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COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

OHIO CONCRETE CONSTRUCTION
ASSOCIATION, et al.,

Plaintiffs,

vs.

OHIO DEPARTMENT OF
TRANSPORTATION, et al.,

Defendants.

Case No. 08CVH 09 13867

Judge Schneider

FILED
COMMON PLEAS COURT
FRANKLIN COUNTY, OHIO
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CLERK OF COURTS

NOTICE OF APPEAL

Notice is hereby given that Plaintiffs the Harper Co. and the Ohio Concrete Construction Association hereby appeal to the Court of Appeals of Franklin County, Ohio, Tenth Appellate District, (a) from the decision of the Franklin County Court of Common Pleas, rendered on October 6, 2008, denying Plaintiffs' Motion for Temporary Restraining Order and granting Defendant John R. Jurgensen Company's Motion to Dismiss and the Ohio Department of Transportation's Motion to Dismiss, and (b) from the Final Judgment Entry of October 14, 2008. A copy of the Order and Final Judgment Entry from which Plaintiffs appeal are attached.

Respectfully submitted,

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and e-mail

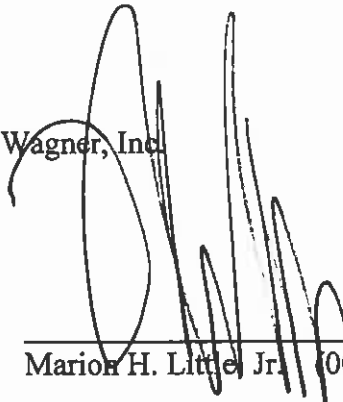
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served, via regular United States mail, postage prepaid, this 14th day of October, 2008, upon the following:

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Marion H. Little, Jr. (0042679)

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

OHIO CONCRETE CONSTRUCTION :
ASSOCIATION, et al., :
 :
 Plaintiffs, :
 :
 v. : Case No. 08CV09-13867
 :
 OHIO DEPARTMENT OF TRANSPORTATION, : Judge Schneider
 et al., :
 :
 Defendants. :

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
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CLERK OF COURTS

DECISION (1) DENYING PLAINTIFFS' MOTION FOR A
TEMPORARY RESTRAINING ORDER, FILED SEPTEMBER 29, 2008;
(2) GRANTING DEFENDANT'S MOTION TO DISMISS,
FILED OCTOBER 2, 2008; AND
(3) GRANTING DEFENDANT'S MOTION TO DISMISS,
FILED OCTOBER 2, 2008
(Case Terminated)

Rendered this 6 day of October, 2008.

Schneider, J.

The above-captioned matter is before this Court on the motion of Plaintiffs The Harper Company ("Harper") and the Ohio Concrete Construction Association for a Temporary Restraining Order. The Defendants are the Ohio Department of Transportation ("ODOT"), E.S. Wagner Company ("Wagner") and John R. Jurgensen Company (JRJ).

On August 20, 2008, ODOT solicited bids for the construction of a multi-lane highway bypass around Wilmington, Ohio ("Project"). All bidders were required to submit alternative bids. One bid was to be for a concrete-pavement design, and a separate bid was for an asphalt-pavement design. Wagner, along

with several other prime contractors, submitted alternative bids.

Harper submitted a price quote to Wagner as a subcontractor for the concrete specification, and JRS submitted a price quote to Wagner as a subcontractor for the asphalt specification. On September 19, 2008, Wagner was awarded the contract as the prime contractor for the Project with the asphalt specification.

Plaintiffs argue that ODOT failed to follow its own rules and procedures when analyzing the bids for the alternative pavement designs. Plaintiffs argue that, had ODOT followed its rules, the concrete pavement design would have been found to be the *lowest competent and responsible* alternative, and Wagner would have been awarded the contract—but with Harper as the subcontractor.

In its memorandum in support of their motion, plaintiffs argue:

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.

The Court allowed each side to present both evidence and argument regarding Plaintiffs' motion. The Defendants filed motions to dismiss, arguing that the plaintiffs lack standing to bring this action. Plaintiffs filed a memorandum contra.

"Standing is a threshold test that, if satisfied, permits the court to go on to decide whether the relief sought can or should be granted to plaintiff." Tiemann v. University of Cincinnati (Franklin 1998), 127 Ohio App. 3d 312, 325. "The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented." Ohio Contractors Assn. v. Bicking (1994), 71 Ohio St. 3d 318, 320.

In the case that is before this Court, we have two different plaintiffs. Plaintiff Harper, which as a sub-contractor submitted an alternative pavement design quote to a prime contractor. The second plaintiff is The Ohio Concrete Construction Association ("OCCA"), an Ohio trade organization of which Harper is a member.

There is no question that in Ohio a trade organization such as OCCA has standing to bring an action on behalf of one of its members, even though the organization did not submit a bid or actually engage in the work necessary to be awarded a contract. However, this standing is not unlimited. OCCA has standing in this matter only if one of its members has standing in its own right to bring an action. Bicking, 71 Ohio St. 3d at 320 (citing Hunt v. Washington St. Apple Adv. Comm'n (1977), 432 U.S. 333, 343. This proposition of law was cited by the Tenth District Court of Appeals in Tiemann, 127 Ohio App. 3d at 325. See also State ex rel. Assoc. Bldrs. & Contrs., Cent. Ohio Chapter v.

Jefferson Cty. Bd. of Comm'rs (Jefferson 1995), 106 Ohio App. 3d 176.

Therefore, the issue of standing for OCCA is dependent upon Harper's standing to bring this action. As a threshold matter, the Court finds that Harper is a member of OCCA.

Harper argues that it submitted a bid and so has standing to prosecute this action. Harper argues that because Harper is member of OCCA, OCCA also has standing.

However, the Court does not believe that the question is that simple.

The purpose of the requirement that the State, in this case through ODOT, shall contract with the *lowest competent and responsible* bidder is to "enable a public contracting authority to obtain the best work at the lowest possible price while guarding against favoritism and fraud." State ex rel. Association Bldrs. & Contrs., 106 Ohio App. 3d at 181 (citing Cedar Bay Constr., Inc. v. Fremont (1990), 50 Ohio St. 3d 19, 21). This is a requirement placed upon the State with regard to entities with which it contracts.

This issue was directly addressed in Treadon v. City of Oxford (Butler 2002), 149 Ohio App. 3d 713. The City of Oxford solicited bids for the construction of a parking garage. Two bids were submitted to Oxford, one by Hotel Development Services ("HDS") and one by Warm Bros. Construction Company ("Warm").

Robert J. Treadon & Associates ("Treadon"), an architectural firm, agreed to prepare the overall architectural design for Warm. The City of Oxford awarded the bid to HDS. Both Warm and Treadon filed a complaint alleging that Warm was the lowest-and-best bid.

In the City's motion for summary judgment, the trial court upheld the City's decision to award the contract to HDS as the lowest-and-best bidder and dismissed Treadon's complaint as a subcontractor for lack of standing. The single assignment of error on appeal was that the trial court erred to the prejudice of plaintiffs-appellants when it granted the defendant's motion for summary judgment. The trial court specifically found that Warm had standing to bring the action, so any discussion on appeal regarding standing relates only to Treadon.

The appellate court held, "In Ohio, in order to have standing to challenge the award of a contract on a public construction project, the party must have submitted a bid on the project." Treadon, 149 Ohio App. 3d at 715. The court rejected appellant's argument that Treadon was in fact a "joint bidder." More relevant to the case at bar, the court rejected appellant's argument that it had standing as a subcontractor. The court went on to state, "There is no genuine issue as to any material fact.

Warm Bros. submitted the bid and that bid was rejected because HAPC guideline standards were not incorporated into the design.

Since appellants did not submit a bid, they have no standing to file suit." Id. at 715.

The conclusion reached by the Treadon court is consistent with other cases in Ohio and makes good sense. The obligation to accept the lowest competent and responsible bid rests with the State. In contrast, contractors submitting bids to the State have no such obligation. Subject to some discriminatory limitations, private contractors are free to associate with whomever they choose. A contractor may not have a good relationship with a particular subcontractor and therefore may choose not to work with that subcontractor, even if it offers the lowest price. Therefore, whether a subcontractor has the lowest quote accepted by the prime contractor has no bearing on the State. The State, in this case ODOT, has no dealings with the subcontractor, which in this case is Harper.

If a disappointed subcontractor were allowed to file suit, it could very possibly draw the prime contractor into protracted and expensive litigation that the prime contractor has decided is not in its best interest. Furthermore, if all disappointed subcontractors were granted standing to file suit, it could result in multiple litigation that could cripple a governmental entity from entering into a contract.

Plaintiffs have suggested that Connors v. Ohio Dep't of Transp. (Franklin 1982), 8 Ohio App. 3d 44, stands for the

proposition that subcontractors do have standing to file suit as a disappointed bidder. In Connors, the ODOT project's specifications imposed an absolute requirement that two percent of the awarded value of such contracts be subcontracted to minority contractors. If the successful bidder did not meet that mandatory requirement, the contractor was subject to termination.

Both prime contractors and subcontractors filed suit before any contract was awarded to "challenge the bidding requirements."

The court found that both the contractors and the subcontractors had standing. However, the Connors decision has nothing to do with the award of a contract. Rather, it deals with the limited situation where the specifications of the contract are being challenged before a contract is awarded. In contrast, the case before this court does not concern such a situation, and so the Connors decision is not controlling.

In addition, Defendants argue that the Tiemann decision, also rendered by the Tenth District Court of Appeals, was issued seventeen years after the Connors decision and supports their position that Harper does not have standing. While it is true that Tiemann does cite Bicking, which contains language indicating that a contractor does not have standing if it does not submit a bid, this Court finds that the facts in Tiemann are distinguishable from both the facts of the present case and the Connors decision.

Based on the foregoing, this Court holds that Harper does not have standing to file this action. Because Harper lacks standing to bring this action, OCCA has no independent standing. Therefore, Defendants' motions to dismiss Harper and OCCA for lack of standing are GRANTED, and Plaintiffs' motion for a temporary restraining order is DENIED. Counsel for Defendants shall prepare an appropriate entry and submit the proposed entry to counsel for the adverse parties pursuant to Loc. R. 25.01. A copy of this decision shall accompany the proposed entry when presented to the Court for signature.



CHARLES A. SCHNEIDER, JUDGE

Copies to:

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COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

OHIO CONCRETE CONSTRUCTION
ASSOCIATION, ET AL.

Plaintiffs,

v.

OHIO DEPARTMENT OF
TRANSPORTATION, ET AL.

Defendants.

Case No. 08CVH09-13867

Judge Schneider

TERMINATION NO. 18
BY KT 10/14/08

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
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FINAL APPEALABLE ORDER

**JOURNAL ENTRY (1) DENYING PLAINTIFFS' MOTION FOR A TEMPORARY
RESTRAINING ORDER, FILED SEPTEMBER 29, 2008;**

AND

**(2) GRANTING DEFENDANT JOHN R. JURGENSEN COMPANY'S
MOTION TO DISMISS, FILED OCTOBER 2, 2008;**

AND

**(3) GRANTING DEFENDANT OHIO DEPARTMENT OF TRANSPORTATION'S
MOTION TO DISMISS, FILED OCTOBER 2, 2008**

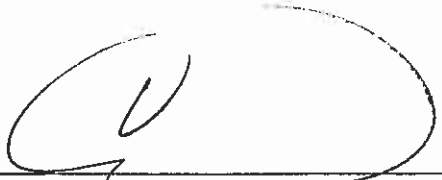
(Case Terminated)

This matter is before the Court to consider the (a) Motion of Plaintiffs The Harper Company and the Ohio Concrete Construction Association for a Temporary Restraining Order; (b) Motion of Defendant John R. Jurgensen Company's Motion to Dismiss; and (c) Defendant Ohio Department of Transportation's Motion to Dismiss and Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order. Upon consideration and being duly advised, and for those reasons set forth in this court's Order of October 6, 2008, it is ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiffs The Harper Company and the Ohio Concrete Construction Association's Motion for a Temporary Restraining Order is hereby DENIED;
2. Defendant John R. Jurgensen Company's Motion to Dismiss is GRANTED;
3. Defendant Ohio Department of Transportation's Motion to Dismiss is GRANTED; and
4. Plaintiffs' Complaint is dismissed as to all Defendants for lack of standing.


IT IS SO ORDERED.

Dated: 10/14/08




Honorable Charles A. Schneider

APPROVED:



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