

IN THE CIRCUIT COURT OF KANAWHA COUNTY WEST VIRGINIA

The Affiliated Construction Trades
Foundation, a division of the
West Virginia State Building and
Construction Trades Council, AFL-CIO,

Plaintiff/Petitioner

v.

Case No. _____

The West Virginia Department of
Transportation, Division of Highways; and
Nicewonder Contracting Inc.,

Defendants/Respondents.

**Petition for Declaratory Judgment and Injunctive Relief of the Affiliated
Construction Trades Foundation**

COMES now the Plaintiff/Petitioner, the Affiliated Construction Trades Foundation, a division of the West Virginia State Building and Construction Trades Council, AFL-CIO (hereinafter referred to as “ACT”), by counsel The Calwell Practice, PLLC, Stuart Calwell and Vincent Trivelli and files a *Petition for Declaratory Judgment* and in support thereof states the following:

Nature of the Case

1. This action is being brought, and jurisdiction is proper, pursuant to the Declaratory Judgment Act (*West Virginia Code* § 55-13-12), the remedial purpose of which is to “settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” Plaintiff/Petitioner alleges that the Defendants have entered into an agreement to construct a highway (hereinafter referred to as the “King Coal Highway” or “KCH”) in violation of the laws and regulations of the State of West Virginia including but not limited to the rules and regulations of the Division of Highways regarding construction as well as *West Virginia Code* § 5-22-1 (regarding competitive bidding) and *West Virginia Code* § 21-5A-1 *et seq.* (regarding the payment of prevailing wages).

Parties

2. ACT is a labor organization, and is a person within the meaning of *West Virginia Code* §§ 55-13-11 and 55-13-13, that represents approximately 20,000 construction workers throughout the State of West Virginia and surrounding counties. The membership of ACT includes employees who are taxpayers of West Virginia and who work for companies that construct highways similar to KCH.

3. Defendant West Virginia Department of Transportation, Division of Highways (“WVDOH”) is a department or division of the government of the State of West Virginia.

4. The Defendant Nicewonder Contracting, Inc. (“Nicewonder”) is an entity that is engaged in or related to other entities that mine coal and is a person within the meaning of *West Virginia Code* §§ 55-13-11 and 55-13-13.

Facts

Based on information and belief and in support of this Petition, ACT states the following:

5. Based on information, the Defendants Nicewonder and WVDOH have entered into an agreement (attached hereto as Exhibit 1) to construct all or a portion of the KCH as a project referred to as the Red Jacket Project.

6. Said agreement, and related documents, provide for material and significant changes and alterations to the KCH including but not limited to: the standards of construction; the location of interchanges; and, the route of the highway. These and other changes are in contradiction to DOH rules and regulations as well as the development of the KCH and are for the private benefit and interest of Defendant Nicewonder and not in the interest or benefit of the public.

7. On or about June of 2004 WVDOH provided data and information to the United States Department of Transportation alleging that said agreement was in the public interest in that it was cost effective, unusual and not likely to be repeated. Said data and information is faulty, incorrect, in contradiction to the rules and regulations of DOH and the United States Department of Transportation and for the private benefit and interest of Defendant Nicewonder and not in the interest or benefit of the public.

8. The data and information provided by the WVDOH states that said agreement is not unusual and not likely to be repeated by stating, “there may be additional opportunities” in West Virginia similar to the instant matter.

9. The construction to be undertaken pursuant to said agreement is not cost

effective and any allegation by the WVDOH that it is so is based upon faulty and inaccurate data and analysis and requires significant and material changes to the construction and location of KCH that are not in the public's interest.

10. Said agreement was entered into without competitive bidding and does not provide for the payment of the prevailing wage in violation of state and/or federal laws.

11. As a result of the actions of WVDOH the public will experience an increase in costs and a reduction in the benefits of the KCH project.

Count 1

12. Petitioner incorporates by reference herein paragraphs 1 through 11.

13. Defendants WVDOH and Nicewonder have entered into an agreement to construct all or a portion of the KCH that is not in the public interest in that it is not cost effective nor unusual and is likely to reoccur and therefore is in violation of state and federal laws.

14. The Defendant WVDOH has a statutory duty to comply with the laws of West Virginia and the United States and is not in compliance with that statutory duty.

15. A declaratory judgment in this action is necessary to avoid the tangle of litigation that will result if the Defendants are permitted to continue such actions in violation of the law and to safeguard the public's funds and the public's interest.

Count 2

16. Petitioner incorporates by reference herein paragraphs 1 through 15.

17. The Defendant WVDOH by undertaking to enter into the agreement herein described has made material changes to critical aspects of the construction of the KCH in

violation of its own rules and regulations, in violation of the public interest and trust and for the private benefit of Defendant Nicewonder.

18. The Defendants have a statutory duty to comply with federal law and the laws of West Virginia and the agreement to construct the KCH is not in compliance with that statutory duty.

19. A declaratory judgment in this action is necessary to avoid the tangle of litigation that will result if the Defendants are permitted to continue such actions in violation of the law and to safeguard the public's funds and the public's interest.

Count 3

20. Petitioner incorporates by reference herein paragraphs 1 through 19.

21. Defendants WVDOH and Nicewonder have entered into an agreement to construct all or a portion of the KCH which is in violation of the laws of West Virginia including but not limited to *West Virginia Code § 21-5A-1 et seq.* (regarding the payment of prevailing wages), *West Virginia Code § 5-22-1* (regarding competitive bidding).

22. The Defendant WVDOH has a statutory duty to comply with the laws of West Virginia and the agreement to construct the KCH detailed herein is not in compliance with that statutory duty.

23. A declaratory judgment in this action is necessary to avoid the tangle of litigation that will result if the Defendants are permitted to continue such actions in violation of the law and to safeguard the public's funds and the public's interest in the State's highway, bidding and prevailing wage laws.

WHEREFORE, the Plaintiff prays that the Court enter an order, granting a declaratory judgment and further relief as follows:

- (1) That the Court grant a speedy hearing on this action and advance this matter on its priority docket; and
- (2) That this Court issue a declaration that the Defendants have entered into an agreement(s) to construct all or a portion of the KCH that does not comply with the laws of West Virginia; and
- (3) That this Court issue a declaration that the Defendants have entered into an agreement to construct all or a portion of the KCH that does not comply with the Constitution of West Virginia and that there is no rational basis for entering into such an agreement; and
- (4) That the Court issue a declaration that any such agreement(s) are void; and
- (5) That the Court issue a declaration enjoining the Defendants from engaging in further action(s) to implement such contract to construct said KCH until and unless the Defendants comply with the law; and
- (6) That the Court award Plaintiff attorney's fees and costs incurred by them in the prosecution of this action; and
- (7) That the Court grant other relief as it deems appropriate.

The Affiliated Construction Trades
Foundation, a division of the West
Virginia State Building
And Construction Trades Council,
AFL-CIO

By Counsel,

Vincent Trivelli (WV Bar # 8015)

The Calwell Practice, PLLC
178 Chancery Row
Morgantown, WV 26505
(304) 291-5223

and

Stuart Calwell, Esq. (WV Bar #595)
The Calwell Practice, PLLC
500 Randolph Street
Charleston, West Virginia 25302
(304) 343-4323