IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

OHIO CONCRETE CONSTRUCTION ASSOCIATION, et al.,	:	**Case No. 08APE10 0905**
Plaintiffs-Appellants,	:	**ACCELERATED CALENDAR**
vs.	:	
OHIO DEPARTMENT OF TRANSPORTATION, et al.,	:	
Defendants-Appellees.	:	

BRIEF OF PLAINTIFFS-APPELLANTS

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APPELLANTS' ASSIGNMENT OF ERROR

The trial court erred in dismissing, under Rule 12(B) of the Ohio Rules of Civil Procedure, all of Plaintiffs'/Appellants' claims, including their claims for declaratory and injunctive relief, and their claims for violation of the Equal Protection Clause of Ohio's Constitution, on the sole basis that Plaintiffs/Appellants lacked standing to assert their claims. [R-29/A-1 (Decision).]

STATEMENT OF ISSUES PRESENTED

A. Does a subcontractor have standing to challenge ODOT's abuse of discretion in its selection among two alternative pavement options for a publicly-bid highway construction project, where the subcontractor at issue supplied the actual bid for the option that ODOT rejected?

B. Does a subcontractor that submits a price quotation to a general contractor for proposed work on a highway construction project have standing to challenge ODOT's abuse of discretion in undertaking actions and/or employing policies and procedures that effectively prevent the subcontractor from fairly competing for a portion of the construction dollar?

C. Does a subcontractor that is also an Ohio corporation and Ohio taxpayer have standing as a taxpayer to challenge ODOT's abuse of discretion as part of the public bidding process for a highway construction project, particularly where such subcontractor has unsuccessfully sought to obtain a portion of the work on the project, and indeed, where such subcontractor submitted the bid for pavement work that was ultimately rejected by ODOT?

D. Does an Ohio trade association that represents a subcontractor, which has standing under any of the grounds asserted above, also have standing to assert such claims on behalf of its members?

E. Does a concrete pavement contractor, who is ready and willing to compete for a portion of the work on ODOT projects, and who has, in fact, submitted a subcontract bid, have standing to assert a claim, under the Equal Protection Clause of Ohio's constitution, that specific ODOT policies and practices preclude, without any rational justification, concrete pavement contractors from participating on equal footing with asphalt pavement contractors as part of the bidding process?

F. Does an Ohio trade association whose members are ready and willing to compete for a portion of the work on projects with ODOT have standing to assert a claim, under the Equal Protection Clause of Ohio's constitution, that specific ODOT policies and practices preclude, without any rational justification, concrete pavement contractors from participating on equal footing with asphalt pavement contractors as part of ODOT's bidding process?

G. Does a concrete pavement contractor, ready and willing to compete for a portion of the work on ODOT projects, and who has, in fact, submitted a subcontract bid, have standing to assert a claim, under the Equal Protection Clause of Ohio's constitution, that specific ODOT policies and practices intentionally discriminate against concrete in favor of asphalt?

H. Does an Ohio trade association whose members are ready and willing to compete for a portion of the work on projects with ODOT have standing to assert a claim, under the Equal Protection Clause of Ohio's constitution, that specific ODOT policies and practices intentionally discriminate against concrete in favor of asphalt?

I. INTRODUCTION

At bottom, the trial court effectively concluded that the Ohio Department of Transportation ("ODOT") may violate the law with impunity, so long as its discriminatory actions harm only *subcontractors*, who do not enter into direct contractual relationships with ODOT. Fortunately for Ohio's taxpayers, who ultimately pay the price for ODOT's indiscretions, that is not the law under this Court's decision in State ex rel. Connors v. Ohio Department of Transportation, 8 Ohio App. 3d 44 (10th Dist. 1982); it is not the law before the Ohio Supreme Court; and it is not the law before the U.S. Supreme Court. Plaintiffs, as the parties directly harmed by ODOT's wrongful actions as part of the bidding process at issue, and as Ohio taxpayers, clearly have standing to assert their claims.

In this public bidding case, ODOT not only made a decision as to who would serve as the general contractor for a 3.65-mile, multi-lane highway construction project in Wilmington, Ohio (the "Wilmington Bypass project"), but, as a result of its decision to receive alternative bids for the pavement portion of the project, *ODOT ultimately made the decision as to who would serve as the pavement subcontractor*. In doing so, ODOT failed to comply with its legislative mandate and internal policies, which require it to base its pavement selections on long-term, or "life cycle" costs of the various pavement alternatives, and thus, it failed to select the "lowest competent and responsible" pavement alternative for the Wilmington Bypass project. Such actions are part and parcel of a systematic, institutional bias at ODOT that favors the use of asphalt over concrete. Because of ODOT's actions, Plaintiff The Harper Co. ("Harper"), a concrete pavement subcontractor and the low concrete bidder, was prevented from fairly competing for a portion of ODOT's construction dollars.

Under Connors, Harper, and Plaintiff The Ohio Concrete Construction Association ("OCCA") as Harper's representative, as the parties directly harmed by ODOT's actions, and as Ohio taxpayers, have standing to sue in this case. Under settled U.S. Supreme Court precedent, Plaintiffs also have standing to assert their Equal Protection claims as members of the class of pavement contractors who are victimized by ODOT's discriminatory actions, and because they have demonstrated their ability and willingness to compete for a portion of the work on ODOT projects. The trial court's decision based solely on standing was contrary to this settled law, and it must be reversed.

II. STATEMENT OF THE CASE

On September 29, 2008, Plaintiffs filed this action seeking declaratory and injunctive relief with respect to ODOT's decision to pursue an asphalt pavement alternative over a concrete pavement alternative for the Wilmington Bypass project. [R-3/A-12 Complaint ("Compl.").] In addition, Plaintiffs asserted claims under the Equal Protection Clause of Ohio's constitution and sought additional injunctive and declaratory relief to enjoin ODOT from impermissibly favoring the selection of asphalt over concrete. Also joined as Defendants were The E.S. Wagner Co. ("Wagner"), the winning general contractor for the Wilmington Bypass project, and The John R. Jurgensen Company ("Jurgensen"), the subcontractor who supplied the winning asphalt bid.

On October 2, 2008, the trial court conducted an evidentiary hearing limited to Plantiffs' Motion for Temporary Restraining Order. On that same day, Defendants ODOT and Jurgensen each filed and served their respective Motions to Dismiss for lack of standing. [R-21, 24.] On October 6, 2008—before Plaintiffs had an opportunity to file memoranda in opposition—the trial court issued a decision granting the Motions to Dismiss as to all claims, and thus denying

injunctive relief, on the sole basis that Plaintiffs lacked standing.[1] [R-29/A-1.] The trial court's decision was journalized on October 14, 2008. Plaintiffs filed their notice of appeal that same day, as well as an opposed motion for injunction pending appeal, which this Court denied.[2]

III. STATEMENT OF FACTS

A. ODOT's Legislative Mandate And Internal Policy Regarding Calculation Of Price For Pavement Alternatives.

Historically, beginning with the creation of the federal interstate highway system, major highways in the state of Ohio and, indeed, across the country had been constructed with concrete paving materials. [R-3, Compl. ¶ 7.[3]] In the 1980s and 1990s, at a time when substantial reconstruction of interstates was undertaken, Ohio switched primarily to asphalt even though asphalt was inferior to concrete in terms of durability, maintenance and longevity. [Id. at ¶ 8.] ODOT switched to mostly asphalt pavements during this period because it was supposedly less expensive in up-front cost, without taking into consideration the additional cost of routine maintenance and periodic resurfacing. [Id.] In fact, concrete has proven to be significantly more durable, less intrusive to motorists from a maintenance perspective, and more cost-effective than asphalt over the long term. [Id. at ¶ 9.]

In response to concerns about the cost-effectiveness of ODOT's pavement selection process, the Ohio General Assembly in 2003 enacted legislation designed with the goal of

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[1] In its October 6, 2008 Decision, the trial court stated that Plaintiffs filed a "Memorandum Contra" to the Motions to Dismiss. They did not. Defendants served their Motions on October 2, 2008—which was the same day of a 9 a.m. evidentiary hearing. Plaintiffs were not afforded the normal 14-day response period set forth in Franklin County Local Rule 21 for responding. Instead, they presented a Bench Memorandum on standing. [R-25.]

[2] Plaintiffs specifically sought injunctive relief enjoining Defendants from, *inter alia*, implementing, and/or *enforcing* the asphalt portion of ODOT's Wilmington Bypass contract between ODOT and Defendant Wagner. Thus, although time remains of the essence, the request for injunctive relief is not moot under Griffin Industries, Inc. v. Ohio Department of Administrative Services, 2001 WL 868073, *4 (10th Dist.Aug. 2, 2001).

[3] Because the evidentiary hearing was expressly limited to Plaintiffs' motion for temporary restraining order, the facts pertinent to the trial court's decision granting the Defendants' *Civil Rule 12(b) motions* are to be gleaned from the face of the parties' pleadings.

changing ODOT's pavement selection procedures to create an objective process by which ODOT could determine the true price of pavement types, by calculating the overall life-cycle cost of all feasible pavement alternatives, and then selecting the alternative that provides taxpayers with the best overall value for their money. [Id. at ¶ 11.] This life cycle cost analysis would provide ODOT with a means of determining the "lowest competent and responsible" pavement alternative, consistent with its statutory mandate. See Ohio Rev. Code § 5525.01. Specifically, in 2003 the legislature passed Amended Sub. House Bill 87 ("H.B. 87"), which included a provision requiring ODOT to contract with a neutral third-party consultant to conduct an analysis of and make recommendations for improving ODOT's pavement selection process and requiring ODOT to make changes in accordance therewith. [Id. at ¶ 12.]

Pursuant to H.B. 87, ODOT contracted with ERES Consultants of Champaign, Illinois, which issued its final report on December 12, 2003. [Compl. ¶ 13; Compl. Exh. A (Report).] ERES offered a number of specific recommendations for improving both the objectivity and efficiency of Ohio's pavement selection process, including a recommendation that ODOT adopt a "traditional" Life Cycle Cost Analysis ("LCCA") approach for determining the true cost of feasible pavement alternatives. [Id. at ¶¶ 14-15.]

The ERES Report makes clear that ODOT is to consider life cycle cost adjustment factors in evaluating pavement alternatives:

> ODOT should consult with these highway agencies to assist in establishing the most appropriate alternative bid process for Ohio. *The typical approach followed by each of the agencies is to develop a life cycle adjustment factor for each of the pavement alternatives to be bid. The life cycle adjustment factor is a fixed-dollar amount added to each bid and is based on the agencies' estimate of the net present value of future rehabilitation work to be performed over the analysis period for each alternative*. ...
>
> [Compl. Exh. A, Recommendation No. 3, pg. 36.]

Following the issuance of the ERES report, the Ohio legislature in 2005 codified its mandate to ODOT with respect to pavement selection, and specifically directed ODOT to "identify and promote longer pavement life spans to lessen user delays and the disruption to traffic on the state highway system." [Compl. ¶ 18; Ohio Rev. Code § 5501.11(B).] In September 2006, ODOT adopted a new policy purportedly implementing, in significant part, the recommendations of ERES with respect to LCCA. [Compl. ¶ 19; Compl. Exh. B (Policy 20-006).] This policy requires ODOT to make its pavement type selections on the basis of a 35-year LCCA. [Id.] On the basis of this price, ODOT is to select the lowest competent and responsible pavement option for its highway construction projects.

B. Even ODOT's Actual LCCA Approach Is Not Objective; Rather, It Improperly Tilts The Playing Field In Favor Of Asphalt.

Notwithstanding its "objective" policy, ODOT, even after implementing Policy No. 20-006(P), continued to take steps to ensure that asphalt remained "king" in Ohio. [Compl. ¶ 24.] For instance, ODOT, as part of its standard Construction and Materials Specifications, provides asphalt contractors/bidders with a unilateral price adjustment that effectively indemnifies them (in light of historical trends in asphalt pricing), for future asphalt price increases more than five percent above the price at the time of bidding. [Id. at ¶¶ 24-25; Compl. Exh. C (excerpt of Construction and Materials Specifications).] No similar price adjustment applies to concrete or other pavement materials.

ODOT magnifies this structural and economically wasteful advantage provided to asphalt contractors by failing to account for the asphalt price adjustment as part of its LCCA. [Id. at ¶¶ 34-36.] In other words, ODOT does not account for the fact that *Ohio's taxpayers will ultimately have to pay* for the likelihood of future asphalt price increases.

C. ODOT Failed To Account For The "True" Price In Making Its Pavement Selection For The Wilmington Bypass Project And, As A Result, It Failed To Select The Lowest Competent And Responsible Pavement Bid.

1. ODOT's Original LCCA For The Wilmington Bypass Project, And The Decision To Accept Alternative Pavement Bids.

In an August 20, 2008 proposal and five subsequent addenda thereto, ODOT solicited bids from general contractors for the construction of the Wilmington Bypass project. [Compl. ¶ 41.] As part of this bidding process, ODOT agreed to accept alternative bids for the use of asphalt versus concrete pavement. [Id. at ¶ 42; Compl. Exhs. E & F.]

Before bidding began, however, ODOT in 2006 conducted a LCCA comparing the estimated cost of the asphalt and concrete design alternatives for the Wilmington Bypass project. [Compl. ¶ 47; Compl. Exh. G (LCCA).] Based on a grossly inaccurate assumption as to the price of asphalt (compared with the price at the time the project was actually bid), ODOT's 2006 LCCA determined that the life cycle cost of asphalt was approximately 16 percent less than that of concrete. [Compl. ¶ 48.] This total difference was based entirely on the assumed difference in up-front costs, even though the same LCCA revealed that the future maintenance costs for concrete were nearly *$663,000 less than for asphalt*. [See, e.g., id. at ¶ 48.] In other words, ODOT's 2006 LCCA determined that the up-front cost savings associated with asphalt were significantly greater than the $663,000 in long-term savings associated with concrete.

This estimated difference in up-front costs, however, can be traced almost entirely to ODOT's erroneous assumption with respect to the price of asphalt. In its 2006 LCCA, ODOT assumed a unit price of asphalt of $70.24. [Id. at ¶ 47.] This estimated unit price accounted for approximately 79 percent of the total up-front cost of the asphalt alternative. [Id.] When the Wilmington Bypass project was finally bid in September 2008, the actual unit price of asphalt, as reflected in the low asphalt alternative bid, was $105.03 per unit—nearly 50 percent higher than

ODOT's 2006 assumption. [Id. at ¶ 51.] In contrast, ODOT's 2006 LCCA estimated a unit price for concrete of $32.61. [Exhibit G to Complaint (Original LCCA).] The 2008 unit price reflected in the actual bid was $32.44. [Id. at ¶ 51.]

Notwithstanding the results of its 2006 LCCA calculations, ODOT elected to require alternative bids from each general contractor for asphalt and concrete pavement for the Wilmington Bypass project. [Compl. ¶¶ 53-54.] As part of this process, ODOT would then select the pavement type for the project on the basis of these alternative bids. [See, e.g., id.] Wagner's concrete pavement bid was based on a subcontract bid submitted to it by Harper, an Ohio corporation and Ohio taxpayer. [Id. ¶¶ 1-2. 45.]

2. ODOT Ignores Its Precedent And Selects The Asphalt Alternative, Even Though Asphalt's True Cost Is $600,000 Higher Than Concrete.

After receiving the bids for the Wilmington Bypass project, ODOT on September 19, 2008, announced its decision to award the primary to contract to Wagner. At the same time, ODOT announced its decision to select the asphalt pavement alternative. [Compl. at ¶ 43.] In making this selection, ODOT rejected the concrete alternative, *which was based on the bid submitted to Wagner by Harper*. ODOT's pavement selection was based solely on the difference in price. [See Compl. ¶ 61.]

As it turned out, in contrast to ODOT's 2006 LCCA, the actual asphalt bid submitted by Wagner reflected an up-front cost for asphalt alternative that was only $72,000 less than concrete—a difference attributable *completely* to more burdensome (and expensive) pavement marking specifications ODOT imposed on concrete bidders.[4] [Compl. ¶¶ 57-59.] But even absent these unequal specifications, the $72,000 difference in up-front costs pales in comparison

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

to *the $663,000 in long-term savings associated with the concrete alternative*, as reflected in ODOT's own LCCA. [Id. at ¶ 59; Compl. Exh. G.] Yet ODOT chose to make its pavement selection solely on the basis of up-front cost.

ODOT's failure to apply an LCCA adjustment in comparing the price between asphalt and concrete alternatives for the Wilmington Bypass project was inconsistent with the ERES Report and it was inconsistent with ODOT's internal policies and procedures. [Compl. ¶¶ 14-18.] Instead, in this lone instance, ODOT based its pavement selection decision solely on up-front cost, *without accounting for an LCCA adjustment.* In short, ODOT simply ignored its own analysis, its own policies and procedures, and its legislative mandate, and selected the asphalt alternative for the Wilmington Bypass project solely on the basis of "false" up-front cost. In doing so, it knowingly selected the pavement alternative with a higher price by nearly $600,000.

IV. LAW AND ANALYSIS

A. Plaintiffs Have Standing, Both As Parties Directly Harmed By ODOT's Actions And As Taxpayers, To Seek Declaratory And Injunctive Relief.

> "1. *An action against the Ohio Department of Transportation and its director seeking injunctive relief from performance of a construction contract containing an allegedly invalid bid condition* dealing with minority business enterprises is not barred by the doctrine of sovereign immunity.
>
> 2. The following have *standing* to bring *the above action*:
>
> (a) *a contractors association* whose members either are qualified to bid with the department and who did bid on such construction projects, or *whose members sought to obtain work as subcontractors on such projects*;
>
> (b) contractors qualified to bid on department projects who purchased plans and who did bid as prime contractors;
>
> (c) *contractors qualified to bid on department projects who purchased plans and sought to obtain contracts as subcontractors*;
>
> (d) *taxpayers of the state of Ohio who are specially affected by the bid conditions*."

[State ex rel. Connors v. Ohio Department of Transportation, 8 Ohio App. 3d 44, at Syllabus (10th Dist. 1982) (emphasis added).]

This Court's syllabus law, quoted above, is conclusive of Plaintiffs' standing to assert their claims for declaratory and injunctive relief.[5] Connors makes clear that where a subcontractor is prevented from competing for a portion of the construction dollar by ODOT's wrongful actions, it has standing *both* as a party directly injured by ODOT's actions, *and* separately as an Ohio taxpayer who is presumed to have a special interest in the funds at issue. In this case, ODOT not only made a decision as to who would serve as the general contractor for the Wilmington Bypass project, *but it also made the decision as to who would serve as the subcontractor for the pavement portion of the project*. As a result of ODOT's actions, Harper was prevented from fairly competing for a portion of the construction dollar and it was denied a subcontract for the pavement portion of the project. Harper, and the OCCA as Harper's representative, have standing to assert their claims.

1. Plaintiffs Have Standing As Parties Directly Harmed By ODOT's Abuse Of Discretion.

First, as this Court recognized in Connors, a subcontractor who submits price quotations to a bidding general contractor, and a trade organization that represents the subcontractor, have

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[5] When, as here, the issue of *standing* is resolved at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice [to establish standing], *for on a motion to dismiss, the court will presume that general allegations embrace those specific facts that are necessary to support a claim*." Bourke v. Carnahan, 163 Ohio App. 3d 818, 824 (10th Dist. 2005) (emphasis added). On the face of the parties' pleadings, it is clear that Plaintiffs, for all of the reasons set forth herein, have standing to challenge wrongful actions.

The additional information gleaned at the TRO hearing merely reinforces Plaintiffs' standing in this case. For instance, during the hearing, ODOT Deputy Director Bill Lindenbaum confirmed conversations with OCCA in which he indicated that ODOT would consider Life Cycle Cost of the alternatives as part of its pavement selection process for the Wilmington Bypass project. In addition, the evidence presented at hearing revealed that, in five prior alternative bidding contexts, ODOT had applied a LCCA adjustment factor in considering the price differences between asphalt and concrete, but it did not do so for the Wilmington Bypass project. And, finally, the evidence revealed that ODOT actually prepared internal LCCA-type documents, based on the actual bids received for the Wilmington Bypass project, that showed, under eight different "best" and "worst" case scenarios, that concrete had a lower price than asphalt. But again, it ignored them.

standing, even absent a direct contractual relationship with ODOT, to assert claims against ODOT for *declaratory and injunctive relief* to enjoin "performance of a construction contract" on the grounds that ODOT's improper conduct prevented them from fairly competing for a portion of the construction funds. In Connors, the plaintiff subcontractors specifically sought to enjoin a construction project, prior to opening of the bids, because ODOT improperly employed minority set-aside specifications that effectively prevented the subcontractors from competing for their share "of the construction dollar." Id. at 46-47. Recognizing that the subcontractors had *submitted price quotations to the general contractors*, the Court held that the subcontractors had standing because they were directly harmed by ODOT's actions that thwarted their ability to compete for project funds. Id.[6] The Court further held that a trade association that represented the plaintiff subcontractors also had standing because one or more of its members was "suffering immediate or threatened injury as a result of the challenged action." Id. at 47.[7]

The case for Plaintiffs' standing in this case is even more compelling than in Connors. Here, ODOT established an alternative bidding process by which *it selected* the pavement type for the Wilmington Bypass project based on the bids submitted to Wagner by pavement subcontractors. Harper's bid was the pavement alternative that ODOT illegally rejected. The end result is that Harper was precluded from fairly competing for a portion of the construction

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[6] In general, a plaintiff has standing where: (1) it has "suffered an injury in fact ..."; (2) the conduct complained of is "causally connected to the injury"; and (3) it is "likely, as opposed to merely speculative, that a favorable decision will redress the injury." Bourke v. Carnahan, 163 Ohio App. 3d 818, 824 (10th Dist. 2005).

[7] Accord: K.S.B. Technical Sales Corp. v. North Jersey Water Supply Commission, 150 N.J. Super. 533, 541-42 (N.J. Super. 1977) (subcontractor had standing to challenge "buy American" specification in public contract because it alleged that "it was deprived of the opportunity to offer its pumps to prospective [general contract] bidders"; the fact that "*K.S.B. and the [public entity] will not have a direct contractual relationship, for the purpose of standing, is of no moment*") (emphasis added).

dollar for the Wilmington Bypass project because of ODOT's misconduct. Under Connors, both Harper and OCCA have standing to seek declaratory and injunctive relief in this case.[8]

2. Plaintiffs Also Have Standing As Ohio Taxpayers Who Are Presumed To Have A "Special Interest" In The Funds At Issue.

Second, as Connors again makes clear, a subcontractor that is also an Ohio taxpayer has an independent basis of standing to challenge improprieties in a public bidding process because it is presumed to have a "special interest" in the funds at issue. As a general rule, an Ohio taxpayer has standing to institute an action "to enjoin the expenditure of public funds ... [where] he has some special interest therein by reason of which his own property rights are placed in jeopardy." State ex rel. Masterson v. Ohio Racing Commission, 162 Ohio St. 366, at Syllabus ¶ 1 (1954).

In Connors, this Court held that a "special interest" may be *presumed* "in some situations ... [as] *in the award of public contracts in violation of statutory requirements*." Connors, 8 Ohio App. 3d at 47 (quoting American Jurisprudence) (emphasis added). Accord: 74 Am. Jur. 2d Taxpayers' Actions § 10 ("In some situations, damage or injury to a taxpayer may be *presumed*, as in the award of public contracts in violation of statutory requirements that *such award must be made to the lowest bidder* ....") (emphasis added). In view of this presumption, the Connors Court concluded that *all* of the plaintiffs, including the subcontractors and trade association, had

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[8] The trial court based its standing decision almost entirely on Treadon v. City of Oxford, 149 Ohio App. 3d 713 (12th Dist. 2007). In that case, the court held that an architect, who had a side agreement with a general contractor to provide architectural services if the general was the successful bidder, did not have standing to challenge the public entity's decision to award the contract to another bidder. In that case, unlike here, it was the *general contractor* who suffered direct harm as a result of the public entity's decision to award the contract to another bidder. Treadon simply has no application to circumstances where, as here, the public entity decides to accept alternative bids and then makes an illegal selection among the proposed alternatives that directly harms the subcontractors bidding for the various alternatives, but not the general contractors who submitted the primary bids.

Equally misplaced is the trial court's attempt to distinguish Connors from the present case on the ground that Connors dealt only with the "limited situation where the specifications of the contract are being challenged before a contract is awarded." [See October 6, 2008 Decision, at 7.] Such a distinction, based solely on the *timing* of the claims, is not warranted. In Connors, the subcontractors' standing was premised not on the timing of their complaint, but, like here, upon *ODOT's actions/specifications that improperly prevented them from competing for a share of the construction dollar*.

independent standing as taxpayers because they had a "special interest" in the public funds (i.e., gasoline tax dollars) used to fund the ODOT project at issue. Connors, 8 Ohio App. 3d at 47.

Harper, an Ohio corporation, is an Ohio taxpayer. [Compl. ¶ 1.] In this case, Harper seeks declaratory and injunctive relief to ensure that ODOT does not execute and/or enforce a public contract "in violation of statutory requirements." Under Connors, Harper is *presumed* to have a special interest in the funds at issue. But even absent such a presumption, Harper (and OCCA as its representative) clearly has a special interest in the funds at issue, inasmuch as Harper was the subcontractor *specifically harmed* by ODOT's wrongful actions. In either event, Appellants have taxpayer standing in this case.

B. Plaintiffs Have Standing To Assert Their Equal Protection Claims.

> "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. *The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit."*
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> [Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida, 508 U.S. 656, 666 (1993) (emphasis added).]

In dismissing all of Plaintiffs' claims, the trial court specifically addressed only Plaintiffs' lack of standing to seek injunctive and/or declaratory relief. It apparently did not even consider Plaintiffs' specific allegations in Count Three of their Complaint against ODOT for violation of the Equal Protection Clause Ohio's constitution (Article I, Section 2). Had it done so, it clearly would have concluded that Plaintiffs have standing to assert such claims.

The Supreme Court made clear in Northeastern that, in a public bidding context, the "actual injury" element is established where the party challenging the government entity's

actions and/or policies demonstrates that "it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." Northeastern, 508 U.S. at 666. In other words, to have standing to challenge a public entity's discriminatory policy or practice employed as part of a public bidding process, a party need not demonstrate that it actually lost a contract as a result of such process. Id. Rather, a *subcontractor* need only demonstrate that it was ready and willing to compete for a portion of the work on such projects. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995) (to have standing to assert Equal Protection claims with respect to minority subcontractor compensation clause in publicly bid contract, subcontractor "need not allege that he would have obtained the benefit but for the barrier in order to allege standing"; instead, "the injury in cases of this kind is that '*a discriminatory classification prevent[s] the plaintiff from competing on an equal footing*'") (quoting Northeastern) (emphasis added).

The Equal Protection clauses of the federal and Ohio constitutions are construed the same and, thus, the rule of standing announced in Northeastern also provides the standard of analysis under Ohio law. See Fabrey v. McDonald Village Police Dept., 70 Ohio St. 3d 351, 353 (1994) ("The standard for determining violations of equal protection is essentially the same under state and federal law."); Cincinnati City School District v. State Board of Education, 113 Ohio App. 3d 305, 680 N.E.2d 1061, 166 (10th Dist. 1996) ("[I]n deciding issues of standing in the courts of Ohio, *the Ohio Supreme Court relies on federal court decisions*.") (emphasis added).

Here, Plaintiffs' allegations plainly reveal their standing to assert Equal Protection claims. First, Plaintiffs allege their status as members of the class of concrete pavement contractors who are discriminated against: (1) as a result of ODOT's disparate treatment of asphalt and concrete, which are similarly situated competitors and substitute pavement products,

with no rational justification therefor; and (2) as a result of ODOT's systematic and intentional discrimination against concrete in favor of asphalt, as reflected in the unilateral asphalt price adjustment, ODOT's failure to account for the asphalt price adjustment as part of the LCCA process, and in ODOT's specific actions favoring the asphalt pavement alternative for the Wilmington Bypass project. [Compl. ¶¶ 77-82.][9]

Second, there can be no question that Plaintiff Harper, and Plaintiff OCCA as Harper's representative, have demonstrated their ability and willingness to compete for work on ODOT highway construction projects. *Indeed, they did so on the Wilmington Bypass project*. As a result, under U.S. and Ohio Supreme Court precedent, Appellants, who are members of the class allegedly discriminated against, have suffered an "injury in fact" because ODOT's discriminatory actions and policies favoring asphalt have prevented them from competing for a portion of the construction dollar on an "equal basis" with asphalt. In dismissing Plaintiffs' Equal Protection claims on the basis of standing, without any discussion, the trial court erred.

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[9] Ohio's Equal Protection clause is violated where a state entity grants one business certain advantages that it does not provide to similarly situated competitors, in the absence of a rational justification therefor. See Boothe Financial Corp. v. Lindley, 6 Ohio St. 3d 247, 250 (1983) ("[W]e hold that a taxpayer who leases equipment is denied equal protection when a competitor, who manufactures and leases essentially identical equipment, is allowed to grossly undervalue its property by reporting the property's value as manufacturing cost less depreciation, and the former is not allowed to value his property in the same manner."). A violation also may be found where a facially neutral law or policy is applied unequally as a result of intentional or purposeful discrimination. See Cahill v. Village of Lewisburg, 79 Ohio App.3d 109, 116 (12th Dist. 1992).

V. CONCLUSION

The trial court's decision should be reversed, with the case remanded for further proceedings, including a decision with respect to the merits of Plaintiffs' claims for temporary and/or preliminary injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served, via email transmission and regular United States mail, postage pre-paid, this 21st day of November, 2008, upon the following:

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853-001:189078

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

OHIO CONCRETE CONSTRUCTION ASSOCIATION, et al.,	:	**Case No. 08APE10 0905**
Plaintiffs-Appellants,	:	**ACCELERATED CALENDAR**
vs.	:	
OHIO DEPARTMENT OF TRANSPORTATION, et al.,	:	
Defendants-Appellees.	:	

APPENDIX OF EXHIBITS IN SUPPORT OF BRIEF OF PLAINTIFFS-APPELLANTS

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