

COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

OHIO CONCRETE CONSTRUCTION :
ASSOCIATION, ET AL. :

Plaintiffs :

v. :

Case No. 08CVH 09 13867

OHIO DEPARTMENT OF :
TRANSPORTATION, ET AL. :

Judge Schneider

Defendants :

**OHIO DEPARTMENT OF TRANSPORTATION'S MOTION TO DISMISS AND
MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER**

Now comes Defendant, the Ohio Department of Transportation (ODOT) which moves pursuant to Ohio Civ.R. 12 to dismiss Plaintiffs' Complaint as they do not have standing to challenge a project they did not bid on.

Further, even if this Court finds that Plaintiffs have standing, they are not entitled to a Temporary Restraining Order to prevent ODOT from awarding the contract for this project to the lowest bidder.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. PLAINTIFFS' LAWSUIT MUST BE DISMISSED AS THEY DO NOT HAVE STANDING TO CHALLENGE A PROJECT THEY DID NOT BID UPON.

The Ohio Supreme Court has held that “[A] Contractors Association lacks standing ... where its members failed to bid on the project in question.” *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St. 3d 318, 320.

The Tenth District Court of Appeals has held that a contractor lacks standing to challenge a project where it has failed to bid on that project. *Tiemann v. University of Cincinnati* (1998), 127 Ohio App.3d 312, 325-26. Plaintiff, Harper Construction, did not submit a bid to ODOT. At best, according to Plaintiffs’ pleadings, it submitted a concrete bid to the company which had the low alternate asphalt bid, the Jurgensen Co. Not having been part of the process of submitting a bid to ODOT, Plaintiff cannot now sue ODOT to challenge a process it didn’t participate in. ODOT owed no duty to Plaintiff. It breached no duty to Plaintiff. Plaintiff has no basis to sue ODOT. Plaintiff and its Association must be dismissed from this lawsuit.

II. PLAINTIFFS ARE NOT ENTITLED TO A TEMPORARY RESTRAINING ORDER.

A. Standard of Review

In order to enjoin the award of a public construction contract, a contractor must prove, by clear and convincing evidence, that the public authority abused its discretion which resulted in some tangible harm to the public generally and the contractor individually. *Cleveland Construction v. DAS* (1997), 121 Ohio App. 3d 372, 384.

Abuse of discretion has been defined as an unreasonable, arbitrary or unconscionable attitude. *Cedar Bay Constr., Inc. v. Freemont* (1990), 50 Ohio St.3d 19. Abuse of discretion means more than an error of judgment. *Dayton, ex rel. Scandrich v. McGee* (1981), 67 Ohio

St.2d 356. Arbitrary has been further defined to mean without standards. *Id.* at 359. Unreasonable has been equated to irrational. *Id.*

The Supreme Court has cautioned trial courts against granting injunctions “especially in cases affecting public interest where the court has been asked to interfere with or suspend the operation of important works or control the action of another department of government.” *Danis Clark Co. Landfill Company v. Clark Cty. Solid Waste Mgt. Dist.* (1995) 73 Ohio St.3d 590, 604.

B. Plaintiffs Want This Court to Take the Award Away From The Low Bidder.

Despite not having submitted a bid to ODOT, Plaintiffs have launched several meritless complaints about ODOT selecting the low bidder for the project in this case.

Despite Plaintiff trade association having participated in the process which led to the development of criteria (the Life Cycle Cost Analysis, L.C.C.A.) to determine what would be the best pavement surface for any particular project, Plaintiffs complain about the application of these criteria to this project claiming that over the long run, concrete would be a cheaper alternative. In addition to being biased and speculative, Plaintiffs’ Complaint flies in the face of ODOT’s discretion. Despite the LCCA showing that asphalt was the best pavement option for this project, ODOT acceded to Plaintiff trade association’s request that the project be bid as both a concrete and asphalt job. The asphalt alternate ended up being the lowest bid. There was certainly no abuse of discretion in ODOT accepting the low bid.

Plaintiffs also complain that within the bid documents for this project there is an allowance to adjust the price of oil used in the asphalt between the time of bidding and the time of placement of the asphalt. This adjustment can raise or lower the price of the asphalt. What Plaintiffs don’t mention is that there are similar price adjustments for fuel and steel. The bidders who actually submitted bids to ODOT all understood these adjustments would be part of the

contract if awarded. These would allow a pass through of the direct increase or decrease in the cost of these products. It was certainly within the discretion of ODOT to have such terms in its contract.

Plaintiffs further complain that the concrete paving alternate required more expensive striping of the concrete than the asphalt alternative. Once again, it is entirely within the discretion of ODOT to select the best and longest lasting striping for its pavement projects. Again, no abuse of discretion on ODOT's part.

Finally, Plaintiffs complain that they had to bid on a half inch more aggregate than they should have. To accommodate Plaintiff trade association's request to consider concrete as an alternate to this project, ODOT made this adjustment so as not to redesign and delay the project. All this was for the benefit of Plaintiffs. Plaintiffs cannot now criticize ODOT for making this change to allow concrete as an alternate pavement surface for this project.

In sum, Plaintiffs will not be able to prove, by clear and convincing evidence, that ODOT abused its discretion; that it acted unreasonable, arbitrary, unconscionable or irrational.

C. The Harm of Enjoining This Project is Far Greater Than Any Harm Plaintiffs Will Suffer

The previous section makes it clear that Plaintiffs will not succeed on the merits and thus are not entitled to a temporary restraining order.

Additionally, any harm or injury to Plaintiffs pales in comparison to the harm and damage caused by delaying this project. Plaintiff trade association has not been harmed or damaged. In fact, it is understood that the sub to the low prime is a member of plaintiff trade association.

As to the other plaintiff in this case, the most that it would be out is whatever time it had in submitting its bid to the prime which bid to ODOT.

The Supreme Court has made it clear that Ohio's competitive bidding laws are for the protection of taxpayers, not contractors. *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991. It would not be in the taxpayers best interest to delay this project which would increase the cost of this project.

D. Plaintiffs Will Need to Post a Bond Covering Damages of \$1,400 a Day If This Project is Enjoined.

The low bidder who was awarded the contract in this case is subject to liquidated damages of \$1,400 a day. At this point, that is as good a measure of damages as any. Thus, despite the foregoing arguments, if this Court is inclined to grant Plaintiffs' Temporary Restraining Order, then Plaintiffs should be required to post a bond covering damages of \$1,400 a day.

IV. CONCLUSION

The Ohio Supreme Court and Tenth District Court of Appeals have made it clear that not having bid on this project, Plaintiffs do not have standing to bring this lawsuit.

Aside from the standing issue, Plaintiffs are not entitled to a Temporary Restraining Order. Plaintiffs will not be able to prove, by clear and convincing evidence, that ODOT abused its discretion; that it was unreasonable, arbitrary, unconscionable or irrational in awarding the contract in this case to the low bidder.

It would not be in the best interest of the taxpayers, the very people the Ohio Supreme Court has held competitive bidding laws are designed to protect, to restrain a highway project that will do nothing more than raise its cost.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss and Memorandum in

Opposition was hand delivered this 2d day of October, 2008 to

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