COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

OHIO CONCRETE CONSTRUCTION ASSOCIATION, et al.,	:	**Case No. ____________**
Plaintiffs,	:	**Judge ____________**
vs.	:	08CVH 09 13867
OHIO DEPARTMENT OF TRANSPORTATION, et al.,	:	
Defendants.	:	

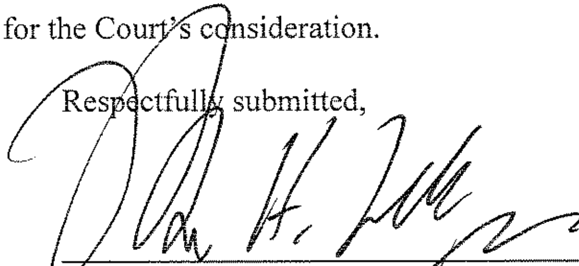
MOTION OF PLAINTIFFS THE HARPER COMPANY AND THE OHIO CONCRETE CONSTRUCTION ASSOCIATION FOR A TEMPORARY RESTRAINING ORDER

FILED 2008 SEP 19 PM 3:09 CLERK OF COURTS

Pursuant to Rule 65 of the Ohio Rules of Civil Procedure, Plaintiffs the Harper Co. and the Ohio Concrete Construction Association (collectively, "Plaintiffs") move this Court for a temporary restraining order: (1) Enjoining Defendant Ohio Department of Transportation ("ODOT") and Defendant E.S. Wagner Co. ("Wagner") from executing, implementing and/or enforcing the asphalt pavement portion of a contract awarded by ODOT to Wagner on September 19, 2008 for the construction of a 3.65-mile multi-lane state highway in Wilmington, Ohio (the "Wilmington Bypass project"); and (2) Enjoining ODOT from awarding any other contracts for projects with a paving component unless the actual bid prices are assessed pursuant to a life cycle cost analysis ("LCCA") and compared with the LCCA for alternative pavement designs. As set forth herein, ODOT's decision to select the asphalt pavement alternative over the concrete pavement alternative in awarding the Wilmington Bypass contract, as well as the policies and procedures that led to such decision, were illegal, contrary to public policy, and constituted an abuse of discretion.

In support, Plaintiffs offer the attached memorandum and supporting affidavits. A proposed form of Order also is attached for the Court's consideration.

Respectfully submitted,



Marion H. Little, Jr. (0042679)
John W. Zeiger (0010707)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-9900
(614) 365-7900
little@litohio.com
zeiger@litohio.com
hogan@litohio.com

Attorneys for Plaintiffs

MEMORANDUM IN SUPPORT

I. INTRODUCTION

This action presents a challenge to ODOT's decision to pursue an asphalt pavement option over a concrete pavement option with respect to its September 19, 2008 award of a contract for construction of a multi-lane highway bypass around Wilmington, Ohio and to the ODOT policies and procedures that led to such decision. As detailed below, in selecting the asphalt pavement option over the concrete option, ODOT picked a pavement product that it knew to be more expensive, less efficient, less durable, and more intrusive for the residents of Ohio than the concrete alternative. *On the basis of ODOT's own previous calculations, which it did not consider, concrete was the lowest competent and responsible bidder for the pavement portion of the Wilmington Bypass project.*

Thus, in selecting the asphalt option for the Wilmington Bypass project, ODOT did not select the lowest competent and responsible bidder, in contravention of its statutory mandate and the public policy of Ohio—at a substantial and unjustifiable cost to the taxpayers of Ohio. ODOT's selection of the asphalt alternative, and the process that led to such selection, were contrary to Ohio law and public policy and constituted an abuse of discretion. As a result, Plaintiffs are entitled to immediate injunctive relief enjoining Defendants from executing and/or enforcing the asphalt portion of the Wilmington Bypass contract, and enjoining ODOT from awarding any other contracts without accepting and analyzing bids for alternative pavement designs in terms of the actual life cycle cost thereof.

II. STATEMENT OF FACTS

A. History Of ODOT's Pavement Selection Process And Legislative Oversight Thereof.

Historically, beginning with the creation of the federal interstate highway system, major highways in the state of Ohio and, indeed, across the country had been constructed with concrete paving materials. [Affidavit of Roger Faulkner at ¶ 4 ("Faulkner Aff'd"), Exh. A.] In the 1980s and 1990s, at a time when substantial reconstruction of interstates was undertaken, Ohio switched primarily to asphalt even though asphalt was inferior to concrete in terms of durability, maintenance and longevity. [Id. at ¶ 5.] ODOT purportedly switched to mostly asphalt paving during this period because it was supposedly less expensive on first cost without taking into consideration the additional cost of routine maintenance and periodic resurfacing. [Id.] In fact, concrete has proven to be significantly more durable, less intrusive to motorists from a maintenance perspective, and more cost-effective than asphalt, from a long-term perspective. [Id. at ¶ 6.]

Apparently in response to concerns about ODOT's pavement selection process, the Ohio General Assembly in 2003 enacted legislation designed with the goal of changing ODOT's pavement selection procedures to create an objective process by which ODOT would estimate the overall life-cycle cost of all feasible pavement alternatives, and select the alternative that provides taxpayers with the best overall, long-term value for their money. Specifically, the legislature passed Amended Sub. House Bill 87, which included a provision requiring ODOT to contract with a neutral third-party consultant to conduct an analysis of ODOT's pavement selection process. The consultant was to evaluate ODOT's process with similar selection processes employed by other states, and to make recommendations to ensure the efficiency and

objectivity of Ohio's pavement selection process. See Section 12 of Am. Sub. H.B. 87 ("H.B. 87").

Pursuant to H.B. 87, ODOT contracted with ERES Consultants of Champaign, Illinois, which conducted its third-party analysis of ODOT's pavement selection procedures. ERES issued its final report on December 12, 2003. [See Faulkner Aff'd at ¶ 31; Exh. A to Complaint (ERES Report).] In its final report, ERES offered a number of specific recommendations for improving both the objectivity and efficiency of Ohio's pavement selection process. These included a recommendation that ODOT adopt a "traditional" Life Cycle Cost Analysis ("LCCA") approach for evaluating the total long-term costs, including both initial costs and long-term costs for maintenance and rehabilitation, of feasible pavement alternatives prior to sending projects out for bids.

Following the issuance of the ERES report, the Ohio legislature codified its mandate to ODOT with respect to pavement selection, and specifically directed ODOT to "identify and promote longer pavement life spans to lessen user delays and the disruption to traffic on the state highway system." See Ohio Rev. Code § 5501.11(B), effective March 29, 2005. Subsequently, in September 2006, ODOT adopted a new department policy purportedly implementing, in significant part, the recommendations of ERES, specifically with respect to Life Cycle Cost Analysis of alternative pavement options. [See Faulkner Aff'd at ¶¶ 7-8, Exh. B to Complaint ("ODOT Policy No. 20-006).]

ODOT Policy No. 20-006(P) and Standard Procedure No. 520-001(SP), promulgated thereunder, requires ODOT to conduct a LCCA of feasible pavement design alternatives before selecting a pavement type for a particular highway construction project. [Faulkner Aff'd at ¶ 7.] The LCCA approach is designed to allow ODOT to objectively determine the cheapest overall

pavement design alternative, including up-front costs and overall long-term costs, such as maintenance, repairs and disruption to motorists. [Id.]

B. ODOT's Actual LCCA Approach Is Not Objective; Rather, It Improperly Tilts The Playing Field In Favor Of Asphalt, As Evidenced By The Wilmington Bypass Project.

1. ODOT's Unilateral Asphalt Price Adjustment And Failure To Account Therefore As Part Of LCCA.

Notwithstanding its "objective" pavement selection policy, ODOT, even after implementing Policy No. 20-006(P), continues to take steps to ensure that asphalt remains "king" in Ohio. For instance, ODOT, as part of its standard Construction and Materials Specifications, provides asphalt contractors/bidders with a unilateral price adjustment that effectively indemnifies them, on behalf of the state of Ohio, for future asphalt price increases more than five percent above the price at the time of bidding. [See Faulkner Aff'd at ¶ 9; Exh. C to Complaint (Item 401.20 of ODOT's Construction and Materials Specifications).] No similar price adjustment applies to concrete or other pavement materials. [Faulkner Aff'd at ¶ 5.] The result of this unilateral price adjustment, given that asphalt prices have consistently and significantly increased in recent years (irrespective of petroleum prices), is that asphalt contractors do not have to account for the risk of future price increases in bidding on ODOT projects. [See Faulkner Aff'd at ¶¶ 11, 32; Exh. 32 to Complaint (Associated General Contractors of America August 2008 Summary of Percentage Change in Producer Price Indexes for Construction Materials Components).] On the other hand, contractors who offer alternative pavement materials, such as concrete, must calculate the risk of future price increases as part of the bid process. [Faulkner Aff'd at ¶ 11.]

ODOT magnifies this structural and economically wasteful advantage provided to asphalt contractors by failing to account for the asphalt price adjustment as part of its LCCA

calculations. [Faulkner Aff'd ¶ 9.] In other words, in calculating which pavement design alternative will have the lowest life cycle cost for a particular project, ODOT does not account for the fact that *Ohio's taxpayers will ultimately have to pay* for the substantial likelihood of future asphalt price increases. The advantages inherent to asphalt under such a system (and the concurrent cost to taxpayers) are particularly evident, when one considers that paving work on an ODOT-funded on a highway project typically does not begin for many months or years after the contract is awarded. [Id. at ¶ 12.]

2. The Wilmington Bypass Project Exemplifies ODOT's Efforts To Tilt The Playing Field In Asphalt's Favor.

The Wilmington Bypass project exemplifies ODOT's efforts to favor asphalt. At both the LCCA stage and, ultimately, at the bidding and contracting stage of the project, ODOT has continued to demonstrate the breadth of its efforts to preserve asphalt's favored status in Ohio.

But first, by way of background, in an August 20, 2008 proposal and five subsequent addenda thereto, ODOT solicited bids from general contractors for the construction of the Wilmington Bypass project, a proposed, 3.65-mile multi-lane highway in Wilmington, Ohio. [Faulkner Aff'd ¶ 13.] As part of this bidding process, ODOT agreed to accept alternative bid proposals for the use of asphalt versus concrete pavement in the construction of the Wilmington Bypass project. [Id.]

In September 2008, ODOT accepted bids for the project. [Affidavit of Michael Shayeson at ¶ 3 ("Shayeson Aff'd"), Exh. B.] As part of this bidding process, Plaintiff The Harper Company ("Harper") submitted a bid for concrete pavement for the Wilmington Bypass project to Defendant E.S. Wagner Co. "Wagner"), which intended to bid on the project as a general contractor. [Id. at ¶ 4.] Wagner incorporated Harper's proposal into its alternative concrete bid for the project, which it submitted to ODOT in September 2008. [Id. at ¶ 5.] Wagner also

submitted an alternative asphalt proposal, which it based on a bid submitted to it by an asphalt subcontractor. [Id. at ¶ 4.] Plaintiffs understand that the alternative asphalt bid was submitted to Wagner by Defendant John R. Jurgensen Company. Ultimately, on September 19, 2008, ODOT awarded the Wilmington Bypass contract to Wagner, and in doing so, it elected to choose the asphalt pavement option instead of the concrete option. [Id. at ¶ 6.] ODOT, therefore, rejected the concrete alternative submitted to Wagner by Harper. [Id.]

Before the bidding process even began, however, ODOT in 2006 conducted an LCCA of both the asphalt and concrete design alternatives for the Wilmington Bypass project. [Faulkner Aff'd at ¶ 16; Exh. G to Complaint (ODOT's original LCCA for the Wilmington Bypass project).] In conducting the LCCA for this project, ODOT did not account for the asphalt price adjustment, and it assumed a unit price for asphalt of $70.24. [Faulkner Aff'd at ¶ 17.] This estimated unit price accounted for approximately 79 percent of the total initial cost of asphalt, for purposes of ODOT's LCCA calculations. [Id.]

Based on this assumed price, ODOT calculated that the life cycle cost of asphalt would be approximately 16 percent less than concrete. [Id. at ¶ 18.] This difference was based entirely on the assumed difference in up-front costs, even though the same LCCA revealed that the future maintenance costs for concrete were nearly *$700,000 less than those estimated for asphalt*. [Id.] On the basis of its 2006 LCCA, ODOT initially selected asphalt as the pavement design alternative for the Wilmington Bypass project. [Id. at ¶ 22.]

ODOT's LCCA for the Wilmington Bypass project did not consider potential costs for traffic control devices (such as pavement markings) for either asphalt or concrete. [Id. at ¶ 19.] Nor did it account for the asphalt price adjustment, let alone the substantial increase in petroleum

and asphalt costs that ultimately occurred between 2006 and 2008, even before the project was actually bid. [Id. at ¶ 20.]

Figures provided by ODOT and Wagner reveal that the asphalt price ultimately awarded was $105, nearly 50 percent higher than ODOT's LCCA per-unit estimate. [Id. at ¶ 21.] On the other hand, the actual bid price ODOT received for concrete in September 2008 was $32.44 per unit, $.17 less than it had estimated in the LCCA. [Id.]

By 2008, even before bidding began, the price of asphalt had risen significantly, but the price of concrete had remained relatively constant. [Faulkner Aff'd at ¶ 23.] Thus, ODOT agreed to accept alternative bids for asphalt and concrete pavement design for the Wilmington Bypass project. [Id.] However, in establishing the specifications for the asphalt and concrete design alternatives, ODOT established substantially different requirements for pavement marking systems (typically, "traffic control" items) for concrete as opposed to asphalt, and it required concrete contractors to account for an additional .50 inch of gravel aggregate base that was not part of the asphalt specifications. [Id. at ¶ 24.] The specifications for the asphalt alternative required a lower-priced pavement marking system, even though the same top-of-the-line pavement marking system required in the concrete alternative could have been specified for the asphalt alternative. [Id. at ¶ 25.]

Information obtained from Wagner indicates these unequal traffic control specifications imposed approximately $184,000 in additional costs with respect to the concrete alternative. [Id. at ¶ 26.] The same information reveals that the actual concrete bid that ODOT received was $71,801.92 more than its asphalt counterpart. [Id. at ¶ 27.] Absent these unequal specifications, the actual bid amount for concrete was $112,268.31 *lower* than the asphalt bid amount, even

without accounting for the asphalt price adjustment and the long-term savings associated with concrete, as reflected in ODOT's original LCCA. [Id.]

But even including the extra traffic control costs associated with the concrete bid specifications, the initial $72,000 in up-front bid costs is offset by the *$700,000 differential* in long-term maintenance costs reflected in ODOT's initial LCCA. This differential is likely even greater today given the recent increases in asphalt price. [Id. at ¶ 28.]

Nonetheless, ODOT did not conduct an additional LCCA upon receiving the bids for the asphalt and concrete design alternatives for the Wilmington Bypass project. [Id. at ¶ 29.] In fact, at a September 25, 2008 public meeting of ODOT's Transportation Review Advisory Council ("TRAC"), ODOT Director James Beasley offered public comments indicating that the concrete pavement bid was actually lower than the asphalt bid but for the additional costs imposed on concrete as a result of the more expensive pavement marking specification. [Id.] Indeed, had ODOT simply looked at its previous LCCA calculations, it would have realized that concrete was, in reality, nearly $630,000 cheaper than the asphalt alternative.

III. LAW AND ARGUMENT

A temporary restraining order is appropriate where the movant has a substantial likelihood of prevailing on the merits, the movant will suffer irreparable injury, there is no prejudice to others, and the injunction serves the public interest. See Cleveland v. Cleveland Electric Illuminating Co., 115 Ohio App. 3d 1, 14 (8th Dist. 1996); Adams v. Federal Express Corp., 547 F.2d 319, 323 (6th Cir. 1976), cert. denied, 431 U.S. 915 (1977). As set forth below, Plaintiffs satisfy each of these elements, and thus, they are entitled to a temporary restraining order enjoining the execution and/or enforcement of the asphalt portion of the Wilmington Bypass contract, and enjoining ODOT from awarding any other contracts for projects with a

paving component unless the actual bid prices are assessed pursuant to a life LCCA and compared with the LCCA for alternative pavement designs.

A. Plaintiffs Are Likely To Succeed On The Merits.

It is well settled that an unsuccessful bidder, subcontractor and/or taxpayer (and a trade organization that represents it) is entitled to an injunction enjoining the execution and/or enforcement of a publicly-awarded contract where the award by a public entity constituted an abuse of discretion.[1] See, e.g., State ex rel. Cotleur v. Board of Education of Cleveland Heights School District, 171 Ohio St. 335, 336 (1960) (party entitled to injunctive relief where public body's award of contract is "illegal, an abuse of discretion, and contrary to the law and facts"); Coleman ex rel. State v. Munger, 84 Ohio App. 148, 150-54 (2d Dist. 1948) (injunction is proper remedy where party challenges contract as "null and void" because it was awarded as a result of public entity's abuse of discretion).

In this context, and particularly in this case, three propositions are fundamental to the court's analysis: (1) A public entity abuses its discretion in awarding a contract where it fails to select the lowest, competent and responsible bidder; (2) A public entity has no discretion to establish an unbalanced or unfair bid process that fails to promote *actual competition*; and (3) A public entity abuses its discretion when its award of a contract violates its legal mandate and/or Ohio public policy. As set forth below, in specifically selecting the asphalt alternative for the Wilmington Bypass contract and, generally, in failing to account for the asphalt price adjustment as part of the LCCA process, ODOT has abused its discretion in all three of these respects.

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[1] See State ex rel. Connors v. Ohio Department of Transportation, 8 Ohio App. 3d 44, 44 Syllabus ¶ 2 (10th Dist. 1982) (recognizing standing to challenge contract awarded by ODOT on behalf of "a contractor's association … whose members sought to obtain work as subcontractors on … [the project]", and "taxpayers of the state of Ohio who are specially affected by the bid conditions").

1. ODOT Abused Its Discretion In Selecting The Pavement Alternative For The Wilmington Bypass Project That Was Not The Lowest Competent and Responsible Bidder.

It is beyond dispute that a public entity, such as ODOT, charged with awarding public contracts to the lowest competent and responsible bidder abuses its discretion when it fails to do so. See Ohio Rev. Code § 5525.01 (ODOT is required to award contracts to "lowest competent and responsible bidder"); Cotleur, 171 Ohio St. at 335-36 (if party demonstrates that contract was not awarded to "the lowest responsible bidder," such party is "entitled to injunctive relief"). For instance, the court in Ohio Asphalt Paving, Inc. v. Bd. of Comm'rs of Coshocton County, 2005 WL 1421952, *5-7 (S.D. Ohio June 17, 2005) (Exh. C), held that a county abused its discretion in awarding a contract to the second lowest bidder based, at least in part, on unannounced requirements. See also Central Ohio Disposal Co. v. City of Hilliard, 1983 WL 3456, *1-2 (10th Dist. April 12, 1983) (finding abuse of discretion where commissioners awarded contract to higher bidder) (Exh. D).

Even including the unequal traffic control specifications ODOT imposed on the concrete bidders with respect to the Wilmington Bypass project, concrete clearly provided the lowest competent and responsible pavement design alternative for the project. Using ODOT's own 2006 LCCA calculations (which did not even account for the subsequent, significant increases in the price of asphalt and the state's obligation to pay for them), concrete was nearly $700,000 cheaper than asphalt in terms of long-term maintenance and repair costs. Thus, the initial $72,000 difference in initial costs (which again, was based totally on the unequal specifications) would be off-set several times over under ODOT's own LCCA calculations. In short, the concrete alternative would be approximately $630,000 cheaper than asphalt.

Yet, inexplicably, ODOT selected the asphalt alternative for the Wilmington Bypass project. In doing so, it failed to conduct a LCCA of the alternative bids and it did not consider its prior LCCA with respect to concrete. As a result, ODOT did not select the lowest competent and responsible alternative, and it clearly abused its discretion.

2. In Failing To Account For The Asphalt Price Adjustment And Imposing Unequal Specifications, ODOT Destroyed The Competitive Process.

> *"[W]hen it is reasonably certain that factors which would materially affect the price entered into the submission of one bid which were not considered in the other bid as submitted ..., the bidding has not been competitive as required by law. In such case [the public body] ha[s] no discretion to exercise."*
>
> [Coleman ex rel. State v. Munger, 84 Ohio App. 148, 153-54 (2d Dist. 1948) (emphasis added).]

So, too, here. In failing to account for the asphalt price adjustment at both the LCCA and bid evaluation stages of the Wilmington Bypass project, ODOT has effectively ensured that the factors considered by bidders for the asphalt versus concrete design alternatives are substantially and materially different. As noted above, ODOT's policy of allowing the unilateral price adjustment for asphalt and its failure to account for such adjustment at the LCCA and bidding stages means that the Ohio taxpayers, but not the asphalt contractors, are required to assume the risk of future price increases. Concrete contractors, however, are not afforded a similar luxury but are, instead, required to account for such risk as part of the bidding process.

With respect to the Wilmington Bypass project, the inequity in the bidding process and, thus, the uncompetitive nature thereof, is further revealed in the unequal traffic control specifications imposed on the pavement design alternatives. Even though the same top-of-the-line pavement marking system ODOT required for concrete could also have been required of asphalt, ODOT elected to impose that specification on only *one* of the two alternatives.

Under the rule recognized in Coleman, *supra*, ODOT does not even have the discretion (let alone the ability to abuse it) to thwart the competitive process in such a manner. Any contracts awarded as the result of such an anti-competitive process are "null and void" as a matter of law. See, e.g., Coleman. 84 Ohio App. at 148, 154.[2]

3. ODOT's Failure To Account For The Asphalt Price Adjustment And Its Failure To Conduct An Additional LCCA In Evaluating The Alternative Bid Violated Its Legislative Mandate And Ohio Public Policy, And Constituted An Additional Abuse Of Discretion.

ODOT's failure to account for the asphalt price adjustment, either at the LCCA and/or bidding stage further constituted an abuse of discretion, inasmuch as such failure was contrary to ODOT's legislative mandate as reflected in H.B. 87 and Section 5501.11(B) of the Revised Code. In short, the Ohio General Assembly has made clear that ODOT is to determine the "lowest competent and responsible bidder" on the basis of a life cycle cost analysis that determines which of various feasible pavement materials is most cost effective and durable over the long run.

These legislative enactments clearly evince a public policy favoring the selection of pavement alternatives that provide the best, overall long-term, value for Ohio's taxpayers. The exact opposite result attains, as reflected in the case of the Wilmington Bypass project, under ODOT's current policies and practices of: (1) not conducting an additional LCCA—or at least utilizing the prior LCCA—upon receiving bids for alternative pavement designs (such as

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[2] Coleman is consistent with the rule that a public entity abuses its discretion in failing to award a contract to the lowest responsible bidder on the basis of unannounced criteria that materially affect the competitive nature of the process. For instance, in City of Dayton ex rel. Scandrick v. McGee, 67 Ohio St. 2d 356, 359-60 (Ohio 1981), the Court affirmed injunctive relief where a city failed to award a contract to the lowest bidder on the basis of an unannounced residency requirement. Specifically, the court found that the city's actions in withholding the residency-preference policy undermined the integrity of competitive bidding and constituted an abuse of discretion. Id. at 359. See also Hardrives Paving and Constr. v. City of Niles, 99 Ohio App. 3d 243 (11th Dist. 1994) (finding abuse of discretion in awarding public contracts where award was based on additional work not part of bid specifications); Rein Constr. Co. v. Trumbull County Bd. of Comm'rs 138 Ohio App. 3d 622 (11th Dist. 2000) (finding abuse of discretion where award was based on a letter written by the successful contractor to the contracting body after bids were opened).

concrete and asphalt); and (2) not accounting for the asphalt price adjustment as part of LCCA calculations.

Simply put, in failing to evaluate alternative pavement bids under an LCCA approach *and* in both applying the asphalt price adjustment and in failing to account for such price adjustment as part of its LCCA, ODOT has run directly afoul of its legislative mandate with respect to pavement selection, and it has violated the well established public policy of Ohio with respect to long-term *preservation of taxpayer funds*. In doing so, specifically with respect to the Wilmington Bypass project, ODOT has further abused its discretion.

B. Plaintiffs Will Suffer Irreparable Injury Absent Injunctive Relief.

Plaintiffs will be irreparably injured absent the requested injunctive relief. A party faces irreparable injury where "there could be no plain, adequate, and complete remedy at law for its occurrence and when any attempt at monetary restitution would be 'impossible, difficult or incomplete.'" Fraternal Order of Police v. Cleveland, 141 Ohio App. 3d 63, 81 (Ohio App. 8th Dist. 2001) (quoting Cleveland v. Cleveland Elec. Illum. Co., 115 Ohio App. 3d 1, 12 (Ohio App. 8th Dist. 1996)). The Ohio Supreme Court has recently recognized that injunctive relief is appropriate in a public bid context for the very reason that monetary damages are typically unavailable to an unsuccessful bidder. Cementech v. Fairlawn, 109 Ohio St. 3d 475, 478 (2006). As the Court recognized:

> It is clear that in the context of competitive bidding for public contracts, injunctive relief provides a remedy that prevents excessive costs and corrupt practices, as well as protects the integrity of the bidding process, the public, and the bidders. Moreover, the injunctive process and resulting delays serve as a sufficient deterrent to a municipality's violation of competitive bidding laws.

Id. at 477 (citations omitted).

Accordingly, as the Ohio Supreme Court has recognized, Plaintiffs do not have an adequate remedy and law, and both Plaintiffs and the taxpaying public will be irreparably harmed in the absence of injunctive relief.

C. Harm To Others.

The requested injunctive relief will not result in any harm to others. Indeed, given the timing of this action, it is likely that any paving work on the Wilmington Bypass project will not begin for at least a year. [Faulkner Aff'd at ¶ 30.] Thus, particularly in light of ODOT's asphalt price adjustment, the requested relief would merely maintain the status quo pending a final resolution of the merits in this case.

If the injunction is granted, Defendant Wagner will retain its contract as general contractor for the Wilmington Bypass project, it will simply be enjoined from performing the pavement portion thereof until a final resolution on the merits is obtained. And, even if the asphalt alternative is ultimately selected, Wagner will presumably have the benefit of the price adjustment, which will indemnify it for any asphalt price increases during the interim period.

D. The Public Interest.

Obviously, the public interest is best served by an order ensuring that ODOT does not waste taxpayer funds. See, e.g., Sequoia Voting Systems, Inc. v. Ohio Secretary of State, 125 Ohio Misc. 2d 7, 18 (Ohio Ct. Cl. 2003) (public interest supports an order ensuring that, for benefit of taxpayers, Ohio obtains "*the best value in this market*").

IV. CONCLUSION

For all of the reasons set forth above, Plaintiffs are entitled to a temporary restraining order:

(1) Enjoining Defendant ODOT and Defendant Wagner from executing, implementing and/or enforcing the asphalt pavement portion of a contract awarded by ODOT to Wagner on September 19, 2008 for the construction of a 3.65-mile multi-lane state highway in Wilmington, Ohio (the "Wilmington Bypass project"); and

(2) Enjoining ODOT from awarding any other contracts for projects with a paving component unless the actual bid prices are assessed pursuant to a life cycle cost analysis ("LCCA") and compared with the LCCA for alternative pavement designs.

A proposed form of order is attached for the Court's consideration.

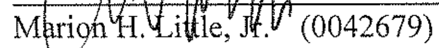
Respectfully submitted,

Marion H. Little, Jr. (0042679)
John W. Zeiger (0010707)
Christopher J. Hogan (0079829)
ZEIGER, TIGGES & LITTLE LLP
3500 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 365-9900
(614) 365-7900
little@litohio.com
zeiger@litohio.com
hogan@litohio.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been personally served upon Defendants with the Summons and Complaint in this Action.



Marion H. Little, Jr. (0042679)

999-999:188082

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

OHIO CONCRETE CONSTRUCTION ASSOCIATION, et al.,	:	**Case No. ________________**
Plaintiffs,	:	**Judge ___________________**
vs.	:	
OHIO DEPARTMENT OF TRANSPORTATION, et al.,	:	
Defendants.	:	

TEMPORARY RESTRAINING ORDER

This matter came to be heard on Plaintiffs' Motion for Temporary Restraining Order, pursuant to Rule 65(A) of the Ohio Rules of Civil Procedure. The Court has considered the Complaint for Declaratory and Injunctive Relief, the Motion for Temporary Restraining Order and the Memorandum In Support and finds as follows:

1. This is an action to enjoin Defendants Ohio Department of Transportation ("ODOT") and E.S. Wagner Co. ("Wagner") from executing and/or enforcing the asphalt pavement portion of a contract awarded by the Ohio Department of Transportation ("ODOT") to Defendant E.S. Wagner on September 19, 2008 for the construction of a 3.65-mile multi-lane state highway in Wilmington, Ohio; and to enjoin Defendant ODOT from awarding any other contracts for projects with a paving component unless the actual bid prices are assessed pursuant to a life cycle cost analysis ("LCCA") and compared with the LCCA for alternative pavement designs.

2. Plaintiffs have sought a temporary restraining order.

3. Defendants received notice of Plaintiffs' Motion for Temporary Restraining Order.

4. It is more likely than not that Plaintiffs will succeed on the merits at trial.

5. Plaintiffs will suffer irreparable harm and loss in the event that a temporary restraining order is not granted.

6. Plaintiffs have no adequate remedy at law.

7. Greater injury will be inflicted upon Plaintiffs by the denial of the temporary restraining order than will be inflicted on the Defendants by the granting of such relief.

8. A temporary restraining order serves the public interest.

IT IS HEREBY ORDERED:

1. That Defendants ODOT and Wagner and their agents, servants, employees, attorneys, and those in active concert or participation with them are temporarily restrained and enjoined from, directly or indirectly, alone or in concert with others:

> Executing, implementing and/or enforcing the asphalt pavement portion of a contract awarded by ODOT to Wagner on September 19, 2008 for the construction of a 3.65-mile multi-lane state highway in Wilmington, Ohio (the "Wilmington Bypass project").

2. That Defendant ODOT and its agents, servants, employees, attorneys, and those in active concert or participation with it is temporarily restrained and enjoined from, directly or indirectly, alone or in concert with others:

> Awarding any other contracts for projects with a paving component unless the actual bid prices are assessed pursuant to a life cycle cost analysis ("LCCA") and compared with the LCCA for alternative pavement designs.

3. That Plaintiffs shall post a bond in the amount of $_______;

4. That this order shall be effective immediately and continue in full force and effect for a full fourteen (14) days hereafter or such other time as the Court may hereafter direct;

5. That this matter shall come on for a hearing on Plaintiffs' Motion for Temporary Restraining Order on the ___________ day of _____________. 2008 at _______ a.m./p.m.; and

6. That discovery on this matter shall proceed on an expedited basis with each party responding to requests for production of documents and answering interrogatories within five (5) business days of their service, and each party submitting to deposition within seven (7) business days after being noticed.

IT IS SO ORDERED this __________ day of September, 2008.

____
Common Pleas Judge

853-001:188090

AFFIDAVIT OF ROGER FAULKNER

STATE OF OHIO :
: SS
COUNTY OF FRANKLIN :

Roger Faulkner, first being duly sworn according to law, deposes and states that he has personal knowledge of matters set forth herein except as specifically noted otherwise, and further states as follows:

1. I am a Professional Engineer licensed by the state of Ohio and Director of Engineering and Promotion for the Ohio Concrete Construction Association.

2. I have served in this capacity for nearly 6 years.

3. In this capacity, I have developed extensive knowledge of both the history of Ohio's and the nation's use of pavement materials, as well as the Ohio Department of Transportation's pavement material selection processes.

4. Historically, beginning with the creation of the federal interstate highway system, major highways in the state of Ohio and, indeed, across the country had been constructed with concrete paving materials.

5. In the 1980s and 1990s, at a time when substantial reconstruction of interstates was undertaken, Ohio—under the direction of ODOT—switched primarily to asphalt despite the fact that asphalt was inferior to concrete in terms of durability, maintenance and longevity. ODOT purportedly switched to mostly asphalt paving materials during this period because it was supposedly less expensive on first cost without taking into consideration the additional cost of routine maintenance and periodic resurfacing.

6. In fact, concrete has proven to be significantly more durable, less intrusive to motorists from a maintenance perspective, and more cost-effective than asphalt, from a long-term perspective.

EXHIBIT
A

7. ODOT Policy No. 20-006(P) and Standard Procedure No. 520-001(SP), promulgated thereunder, requires ODOT to conduct a Life Cycle Cost Analysis ("LCCA") of feasible pavement design alternatives before selecting a pavement type for a particular highway construction project. An LCCA is designed to allow ODOT to objectively determine the cheapest overall pavement design alternative, including up-front costs and overall long-term costs, such maintenance, repairs and disruption to motorists.

8. True and accurate copies of Policy No. 20-006(P) and SP No. 520-001(SP) are attached as Exhibit B to Plaintiffs' Complaint in this case (the "Complaint").

9. As part of its standard LCCA calculations, however, ODOT does not take into account the price adjustment for asphalt provided in Item 401.20 of ODOT's Construction and Materials Specifications, which effectively indemnifies asphalt contractors, on behalf of the state of Ohio, for future price increases more than five percent above the price at time of bidding. A true and accurate copy of Item 401.20 is attached as Exhibit C to the Complaint.

10. No similar price adjustment applies to concrete or other pavement materials.

11. The price of asphalt has increased consistently and significantly in recent years.

12. In many instances, actual paving work on a highway project funded by ODOT does not begin for many months or years after the contract is awarded. Thus, the asphalt price adjustment typically requires ODOT to pay much more than the LCCA calculation, as well as the actual bid price for asphalt, once paving actually begins.

13. In an August 20, 2008 proposal and five subsequent addenda thereto, ODOT solicited bids from general contractors for the construction of a proposed, 3.65-mile multi-lane highway in Wilmington, Ohio (the "Wilmington Bypass project"). As part of this

bidding process, ODOT agreed to accept alternative bid proposals for the use of asphalt versus concrete pavement in the construction of the Wilmington Bypass project. A true and accurate copy of the August 20, 2008 proposal for Project No. 080507 and the addenda thereto are attached as Exhibits E and F to the Complaint.

14. On September 19, 2008, ODOT announced its decision to award the primary to contract to Defendant E.S. Wagner and its election to pursue the asphalt design alternate.

15. ODOT thus rejected the concrete design alternate, which was based on a bid submitted to E.S. Wagner by Plaintiff The Harper Company.

16. Before the bidding process began, however, ODOT in 2006 conducted an LCCA of both the asphalt and concrete design alternatives for the Wilmington Bypass project. A true and accurate copy of ODOT's original LCCA for the Wilmington Bypass project is attached as Exhibit G to the Complaint.

17. In conducting the LCCA for this project, ODOT did not account for the asphalt price adjustment, and it assumed a unit price of asphalt of $70.24. Based on my calculations, this estimated unit price accounted for approximately 79 percent of the total initial cost of asphalt, for purposes of ODOT's LCCA calculations.

18. Based on this assumed price, ODOT calculated that the life cycle cost of asphalt would be approximately 16 percent less than concrete. This difference was based entirely on the assumed difference in up-front costs, even though the same LCCA revealed that the future maintenance costs for concrete were nearly $700,000 less than those estimated for asphalt.

19. Likewise, ODOT's LCCA for the Wilmington Bypass project did not consider potential costs for traffic control devices (such as pavement markings) for either asphalt or concrete.

20. ODOT's initial LCCA for the Wilmington Bypass project did not account for the asphalt price adjustment, let alone the exponential increase in petroleum and asphalt costs that ultimately occurred between 2006 and 2008, even before the project was actually bid.

21. In fact, based on figures I obtained from ODOT and the winning bidder, E.S. Wagner, I determined that the asphalt price ultimately awarded was $105, nearly 50 percent higher than ODOT's LCCA per-unit estimate. On the other hand, the actual bid price ODOT received for concrete in September 2008 was $32.44 per unit, $.17 less than it had estimated in the LCCA.

22. On the basis of its 2006 LCCA, ODOT initially selected asphalt as the pavement design alternative for the Wilmington Bypass project.

23. By 2008, even before bidding began, the price of asphalt had risen significantly, but the price of concrete had remained relatively constant. Thus, ODOT agreed to accept alternative bids for asphalt and concrete pavement design for the Wilmington Bypass project.

24. In establishing the specifications for the asphalt and concrete design alternatives, ODOT established substantially different requirements for pavement marking systems (typically, "traffic control" items) for concrete as opposed to asphalt, and it required concrete contractors to account for an additional .50 inch of gravel aggregate base that was not part of the asphalt specifications.

25. The specifications for the asphalt alternative required a lower-priced pavement marking system, even though the same top-of-the-line pavement marking system required in the concrete alternative could have been specified for the asphalt alternative.

26. On the basis of information I received from E.S. Wagner, I have calculated that these unequal traffic control specifications imposed approximately $184,000 in additional costs with respect to the concrete alternative. A true and accurate summary I prepared based on this information, and information I obtained with respect to the actual winning bid for the Wilmington Bypass project, is attached as Exhibit H to the Complaint.

27. Based on my calculations, the actual concrete bid that ODOT received was $71,801.92 more than its asphalt counterpart. Absent these unequal specifications, however, the actual bid amount for concrete was $112,268.31 lower than the asphalt bid amount, even without accounting for the asphalt price adjustment and the long-term savings associated with concrete, as reflected in ODOT's original LCCA.

28. Even including the extra traffic control costs associated with the concrete bid specifications, the initial $72,000 in up-front bid costs is offset by the $700,000 differential in long-term maintenance costs reflected in ODOT's initial LCCA. This differential is likely even greater today given the recent increases in asphalt price.

29. It is my understanding that ODOT did not conduct an additional LCCA upon receiving the bids for the asphalt and concrete design alternatives. In fact, I attended a September 25, 2008 public meeting of ODOT's Transportation Review Advisory Council ("TRAC"), at which ODOT's Director James Beasley publicly addressed the Wilmington Bypass project. Beasley's comments at the TRAC meeting indicated that the concrete pavement bid was actually lower than the asphalt bid but for the additional costs imposed on concrete as a result of the more expensive pavement marking specification.

30. Based on past experience, I anticipate that actual paving work on the Wilmington Bypass project will not begin for at least a year.

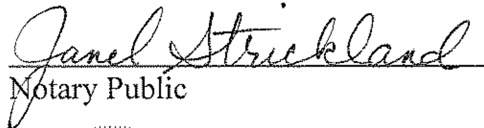
31. I certify that a true and accurate copy of the 2003 third-party consultant's report, prepared by ERES Consultants of Champaign, Illinois, with respect to ODOT's pavement selection policies and procedures, is attached as Exhibit A to the Complaint.

32. I additionally certify that a true and accurate copy of an August 2008 summary of percentage changes in Producer Price Indexes for Construction Materials and Components, compiled by the Associated General Contractors of America from price data provided by the federal Bureau of Labor statistics, and available at http://www.agc.org (last checked Sept. 25, 2008), is attached as Exhibit D to the Complaint.

Further Affiant sayeth naught.

Roger Faulkner

Sworn to and subscribed in my presence this 26th day of September, 2008.



Notary Public

999-999: 188091

JANEL STRICKLAND
Notary Public, State of Ohio
My Commission Expires 07-24-13

AFFIDAVIT OF MICHAEL SHAYESON

STATE OF KENTUCKY :
: SS
COUNTY OF BOONE :

Michael Shayeson, first being duly sworn according to law, deposes and states that he has personal knowledge of matters set forth herein except as specifically noted otherwise, and further states as follows:

1. I am President of The Harper Company, an Ohio corporation with its principal place of business in Hebron, Kentucky.

2. The Harper Company is a construction contractor that specializes in concrete pavement. The Harper Company is a member of the Ohio Concrete Construction Association.

3. In September 2008, the Ohio Department of Transportation ("ODOT") accepted bids from general contractors for the construction of a proposed, 3.65-mile multi-lane highway in Wilmington, Ohio (the "Wilmington Bypass project"). As part of this bidding process, ODOT agreed to accept alternative bid proposals for the use of asphalt versus concrete pavement in the construction of the Wilmington Bypass project.

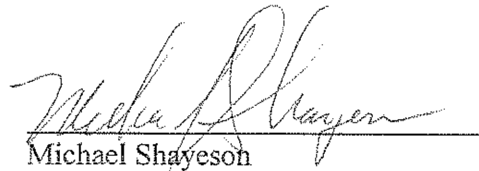
4. As part of this bidding process, The Harper Company submitted a bid for concrete pavement for the Wilmington Bypass project to E.S. Wagner Co., which intended to bid on the project as a general contractor.

5. E.S. Wagner Co. incorporated The Harper Company's proposal into its alternative concrete bid for the Wilmington Bypass project, which it submitted to ODOT in September 2008. E.S. Wagner Co. also submitted an alternative asphalt proposal, which it based on a bid submitted to it by an asphalt subcontractor.

EXHIBIT B

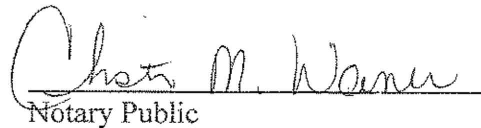
6. Ultimately, on September 19, 2008, ODOT awarded the Wilmington Bypass contract to E.S. Wagner. In doing so, however, ODOT elected to choose the asphalt pavement option instead of the concrete option. ODOT, therefore, rejected the concrete alternative submitted to E.S. Wagner by the Harper Company.

Further Affiant sayeth naught.



Michael Shayeson

Sworn to and subscribed in my presence this 26 day of SEPTEMBER, 2008.



Notary Public

999-999: 188099

H
Ohio Asphalt Paving, Inc. v. Board of Com'rs of Coshocton County, Ohio
S.D.Ohio,2005.
Only the Westlaw citation is currently available.
United States District Court,S.D. Ohio, Eastern Division.
OHIO ASPHALT PAVING, INC., Plaintiff,
v.
BOARD OF COMMISSIONERS OF COSHOCTON COUNTY, OHIO, Defendant.
No. 2:05-CV-0336.

June 17, 2005.

Brian P. Barger, Patricia J. Kleeberger, Brady, Coyle & Schmidt LLP, John Anthony Borell, Jr., Thomas W. Palmer, Marshall & Melhorn LLC, Toledo, OH, for Plaintiff.
Jeffrey Alan Stankunas, Maribeth Deavers, Isaac, Brant, Ledman & Teetor, Jeffery James Sniderman, Ulmer & Berne, Columbus, OH, for Defendant.
Ronald G. Macala, Macala, Baasten, McKinley & Gore LLC, Canton, OH, for Amicus.
David William Burns, Pomerene, Burns & Skelton, Coshocton, OH, Daniel Finley Edwards, John Bernard Kopf, III, William Randolph Case, Thompson Hine LLP, Columbus, OH, for Intervenor.

OPINION AND ORDER

SMITH, J.
*1 Plaintiff, Ohio Asphalt Paving, Inc. ("OAP") asserts a claim for injunctive relief under 42 U.S.C. § 1983, arguing that defendant Board of Commissioners of Coshocton County, Ohio ("Commissioners") violated OAP's due process and equal protection rights by failing to award OAP a contract for highway work. OAP moves for a preliminary injunction requiring the Commissioners to award the contract to OAP. For the reasons that follow the Court grants OAP's motion.

I. Background

OAP is a highway contractor. OAP's principal place of business is Knox County, which adjoins Coshocton County. OAP has been in business since the 1970s. The Commissioners are the governing board of Coshocton County, a political subdivision of the State of Ohio. Apache Aggregate and Paving Co. ("Apache") [FN1] is also a highway contractor. Apache is headquartered and has its principal place of business in Coshocton County.

FN1. The Court grants Apache's unopposed motion to intervene.

On February 11, 2005, and again on February 18, 2005, Coshocton County advertised for bids for a road resurfacing project known as "Coshocton County Round 19 of the County's Issue II Resurfacing Program for 2005" ("Project"). The Project is to be funded by State of Ohio "Issue II" funds, with work to begin upon disbursement of those funds after July 1, 2005. Under the General Provisions for the Project, the roads will be available and work will begin after July 15, 2005. The parties agree that the Project is subject to Ohio's competitive bidding law, which requires, *inter alia,* that the contract be awarded to "the lowest and best bidder." Ohio Rev.Code § 307.90.

The Bid Documents provided, in part, "all materials ... shall comply with the current requirements of the State of Ohio Department of Transportation Construction and Material Specifications."The quoted language is the only reference in the Bid Documents to ODOT requirements. The Bid Documents also included "Bid Qualification and Responsibility Questionnaire for Contractors" ("Questionnaire"). The Questionnaire inquired as to the number of persons the bidding contractor would employ from Coshocton County.

OAP, Apache and The Shelly Company each submitted a bid. The Commissioners received and

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C

opened the bids on February 23, 2005. OAP's bid, $1,466,823.28 was the lowest; Apache's bid, $1,474,978.14 was the second lowest. Hence, the difference between the bids was $8,155.14, or less than one percent.

That same day, while the Commissioners were still in session, representatives of Apache spoke to the Commissioners, indicating to them that they "needed to award the contract to Apache for various reasons."Shortly thereafter, Bruce St. Clair, a principal of Apache, contacted Commissioner Kathleen Thompson and indicated to her that the contract should be awarded to Apache.

Later, St. Clair met with Commissioner Dane Shryock. St. Clair showed Shryock the Ohio Department of Transportation's ("ODOT") Construction and Material Specifications ("CMS") manual referred to in the bid documents. St. Clair stated that OAP did not have a current 448 paving mix on file with ODOT as required by the CMS.

*2 Commissioner Shryock then contacted ODOT. ODOT informed Shryock that OAP did not have current 448 paving mix approval, and indicated that OAP's 448 paving mix had not been current for eight to ten years. ODOT told Shryock that OAP probably could become current by submitting the appropriate paperwork. ODOT also told Shryock that OAP was in the process of remodeling and building a new plant, and that ODOT would examine the new plaint within the next three weeks. ODOT also apparently told Shryock that Apache had current ODOT approval of its quality control program and testing laboratory, whereas OAP did not.

On March 23, 2005, the Commissioners adopted a resolution to award the contract for the Project to Apache. The Commissioners determined that Apache was the "lowest and best bidder" based upon the following two factors:

a. Coshocton County's determination that 90% of Apache's workforce would be drawn from Coshocton County whereas 10% of OAP's workforce would be drawn from Coshocton County, as indicated by Apache and OAP in their bid questionnaires.

b. Coshocton County's determination that OAP did not have a current 448 paving mix on file with ODOT, pursuant to the General Provisions in the Scope of Work Section of the Bid Documents.

ODOT does not engage in approval of paving design mixes unless ODOT is administering the project. The Project in the instant case is not an ODOT-administered project. ODOT itself does not require a contractor to have a previously approved 448 paving mix design on file prior to the awarding of the contract. Rather, ODOT requires a contractor to have an approved paving design mix at the time the contractor furnishes the material for the project. Moreover, the fact that a contractor has an approved paving mix design on file with ODOT does not necessarily mean that ODOT will approve the paving mix design will for a later project.

OAP seeks a preliminary injunction that would include the following:

1. An order prohibiting Coshocton County from awarding the contract for the Project to Apache, such prohibition to include Coshocton County's (i) execution of a contract with Apache to perform any work on the Project, (ii) authorization to Apache to perform any work on the Project, and (iii) payment to Apache for work performed on the Project; and

2. An order directing Coshocton County to award the contract for the Project to OAP under the terms of its bid.

II. Standard of Review

The Court considers four factors in determining whether to issue a TRO or preliminary injunction:

(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant

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would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.

Chabad of S. Ohio & Congregation Lubavitch v. City of Cincinnati, 363 F.3d 427, 432 (6th Cir.2004). The factors are not prerequisites; rather, they must be balanced. *Capobianco, D.C. v. Summers,* 377 F.3d 559, 561 (6th Cir.2004).

III. Discussion

A. Likelihood of success on the merits

*3 OAP asserts that the Commissioners violated its rights to both substantive and procedural due process, as well as equal protection. In support of these claims, OAP relies primarily upon *Enertech Elec., Inc.,* 85 F.3d 257 (6th Cir.1996); and *City of Dayton ex rel. Scandrick v. McGee,* 67 Ohio St.3d 356, 360 (1981).

In *Enertech,* Mahoning County, Ohio solicited bids for a Justice Center construction project, including one for electrical work. To aid in the bidding process, the county published an employee handbook, which it made available to prospective bidders. The handbook stated that the county had negotiated a Project Labor Agreement ("PLA") with the Western Reserve Building and Construction Trades Council to govern the duties and responsibilities of all persons working on the project and to promote labor harmony. The handbook also provided that all trade contractors who performed work on the project would be required to ratify the PLA and operate under its terms.

At a pre-bid meeting, which the plaintiff in *Enertech* attended, the county informed bidders that aspects of the PLA were still under negotiation. At the time of the meeting, the local bargaining representative for electricians had not been selected.

As part of the bidding process, the county in *Enertech* mailed the plaintiff a questionnaire. The questionnaire asked the plaintiff whether it would sign the PLA, sign a collective bargaining agreement with the local electrical workers union, and commit to safety criteria. The plaintiff responded that the union which represented its electricians was not a signatory to the PLA, and that it was in the process of negotiating a collective bargaining agreement with its own electricians. The plaintiff indicated that while it would agree to the safety criteria, it would not sign the PLA.

Following a rebid, the county in *Enertech* determined that the plaintiff was the low bidder. The county offered the contract to the plaintiff on the express condition that the plaintiff sign the PLA and the collective bargaining agreement with the local electricians' union. The plaintiff, however, responded that while it would sign the documents, it would not consider the local electrical workers union to be the collective bargaining unit for its employees because neither the PLA nor the bid documents had specified the local union.

The plaintiff in *Enertch* then brought suit against the county in federal court, asserting a deprivation of its property right to the contract without due process of law. The district court denied the plaintiff's motion for a preliminary injunction. The county then awarded the contract to the next lowest bidder. Thereafter, the plaintiff filed an amended complaint seeking damages for lost profits. The district court granted summary judgment in favor of the county and the local union.

The Sixth Circuit Court of Appeals affirmed the judgment of the district court. *Enertech,* 85 F.3d at 261. The court of appeals explained that a bidder can demonstrate a protected property interest in a publically bid contract in one of two ways. *Id.* at 260.A bidder can either show that it actually was awarded the contract and then deprived of it, or it can show that the county abused its limited discretion in awarding the contract to another bidder. *Id.*

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*4 The appellate court then examined Ohio law, noting that the Ohio Supreme Court has held Ohio Rev.Code § 307.90 does not require the county to accept the lowest dollar amount; rather, the statute " 'places in the hands of the [county] authorities the discretion of determining who under all of the circumstances is the lowest and best bidder." ' *Enertech,* 85 F.3d at 260 (quoting *Cedar Bay Constr., Inc. v. City of Fremont,* 50 Ohio St.3d 19, 21, 552 N.E.2d 202 (1990). The statute empowers the local government to make a qualitative determination as to which bid is both lowest and best. *Id.* (citing *Dayton,* 67 Ohio St.3d at 358, 617 N.E.2d 1136.) Thus, local governments are vested with the discretion to award a contract based on the lowest and best bid, and a court may not interfere with a local government's exercise of this discretion unless the local government abused its discretion or acted fraudulently. *Id.* Under Ohio law, abuse of discretion " 'implies an unreasonable, arbitrary or unconscionable attitude." ' *Id.* (quoting *Dayton,* 67 Ohio St.3d at 359, 617 N.E.2d 1136). Applying these principles, the court of appeals in *Enertech* reasoned as follows:

We do not believe the county abused its discretion by determining that the "best" bidder would be a bidder willing to ratify the PLA. These terms, the ratification of the PLA and applicable local collective bargaining agreements, were added to secure labor harmony on the project and to govern the rights and responsibilities of project participants. The insertion of these terms is not inconsistent with Ohio's competitive bidding policy. Ohio's competitive bidding statutes were enacted " 'to provide for open and honest competition in bidding for public contracts and to save the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms." ' *Cedar Bay,* 552 N.E.2d at 204 (quoting *Chillicothe Bd. of Ed. v. Sever-Williams Co.,* 22 Ohio St.2d 107, 258 N.E.2d 605, 610 (1970)). The PLA was included in the bidding process from the beginning, and it in no way interfered with openness and honesty of the bidding process. Furthermore, we find that the inclusion of the PLA in this bidding process neither resulted in favoritism nor fraud. We therefore conclude that in making ratification of the PLA a criterion for determining the lowest and best bidder, the County acted within its statutorily granted discretion.

Id.

The concept of abuse of discretion was also the guiding principle in *Dayton.*In that case, the City of Dayton advertised for and solicited bids for a public construction project. Fryman-Kuck General Contractors submitted the lowest bid, in the amount of $240,540. Leo B. Schroeder, Inc. submitted the second lowest bid, in the amount of $241,690. Thus, the difference between the two bids was $1,150, or about one-half percent. The city awarded the contract for the project to Schroeder because Schroeder was a city resident.

The trial court in *Dayton* granted a permanent injunction against the city, prohibiting the city from entering into the contract with Schroeder and from making any payments to Schroeder under the contract. The court of appeals affirmed.

*5 The Ohio Supreme Court affirmed the judgment of the appellate court. The court's decision rested on two fatal flaws in the city's determination that Schroeder was the lowest and best bidder. First, the court condemned the lack of notice of the residency preference:

Despite the purported primacy of the policy to prefer resident bidders, appellants did not announce or disclose the existence of such policy to the bidders until after the bids were opened. It appears, therefore, that appellants made a conscious decision to withhold this pertinent information until after they had actual knowledge of the amounts of the bids. In effect, appellants modified their requirements without notice. This action tended to undermine the integrity of the competitive bidding process. *SeeBoger Contracting Corp. v. Board* (1978), 60 Ohio App.2d 195, 396 N.E.2d 1059.

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Dayton, 67 Ohio St.2d at 359, 423 N.E.2d 1095. The court then examined the testimony of the city's representative, who was unable to articulate any standard by which residency would be weighed:

"(Appellants' counsel Mr. Randolph) Q. Now here again I might be engaging in speculation but, or asking you to, when you say to award contracts to business, that is not in every circumstance, is it?

"(Schierloh) A. No it's not.

"(Objection.) * * *

"MR. RANDOLPH: The point is, your honor, the recommendation was made by the department director here and we would not want to leave the court with the impression that he always recommends the contract go to the local bidder and the question is if the difference in the award were, say ten percent, what his recommendation would be, would his recommendation be the same? * * *

"(Schierloh) A. Well if you, if the items have been entered and as we state, the difference is approximately one half of one percent difference, we'd recommend we go this way. If the difference were many percentages greater than that, I would not say we at all could recommend that to the department or City Manager for approval, in fact, we have not in the past done that."(Emphasis added.)

Dayton, 67 Ohio St.2d at 360, 423 N.E.2d 1095. In light of this testimony, the court found that the lack of any discernable standard for preferring the resident bidder resulted in an abuse of discretion:

The evil here is not necessarily that "resident" bidders are preferred but that there are absolutely no guidelines or established standards for deciding by how "many percentages" a bid may exceed the lowest bid and yet still qualify as the "lowest and best" bid. Absent such standards, the bidding process becomes an uncharted desert, without landmarks or guideposts, and subject to a city official's shifting definition of what constitutes "many percentages." Neither contractors nor the public are well served by such a situation.

While municipal governing bodies are necessarily vested with wide discretion, such discretion is neither unlimited nor unbridled. The presence of standards against which such discretion may be tested is essential; otherwise, the term "abuse of discretion" would be meaningless. In its opinion, the trial court stated that: " * * * (t)he lack of an announced standard and priority of miscellaneous considerations allows unbridled discretion and political favoritism."We find neither allegation nor proof of political favoritism. However, we do find, due to the lack of announced standards, that appellants' action in this case was arbitrary. Accordingly, the judgment of the Court of Appeals is affirmed.

***6** *Id.* at 360-61, 423 N.E.2d 1095.

Under *Enertech* and *Dayton,* the issue in the instant case is whether the Commissioners abused their discretion in determining that Apache was the lowest and best bidder. The Court will begin by examining the Commissioners' rationale for their determination that Apache was the lowest and best bidder.

The Commissioners offer two bases for their decision: First, 90% of Apache's workforce would be drawn from Coshocton County whereas 10% of OAP's workforce would be drawn from Coshocton County, as indicated by Apache and OAP in their bid questionnaires. Second, OAP did not have a current 448 paving mix on file with ODOT.

Here, unlike *Dayton,* the inclusion of the question concerning workforce residency arguably put OAP on notice that the Commissioners might consider workforce residency in determining the lowest and best bidder. Such a notice does not, however, satisfy the standard set forth in *Dayton.*The Commissioners were required not merely to announce that they were going to consider workforce residency, but they were further required to give notice of the *standard* by which workforce residency would be considered. In the instant case, the Commissioners do not appear to have created or followed, let alone announced, any standard for evaluating how much

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weight to give the fact that 90% of Apache's workforce resided in Coshocton County. Under *Dayton,* the Commissioners' use of workforce residency as a factor in determining who was the lowest and best bidder was, in the absence of a previously announced standard, an abuse of discretion. The Court will proceed to examine the second basis for the Commissioners' determination that Apache was the lowest and best bidder.

The sum and substance of the Commissioners' analysis of the second reason for their decision is as follows: The Bid Documents provided, in pertinent part, "all materials ... shall comply with the current requirements of the State of Ohio Department of Transportation Construction and Material Specifications."The Commissioners interpreted "shall comply" to mean "shall comply *before the contract is awarded.*"Taken to its logical conclusion, this interpretation would have required all of the bidders to have complying materials on hand for the project at the time the contract was to have been awarded. This would, of course, be an absurd result. The next leap in logic was to assume, based on the representation of an interested party, and without adequate investigation, that the lack of a current approved 448 paving mix on file with ODOT meant that OAP was less likely to be capable of performing under the contract. The Commissioners' mistaken belief that ODOT pre-approval of the 448 paving design mix was required led the Commissioners to the erroneous conclusion that OAP had not complied with the CMS manual, and therefore could not be the lowest and best bidder. The evidence shows ODOT does not engage in approval of paving design mixes unless ODOT is administering the project. ODOT itself does not require a contractor to have a previously approved 448 paving mix design on file prior to the award of the contract. Rather, ODOT requires a contractor to have an approved paving design mix at the time the contractor furnishes the material for the project. Moreover, the mere fact that a contractor has an approved paving mix design on file with ODOT does not necessarily mean that ODOT will approve the paving mix design for use in a later project. Significantly, there is no evidence in the record suggesting that the absence of a current approved paving mix design on file with ODOT provides any indication of a contractor's actual ability to do a job.

*7 The Commissioners argue that they are not bound by ODOT's interpretation of its CMS manual. This may be so, however, the Commissioners' interpretation of the CMS manual does not appear to be the result of any reasoned examination of the language of the manual or the bid documents. The Commissioners mistakenly believed Apache's representation that the CMS manual required prior ODOT approval of the paving design before the contract was awarded. If there was some support for the Commissioners' interpretation other than Apache's representation, the Commissioners' determination might be deemed rational. In the absence of such support, the Commissioners' decision was arbitrary.

That the Commissioners contacted ODOT does not alter the analysis. In essence, the Commissioners asked ODOT the questions Apache told them to ask. Having erroneously determined that Apache's proposed interpretation of the CMS was correct, the Commissioners proceeded to illicit irrelevant information from ODOT. It appears that the Commissioners did so without consulting with the county engineer. The Court finds that the Commissioners, having relied primarily on an interpretation provided by an interested party, failed to make a reasonable inquiry into the facts and circumstances necessary to make a rational and informed decision.

Aside from the flawed decision-making process, the Commissioners' determination also runs afoul of the notice prong of *Dayton.*There is no indication in the record that the Commissioners provided notice to the bidders that bidders were required to have a current approved 448 paving mix design on file with ODOT in order to be awarded the contract. Indeed, given that ODOT only requires the approved paving mix to be on file at the time the materials are furnished, it would likely come as a surprise to

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bidders that a local government, using the same ODOT standards, would require such compliance before the contract was to have been awarded. The Commissioners therefore violated the notice requirement set forth in *Dayton.*

Based on the above, and on the current record, the Court finds that the Commissioners abused their discretion in determining that Apache was the lowest and best bidder for the Project. As a result, the Court finds that OAP has demonstrated a strong likelihood of success on the merits.

B. Irreparable harm

The Court finds that the constitutional deprivation in this case constitutes irreparable harm.

C. Harm to others

If the Court grants an injunction, Apache would be substantially harmed. This factor weighs against the granting of injunctive relief.

D. Public interest

The Court finds that the public interest would be best served by requiring the local government to rationally administer the bidding process in accordance with predetermined standards, prior notice of which has been provided to the bidders.

The Court will proceed to balance the four factors. OAP has demonstrated a substantial likelihood of success on the merits. The Court has found that OAP will suffer irreparable harm in the absence of an injunction. An injunction would serve the public interest by preserving the integrity of the bidding process. The only factor that weighs against the granting of a preliminary injunction is the harm an injunction would cause to Apache. Weighing these factors together, the Court finds that injunctive relief is appropriate in this case.

IV. Disposition

*8 For the above reasons, the Court GRANTS OAP's motion for a preliminary injunction.

The Court PRELIMINARILY ENJOINS the defendant as follows:

1. The Court enjoins Coshocton County, through its Commissioners, from awarding the contract for the Project to Apache, such prohibition to include Coshocton County's (i) execution of a contract with Apache to perform any work on the Project, (ii) authorization to Apache to perform any work on the Project, and (iii) payment to Apache for work performed on the Project; and

2. The Court directs Coshocton County, through its Commissioners, to award the contract for the Project to OAP under the terms of its bid.

IT IS SO ORDERED.

S.D.Ohio,2005.
Ohio Asphalt Paving, Inc. v. Board of Com'rs of Coshocton County, Ohio
Not Reported in F.Supp.2d, 2005 WL 1421952 (S.D.Ohio)

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Central Ohio Disposal Co., Inc. v. City of Hilliard.
Ohio App., 1983.
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
Central Ohio Disposal Co., Inc., Plaintiff-Appellant
v.
City of Hilliard, Ohio, c/o Mike Close, Director of Law, Robert Tucker, Service Director, Defendants-Appellees.
No. 83AP-131 (ACCELERATED CALENDAR).
83AP-131
April 12, 1983.

APPEAL from the Franklin County Common Pleas Court.

MESSRS. VORYS, SATER, SEYMOUR & PEASE, and MR. MICHAEL G. LONG, for appellant.
MR. MICHAEL L. CLOSE, for appellees.

OPINION

McCORMAC, J.
*1 The Central Ohio Disposal Company, Inc. (COD), plaintiff-appellant, has appealed the judgment of the trial court denying its motion for preliminary and permanent injunctive relief.

The City of Hilliard (Hilliard), a charter city, has a provision for purchase of services pursuant to specifications through open competitive bidding under such rules as the council may establish by ordinance. Hilliard Charter Section 6.15. Pursuant to that section, Hilliard passed Ordinance No. 82-53 on October 25, 1982, authorizing the Director of Service and Engineering to prepare specifications, advertise for and receive the lowest and best bid for the collection of residential refuse and garbage within Hilliard. Thereafter, the Hilliard city clerk gave notice to bidders concerning the method and criteria for receiving bids in which bidders were advised that "[a]ny award made will be to the lowest responsible bidder as determined by the City".

Four bids were received. The lowest bid was that of COD. It was almost fifty percent lower than the highest bid, which was the bid of Miller's Refuse Service (Miller), to which the contract was awarded as "the lowest and best bid".

COD filed a complaint in Franklin County Common Pleas Court against Hilliard and its service director, in which it sought an order preliminarily and permanently enjoining defendants from entering into a contract with Miller or any other party for refuse pick-up and disposal services, and a permanent order requiring defendants to award the contract to COD. The trial court denied relief to plaintiff and rendered judgment for defendants on the basis that defendants acted within the range of their discretion in finding Miller's bid to be the lowest and best.

The first issue is whether bids should have been considered by Hilliard on the basis of lowest and best bid or lowest responsible bidder.

Although the Hilliard city clerk should have invited bids on the criteria of lowest and best bid, as established by Hilliard Ordinance 82-53, under the authority of charter provision Section 6.15, the city clerk erroneously gave notice to the bidders that the successful bid would be the one submitted by the lowest responsible bidder. Lowest responsible bidder is a standard that allows Hilliard to use less discretion than if the bid were submitted on the basis of the lowest and best bid. Nevertheless, erroneously or not, Hilliard requested and received bids on the basis that the lowest responsible bidder would receive the contract. There is no doubt that COD was the lowest responsible bidder and was en-

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EXHIBIT
D

titled to be awarded the contract under Hilliard's request for bidding. Hilliard cannot bid the project on one standard and accept the bids on a different standard than that upon which the project was bid. Hence, if anyone were awarded the contract based upon the bidding criteria, the contract must have been awarded to COD rather than to Miller or the other two bidders.

Even if the bids were judged on the basis of the lowest and best bid, Hilliard abused its discretion and acted unreasonably in awarding the bid to Miller rather than to COD. The only articulated basis by Hilliard for awarding the contract to Miller at a cost of about fifty percent higher than if awarded to COD was that Hilliard had previously let a refuse pick-up contract to a bidder who was unable to perform the contract because the bid was too low, that Miller had competently performed refuse service in Hilliard for the past three years without any complaints, and that Miller's bid in 1982 was only six percent higher than their previous bid. There was no investigation concerning COD's ability to deliver refuse service competently or to perform the terms of the contract rather than defaulting. There was no evidence that COD had performed refuse pick-up services improperly anywhere else. The only thing known to the city about COD was that their financial statement appeared to be adequate to enable them to carry out the terms of the contract and that they were a reputable refuse pick-up company operating in central Ohio without any known problems.

*2 Although it is recognized that refuse pick-up is a sensitive area that can engender many complaints, there was no reasonable basis for Hilliard to award a refuse pick-up contract at a cost of almost fifty percent higher solely on the basis that the successful bidder had performed well in the past and that there had been a problem with a low bidder sometime in the past. While these matters were entitled to consideration and allowing for a reasonable differential in determining the best bid, they were not significant enough to allow the differential of the magnitude involved herein. While there is no exact cut-off for the exercise of discretion, there comes a point where the differential is clearly so great that the award based upon "best" becomes arbitrary. Significantly there was not one shred of evidence that COD, by far the lowest bidder, was not able to perform as well as Miller if given a chance.

Hilliard Ordinance No. 82-53 authorized the Director of Service and Engineering to reject any and all bids. This provision does not permit selective rejection of any bid but permits rejection only of all of the bids unless sufficient justification exists to reject an individual bid. State, ex rel. Ross, v. Board of Education (1884), 42 Ohio St. 374, at 378.

Under the facts of this case as stipulated by the parties, Hilliard's only alternative was to either accept the bid of COD or to reject all of the bids and begin the bidding process anew. That alternative still exists.

The trial court erred in denying plaintiff's motion for a temporary and permanent injunction against awarding the contract to Miller. That injunction should have been awarded. However, the trial court did not err in refusing to grant an injunction against Hilliard requiring the contract to be awarded to COD. Hilliard has the option to award the contract to COD under the bids submitted or to reject all of the bids and begin the bidding process anew.

The judgment of the trial court is reversed and the case is remanded to the trial court for further procedure consistent with this opinion.

Judgment reversed and case remanded.

WHITESIDE, P.J., and REILLY, J., concur.

Ohio App., 1983.
Central Ohio Disposal Co., Inc. v. City of Hilliard
Not Reported in N.E.2d, 1983 WL 3456 (Ohio App. 10 Dist.)

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