

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

OHIO CONCRETE CONSTRUCTION)	CASE NO. 08 CVH 09 13867
ASSOCIATION, et al.,)	
)	JUDGE SCHNEIDER
Plaintiffs,)	
)	
v.)	
)	
OHIO DEPARTMENT OF)	DEFENDANT JOHN R. JURGENSEN
TRANSPORTATION, et al.,)	COMPANY'S MOTION TO DISMISS
)	
Defendants.)	

Pursuant to Civil Rule 12(B)(6), Defendant John R. Jurgensen Company moves to dismiss the Verified Complaint of Plaintiffs Ohio Concrete Contractors' Association and Harper Construction. The basis for this motion is that the Plaintiffs lack standing to assert the claims, and as a result, the Verified Complaint fails to state a claim upon which relief can be granted. A memorandum in support of this motion is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANT

JOHN R. JURGENSEN COMPANY'S MOTION TO DISMISS

I. INTRODUCTION

A. The Parties.

This case arises out of, in part, the Ohio Department of Transportation's ("ODOT") competitive bid solicitation and September 19, 2008 award of the multi-million dollar, three mile, multi-lane Wilmington Bypass highway construction project in Wilmington, Ohio (the "Project"). Based on its competitive bid solicitation, and in accordance with Ohio's public bidding statutes and other applicable laws, ODOT awarded the Project prime construction contract to Defendant E. S. Wagner Co. ("Wagner").

Defendant John R. Jurgensen Company ("JRJ") submitted a competitive bid as a Project prime contractor, but it was not successful. However, JRJ also submitted a bid to Wagner to perform a portion of the Project as the asphalt pavement subcontractor. JRJ's price was favorable, and JRJ received a subcontract award from Wagner. JRJ's subcontract value is approximately \$6,200,000.

Plaintiff Ohio Concrete Construction Association ("OCCA") is a trade association. It did not submit a bid, and it has no property or other interest in the Project or contract. Plaintiff Harper Construction is not an Ohio resident. It did not submit a bid to perform the Project as a prime contractor. Rather, it submitted a bid to Wagner, and perhaps others, to perform work as a concrete subcontractor.

B. ODOT's Alternative Bid Solicitation – Concrete Versus Asphalt.

The Project bid solicitation, not unlike countless other public improvement projects, contained detailed engineering plans and specifications to construct the Project using alternate

types of materials and construction techniques. When it solicited competitive pricing, ODOT asked bidders to bid alternate options to construct the major portions of the road surfaces in either concrete or asphalt. Obviously, there are two distinct engineering alternatives to construct a roadway. Each method and material comes with pros and cons from the perspective of an owner and engineer.

Bidders submitted bids for each alternative. Based on the competitive prices that were submitted, and other legitimate considerations, ODOT made its award based on the plans and specifications that were published for the project. Ultimately, having reviewed the pricing, ODOT selected the asphalt alternative.

Any qualified contractor could bid based on the specifications. Bidders, like Wagner, were able to submit competitive pricing for each alternative method and material – concrete and asphalt. They could bid one or the other, or both. Regardless, one thing is clear; there was open, competitive bidding. The market drove the prices, and ODOT, and ultimately the taxpayers, will pay the prices for the selected product and method that were legitimately market driven based on detailed plans and specifications for each method.

There was no favoritism for any one contractor over another. In fact, each contractor was required to submit, and did submit, a competitive price based on the detailed plans and specifications for the specified method of concrete construction. Concrete prices were compared on an apples-for-apples basis with other bids for the same type of work. Similarly, asphalt prices were compared on an apples-for apples basis with prices for other bidders.

Each bidder was required to price the work in accordance with ODOT published specifications and criteria. ODOT, in turn, analyzed the prices, compared the alternatives, and made an award based on what ODOT determined in good faith was most appropriate and

favorable for ODOT based on its engineering criteria and the market-driven pricing.

C. Who is Missing?

Multiple contractors submitted bids to perform the Project as ODOT's prime contractor supplying either concrete or asphalt. Interestingly, none of the unsuccessful contractors that submitted pricing directly to ODOT based on the competitive bid solicitation are plaintiffs in this lawsuit. They have not alleged any defect or deficiency in the competitive bid process. In fact, the evidence suggests that the parties with the real stake in the outcome of the competitive solicitation found no fault with ODOT's process.

D. The Claims.

Plaintiffs' claims to enjoin the award, and prevent the Project from moving forward, lack any basis in law or fact. Plaintiffs essentially seek a restraining order and preliminary injunction to prevent ODOT from awarding and performing asphalt pavement work on the Project, and other projects generally. The claims are premised on arguments that ODOT treats asphalt as "king" to the disfavor of concrete, and that ODOT favors asphalt construction over concrete construction. Both plaintiffs lack standing to pursue this type of challenge.

Harper submitted a subcontract price to Wagner. Its price, however, was not more favorable than the price that JRJ submitted for the work, and JRJ received the award from Wagner. Harper never received a letter of intent from Wagner.

E. The Standing Dilemma

Plaintiffs lack standing to pursue the challenges that they advance. In fact, neither Plaintiff was prevented from submitting a competitive price to perform the Project. OCCA did not even submit a bid, and Harper is not even an Ohio taxpayer. Further, Harper is a subtrade bidder that admittedly was able to competitively price both methods and materials. Neither

party has the right to the underlying prime contract. Harper submitted a price proposal to Wagner, but there is no allegation that Harper ever received a letter of intent or a subcontract for the work.

II. LAW AND ARGUMENT

Under Ohio law, a claim must be dismissed where, as here, the claimant has not alleged facts that entitle it to relief. Ohio Civ. R. 12(B)(6); Desenco, Inc. v. Akron, 84 Ohio St. 3d 535 (1999). Plaintiffs' complaint must be dismissed because Plaintiffs lack standing to assert the claims.

Ohio courts require that, in order to have standing to challenge the award of a contract on a public construction project, the complainant must have submitted a bid on the project. Furthermore, the complainant must have suffered a real, compensable injury that is neither abstract nor suspected. See Ohio Contractors Ass'n v. Bicking, 71 Ohio St. 3d 318 (1994).

Under Ohio law, there are limitations on the right of an association to challenge the legality of an award under the competitive bidding laws. In each instance, the association only has standing if its members have suffered actual injury. Id; see also State ex rel., Consumers League of Ohio v. Rachford, 8 Ohio App. 3d 420 (1982).

Likewise, prospective subcontractors generally have no right to pursue a claim to enjoin the award of a public works contract. See Wilson Bennett, Inc. v. Greater Cleveland Regional Transit Authority, 67 Ohio App. 3d 812 (8th Dist. 1990). A subcontractor only has the right to protest where it was named in the bid with a letter of intent. Id; see also, Treadon v. Oxford, 149 Ohio App. 3d 713 (12th Dist. 2002). Such facts do not exist and are not alleged here. Finally, a subcontractor lacks standing where the subcontractor actually was able to compete for the construction dollars that are involved in the project. State ex rel., Connors v. ODOT, 8 Ohio

App. 3d 44 (10th Dist. 1982). Here, Harper admittedly was able to compete.

For the reasons stated above, the Verified Complaint should be dismissed with prejudice because Plaintiffs lack standing to pursue the claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this pleading was served via email and hand delivery to each counsel of record on this 2nd day of October, 2008 in advance of the scheduled hearing on the restraining order.

Andrew J. Natale

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