

**IN THE SUPREME COURT OF OHIO**

State ex rel. Associated Builders & Contractors of Central Ohio, et al.,  
Appellants,  
v.  
Franklin County Board of Commissioners,  
et al.,  
Appellees.

: Case No. 08-1478  
: On Appeal from the Franklin  
County Court of Appeals,  
Tenth Appellate District  
: Court of Appeals  
Case No. 08AP-301  
:

---

**MEMORANDUM OPPOSING JURISDICTION OF APPELLEES  
FRANKLIN COUNTY BOARD OF COMMISSIONERS**

---

Ron O'Brien (0017245)  
Prosecuting Attorney  
Franklin County, Ohio

Nick A. Soulas, Jr. (0062166)  
(Counsel of Record)  
First Assistant Prosecuting Attorney

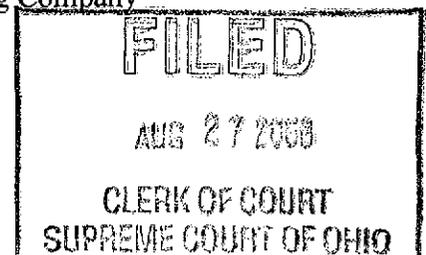
Anthony E. Palmer, Jr. (0082108)  
Assistant Prosecuting Attorney  
373 South High Street, 13<sup>th</sup> Floor  
Columbus, Ohio 43215  
Phone (614) 462-3520  
Fax (614) 462-6012  
Email [nasoulas@franklincountyohio.gov](mailto:nasoulas@franklincountyohio.gov)

Counsel for Appellees  
Franklin County Board of Commissioners

Michael F. Copley (0033796)  
(Counsel of Record)

Kenly S. Maddux (0082786)  
The Copley Law Firm, LLC  
1015 Cole Road  
Galloway, Ohio 43119  
Phone (614) 853-3790  
Fax (614) 467-2000  
Email [mcopley@copleylawfirmllc.com](mailto:mcopley@copleylawfirmllc.com)

Counsel for Appellants  
Associated Builders & Contractors of Central  
Ohio, and The Painting Company



**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES** .....ii

**EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT IMPORTANCE** ..... 1

**STATEMENT OF THE FACTS** .....4

**ARGUMENT** .....5

**RESPONSE TO PROPOSITIONS OF LAW NOS. 1 AND 2** .....5

In a competitive bidding dispute, a bidder that is lawfully rejected by a public agency for not being the lowest and best bid does not acquire a constitutionally protected right requiring due process. The absence of an enforceable right precludes judicial review.

**RESPONSE TO PROPOSITION OF LAW NO. 3** ..... 8

R.C. Chapter 4115 does not prohibit public authorities from considering a contractor’s history of compliance with prevailing wage laws when determining which bid is lowest and best for a public construction project.

**RESPONSE TO PROPOSITION OF LAW NO. 4** .....9

A settlement of prevailing wage violations between a contractor and the State of Ohio does not render unlawful a public authority’s reliance on information provided by the Ohio Department of Commerce detailing the underlying prevailing wage violations by the contractor.

**RESPONSE TO PROPOSITION OF LAW NO. 5** ..... 11

A public authority’s bid selection criteria are not void for vagueness merely for the lack of an express definition of a word within the criteria, and the public authority’s interpretation of the criteria cannot constitute an abuse of discretion.

**CONCLUSION** ..... 12

**CERTIFICATE OF SERVICE** ..... 14

## TABLE OF AUTHORITIES

### Cases

<i>Bickford v. Adm'r., Ohio Bureau of Employment Serv.</i> (Ct. App. 5 Dist. July 30, 1991), Muskingum Co. No. 90-41, 1991 Ohio App. LEXIS 3636 .....	9
<i>Cedar Bay Const., Inc. v. City of Fremont</i> (1990), 50 Ohio St. 3d 19, 21, 552 N.E.2d 202 .....	1
<i>City of Norwood v. Horney</i> (2006), 110 Ohio St. 3d 353 .....	11
<i>Cleveland Constr., Inc. v. Cincinnati</i> (May 21, 2008), 118 Ohio St. 3d 283, 288, 2008-Ohio-2337 .....	6
<i>Cleveland Constr. v. Ohio Dep't of Admin. Servs., GSA</i> (1997), 121 Ohio App. 3d 372 .....	6
<i>Dayton ex rel. Scandrick v. McGee</i> (1981), 67 Ohio St. 2d 356 .....	1, 3
<i>Goldfuss v. Davidson</i> (1997), 79 Ohio St. 3d 116, 122, 679 N.E.2d 1099 .....	7
<i>Klein v. Leis</i> (2003), 99 Ohio St. 3d 537, 541 .....	11
<i>Miami Valley Contrs., Inc., v. Oak Hill</i> (Ohio App. 4 Dist., 1996), 108 Ohio App. 3d 745, 671 N.E.2d 646 .....	6
<i>State v. Williams</i> (2000), 88 Ohio St. 3d 513, 533 .....	11
<i>State ex rel. Assoc. Builders &amp; Contractors of Central Ohio v. Franklin County Bd. of Comm'rs.</i> (Franklin Co. Comm. Pl. March 31, 2008), 2008-CVH-03-3328 .....	5
<i>State ex rel. Assoc. Builders &amp; Contrs. Of Cent. Ohio v. Franklin Cty. Bd. of Commrs.</i> (Ohio App. 10 Dist., June 13, 2008), 2008-Ohio-2870 .....	5
<i>State ex rel. Navratil v. Medina County Comm'rs.</i> (Ct. App. 9 Dist. Oct. 11, 1995), Medina Co. No. 2424-M, 1995 Ohio App. LEXIS 4541, 2 Wage & Hour Cas. 2d (BNA) 1643 .....	9, 10
<i>State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals</i> (1992), 63 Ohio St. 3d 354, 358 .....	11

**Constitutions**

Ohio Const. Art. XVIII, § 3.....8

**Statutes**

Ohio Rev. Code § 9.312 .....8

Ohio Rev. Code § 307.90 .....1

Ohio Rev. Code Chapter 4115 .....8

**EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT  
IMPORTANCE**

Judicial oversight of a county board's lawful rejection of a bid for a public construction contract does not amount to public or great importance. This case, therefore, does not merit the invocation of this Court's jurisdiction.

While Ohio competitive bidding laws require a public agency to award a public construction contract to the lowest and best bidder, *see* R.C. 307.90, the determination of "best" is committed to the discretion of the public agency. *Cedar Bay Const., Inc. v. City of Fremont* (1990), 50 Ohio St. 3d 19, 21, 552 N.E.2d 202. Because this discretion is committed to the public agency, this Court has held that "courts in this state should be reluctant to substitute their judgment for that of [public] officials in determining which party is the 'lowest and best bidder.'" *Id.* Further, "courts cannot interfere in the exercise of this discretion unless it clearly appears that the [public] authorities in whom the such discretion has been vested are abusing the discretion so vested in them." *Id.*

The seminal case illustrating an abuse of discretion by a public agency in the competitive bidding process – and the case relied upon for relief by Appellants – is *Dayton ex rel. Scandrick v. McGee* (1981) 67 Ohio St. 2d 356, 423 N.E.2d 1095. The *Scandrick* Court held that a public agency's disqualification of the lowest bidder on the basis of unannounced bid selection criteria is an abuse of discretion. *Id.* The public officials in *Scandrick* had rejected a bidder on the basis of a residency requirement that was imposed after the bids were open, giving preference to the local bidder. *Id.* Because the residency requirement was not disclosed until after the bids were open, the Court held that the public officials had used an unannounced bid selection criterion and had, therefore, abused their discretion. *Id.* at 359.

The instant case has no indicia of the abuse of discretion found in *Scandrick*. In contrast, the Franklin County Board of Commissioners' rejection of The Painting Company was not based upon an unannounced bid selection criterion. Instead, the bid was rejected on the basis of its bid selection criteria, specifically section 8.2.4.15, that was published in its Invitation to Bidders for the Huntington Park Project. This criterion, established in 2002, excludes contractors that have been "debarred from public contracts or found by the state (after all appeals) to have violated prevailing wage laws more than three times in a two-year period in the last ten years."

The establishment of section 8.2.4.15, among other criteria, was a valid exercise of the Board of Commissioners' discretion in determining which contractors were "lowest and best." As enacted, the criterion ensures standards for selecting quality contractors – specifically, those that comply with Ohio's prevailing wage laws – for public projects. Pertinent to this case, section 8.2.4.15 has had universal application and equal enforcement on the Huntington Park project.

The Painting Company failed to satisfy this criteria. In order to evaluate The Painting Company's compliance with section 8.2.4.15, the Franklin County Board of Commissioners relied upon information provided by the Ohio Department of Commerce. That information provided a basis for determining that The Painting Company had been found by the state to have violated Ohio prevailing wage laws more than three times in a two-year period in the last ten years; more simply, The Painting Company had not satisfied section 8.2.4.15.

While Appellants cite as error the reliance by the Franklin County Board of Commissioners on the information provided to it by the Ohio Department of Commerce,

the nature and extent of the information provided is not relevant to the determination of whether the Franklin County Board of Commissioners abused its discretion in rejecting The Painting Company's bid. Moreover, the characterization of The Painting Company's prevailing wage violations by the Ohio Department of Commerce and the effect of The Painting Company's rejection are immaterial to the narrow inquiry that was presented in this case. Thus, Appellants' exceptions to the Ohio Department of Commerce's administration and enforcement of Ohio's prevailing wage laws are not relevant in this case.

Nevertheless, The Painting Company's bid was rejected on the basis of failing to satisfy the established bid selection criterion, section 8.2.4.15 – not on the basis of unannounced bid selection criteria. As such, this case does not illustrate the clear abuse of discretion found in *Scandrick*.

As *Scandrick* illustrates, there are occasions upon which judicial intervention is necessary in order to preserve the competitive bidding process. But, where, as here, a rejected bidder is disappointed by the county board of commissioners' lawful interpretation and application of its bid selection criteria, judicial intervention undermines the ability of the board to exercise the discretion committed to it by the General Assembly. This case lacks the patent abuse of discretion found in *Scandrick*, thus it lacks the public or great importance requisite for this Court's adjudication. Accordingly, this Court should not exercise its jurisdiction and expend its resources in order to engage in the oversight of a county's administration of a construction project.

## STATEMENT OF FACTS

In 2002, the Franklin County Board of Commissioners (“the Board”) adopted quality contracting standards in order to provide for better contractors. These quality contracting standards were incorporated into the bid selection criteria for determining which bids would be lowest and best for contracts that must be awarded by competitive bidding. These standards included a selection criterion, section 8.2.4.15, on prevailing wage compliance. The language of this prevailing wage criteria has been identical for six years, and the selection criterion has been applied consistently.

During Franklin County’s construction of the Huntington Park Project, the new home stadium for the Columbus Clippers. Part of the project included soliciting bids for the painting portion of the project, which is found in bid package 3A. One of the bids accepted for the painting contract was submitted by The Painting Company

Wayne King, Prevailing Wage Coordinator for Franklin County, reviewed the submitted bids to evaluate whether the bidder satisfied the prevailing wage standard in the quality contracting standards. Through records received from the Ohio Department of Commerce, it was determined by the Board that The Painting Company had numerous prevailing wage violations, even though the violations were ultimately settled by the State and The Painting Company. The Board ultimately rejected the bid protest of The Painting Company for the failure to satisfy section 8.2.4.15.

The Painting Company, as well as the Associated Builders & Contractors of Central Ohio (together, “Appellants”), brought an action seeking declaratory and injunctive relief based upon violations of the competitive bidding laws, mandamus relief

for the award of the contract, and declaratory relief to find that Franklin County's quality contracting standards were preempted by Ohio's prevailing laws.<sup>1</sup>

On March 31, 2008, the trial court denied the declaratory, injunctive, and extraordinary relief sought by ABC and The Painting Company. Specifically, the court held that ABC and The Painting Company failed to prove by clear and convincing evidence that the Board abused its discretion in rejecting The Painting Company's bid. *State ex rel. Assoc. Builders & Contractors of Central Ohio v. Franklin Cty. Bd. of Commrs.* (Franklin Co. Comm. Pl., March 31, 2008), 2008-CVH-03-3328, pp. 22-23. The court also held that section 8.2.4.15 of the bid selection criteria was not preempted by state law or void for vagueness. *Id.* at 22.

Appellants appealed the trial court's decision to the Tenth District Court of Appeals. The court of appeals overruled Appellants' assignment of error and affirmed the judgment of the trial court. *State ex rel. Assoc. Builders & Contrs. Of Cent. Ohio v. Franklin Cty. Bd. of Commrs.* (Ohio App. 10 Dist., June 13, 2008), 2008-Ohio-2870.

## ARGUMENT

### **I. Response to Proposition of Law Nos. 1 and 2**

In a competitive bidding dispute, a bidder that is lawfully rejected by a public agency for not being the lowest and best bid does not acquire a constitutionally protected right requiring due process. The absence of an enforceable right precludes judicial review.

A bidder does not acquire a property interest where a public authority properly exercises its discretion and does not award a contract to the bidder deemed to have failed

---

<sup>1</sup> Counts three and five of Plaintiffs' Complaint sought injunctive relief for alleged violations of Ohio's Open Meetings Act and mandamus relief for violations of the Public Records Act, respectively. Both counts were dismissed by the Plaintiffs at trial.

to satisfy the requirements in order to be the lowest and best bidder. *Cleveland Constr., Inc. v. Cincinnati* (May 21, 2008), 118 Ohio St. 3d 283, 288, 2008-Ohio-2337; *see also*, *Cleveland Constr., Inc. v. Ohio Dept. of Adm. Serv., Gen. Serv. Adm.* (Ohio App. 10 Dist., 1997), 121 Ohio App. 3d 372, 395, 700 N.E.2d 54 (“A party that is a second- or third-place finisher in a determination of lowest and best bidder does not acquire a constitutionally protected property right.”) (citing *Miami Valley Contrs., Inc., v. Oak Hill* (Ohio App. 4 Dist., 1996), 108 Ohio App. 3d 745, 671 N.E.2d 646). Moreover, in the absence of a property interest, constitutional procedural due process concerns are not implicated. *Cleveland Constr., Inc. v. Ohio Dept. of Adm. Serv., Gen. Serv. Adm.* (Ohio App. 10 Dist., 1997), 121 Ohio App. 3d 372, 395, 700 N.E.2d 54.

In this case, The Painting Company never acquired a property right subject to constitutional due process. Appellants failed to establish, both at trial and on appeal, by clear and convincing evidence that the Board abused its discretion in rejecting The Painting Company’s bid. Without establishing an abuse of discretion, The Painting Company did not acquire a property right in the painting contract at issue. Because no constitutionally protected property right was at stake, the Board’s rejection of The Painting Company’s bid did not implicate constitutional due process concerns.

Additionally, the Board’s reliance on the information, regarding The Painting Company’s prevailing wage violations, as provided by the Ohio Department of Commerce, does not implicate any due process concerns because no property interest was at stake. Similarly, The Painting Company’s concerns about its reputation with respect to the Ohio Department of Commerce’s characterizations of The Painting Company’s

prevailing wage violations are irrelevant to this case. The State of Ohio is not a party to this case, and its agency's administration and practices are not subject for review.

Because The Painting Company lacked a constitutionally protected right to due process, judicial review of any procedural due process claim was unnecessary. Appellants claim that the court of appeals' failure to address due process concerns was plain error fails to satisfy the exceptionally high standard necessary for plain error to apply.

This Court has held that the plain error doctrine "is sharply limited to the *extremely rare* case involving *exceptional* circumstances where the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson* (1997), 79 Ohio St. 3d 116, 122, 679 N.E.2d 1099 (emphasis original). Further, the *Goldfuss* Court warned that "[t]he plain error doctrine should never be applied to reverse a civil judgment simply because a reviewing court disagrees with the result obtained in the trial court, or to allow litigation of issues which could easily have been raised and determined in the initial trial." *Id.*

This case is not extremely rare, nor does it involve the exceptional circumstances outlined by the *Goldfuss* Court. The Painting Company lacked a constitutionally protected right, and the Board's lawful rejection of The Painting Company's bid did not implicate any constitutional due process concerns. Without a due process interest at stake, this situation cannot be deemed to have "risen to the level of challenging the legitimacy of the underlying judicial process itself." *Id.* Therefore, judicial review of Appellants' due process claim is unwarranted.

## II. Response to Proposition of Law No. 3

R.C. Chapter 4115 does not prohibit public authorities from considering a contractor's history of compliance with prevailing wage laws when determining which bid is lowest and best for a public construction project.

Public agencies in Ohio are afforded broad discretion in determining which contractor is the lowest and best bidder. As such, public agencies may consider various factors in their evaluation of a contractor in determining which bid is lowest and best. See, e.g. R.C. 9.312(A) (providing for the consideration of such factors as the bidder's past performance and conduct on previous contracts). The Board's application of section 8.2.4.15 is not preempted by state law because R.C. Chapter 4115 does not prohibit a public authority from considering a contractor's history of compliance with prevailing wage laws when determining which bid is lowest and best.

Additionally, Article XVIII, Section 3 of the Ohio Constitution has no application to county contracting standards as that particular constitutional provision was designed to provide for *municipal* home rule in Ohio, and to set forth the parameters under which such home rule could be exercised. It simply does not operate to empower or limit the operations of county governments. But even if Art. XVIII, Sec. 3 were applicable, the standards adopted by the Board as a part of its quality contracting criteria are not laws, ordinances, or regulations. Section 8.2.4.15 is a criterion used by the Commissioners in determining whether a contractor is lowest and best, and thus qualified to an award of a contract for a public construction project.

Ultimately, section 8.2.4.15 is a valid criterion for the Board to utilize and is not preempted by state law.

### III. Response to Proposition of Law No. 4

A settlement of prevailing wage violations between a contractor and the State of Ohio does not render unlawful a public authority's reliance on information provided by the Ohio Department of Commerce detailing the underlying prevailing wage violations by the contractor.

A settlement agreement's non-liability language cannot be interpreted to prohibit a public agency from considering the underlying prevailing wage violations, which were at issue in the settlement, in evaluating whether a bid is both lowest and best. A public agency has the discretion to determine whether or not a non-admissions clause contained in a settlement agreement operates to eliminate the prevailing wage violations history of a company.

Courts have upheld the reliance on the underlying violations that were later settled. *See, State ex rel. Navratil v. Medina County Comm'rs.* (Ct. App. 9 Dist. Oct. 11, 1995), Medina Co. No. 2424-M, 1995 Ohio App. LEXIS 4541, 2 Wage & Hour Cas. 2d (BNA) 1643; *Bickford v. Adm'r., Ohio Bureau of Employment Serv.* (Ct. App. 5 Dist. July 30, 1991), Muskingum Co. No. 90-41, 1991 Ohio App. LEXIS 3636 (holding that while a settlement agreement with OSHA did not constitute an admission of fault or liability, the citations issued by OSHA constituted evidence of the conditions of the work site as they existed).

The board of county commissioners in *Navratil* did not award a plumbing contract to the lowest bidder upon the board's consideration of the bidder's alleged prevailing wage violations. *Id.* In upholding the board's decision, the *Navratil* court held that "the board has broad discretion to consider all relevant factors, including prevailing wage violations, when determining which contractor is the 'lowest and best.'" *Id.* at \*11. The board rejected a bidder on the basis of information obtained from the state concerning

prevailing wage violations, where the contractor “settled with the state before any convictions were obtained.” *Id.* at \*3. As recognized by the court, the rationale behind the board’s consideration of a pattern of alleged prevailing wage violations is that the contractor may not “perform the work according to specifications.” *Id.*

Last, the argument advanced by ABC and The Painting Company, regarding the effect of a settlement on the underlying determinations made by the Ohio Department of Commerce, is contrary to public policy because the impact of this argument would be to encourage contractors not to pay according to Ohio’s prevailing wage laws. If a settlement agreement containing a non-admission clause with the State can erase the original determination, then contractors would be encouraged to not pay the wages owed to the employee upon the initial determination, but instead to anticipate litigation in order to settle the case and escape any penalty. The settlement could then wipe the slate clean, and it would be as if the contractor had never failed to pay the employee the wages he was rightfully owed, and that the State had never found that the contractor violated the prevailing wage laws. The encouragement of delay in the payment of prevailing wages in accordance with Ohio law, and without any repercussion to the violating contractor, cannot be a desirable result.

Therefore, the argument advanced by Appellants cannot be accepted as valid. The settlement agreement cannot rewrite history, or change the underlying situation. The settlement can only preclude any further liability to the State regarding The Painting Company’s prevailing wage violations. And, while the settlement agreement is not an admission of liability or wrongdoing, it is also not an absolution of any violation, and does not change the underlying circumstances that The Painting Company was found by

the State to have violated Ohio's prevailing wage laws. Accordingly, the Board's review regarding the settled prevailing wage claims was within the discretion afforded to the Board.

#### **IV. Response to Proposition of Law No. 5**

A public authority's bid selection criteria are not void for vagueness merely for the lack of an express definition of a word within the criteria, and the public authority's interpretation of the criteria cannot constitute an abuse of discretion.

The bid selection criteria in the quality contractor standards, as established by the Board, are not void for vagueness. While the criteria at issue are not "laws," guidance can be found in analyzing challenges to laws. Pursuant to Ohio law, "a law will survive a void-for-vagueness challenge if it is written so that a person of common intelligence is able to ascertain what conduct is prohibited, and if the law provides sufficient standards to prevent arbitrary and discriminatory enforcement." *State v. Williams* (2000), 88 Ohio St. 3d 513, 533; *see also, Klein v. Leis* (2003), 99 Ohio St. 3d 537, 541. Additionally, a law is not void "simply because it could be worded more precisely or with additional certainty." *City of Norwood v. Horney* (2006), 110 Ohio St. 3d 353, 380 (*citing State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals* (1992), 63 Ohio St. 3d 354, 358).

Section 8.2.4.15 of the quality contracting standards gives notice of what conduct will conform to the law in order to be eligible for the award of a contract for the Huntington Park Project: do not violate Ohio's prevailing wage laws three or more times in a two-year period within the last ten years. A contractor either complies with prevailing wage laws by paying accordingly, or one violates prevailing wage laws by not paying accordingly.

Additionally, section 8.2.4.15 cannot be declared void simply because the word “found” is not expressly defined. The Board’s acceptance of any determination by the Ohio Department of Commerce of a prevailing wage violation as evidence of a violation is not only within the purview of the Board, but also reasonable. While Appellants may not agree with the Board’s broad interpretation of the criterion and its effects, the Appellants’ disagreement with the Board’s reasonable interpretation and application of the section does not provide a sufficient basis to find that section 8.2.4.15 is void for vagueness.

Nor does the Board’s interpretation of the criterion establish an abuse of discretion. The criterion at issue, section 8.2.4.15 was published before the opening of the bids for the painting contract. The Board has applied this criterion consistently throughout the bidding process for the painting contract, and all contracts, for the Huntington Park Project. On this basis, the criterion and the Board’s interpretation of it cannot be viewed as the use of unannounced bid selection criteria.

### **CONCLUSION**

For the foregoing reasons, Appellees respectfully submit that because this case is not of public or great importance this Court should decline to exercise jurisdiction.

Respectfully submitted,

**RON O'BRIEN**  
**PROSECTING ATTORNEY**  
**FRANKLIN COUNTY, OHIO**



---

Nick A. Soulas, Jr. (0062166)  
First Assistant Prosecuting Attorney  
Anthony E. Palmer, Jr. (0082108)  
Assistant Prosecuting Attorney  
373 South High Street, 13<sup>th</sup> Fl.  
Columbus, Ohio 43215-6318  
Tel: (614) 462-3520  
Fax: (614) 462-6012  
E-mail: [nasoulas@franklincountyohio.gov](mailto:nasoulas@franklincountyohio.gov)  
[aepalmer@franklincountyohio.gov](mailto:aepalmer@franklincountyohio.gov)  
Counsel for Appellees