COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

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

BENCH MEMORANDUM REGARDING IRREPERABLE HARM AND PUBLIC INTEREST

At the September 30, 2008 conference, the Court asked several questions specifically relating to the irreparable harm and public interest elements of Plaintiffs' motion for a temporary restraining order. As set forth below, precedent from the Ohio Supreme Court and the Tenth District Court of Appeals answers the Court's question.

A. Plaintiffs Will Be Irreperably Harmed Absent Injunctive Relief.

1. Injunctive Relief Is The Proper Remedy Because Lost-Profit, Monetary Damages Are Not Available In A Bid Protest Action.

The Ohio Supreme Court recently held that *injunctive relief* is the proper remedy where a public entity abuses its discretion in awarding a public contract for the very reason that lost-profit, *monetary damages are not available to an unsuccessful bidder*. Cementech, Inc. v. City of Fairlawn, 109 Ohio St. 3d 475, 477-78 (2006) (Exh. A). In Cementech, the Court specifically overturned a lower court decision awarding a losing bidder lost-profit damages as a result of the city's actions in awarding a contract to another bidder. Id. In doing so, the Court noted that

injunctive relief, and not monetary damages, was the proper relief in such a case because of the very purpose of competitive bidding rules: *to protect Ohio's taxpayers*. Id. at 477.

> The intent of competitive bidding is to protect the taxpayer, prevent excessive costs and corrupt practices, and provide open and honest competition in bidding for public contracts. ... While allowing lost-profit damages in municipal-contract cases would protect bidders from corrupt practices, it also would harm the taxpayers by forcing them to bear the extra cost of lost profits to rejected bidders. Thus, the purposes of competitive bidding clearly militate against allowing lost-profit damages to rejected bidders.
>
> *Rather, a rejected bidder is limited to injunctive relief.* ...
>
> *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.* ....
>
> * * *
>
> Therefore, we hold that when a municipality violates competitive-bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages.
>
> [Id. at 477-78 (emphasis added).]

The Tenth District reached the same conclusion in Hardrives Paving & Construction, Inc. v. City of Niles, 99 Ohio App. 3d 243, 247 (10th Dist. 1994), and held that in a bid protest case, "injunction is the only remedy available." Id. at 248 (Exh. B). Specifically, the court recognized:

> [T]he fact that injunctive relief is available generally indicates that a monetary award is not available for lost profits.
>
> Furthermore, other policy considerations militate against allowing monetary damages. The intent of competitive bidding is to protect both the public and the bidders themselves. ... Thus, if we were to allow appellant to receive monetary damages, only the bidders would be protected because the public would have to pay the contract price of the successful bidder plus the lost profits of an aggrieved bidder. However, if injunction is the sole remedy, both

> the public and the bidders themselves are protected. *Accordingly, we conclude that injunction is the only remedy available*.
>
> [Id. at 247-48 (emphasis added).]

Applying this rule in Boger Contracting Corp. v. Bd. of Commissioners of Stark County, 60 Ohio App. 2d 195, 198 (5th Dist. 1978), the court held that where a public entity acts improperly in the bidding process, the "the trial court is *required* to . . . *enjoin the [public entity] from entering into a contract with any of the bidders*." (Emphasis added.) Likewise, in Wilson v. Bennett, Inc. v. Greater Cleveland Regional Transit Authority, 67 Ohio App. 3d 812, 821 (8th Dist. 1990), the court recognized that "[i]njunctive relief *is the proper remedy* for an unsuccessful bidder to bring against a contracting authority where it is alleged that a contract was unlawfully awarded to another bidder." (Emphasis added.)[1]

In sum, as the Ohio Supreme Court just recently made clear, lost-profit monetary damages are not available to a party challenging a public entity's actions as part of the public bidding and contracting process. Rather, injunctive relief is *the only proper remedy in such cases*.

2. Any Delay Caused By The Issuance Of Injunctive Relief Necessarily Flows From ODOT's Abuse Of Discretion And Such Delay, As A Matter Of Law, Does Not Outweigh The Harm Caused To The Unsuccessful Bidders And Taxpaying Public Absent An Injunction.

> *"[T]he injunctive process and the resulting delays serve as a sufficient deterrent to a [public entity's] violation of competitive bidding laws."*
>
> [Cementech, 109 Ohio St. 3d at 477 (emphasis added).]

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[1] See also H. R. Johnson Construction Co. v. Bd. of Education of Painesville Township Local School District, 16 Ohio Misc. 99, 101 (Com. Pl. Lake Cty. 1968) ("Surely the action of the board [(awarding the contract to a late bidder)] has dealt an irreparable injury to a real and not illusory right of plaintiff for which it has no remedy at law. The injunction it seeks is an appropriate remedy for repairing the injury.") (disagreed with on other grounds by PHC, Inc. v. Kelleys Island, 71 Ohio App. 3d 277 (6th Dist. 1991)).

As the Ohio Supreme Court has made clear, the delays that result from a court's *injunctive* enforcement of Ohio's competitive bidding laws are a *necessary component* of such relief. Rather than militating against the issuance of injunctive relief, the potential delays associated with an injunction serve to *deter* public entities from violating competitive bidding laws.[2] As a matter of law and common sense, this deterrent to wrongful conduct cannot also be a deterrent to the proper issuance of injunctive relief.

In Rein Construction Co. v. Trumbull County Board of Commissioners, 138 Ohio App. 3d 622, 631-32 (11th Dist. 2000), the court expressly addressed the issue of delay in affirming a trial court's grant of injunctive relief as a result of "bid irregularities" that constituted an "abuse of discretion." Specifically, the Rein court affirmed the trial court's finding that the harm to the taxpayers resulting from the unlawful bid process *necessarily outweighed* any harm resulting from project delays. According to the court, "while delays in a public project may be undesirable, *that potential harm does not outweigh the harm suffered by the public generally when public contracts are unlawfully awarded*." Id. at 631 (emphasis added).

This conclusion is consistent with the long settled rule that an injunction enjoining the execution and/or enforcement of an illegal or void contract is proper *irrespective of any potential harm caused to the parties to such illegal or void contract*. See, e.g., State ex rel. Scobie v. Cass, 1910 WL 639, at *3 (Ohio Cir. Ct. Oct. 28, 1910) (Exh. C) ("If the contract be in fact illegal and without authority of law, then the plaintiff is not estopped *no matter how much money the defendants or any of them may have expended in its partial execution*, from enjoining the further execution of the contract, or the payment thereon of any of the public funds.") (Emphasis added).

---

[2] Indeed, as the Court implicitly recognized in Cementech, the potential delays associated with injunctive relief provide the necessary "punish[ment]" for a public body's violation of public bidding laws, because lost-profit monetary damages are not available. Id.

In sum, potential delays in a public project are a *necessary result* of a court's injunctive enforcement of Ohio's competitive bidding laws. As a matter of law, the potential for such delays does not outweigh the irreparable harm to the public and unsuccessful bidders caused by a public entity's violation of said laws.

B. The Public Interest Is Promoted By An Order Preserving The Competitive Bidding Process.

As the Ohio Supreme Court again made clear in Cementech, the public interest in competitive public bidding is best served by an injunction that "prevents excessive costs and corrupt practices, as well as protects the integrity of the bidding process, the public and the bidders." Cementech, 109 Ohio St. 3d at 477. In other words, even where delay may result, the public interest is best served by an order preserving the integrity of the bidding process, which in turn, preserves the taxpayers' interest in ensuring that public entities wisely and efficiently spend taxpayer dollars. See, e.g., id.; Rein, 138 Ohio App.3d at 631-32 ("[R]ein has also shown that the public would be harmed if no injunction were granted because the lease . . . was unlawful and invalid because of the bidding irregularities.")

Indeed, the Ohio Court of Claims has expressly recognized that the public interest is best served by an order ensuring that a public entity does not overspend on public contracts. Sequoia Voting Systems, Inc. v. Ohio Secretary of State, 125 Ohio Misc. 2d 7, 18 (Ohio Ct. Cl. 2003). In Sequoia, the court held that the taxpayers' interest in receiving the best price "far outweighed" any potential delays associated with the injunctive process.

> [T]he relatively short delay necessary to ensure that Sequoia receives a fair and equitable opportunity to negotiate its Best and Final Offer is far outweighed *by the premature elimination of a vendor who may provide the state of Ohio with the best value in this market.*
>
> [Id. (emphasis added).]

See also Leaseway Distribution Centers, Inc. v. Dep't of Administrative Services, 49 Ohio App. 3d 99, 106 (Ohio App. 10th Dist 1988) (affirming injunction, and reasoning that "[t]he public interest in competitive bidding was not undermined when the trial court enjoined the [Department] from awarding the contract to Lewis & Michael since Leaseway's bid was valid and was '*the lowest responsive and responsible bid.*'") (emphasis added).

Here, the public interest in preserving taxpayer funds through the use of a truly *competitive* bidding process clearly supports the issuance of injunctive relief, regardless of any potential delays that may result.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served, via hand delivery this 21 day of October, 2008, upon attorneys for the following:

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109 Ohio St.3d 475, 849 N.E.2d 24, 2006 -Ohio- 2991

H
Cementech, Inc. v. Fairlawn
Ohio,2006.

Supreme Court of Ohio.
CEMENTECH, INC., Appellee,
v.
City of FAIRLAWN, Appellant.
Nos. 2005-0970, 2005-0971.

Submitted Feb. 22, 2006.
Decided June 28, 2006.

Background: Unsuccessful bidder for road construction contract sought damages and injunctive relief against city. The Court of Common Pleas, Summit County, No. CV 2001-12-6452, granted summary judgment for city. Bidder appealed, and the Court of Appeals reversed and remanded. Following jury trial on remand, the trial court entered judgment on jury verdict for bidder but limited award of damages to the cost of bid preparations. Bidder appealed, and the Court of Appeals re- versed.

Holding: On appeal, the Supreme Court, Alice Robie Resnick, J., held that bidder, which failed to appeal the denial of its motion for injunctive relief, could not recover lost profits.

Reversed.

Pfeifer, J., concurred in the judgment only.

West Headnotes

[1] Public Contracts 316A ⚿6

316A Public Contracts
316AI In General
316Ak5 Proposals or Bids
316Ak6 k. Necessity for Submission to Competition. Most Cited Cases
The intent of competitive bidding is to protect the taxpayer, prevent excessive costs and corrupt practices, and provide open and honest competition in bidding for public contracts.

[2] Injunction 212 ⚿86

212 Injunction
212II Subjects of Protection and Relief
212II(E) Public Officers and Entities
212k86 k. Unauthorized or Fraudulent Improvements or Contracts. Most Cited Cases
A rejected bidder on a public contract is limited to injunctive relief.

[3] Injunction 212 ⚿1

212 Injunction
212I Nature and Grounds in General
212I(A) Nature and Form of Remedy
212k1 k. Nature and Purpose in General. Most Cited Cases

Injunction 212 ⚿16

212 Injunction
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k15 Inadequacy of Remedy at Law
212k16 k. In General. Most Cited Cases
An injunction is an extraordinary remedy in equity where there is no adequate remedy at law.

[4] Injunction 212 ⚿1

212 Injunction
212I Nature and Grounds in General
212I(A) Nature and Form of Remedy
212k1 k. Nature and Purpose in General. Most Cited Cases

Injunction 212 ⚿24

212 Injunction
212I Nature and Grounds in General

EXHIBIT A

212I(B) Grounds of Relief
212k20 Defenses or Objections to Relief
212k24 k. Injury or Inconvenience to Public. Most Cited Cases
The grant or denial of an injunction depends largely on the character of the case, the particular facts involved, and factors relating to public policy and convenience.

[5] Injunction 212 ⚷74

212 Injunction
212II Subjects of Protection and Relief
212II(E) Public Officers and Entities
212k74 k. Officers and Official Acts Which May Be Restrained in General. Most Cited Cases
The granting of an injunction should be done with caution, especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government.

[6] Municipal Corporations 268 ⚷336(1)

268 Municipal Corporations
268IX Public Improvements
268IX(C) Contracts
268k334 Acceptance or Rejection of Proposals or Bids
268k336 Award to Lowest Bidder
268k336(1) k. In General. Most Cited Cases
Unsuccessful bidder on city road construction contract, which did not appeal the denial of its motion for injunctive relief, could not recover lost profits damages from city, even though bidder lost profits due to the wrongful award of the contract to another bidder, as it was unfair to hold the taxpayers liable for the bidder's loss.

[7] Municipal Corporations 268 ⚷336(1)

268 Municipal Corporations
268IX Public Improvements
268IX(C) Contracts
268k334 Acceptance or Rejection of Proposals or Bids
268k336 Award to Lowest Bidder
268k336(1) k. In General. Most Cited Cases
When a municipality violates competitive-bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages.

****25 SYLLABUS OF THE COURT**

When a municipality violates competitive-bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages.

David M. Leneghan, Broadview Heights, for appellee.
Amer Cunningham Co., L.P.A., Jack Morrison Jr., and Thomas R. Houlihan, Akron; Edward J. Riegler, City of Fairlawn Law Director, for appellant.
Jim Petro, Attorney General, Douglas R. Cole, State Solicitor, Diane Richards Brey, Deputy Solicitor, and William C. Becker, Holly Hunt, and Erik J. Clark, Assistant Attorneys General, urging reversal on behalf of amicus curiae Ohio Attorney General Jim Petro.
Barry M. Byron, Stephen L. Byron, Willoughby, and John Gotherman, Cleveland, urging reversal on behalf of amicus curiae the Ohio Municipal League.
Schottenstein, Zox & Dunn and Roger L. Sabo, Columbus, urging affirmance on behalf of amicus curiae Associated General Contractors of Ohio and Ohio Contractors Association.
McFadden, Winner & Savage and James S. Savage, Columbus, urging affirmance on behalf of amicus curiae National Electrical Contractors Association, Ohio Conference.

ALICE ROBIE RESNICK, J.
***475** {¶ 1} On December 1 and 8, 2001, the appellant, the city of Fairlawn, publicly advertised that it was accepting bids for a service-road project. The appellant later issued an addendum on December 10, 2001, to include planting pear trees as part of

the project.

**26 {¶ 2} On December 17, 2001, the bids were opened, and the appellant's law director notified the appellee, Cementech, Inc., that its bid had been rejected for failure to include the addendum in the bid. A few days later, the Fairlawn City Board of Audit and Review held a meeting in which it reviewed the submitted bids, as well as correspondence from the appellee regarding its bid and the bidding process. The board agreed to disqualify the appellee's bid and recognize another bid as the lowest and most responsive.

{¶ 3} Appellee filed suit against the appellant and requested that the court enjoin the appellant from taking any action or awarding the contract to any other bidder. The trial court denied the appellee's request for injunctive relief, and the appellee did not appeal the denial. The trial court later granted the appellant's motion for summary judgment.

*476 {¶ 4} The appellee appealed the summary judgment to the Ninth District Court of Appeals. The appellate court reversed the summary judgment after holding that the appellant had failed to produce evidence that the city's law director had the authority to make the decision to remove the appellee's bid from consideration. *Cementech, Inc. v. Fairlawn*, Summit App. No. 21344, 2003-Ohio-3145, 2003 WL 21396510, ¶ 14. The appellate court remanded the cause to the trial court for a hearing on the merits. Id. at ¶ 17.

{¶ 5} On remand, the trial court ruled that the appellee could recover its cost of bid preparations, but nothing more, should it prevail on its claims for violations of the competitive-bidding process. In reaching this conclusion, the court reasoned that it was not in the public's interest to allow a rejected bidder to recover lost profits, because the public had already paid for performance by the successful bidder (including its profits) and should not be required to pay profits a second time. The trial court further found that the prospect of liability for bid preparations would serve as a reasonable and necessary deterrent to a municipality's noncompliance with competitive-bidding laws.

{¶ 6} A trial ensued, and a jury found in favor of the appellee and awarded it damages in the amount of the cost of its bid preparations. Following the verdict, the appellee appealed the trial court's order limiting damages to the cost of bid preparations. The appellate court reversed the trial court's judgment that lost profits could not be recovered. The court determined that the project had been completed because injunctive relief had been denied and that if the appellee could not recover its lost profits, it was left with inadequate relief. Further, the appellate court held that precluding recovery of lost profits would undermine the integrity of the competitive-bidding process because other relief would not adequately discourage government entities from violating bidding procedures.

{¶ 7} The appellate court recognized that its decision rejected the public-policy argument that other appellate courts had found persuasive. Specifically, the court held that the interest of protecting the integrity of the bidding process and ensuring that wronged parties receive meaningful relief outweighs the risk of taxpayers' paying profits twice for the same project. However, the appellate court also noted that the way to avoid awarding lost profits was by granting an injunction pending the outcome on the merits.

{¶ 8} The court of appeals determined that its judgment conflicted with the judgment of the Eighth District Court of Appeals in *Cavanaugh Bldg. Corp. v. Cuyahoga Cty. Bd. of Commrs.* (Jan. 27, 2000), 8th Dist. No. 75607, 2000 WL 86554, and the judgment of the Eleventh District **27 Court of Appeals in *Hardrives Paving & Constr., Inc. v. Niles* (1994), 99 Ohio App.3d 243, 650 N.E.2d 482, on the following issue: "Does the availability of injunctive relief if timely filed but denied preclude an award of lost profits in a municipal contract case?" The cause *477 is now before this court upon our determination that a conflict exists (case No. 2005-0971), as well as pursuant to our acceptance

of a discretionary appeal (case No. 2005-0970).

[1] {¶ 9} The intent of competitive bidding is to protect the taxpayer, prevent excessive costs and corrupt practices, and provide open and honest competition in bidding for public contracts. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.* (1995), 73 Ohio St.3d 590, 602, 653 N.E.2d 646. While allowing lost-profit damages in municipal-contract cases would protect bidders from corrupt practices, it also would harm the taxpayers by forcing them to bear the extra cost of lost profits to rejected bidders. Thus, the purposes of competitive bidding clearly militate against allowing lost-profit damages to rejected bidders.

[2][3][4][5] {¶ 10} Rather, a rejected bidder is limited to injunctive relief. An injunction is an extraordinary remedy in equity where there is no adequate remedy at law. *Garono v. State* (1988), 37 Ohio St.3d 171, 173, 524 N.E.2d 496. The grant or denial of an injunction depends largely on the character of the case, the particular facts involved, and factors relating to public policy and convenience. *Perkins v. Quaker City* (1956), 165 Ohio St. 120, 125, 59 O.O. 151, 133 N.E.2d 595. Further, the granting of an injunction should be done with caution, " 'especially in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important works or control the action of another department of government.' " *Danis*, 73 Ohio St.3d at 604, 653 N.E.2d 646, quoting *Leaseway Distrib. Ctrs, Inc. v. Dept. of Adm. Servs.*(1988), 49 Ohio App.3d 99, 106, 550 N.E.2d 955.

{¶ 11} 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 the resulting delays serve as a sufficient deterrent to a municipality's violation of competitive-bidding laws.

[6] {¶ 12} In this case, the appellate court justified its decision to award the appellee lost profits by finding that precluding damages would "allow government entities to go unpunished for ignoring Ohio and municipal laws." *Cementech, Inc.*, 160 Ohio App.3d 450, 2005-Ohio-1709, 827 N.E.2d 819, ¶ 17. However, punishing government entities through lost-profit damages to rejected bidders in effect punishes the very persons competitive bidding is intended to protect-the taxpayers. This court has long prohibited the assessment of punitive damages against a municipal corporation, except when specifically permitted by statute, for that very reason. *Ranells v. Cleveland* (1975), 41 Ohio St.2d 1, 6-7, 70 O.O.2d 1, 321 N.E.2d 885.

{¶ 13} Unfortunately, the appellee did not appeal the trial court's denial of its motion for injunctive relief. Consequently, the propriety of the denial of the ***478** appellee's motion for an injunction was not an issue before the court. The service-road project proceeded and was completed by another bidder. Although it is true that the appellee lost profits due to the appellant's wrongly awarding the project to another bidder, we believe it would be unfair to hold the taxpayers liable for the appellee's loss.

****28** [7] {¶ 14} Therefore, we hold that when a municipality violates competitive-bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages.

{¶ 15} Accordingly, we reverse the judgment of the court of appeals.

Judgment reversed.

MOYER, C.J., LUNDBERG STRATTON, O'CONNOR, O'DONNELL and LANZINGER, JJ., concur.
PFEIFER, J., concurs in judgment only.
Ohio,2006.
Cementech, Inc. v. City of Fairlawn
109 Ohio St.3d 475, 849 N.E.2d 24, 2006 -Ohio- 2991

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650 N.E.2d 482
99 Ohio App.3d 243, 650 N.E.2d 482

Hardrives Paving & Constr., Inc. v. Niles
Ohio App. 11 Dist.,1994.

Court of Appeals of Ohio,Eleventh District, Trumbull County.
HARDRIVES PAVING AND CONSTRUCTION, INC., Appellant,
v.
CITY OF NILES, Appellee.[FN*]

FN* Reporter's Note: A discretionary appeal to the Supreme Court of Ohio was not allowed in (1995), 71 Ohio St.3d 1500, 646 N.E.2d 1125.

No. 93-T-4910.

Decided Nov. 14, 1994.

Contractor brought action challenging city's awarding of repaving contract to another bidder, seeking writ of mandamus, injunction, and declaratory judgment. The Court of Common Pleas, Trumbull County, entered judgment against contractor, and contractor appealed. The Court of Appeals, Ford, P.J., held that: (1) award was improperly based on unannounced criteria, and (2) damages for lost profits were not available.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Mandamus 250 ⇐84

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k84 k. Contracts in General. Most Cited Cases
Mandamus relief was unavailable to contractor challenging city's decision to award repaving contract to another bidder, in view of city's discretion in determining lowest and best bidder, which could not be controlled by mandamus. R.C. § 735.05.

[2] Mandamus 250 ⇐1

250 Mandamus
250I Nature and Grounds in General
250k1 k. Nature and Scope of Remedy in General. Most Cited Cases
For writ of mandamus to issue, petitioner must establish that it has clear legal right to relief prayed for, that respondent is under clear legal duty to perform acts, and that petitioner has no plain and adequate remedy in ordinary course of law.

[3] Declaratory Judgment 118A ⇐209

118A Declaratory Judgment
118AII Subjects of Declaratory Relief
118AII(K) Public Officers and Agencies
118Ak209 k. Counties and Municipalities and Their Officers. Most Cited Cases
Contractor's challenge to city's award of repaving contract to another bidder was appropriate for declaratory judgment; contractor presented real controversy which was justiciable in character, speedy relief was necessary to preserve rights of parties, and contractor was seeking to have statutory rights declared. R.C. §§ 735.05, 2721.03.

[4] Declaratory Judgment 118A ⇐62

118A Declaratory Judgment
118AI Nature and Grounds in General
118AI(D) Actual or Justiciable Controversy
118Ak62 k. Nature and Elements in General. Most Cited Cases
Three elements are necessary to obtain declaratory judgment: real controversy between parties, controversy which is justiciable in character, and situation where speedy relief is necessary to preserve rights of parties.

[5] Municipal Corporations 268 ⇐336(1)

268 Municipal Corporations

EXHIBIT B

268IX Public Improvements
268IX(C) Contracts
268k334 Acceptance or Rejection of Proposals or Bids
268k336 Award to Lowest Bidder
268k336(1) k. In General. Most Cited Cases
City's award of repaving contract would not be judicially disturbed in absence of abuse of discretion.

[6] Municipal Corporations 268 ⚖336(1)

268 Municipal Corporations
268IX Public Improvements
268IX(C) Contracts
268k334 Acceptance or Rejection of Proposals or Bids
268k336 Award to Lowest Bidder
268k336(1) k. In General. Most Cited Cases
City's award of repaving contract based upon funds available for additional resurfacing amounted to improper utilization of unannounced criteria in selecting bidder. R.C. § 735.05.

[7] Municipal Corporations 268 ⚖336(1)

268 Municipal Corporations
268IX Public Improvements
268IX(C) Contracts
268k334 Acceptance or Rejection of Proposals or Bids
268k336 Award to Lowest Bidder
268k336(1) k. In General. Most Cited Cases
Award of damages for lost profits was not available to contractor for city's improperly awarding repaving contract to another bidder; injunction was only remedy available.

[8] Injunction 212 ⚖14

212 Injunction
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k14 k. Irreparable Injury. Most Cited Cases
Injunctive relief should not ordinarily be granted unless irreparable injury will result.

[9] Injunction 212 ⚖16

212 Injunction
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k15 Inadequacy of Remedy at Law
212k16 k. In General. Most Cited Cases
Injunction is proper only when there is no adequate remedy at law.

****482** William M. Roux, Warren, for appellant.
J.T. Dull, Niles, for appellee.

FORD, Presiding Judge.
This case comes from the Trumbull County Court of Common Pleas.

In April 1993, appellee, the city of Niles, solicited bids for the "1993 City Resurfacing Program," a road repaving project. Appellee ****483** received three bids on the project. Unit prices were itemized by each of the competitive bidders as required by the bid specifications. Appellant, Hardrives Paving and Construction, Inc., submitted the lowest total bid at $225,588.40, followed by Gennaro Pavers, Inc. ("Gennaro") at $225,592.30, and the City Asphalt & Paving Co. ("City Asphalt") at $261,609.41.

Despite the fact that appellant underbid Gennaro by $3.90, Mark Hess, the Engineering and Development Coordinator, recommended that the contract be awarded to Gennaro. In a letter, Hess expressed his rationale as follows:

***245** "Although the low bidder is Hardrives Paving at $225,588.40 and Gennaro Pavers is second at $225,592.30, I am recommending the award be made to Gennaro Pavers Inc. for the following reasons:

"1. $245,000.00 is available for resurfacing which

will mean extending the contract to include $20,000.00 of additional paving. The highest cost item in this extension will be asphalt concrete which is $49.40/CY in Hardrives bid and $48.00/CY in Gennaro Pavers bid.

"2. Gennaro's equipment is currently in town and he is ready to start upon notification.

"Please be aware that this recommendation is based on cost projections *only* and is not a reflection on Hardrives Paving. They have performed quality work in the past for the City and if your decision is to award Hardrives Paving this contract, I am confident they would perform effectively." (Emphasis added.)

With the remaining funding, appellee intended to add Niles-Vienna Road and Near Street to the repaving project. Neither road appeared in the bid specifications.

Appellant filed a complaint seeking a writ of mandamus, injunction and declaratory judgment. Additionally, at trial, the court permitted appellant to present testimony for lost profits if it were not awarded the job under any of the previously mentioned avenues.

The trial court ruled against appellant, concluding that the decision to award the contract to Gennaro was not an abuse of discretion.

Appellant [FN1] appeals, assigning the following as error:

> FN1. Appellee did not file a brief with this court.

"1. The Trial Court erred to the prejudice of Plaintiff-Appellant by denying Plaintiff-Appellant's request for Writ of Mandamus and/or Declaratory Judgment when it found that no abuse of discretion existed on the part of Defendant-Appellee where Defendant-Appellee failed to comply with competitive bidding requirements pursuant to Ohio law as to 'lowest and best,' materially changed the bid specifications after opening the bids, and further awarded the public contract to the second lowest bidder, Gennaro Pavers, based on the changes in the bid specifications.

"2. The Trial Court erred in refusing to award damages to Plaintiff-Appellant where an abuse of discretion was shown and where Plaintiff-Appellant presented evidence as to lost profits, which evidence was not rebutted by Defendant-Appellee."

R.C. 735.05 governs the present situation. It states:

***246** "The director of public service may make any contract, purchase supplies or material, or provide labor for any work under the supervision of the department of public service involving not more than ten thousand dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds ten thousand dollars, such expenditure shall first be authorized and directed by ordinance of the city legislative authority. When so authorized and directed, except where the contract is for equipment, services, materials, or supplies to be purchased under division (D) of section 713.23, or section 125.04 or 5513.01 of the Revised Code or available from a qualified nonprofit agency pursuant to sections 4115.31 to 4115.35 of the Revised Code, the director shall make a written contract with the *lowest and best bidder* after advertisement for not less than two nor more than ****484** four consecutive weeks in a newspaper of general circulation within the city." (Emphasis added.)

In *Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 552 N.E.2d 202, the court noted that the statute does not require a contract to be awarded to the lowest bidder because factors other than price may be considered in determining the "lowest and best" bidder. *Id.* at 21, 552 N.E.2d at 204-205. Moreover, the statute empowers the decisionmakers with discretion in determining the lowest and best bidder and a court should not intervene absent a showing of an abuse of discretion. *Id.*, at 21-22, 552 N.E.2d at 204-205.

In appellant's first assignment of error, it contends that the court should have granted a writ of mandamus or declaratory judgment in its favor.

[1][2] First, appellant maintains that it was entitled to a writ of mandamus. For a writ of mandamus to issue, appellant was required to establish that it had a clear legal right to the relief prayed for, that appellee was under a clear legal duty to perform the acts and that appellant had no plain and adequate remedy in the ordinary course of the law. See *State ex rel. Weger v. Hague* (May 27, 1994), Ashtabula App. No. 93-A-1840, unreported, at 2, 1994 WL 237984.

As previously stated, appellee has discretion in determining the lowest and best bidder. "[A] statute which confers upon a board of public officers authority to make a contract 'with the lowest and best bidder,' confers upon the board a discretion with respect to the contract which can not be controlled by mandamus." *State ex rel. Walton v. Hermann* (1900), 63 Ohio St. 440, 59 N.E. 104, syllabus. See, also, *Cedar Bay* 50 Ohio St.3d at 22, 552 N.E.2d at 205. Thus, mandamus is not available, and this argument is meritless.

[3][4] Next, appellant contends that he was entitled to declaratory judgment. "It is well-settled that three elements are necessary to obtain a declaratory judgment: (1) a real controversy between parties, (2) a controversy which is justiciable in character, and (3) a situation where speedy relief is necessary to ***247** preserve the rights of the parties." *Buckeye Quality Care Centers, Inc. v. Fletcher* (1988), 48 Ohio App.3d. 150, 154, 548 N.E.2d 973, 976. All of these elements are fulfilled in the present case. Furthermore, appellant is seeking to have its rights under a statute declared which is expressly set forth in R.C. 2721.03.

[5][6] As previously stated, appellee has discretion to award the contract, and its decision should not be altered absent an abuse of discretion. *Cedar Bay*, 50 Ohio St.3d at 21-22, 552 N.E.2d at 204-205. "Regarding the term 'abuse of discretion' by a public authority in the letting of a contract subsequent to the taking of bids, [it is] recognized that such an abuse includes the utilization of unannounced criteria in selecting a bidder * * *." *State ex rel. Executone of Northwest Ohio, Inc. v. Commrs. of Lucas Cty.* (1984), 12 Ohio St.3d 60, 61, 12 OBR 51, 53, 465 N.E.2d 416, 417. Clearly, the decision to award the contract to Gennaro was based on such criteria because the additional streets were not part of the bid specifications. Thus, the trial court erred in concluding that appellee did not abuse its discretion. This argument has merit.

[7] In its second assignment, appellant claims it was entitled to money damages for lost profits; however, it has not cited any case which has ever awarded money damages in a situation like this. Furthermore, injunction is available as a remedy for an unsuccessful bidder. See *Cedar Bay Constr. v. Fremont* (Nov. 18, 1988), Sandusky App. No. s-87-36, unreported, at 5-6, 1988 WL 123642.

[8][9] Injunctive relief should not ordinarily be granted unless irreparable injury will result. 56 Ohio Jurisprudence 3d (1984) 135, Injunctions, Section 32. Stated otherwise, "[a]n injunction is proper only where there is no adequate remedy at law." *Fodor v. First Natl. Supermarkets* (1992), 63 Ohio St.3d 489, 491, 589 N.E.2d 17, 19. It would appear that if monetary damages for lost profits were an available remedy, damages would provide an adequate remedy at law and injunction would not be appropriate. Thus, the fact that injunctive relief is available generally indicates that a monetary award is not available for lost profits.

****485** Furthermore, other policy considerations militate against allowing monetary damages. The intent of competitive bidding is to protect both the public and the bidders themselves. See *Cedar Bay Constr.*, 50 Ohio St.3d at 21, 552 N.E.2d at 204-205. Thus, if we were to allow appellant to receive monetary damages, only the bidders would be protected because the public would have to pay the contract price of the successful bidder plus the lost profits of an aggrieved bidder. ***248** However, if

injunction is the sole remedy, both the public and the bidders themselves are protected. Accordingly, we conclude that injunction is the only remedy available. This assignment is without merit.

Appellee abused its discretion because in making its decision to award the contract to Gennaro, it utilized criteria which were not part of the bid specifications. Additionally, injunction is appellant's sole remedy.

While, based on the foregoing, the trial court's opinion is reversed in part, we note that appellant did not obtain a stay of the trial court's decision. Although the record does not disclose whether the roads have already been repaved, it may well be that that has occurred, since some time has elapsed between the time that the trial court issued its decree and the pronouncement rendered by this court today. If the roads have been repaved, this dispute may well have been mooted by the passage of time. Nevertheless, we are of the view that public policy considerations require an opinion by our court in this case.

Based on the foregoing, the judgment of the trial court is affirmed in part, reversed in part, and the cause is remanded for proceedings consistent with this opinion.

Judgment affirmed in part, reversed in part and cause remanded.

DONOFRIO and MAHONEY, JJ., concur.
GENE DONOFRIO, J., of the Seventh Appellate District, sitting by assignment.
EDWARD J. MAHONEY, J., retired, of the Ninth Appellate District, sitting by assignment.
Ohio App. 11 Dist.,1994.
Hardrives Paving & Constr., Inc. v. Niles
99 Ohio App.3d 243, 650 N.E.2d 482

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H

STATE EX REL. SCOBIE v. EDSON A. CASS ET AL.

Ohio Cir.Ct. 1910.

STATE EX REL. SCOBIE
v.
EDSON A. CASS ET AL.
Oct. 28, 1910.

West Headnotes

Counties 104 ⚿124(1)

104 Counties
104V Contracts
104k124 Unauthorized or Illegal Contracts
104k124(1) k. In General. Most Cited Cases

Injunction 212 ⚿23

212 Injunction
212I Nature and Grounds in General
212I(B) Grounds of Relief
212k20 Defenses or Objections to Relief
212k23 k. Injury or Inconvenience to Defendant. Most Cited Cases

If a contract to do certain work for a county is illegal, the fact that the contractor has expended a large sum of money in the partial execution of the agreement does not estop a taxpayer from enjoining the further execution of the contract, or the payment thereon of the public funds.

Counties 104 ⚿196(5)

104 Counties
104X Taxpayers' Suits or Actions
104k196 Rights and Remedies of Taxpayers
104k196(5) k. Limitations and Laches. Most Cited Cases

Injunction 212 ⚿113

212 Injunction
212III Actions for Injunctions
212k113 k. Limitations and Laches. Most Cited Cases

A taxpayer of a county, immediately upon refusal of the prosecuting attorney to do so, instituting suit to enjoin illegal expenditure of public money, pursuant to Gen.Code, § 2922, having within a few days of the execution of the contract complained of served notice upon the prosecuting attorney to bring such suit as provided by Gen.Code, § 2921, is not guilty of laches.

Counties 104 ⚿105(1)

104 Counties
104IV Public Buildings and Other Property
104k105 Construction of Buildings and Other Works
104k105(1) k. In General. Most Cited Cases

Statutes 361 ⚿147

361 Statutes
361IV Amendment, Revision, and Codification
361k147 k. Continuance or Alteration of Existing Law by Revision or Codification. Most Cited Cases

A courthouse building commission having been appointed and the building partially completed pursuant to Act March 14, 1906, 98 Ohio Laws, p. 53, Gen.Code, §§ 2333 to 2338, the plans made for its completion is a proceeding within the meaning of Gen.Code, § 26, and are not affected by an amendment of the statute under which such plans were made. Hence the words "shall be governed by the provisions of this chapter relating to the erection of public buildings in the county" in Gen.Code, § 2338, being added in codification, does not restrict the powers of the "commission" under the original act.

Counties 104 ⚿105(1)

104 Counties

EXHIBIT
C

104IV Public Buildings and Other Property
104k105 Construction of Buildings and Other Works
104k105(1) k. In General. Most Cited Cases

Counties 104 ⇐116

104 Counties
104V Contracts
104k115 Proposals or Bids
104k116 k. In General. Most Cited Cases

If the contemplated interior decorations of a new courthouse are of such an artistic nature that they are noncompetitive, the statutes requiring contracts for public work to be let at competitive bidding do not apply.

CONTRACTS--INJUNCTION--STATUTES.

HENRY, FILLIUS and WINCH, JJ.
(Judge Fillius of the seventh circuit sitting by designation in place of Judge Marvin.)

*1 APPEAL from common pleas court.

Smart, Marvin & Ford, for plaintiff.
J. A. Cline, Pros. Atty., *W. D. Meals,* Asst. Pros. Atty., *Hoyt, Dustin & Kelley,* for defendants.

FILLIUS, J.
This case comes into this court on appeal from a judgment rendered in favor of the plaintiff by the court of common pleas of this county.

The plaintiff, a taxpayer of the county, brings this suit to enjoin the defendants, constituting the building commission of Cuyahoga county, and as well the auditor and treasurer respectively of the county, and William F. Behrens, from decorating the courthouse as proposed by a contract made with Behrens, alleging that the building commission is constructing a courthouse in Cuyahoga county and that it has entire charge thereof by virtue of authority vested in it by law, including the painting and decorating of the interior thereof and the letting of the contract therefor; that the commission has entered into a contract with the defendant, Behrens, for doing the painting and decorating for the agreed sum of $90,000; that the contract is illegal and without authority of law, because the commission did not cause full and accurate plans of the painting thus contracted for to be made, nor did it submit the work for such painting to competitive bidding, but wholly failed to give notice thereof by advertising, as required by law, for the lowest and best bid therefor, and that no invitation whatever for bids for said work was given by the commission; that the contract was made with Behrens without giving anybody an opportunity to examine plans and specifications therefor to bid on the work; that the auditor of said county will issue vouchers to the treasurer of the county for the work to be done under said contract, and that the treasurer will pay such vouchers, and that the defendant, Behrens, is about to proceed to carry out said contract, and he prays that the defendants, and each of them, be restrained and enjoined from carrying out or completing the contract for said painting.

To this petition the defendants, composing the building commission, and the auditor and treasurer of Cuyahoga county, jointly answer, admitting that the building commission is engaged in the construction of the courthouse and that it has entire charge of the construction thereof and the right to determine all questions connected therewith, including the interior painting thereof. They admit the execution of the contract with the defendant, Behrens, to paint and decorate the interior of the courthouse in accordance with plans and specifications adopted by the commission, which work is to be done to the satisfaction of the commission and its architect, and that by the terms of the contract the commission agrees to pay Behrens $90,000 therefor; that the work to be done and the services to be rendered by Behrens, under said contract, are of a personal character, involving and requiring an extensive knowledge of decorative art, including the mixing, blending and harmonizing of colors, and they admit that if not restrained the commission will go forward in the execution of this contract, and they

deny that the contract is illegal.

*2 The defendant, Behrens, files a separate answer, and after admitting the principal averments of the petition, he in effect denies that there is any illegality in the execution of the contract, and denies that the commission was wanting in power to make the same. He further alleges that the nature and character of the work is such as to demand a high order of artistic skill and taste to paint and decorate the walls of the courthouse, as required by the terms of his contract, and that the services required of him are in their nature of that personal, skillful and artistic quality as to make them noncompetitive in character.

Thus are the issues presented.

The facts, as established by the testimony offered upon the trial of the case, are substantially as follows:

The defendants, Fischer, Eirick and Vail, the county commissioners of this county, together with the defendants, Cass, Higley, Osborn and Smith, appointed by the court of common pleas to act with said board of county commissioners, constitute a building commission, pursuant to an act of the legislature passed in 1904, to build the courthouse. Pursuant to the statute authorizing its creation, the commission employed architects, superintendents and others; procured plans, drawings and specifications; invited bids thereon for the construction of the courthouse, and entered actively upon the work of constructing the courthouse. For reasons apparently satisfactory to the commission, but not appearing in this record, in the original letting of contracts for the construction of the courthouse, bids were not invited, nor contracts made, for painting and decorating the interior walls and ceilings thereof. The building itself about the time of the execution of the contract complained of was substantially completed. The only work left to be done was the completion of some parts of the interior finish of the building and the painting and decoration of the walls, and the supplying of the mural paintings intended for various rooms in the building.

The building, to cost upwards of two and a half million dollars, is of magnificent proportions, and artistic design and finish. Built of granite, of the style of the Italian Renaissance, located upon the bluff adjacent to the shore of the lake, it is designed not alone to be an appropriate place for the administration of justice, but a monument to the genius and modern artistic development of the city and county which it adorns, and as well to be one of a group of buildings in process of erection and to be erected in the city of Cleveland and county of Cuyahoga, so placed and constructed about a mall that each shall be in harmony with the others, and together constitute an expression of the highest development of the art of architecture and civic usefulness in this country.

The commission proceeding to complete this structure, thus conceived and designed, employed Charles F. Schweinfurth, a gentleman of this city, eminent as an architect and as a man possessing a fine artistic sense, not only in the designing of buildings but in their interior decoration, to prepare plans and specifications for its interior decoration, in keeping in design and artistic finish with the building itself. Without attempting to go into detail, the plans and specifications, thus prepared, required the interior decoration to be like the building itself of the period of the Italian Renaissance, particularly giving expression to the peculiar quality, style and effect of that period, which found its highest development in one of the greatest artists of that period. The commission adopted the views, plans and specifications of Mr. Schweinfurth, and in addition, determined to place upon the interior walls of the building a number of mural paintings to be executed by one or more of the present day masters of mural art, and it was required that the decorating to be done by Mr. Behrens, under his contract, should be in harmony with these mural paintings, so that the whole should have one harmonious, artistic effect, suggestive of the majesty and dignity of the law and its administration. To do the interior decor-

ating thus determined upon and in this manner, the commission found that it would require a highly developed professional and artistic skill, involving taste, feeling, harmony, idealism and an aesthetic sense that in fact made the work noncompetitive in character. The commission, therefore, did not advertise for bids for the doing of this work, but did make inquiry as to prices therefor, through its representative, Mr. Schweinfurth. Accordingly, acting upon the belief that it had the power to enter into a contract of this character without submitting the work to competitive bidding, it entered into the contract in question with Mr. Behrens to do the work and furnish the material therefor, upon plans and specifications, as definite as the nature of the work would permit, though leaving much ultimately to the judgment of Mr. Schweinfurth.

*3 The question therefore now for determination is, did the commission in thus making this contract exceed the authority conferred upon it by the statute creating it, and any amendment thereof?

Before undertaking to answer this question, it will be well to dispose of two defenses interposed upon the trial: First, that the plaintiff has been guilty of such laches that a court of equity ought not to interfere in his behalf; and, second, that he is estopped to claim the interposition of this court by reason of the fact that he delayed bringing his action so long that the defendant Behrens has, in good faith, and relying upon the legality of his contract, made expenditures and incurred obligations on account thereof, amounting to a very large sum of money, to wit, more than $10,000.

So far as the question of laches is concerned, it is difficult to see how the plaintiff could reasonably have been more diligent. While it is true the newspapers of the city about August 3, published the fact that the commission had substantially contracted with Mr. Behrens to do this work, yet the contract itself and the bond to be executed concurrent with it, were not executed until September 14, and upon that date, or within a day or two thereafter, the plaintiff made application to counsel and counsel immediately served notice upon the prosecuting attorney of the county to bring this action, and he, after the lapse of two or three days, refused to do so, and the very day that his refusal was communicated to plaintiff's counsel, this suit was begun. It would appear, therefore, that the plaintiff was not guilty of laches. The court would hardly be warranted, in a suit begun on behalf of the taxpayers of the county, to protect their interests against the illegal expenditure of public funds, in finding that the plaintiff was guilty of laches, unless such clearly appeared to be the case.

Neither is the plaintiff estopped to prosecute this action. He claims that the defendants should be enjoined from carrying out this contract because it is illegal, because the defendants are utterly without authority to execute it, or having executed it, to carry it out. If the contract be in fact illegal and without authority of law, then the plaintiff is not estopped, no matter how much money the defendants or any of them may have expended in its partial execution, from enjoining the further execution of the contract, or the payment thereon of any of the public funds.

Whether, then, the commission had authority to execute the contract in question, depends upon what effect is to be given to the statute and any amendment thereof, under which the commission is acting. This statute is general in its nature and is entitled "An act to provide for a commission for building courthouses," and seems to have been an entirely independent act upon that subject. The commission was empowered by the terms of the act with the broadest discretion to determine all questions connected with the building of a courthouse, and was granted, in the language of the Supreme Court, "every phase of power and duty which is conferred upon the county commissioners and more."The act expressly provided: "said building commission shall, after adopting plans, specifications and estimates, invite bids and award contracts for said court-house, and for furnishing heat, light, ventilating and for sewerage of the same, and de-

termine all questions therewith, until said courthouse shall be completed and accepted by said building commission."

*4 In view of this express power thus conferred upon the commission, and of the decision of the Supreme Court in the case of *Mackenzie v. State,* 76 Ohio St. 369 [81 N. E. Rep. 638], there is little doubt that the commission was well within the limitations of its authority in making this contract. But confusion has arisen from the fact that the codifying commission in codifying the statutes, embraced in the General Code, the statute creating the building commission with other sections of the statutes relating to the authority of county commissioners to erect county buildings, under chapter 1, title 10, relating to public buildings, covering sections from No. 2333 to 2366, inclusive, and from the further fact that the codifying commission divided Sec. 1 of the original act creating the building commission into several sections, and incorporated that part of the statute above quoted in Gen. Code 2338, making an addition thereto, so that the whole of Gen. Code 2338 now reads as follows:

"After adopting plans, specifications and estimates, the commission shall invite bids and award contracts for the building and for furnishing, heating, lighting and ventilating it, and for the sewerage thereof. Until the building is completed and accepted, by the building commission, it may determine all questions connected therewith, and shall be governed by the provisions of this chapter relating to the erection of public buildings of the county."

Plaintiff now claims that because the original act creating the building commission is now incorporated in the General Code under one chapter relating to the construction of county buildings, and especially because the original act appears to have been amended, as shown by Gen. Code 2338, by adding the words "and shall be governed by the provisions of this chapter relating to the erection of public buildings of the county," the power of the building commission has thereby been limited and restricted, and that it no longer has any discretion with respect to letting contracts, but every contract of whatever kind or nature must be advertised upon plans and specifications for public letting and let to the lowest and best bidder, and that if the decoration of the interior of the courthouse proposed to be done by the commission, pursuant to the contract made with Behrens, be of a character that can not be submitted to competitive bidding, then the commission and the county which it represents must forego that character of work and must adopt a kind and class of work which can be submitted to such bidding.

If this conclusion must necessarily follow from the addition of the words to the statute above referred to, and now appearing in Gen. Code 2338 for the first time, then, of course, there is nothing for this court to do but to allow the prayer of the petition. We, however, do not think the conclusion contended for by the plaintiff, from the change in the statute, necessarily follows. The commission came into existence for the purpose of building the courthouse. Preliminary to the appointment of four members of the commission by the court of common pleas, the commissioners of the county had, under the act, determined to build a courthouse; had submitted to the electors of the county the question of issuing bonds for that purpose, which had been determined affirmatively by them, and then it was that the building commission was organized, pursuant to the terms of the statute, and the members appointed thereto by the court were to serve until the courthouse, as contemplated in the act, was completed. The commission, thus created, had but one thing to do, to wit, to build and complete the courthouse. The money was provided by the issuing of bonds for that purpose. The members of the commission appointed by the court took an oath and gave bond for the faithful and honest discharge of their duty. In case one of them died before the courthouse was completed, the judge appointed his successor, and the commission was authorized to employ architects, superintendents and employes, and to adopt plans and specifications and estimates, and invite bids and award contracts for the courthouse, and for furnishing heat, light and ventilating the same, and

for sewerage thereof, and were given authority to determine all questions connected with that work until the courthouse shall have been completed and accepted by the building commission. Thus the statute had one purpose, one object. The commission's service was continuous, beginning with its appointment and ending when the courthouse was completed. It seems clear, thus viewed, that the work of the commission in carrying out the objects and purposes for which it was appointed, and the building of the courthouse down to its completion, constituted within the meaning of Gen. Code 26 "a proceeding" and that any amendment of the statute made after that *proceeding* was instituted and carried forward almost to completion, can in no manner affect the powers given that commission in the original act. Suppose, indeed, that the codifying act by some error had repealed the entire act creating the commission and authorizing the erection of the courthouse, can it be said that if that had been done the commission would have been absolutely without power or authority to proceed at all with the completion of the building, and that it must remain in its unfinished and unusable state? It would seem as though the very purpose and object of Gen. Code 26 was to provide against just exactly such a contingency, such repeals, and to permit the authority originally granted to be exercised down to the completion of the work which this statute itself originally authorized, and which was begun and largely completed before this amendment was made.

*5 The case of *Cincinnati v. Davis,* 58 Ohio St. 225 [50 N. E. Rep. 918], lends substantial support to this view. In that case the proper board of the city adopted a resolution to improve an alley of a certain width. Thereafter, and pending proceedings to improve the alley, the statute was amended, conferring the authority to do this upon another board. The Supreme Court held that such amendment did not work a discontinuance of the proceeding pending before the original board to improve the alley and that the improvement should be prosecuted to completion by the board that adopted the resolution, under favor of Gen. Code 26 (R. S. 79).

In passing upon the case, Minshall, J., in the opinion says:

"The question then arises whether the assessments are void, because the ordinance to improve, adopted June 20, 1893, was adopted by the board of legislation, instead of by the board of administration; or, whether, by the amendment of March 30, 1893, the proceeding did not abate for the want of jurisdiction in the board, before which it was commenced, to make it? We think not. The act of March 30, 1893, contained no express provision making it apply to pending proceedings. Hence, as we think, this proceeding was not discontinued thereby, and the board of legislation was authorized under section 79, Revised Statutes, to proceed with and complete the improvement as it did. This section relates to no particular subject of legislation. It relates to the operation of statutes in general. The section reads as follows:

'Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal, and where the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions, or proceedings, unless so expressed; nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.'

The section as first adopted did not contain the second clause as to repeals or amendments affecting the remedy; but as there was a disposition to hold that it did not apply to such changes in the law, this clause was inserted, so that a repeal or amendment affecting the remedy should not apply to pending proceedings 'unless so expressed'; so that the amendment of March 30, 1893, does not apply to this case, if it is within the provisions of the above section, whether it relates to the remedy or not, for the amendment contains no express pro-

vision to that effect. There seems to be the same reason for applying the provisions of this section to a pending proceeding for the improvement of a road or street that there is for its application to a pending proceeding in the nature of a suit, where the change in the law simply applies to the mode of procedure. In either case it must be assumed that the proceeding was commenced with reference to the provisions of the existing law; and it is neither wise nor just, as a general rule, to disappoint the parties in this regard by a change of the law, and, as must frequently happen, after a considerable amount of costs and expenses have been incurred.

*6 The section announces the permanent policy of the legislature as to the operation of its statutes; and, where there are, in its opinion, sufficient reasons for a departure from this policy in a particular instance, it has been declared that the departure shall be expressed in the amendatory statute. In so far as *Union Co. (Comrs.)* v. *Greene,* 40 Ohio St. 318, conflicts with this view, it is not approved. In *Raymond v. Cleveland,* 42 Ohio St. 522, a more correct view is taken of a clause similar to the provisions of section 79, Revised Statutes. There under the municipal code of 1869, and its amendments, proceedings had been commenced for the improvement of a street to be paid for by assessments on the property benefited. An assessment was made and set aside by the courts for irregularity. Subsequently, under provisions of the code in force when the proceeding was commenced, a reassessment was made; but the provisions of the code in regard to a reassessment had been previously repealed by the revision of 1878; and it was claimed for this reason that the reassessment was void. The revision, however, contained the following saving clause: 'No suit, prosecution or proceeding shall be in any manner affected by such change, but the same shall stand or proceed as if such change had not been made. It was argued that this provision related only to proceedings in the nature of actions and the like, and did not extend to the right to make a reassessment authorized only by the law that had been repealed. But Okey, J., in delivering the opinion said: 'We are unwilling to place any such limitation upon the provision. It is remedial and no violence is done to the language by holding that it preserves the right to make this reassessment under the municipal code of 1869.''DD'

It would seem in view of the foregoing, that if it be conceded that the words added in Gen. Code 2338 be in fact an amendment of the statute of a character compelling a different construction than would be given it if the words were not added, then, nevertheless, the amendment would be without effect, because it relates to the work of building this courthouse, a proceeding, within the meaning of Gen. Code 26, long commenced and prosecuted before the amendment was made, and which was in fact made pending the proceeding relative to its completion.

The conclusion, therefore, necessarily follows that the amendment for which so much is claimed by the plaintiff here is not effectual to limit or restrict the powers of the commission granted by the original act so far as the proceeding relative to this courthouse is concerned, and that the commission has, with reference to this contract, the same power that it had before that amendment was made, and in view of the conclusions reached by the Supreme Court in *Mackenzie v. State, supra,* above referred to, we are of opinion that the commission had the power and authority to make this contract in the manner it did make it.

*7 This conclusion necessarily disposes of the case, but we deem it proper to pass upon the other question here raised, namely, whether the interior decoration of this courthouse provided for in this contract is so essentially noncompetitive in character that the commission is not required to submit the work therefor to competitive bidding, assuming that otherwise the statute requires it to do so.

The contention of the plaintiff is that where a statute requires work to be submitted to competitive bidding and a contract to be made only with the lowest and best bidder, that then no construction is

permissible which undertakes to read into the statute any exception, and that in such a case the evident design and purpose of the lawmaking power is to restrict all work to that kind and character which can be in its nature the subject of competitive bidding. Upon the other hand, the contention is that the purpose of the law is to protect the public against unwise and injudicious contracts resulting from favoritism, dishonesty, and to secure for the public the construction of any public work upon the best terms and to the best advantage and at the lowest possible cost, and that the only sure way of securing this is by open public competition; but it is further contended that while this is true, it was no part of the purpose of the lawmaking power thereby to prevent the public from having those things which are essentially noncompetitive, where they subserve a useful if not necessary purpose which otherwise could not be obtained, and that it is not inimical at all to the purpose of these statutes to limit the public bidding required to those things about which there may be competition. Naturally the things which are noncompetitive in their nature are few as compared with the number of things that are competitive. So here. Here is a great public building, erected at great cost, intended not only for the present but many future generations; imposing in appearance, beautiful in design, monumental in character, whose walls it is proposed to decorate in harmony with the style and structure of the building itself, in a manner at once to add to its dignity and its beauty, exhibiting those elements of taste, feeling and harmony corresponding to the highest aesthetic taste of present day culture. This work, we find, is of that character that requires in him who undertakes to do it the idealism and imagination of an artist, the skill of the painter, the sentiment and feeling of the poet. That it may be done to harmonize with the building itself, with the mural paintings proposed to be placed upon its walls and in the manner herein described, requires the commission should select the man fitted to do the work and not to submit the work to any man who might bid upon it, whether he is fitted to do it or not. It seems to us that it is not doing violence to the intention of the lawmakers nor the evils against which the statute is directed to construe it to be limited to work that is in its nature competitive and not otherwise.

*8 This court in the case of *State v. McKenzie,* 29 O. C. C. 115 (9 N. S. 105), decided in 1907 this question, arriving at the same conclusion. In an able opinion by Henry, J., concurred in by Marvin and Burrows, JJ., it is said that "When the contemplated construction is essentially and absolutely non-competitive, because of its artistic nature, or is strictly monopolistic, because the function to be performed thereby is necessarily dependent upon a single means which is the subject of an exclusive patent, or franchise, or sole source of supply, then the principle of competition is, so far forth, inapplicable."

Numerous authorities from other states support this conclusion.

While the Supreme Court of our state has nowhere expressly passed upon the question, yet in the case of *Mackenzie v. State, supra,* Davis, J., in the opinion, speaking with reference to whether requiring public bidding had always worked out the best results or not, says:

"Every man has realized in his own experience, that the lowest price does not always secure satisfactory results and that some things which are most desired are not open to competition."

To us it is obvious that it is most desirable that the interior decoration of this magnificent structure should be in harmony with its original design, and that the plans and specifications and ideas with reference thereto of the architect employed by the commission, Mr. Schweinfurth, should be carried out, and if carried out, will add permanently to the dignity, beauty and character of the structure itself. This, we are convinced, can not be done by submitting the work to competitive bidding, but can only be done by the commission's selecting an artist whose skill, taste and aesthetic sense are of that high order that will enable him to carry out upon

the walls of that building the scheme of decoration proposed.

It is claimed, however, that the Supreme Court of this state, has, in effect, determined this question otherwise in the case of *State v. Yeatman,* 22 Ohio St. 546. In that case the Supreme Court held that a contract made by the county commissioners for re-copying plats of the county for use in the auditor's office, the estimated expense of which exceeds $5,000, is void, as against the county, unless it be made with the lowest responsible bidder, in accordance with the provisions of the statute. The statute provided that in cases where the estimated expense exceeded $500, contracts should be awarded to the lowest responsible bidder, and Day, J., in passing upon the question, said:

"There is nothing in the character of the work to be contracted for that excludes it from the operation of this section of the statute. If the 'lowest responsible bidder' should not be possessed of the skill requisite to perform the work in a suitable and acceptable manner, he would be under the necessity, as in other cases, of employing those who have the capacity to do the work in a manner that will secure a faithful performance of the contract."

***9** We do not think this is in conflict with the view we have taken of the case at bar. Obviously, the copying of plats required merely skill in copying, and it might be added, but ordinary skill at that, and it was with reference to work of that kind that the court was speaking; but in the case at bar the work involves not only skill, but it involves taste, feeling, harmony, sentiment, ideals; indeed the whole category involved in what is denominated aesthetics. We thus conclude that for this reason, also, the contention of the plaintiff in this case is not well taken, and that the commission had power and authority to make the contract which it is sought here to enjoin.

It is therefore ordered that the plaintiff's petition be and it is hereby dismissed at the costs of the plaintiff.

Henry and Winch, JJ., concur.
Ohio Cir.Ct. 1910.
State ex rel. Scobie v. Cass
22 Ohio C.D. 208, 32 Ohio C.C. 208, 13 Ohio C.C.(N.S.) 449, 1910 WL 639 (Ohio Cir.)

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