

STATE OF INDIANA)
) SS:
MARSHALL COUNTY)

IN THE MARSHALL CIRCUIT COURT

2009 CALENDAR TERM

FILED
IN OPEN COURT

WAYNE LAMBERSON and
INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL
150, AFL-CIO
Plaintiffs

CAUSE NO. 50C01-0509-PL-030

JUN 08 2009

[Handwritten Signature]

v.

CLERK OF MARSHALL CIRCUIT COURT
MARSHALL COUNTY, INDIANA

MARSHALL COUNTY, INDIANA,)
and its MARSHALL COUNTY,)
INDIANA HIGHWAY DEPARTMENT)
Defendants)

**ORDER ON PARTIES' CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

This matter came before the Court on May 14, 2009, for hearing on Plaintiffs' Motion for Summary Judgment filed on June 16, 2008, and the Defendants' Motion for Summary Judgment filed October 17, 2008. The Plaintiffs appeared by counsel, Jeffrey Wrage and Robert Reiter, Jr.; the Defendants appeared by counsel, James Clevenger; and the State of Indiana appeared by Deputy Attorney General, Kate Van Bokkelen.

The Plaintiffs and Defendants have both requested the Court issue summary judgment in their respective favor on the following issue:

In 2003 - 2005, did Defendant Marshall County violate Indiana Code § 36-1-12 by using the County's own equipment and manpower to apply asphalt on roads and/or bridges within the County? Secondly, the Defendant argues that if their conduct is found to be a violation of IC 36-1-12, then the statute is unconstitutional.

Following able arguments by counsel all matters were taken under advisement and the Court, having now reviewed the designated materials and legal authorities cited by the parties, enters the following **FINDINGS, CONCLUSIONS and ORDERS:**

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FINDINGS

1. The parties agree that during 2003 - 2005 the Defendants Marshall County and the Marshall County Highway Department (hereinafter "County") used their own manpower and equipment to apply asphalt to existing roadways in projects that exceeded \$100,000 in cost of materials alone for the following roadways:
 - a. Plymouth LaPorte Trail - June 2003
 - b. North Michigan Street - May 2004
 - c. South Michigan Street - August 2004
 - d. Lincolnway West - May 2005
 - e. Lincolnway East - May 2005
2. The parties agree that during the same time period the County used its own manpower and equipment to apply asphalt onto newly constructed bridges for projects in which the bridge structure exceeded \$100,000 in cost, but the cost of paving the bridge was less than \$100,000 for the following bridges:
 - a. Bridge 50, East 3rd Road
 - b. Baker St. Bridge
 - c. Oak Road Bridge
 - d. Rose Road Bridge
 - e. Fir Road Bridge
3. IC § 8-14-2-1 reads as follows:

(5) The term "construction" shall mean both construction and reconstruction to a degree that new, supplementary, or substantially improved traffic service is provided, and significant geometric or structural improvements are effected.

(10) "Resurfacing" means the placement of additional pavement layers (including protective systems for bridge decks) over the existing (or restored or rehabilitated) roadway or bridge deck surface to provide additional strength or to improve serviceability for a substantial time period.

(11) "Restoration and rehabilitation" means work required to return the existing structure (roadway pavement or bridge deck) to a suitable condition for an additional stage of construction (bridge deck protective system or resurfacing) or to a suitable condition to perform satisfactorily for a substantial time period.
4. IC § 36-1-12-2 reads as follows:

"As used in this chapter, "public work" means the construction, reconstruction, alteration, or renovation of a public building, airport facility, or other structure that is paid for out of a public fund or out of a special assessment. The term includes the construction, alteration, or repair of a highway, street, alley, bridge, sewer, drain, or other improvement that is paid for out of a public fund or out of a special assessment. The term also includes any public work leased by a political subdivision under a lease containing an option to purchase."

5. IC § 36-1-12-3 reads as follows:

(a) The board may purchase or lease materials in the manner provided in IC 5-22 and perform any public work, by means of its own workforce, without awarding a contract whenever the cost of that public work project is estimated to be less than one hundred thousand dollars (\$100,000). Before a board may perform any work under this section by means of its own workforce, the political subdivision or agency must have a group of employees on its staff who are capable of performing the construction, maintenance, and repair applicable to that work. For purposes of this subsection, the cost of a public work project includes the actual cost of materials, labor, equipment, rental, a reasonable rate for use of trucks and heavy equipment owned, and all other expenses incidental to the performance of the project.

...

(e) If a public works project involves a structure, an improvement, or a facility under the control of a department (as defined in IC 4-3-19-2(2)), the department may not artificially divide the project to bring any part of the project under this section.

6. The complained of work on the roadway projects is the placement of a new layer of asphalt over the old surface of the existing roadway. This work is construed by the County as "maintenance" which the County contends falls outside the scope of IC § 36-1-12 as not being a "public work" project. Conversely, the Plaintiff construes this type of work as "repair" of the existing roadways and asserts that the work is a "public work" within the scope of IC § 36-1-12.
7. The Court finds the definition of "resurfacing" from IC § 8-14-2-1(10) to fairly encompass the type of work performed on the roadway projects and, as that definitional statute is referred to in IC § 36-1-12-4, it seems appropriate to apply it to the other subsections of IC § 36-1-12 as well.
8. The parties agree that the County has a group of employees on its staff who are capable of performing the resurfacing paving work.

9. The historical custom and practice of the County as established by the Marshall County Board of Commissioners was to perform all "maintenance" of county roads using county manpower and equipment regardless of the project cost.
10. The historical custom and practice of the County as established by the Marshall County Board of Commissioners was to "bid out" all new road construction and all road changes requiring design or engineering expertise.
11. The public works statute specifically includes the work of "... construction, alteration, or repair of a highway..." as being within the ambit of the statute.
12. The definition of alter or alteration is "to make different without changing into something else."
13. The definition of repair is "to restore by replacing a part or putting together what is torn or broken."
14. The definition of maintain or maintenance is "the upkeep of property or equipment."
15. The Court finds that the resurfacing work performed by the County on the above listed roadway projects, even if construed to be "the upkeep of property", falls within the definition of the type of work contemplated by IC § 36-1-12-2.
16. The resurfacing work performed by the County on the above listed roadway projects was a public work as defined by IC § 36-1-12-2 in that it encompassed the alteration or repair of the roadway. The Court does not find resurfacing work to be maintenance similar to periodically removing snow or debris from the roadway which work does not alter the structure of the roadway.
17. The Marshall County Board of Commissioners and Highway Superintendent had a good faith belief (although incorrect) that the resurfacing of public roadways was not a public work based upon their knowledge of it being a common practice in other counties in Indiana and the County's lengthy, unchallenged history of performing such work "in house".

CONCLUSION OF LAW

- **The Defendant County violated IC § 36-1-12-3 when it performed resurfacing work in excess of \$100,000 on the listed roadway projects rather than allowing private contractors to bid and contract for the work.**

18. The established custom and practice of the County as established by the Marshall County Board of Commissioners was to "bid out" all bridge replacement work, excluding the asphalt paving that would be laid on the top of the new bridge. Such paving work was performed by using county manpower and equipment and although each bridge project exceeded \$100,000 in cost, the expense of the paving portion alone was less than \$100,000 per bridge project.
19. The Plaintiff alleges that the County's bidding out the new bridge construction work but excluding the paving work from the bid contracts was an impermissible, artificial division of the bridge projects in violation of IC § 36-1-12-3(e).
20. Formal bids were requested and submitted for the replacement of bridges without reference to any paving work. There are also references within the designated evidence to bridge replacement projects being "completed" without any asphalt paving being installed over the top of the new bridge structure, or at least not being installed until some later date.
21. The Court finds that soliciting bids for bridge replacement projects and excluding the paving work of less than \$100,000 was not an artificial splitting of the projects.

CONCLUSION OF LAW

- **The Defendant County did not violate IC § 36-1-12-3 when it performed paving work costing less than \$100,000 on the listed bridge projects "in house" rather than allowing private contractors to bid and contract for the work.**
22. The County alleges that IC § 36-1-12 is unconstitutional as the statute is a special law and/or the limit of \$100,000 per project is so arbitrary as to be unconstitutional.
 23. The Court finds that the statute does not single out Marshall County nor any other political subdivision and is therefore general in nature.
 24. The Court also finds that Marshall County does not possess any unique characteristics that would cause enforcement of the law to be unfair in their particular circumstances.
 25. The Court believes it is within the purview of the Legislature (not the Courts) to establish and review the limit of \$100,000 contained within IC § 36-1-12-3.

CONCLUSION OF LAW


- **IC § 36-1-12-3 is constitutional.**

THEREFORE, THE COURT NOW GRANTS THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT as to Counts I through V of their Complaint as they pertain to roadway projects only. The Motion for Summary Judgment is **DENIED** as it pertains to the bridge projects.

The Court **DENIES** the Defendants' Motion for Summary Judgment as it pertains to the roadway projects, but **GRANTS** the Motion as it pertains to the bridge projects.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that a judgment is entered on behalf of the Plaintiff and against Marshall County, Indiana, declaring that Defendant Marshall County violated IC § 36-1-12 when it resurfaced roadway projects in excess of \$100,000 without allowing outside contractors to bid for and perform the work and that there is no just reason for delay with respect to this determination and that said judgment is a final judgment pursuant to TR 54(F) of the Indiana Rules of Trial Procedure.

ALL OF WHICH IS ORDERED this 9 day of June, 2009.


Curtis Palmer, Judge
Marshall Circuit Court