \$35 million in profits, interest and funds to cover depreciation charges. Of that, \$6 million will go to construction corporations, \$8 million to supplier corporations and \$22 million to companies providing consumer goods and services.

The construction phase will provide the government with \$23 million in new tax revenues. The federal government will receive \$17 million, of which \$9 million is for Social Security and Medicare, \$6 million in personal income taxes and \$1 million in corporate profits tax. State and local government will receive \$5 million, of which \$2 million will be from the state personal income tax and \$3 million in various indirect taxes such as property and sales taxes, and license fees.

III. Conclusion

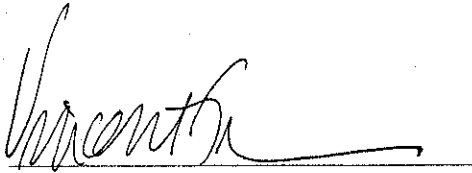
The economic development and security of this State is as important to ACT as it is to the Legislature and the Governor. By establishing prevailing wage and competitive bidding criteria for the expenditure of the funds at issue in this matter, the Legislature ensured that - through the hiring of thousands of prevailing wage construction workers - the State would experience the positive economic benefit it needs and requires when public monies are spent on development. The total economic impact of the construction work on projects in question will assist in bringing about the economic security desired by all parties in this matter. It is an impact that was largely ignored by the proceedings at the Circuit Court. ACT urges this Court to consider this impact in its consideration of the matter before it.

The data are offered for the Court's consideration.

Respectfully submitted this 3rd day of March, 2003.

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that service of **BRIEF OF THE AFFILIATED CONSTRUCTION TRADES FOUNDATION AS AN AMICUS CURIAE** has been made by depositing a true and exact copy thereof in the U.S. Mail, postage pre-paid on March 3, 2003 to the following:

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