

IN THE SUPREME COURT OF OHIO

STATE, *ex rel.* ASSOCIATED BUILDERS
& CONTRACTORS OF CENTRAL OHIO,
et al.,

Plaintiffs-Appellants,

v.

FRANKLIN COUNTY BOARD OF
COMMISSIONERS, *et al.*,

Defendants-Appellees.

Case No. 08-1478

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

**BRIEF OF AMICI CURIAE, THE OHIO STATE BUILDING AND CONSTRUCTION
TRADES COUNCIL AND THE COLUMBUS/CENTRAL OHIO BUILDING &
CONSTRUCTION TRADES COUNCIL, IN SUPPORT OF APPELLEES**

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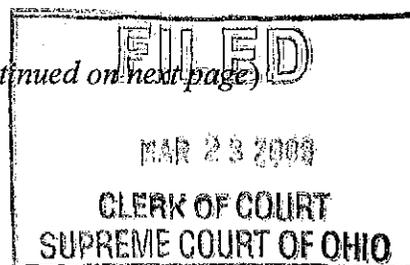
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INTRODUCTION

The Ohio State Building and Construction Trades Council, AFL-CIO ("Council"), is a statewide organization representing construction trades unions throughout the State of Ohio. There are approximately 100,000 union construction tradesmen engaged in construction throughout the state. The Columbus/Central Ohio Building & Construction Trades Council, AFL-CIO, is the Local Council representing construction trades unions throughout Central Ohio.

The Council and its Local Councils are responsible for protecting the interests of construction tradesmen and tradeswomen throughout the state. They carry out that responsibility by, *inter alia*, participating as *amici curiae* on a variety of issues in cases pending in courts across the state. This Court has long recognized the Council's interest by accepting the Council's *amicus* briefs in cases dealing with competitive bidding¹ and the prevailing wage law.²

Contrary to the Plaintiffs-Appellants' argument in this case, the Court of Appeals for Franklin County, Tenth Appellate District, simply deferred to the Franklin County Commissioners' well-recognized discretion in awarding competitively-bid contracts. Plaintiffs-Appellants would have this Court substitute its judgment for the Commissioners' judgment as to which bid was the "lowest and best" for the painting contract on the county's new baseball

¹See *U.S. Corrections Corp. v. Ohio Dep't of Indus. Relations* (1995), 73 Ohio St.3d 210 (1995), 1995-Ohio-102; *Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgt. Dist.* (1995), 73 Ohio St.3d 590, 1995-Ohio-301; and *Plumbers & Steamfitters Local Union 83 v. Union Local School Dist. Bd. of Educ.* (1999), 86 Ohio St.3d 318, 1999-Ohio-109.

²See *State, ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88; *State v. Buckeye Elec. Co.* (1984), 12 Ohio St.3d 252; *State, ex rel. Harris v. Williams* (1985), 18 Ohio St.3d 198; *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24; *Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations* (1991), 61 Ohio St.3d 366; *Ohio Asphalt Paving, Inc. v. Ohio Dep't of Indus. Relations* (1992), 63 Ohio St.3d 512; *Harris v. Atlas Single Ply Sys., Inc.* (1991), 64 Ohio St.3d 171; and *Sheet Metal Workers' Int'l Ass'n, Local Union 33 v. Mohawk Mechanical, Inc.*, 86 Ohio St.3d 611, 1999-Ohio-209 (1999).

stadium. *Amici Curiae* maintain that the Commissioners properly exercised their discretion in this case by rejecting the low bidder for, *inter alia*, its long and repeated history of significant violations of the Ohio prevailing wage law, R.C. Chapter 4115. Both the trial court and the Court of Appeals properly refused to interfere with the Commissioners' exercise of their discretion, and this Court should, therefore, affirm the decision of the Court of Appeals.

This case is, in reality, nothing more than a "disappointed bidder" case. The Painting Company bid on, but was not awarded, a public construction contract. In rejecting its bid, Franklin County relied upon the company's well-documented history of violating state law on previous public construction contracts. The County was entitled to rely on this history in rejecting the Painting Company's bid, regardless of whether the County had previously adopted quality contracting standards expressly advising potential bidders that their prior non-compliance with the law would be considered when evaluating their bids.

STATEMENT OF THE CASE AND THE FACTS

On April 9, 2002, the Franklin County Board of Commissioners, with the stated purpose of ensuring "that the County's contractors are compliant with the law, financially stable, and capable of executing construction contracts in a competent and professional manner," Franklin County Resolution No. 421-02 (April 9, 2002), adopted Resolution Nos. 421-02 and 422-02 which set forth "qualitative criteria" under which the County would evaluate future bids for construction contracts. (Appellants' Appendix at 38). Among the criteria was the following requirement:

Bidder certifies that Bidder has not 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.

Franklin County Resolution No. 421-02 at ¶ 5 (Appellants' Appendix at 40).

On June 13, 2006, the Commissioners adopted Resolution No. 476-06 in which they determined that enforcement of quality contracting standards would foster the goals of "expediting the construction process," promote "fair and quality employment practices," and "create a safer construction site" on the Huntington Park project. Franklin County Resolution No. 476-06 (June 13, 2006) (Appellants' Appendix at 42). It therefore reaffirmed the qualitative criteria contained in Resolution Nos. 421-02 and 422-02 "*as bid conditions* which will bind all parties working on the Huntington Park construction project including contractors and subcontractors of whatever tier." *Id.* (emphasis added).

Consistent with Resolution Nos. 421-02, 422-02, and 476-06, the "Project Manual for Bids to Perform Huntington Park" ("Project Manual") contained the following:

8.2.1 The Contract will be awarded to the lowest and best Bidder as determined in the discretion of the County or all bids will be rejected in accordance with the following procedures:

* * *

8.2.3 In determining whether a Bidder is best, factors to be considered include, without limitation:

* * *

8.2.3.4 *The conduct and performance of the Bidder on previous contracts, which shall include, without limitation, compliance with prevailing wage laws and equal opportunity requirements;*

* * *

8.2.4 The Construction Manager shall obtain from the lowest responsive Bidder any information the Project Representative deems appropriate to the consideration of factors showing that such Bidder's bid is best, including without limitation the following:

* * *

8.2.4.15 *Information that the Bidder has not 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.*

* * *

Plaintiffs' Exhibit 7 (Project Manual) at 13-15 (emphasis added) (Appellants' Appendix at 110-12).

In October, 2007, the Commissioners advertised Huntington Park Bid Package No. 3, which included the painting contract. Both the Painting Company and the W.F. Bolin Company ("Bolin") submitted bids for the painting contract. The Painting Company's bid was the lower of the two bids.

Consistent with Resolution Nos. 421-02, 422-02, and 476-06 and the Project Manual, the County conducted an investigation of the Painting Company and its bid to determine whether it was the best bid. As part of its investigation, the County contacted the Ohio Department of Commerce, Bureau of Wage and Hour ("Department"), to inquire with regard to the Painting Company's history of compliance with the prevailing wage law, R.C. Chapter 4115. The investigation revealed, *inter alia*, that the Painting Company violated the prevailing wage law no fewer than eight times during the relevant time period.³ Based upon its investigation, the Commissioners rejected the Painting Company's bid, specifically citing its history of prevailing wage violations. (Appellants' Appendix at 54-99). On March 4, 2008, following the Painting Company's bid protest, the Commissioners reaffirmed their rejection of the company's bid on the

³Although the Painting Company attempts to characterize its prevailing wage violations as minor or clerical errors, a review of the record reveals that many of the violations were of a serious nature and involved improperly reporting that numerous individuals were "apprentices," and thereby paid at a lower rate of wages, when such individuals were not, in fact, enrolled in an apprenticeship program registered with the Ohio Apprenticeship Council. Under the prevailing wage law, all workers on public construction projects must be paid the prevailing rate of wages for each classification of work performed, *i.e.*, the journeyman rate, unless such worker is enrolled in an apprenticeship program registered with the Ohio Apprenticeship Council, in which case, such worker may be paid at the lower prevailing rate for apprentices. R.C. 4115.05. Improperly classifying workers as "apprentices" when they are not, in fact, apprentices gives the offending contractor a significant competitive advantage over other contractors that properly classify their employees. "At its January 3rd [, 2008] meeting, the Ohio State Apprenticeship Council voted to de-register the apprenticeship program sponsored by the Painting Company" <http://jfs.ohio.gov/apprenticeship/publicAnnouncements.stm> (accessed March 20, 2009).

Huntington Park painting contract. Franklin County Resolution No. 180-08 (Appellants' Appendix at 44).

The Painting Company and the Associated Builders and Contractors of Central Ohio (collectively, "Plaintiffs" or "Appellants") commenced this case on March 5, 2008 against the Franklin County Board of Commissioners and the three individual Commissioners. In their complaint, Plaintiffs asserted a variety of claims alleging that the Commissioners abused their discretion in awarding the competitively-bid painting contract on Huntington Park, Franklin County's new baseball stadium, to a bidder other than the Painting Company.

The trial court accelerated proceedings in the case, and a trial on the merits was conducted on March 24 & 25, 2008. On March 31, 2008, the trial court issued its *Decision of the Court Following Trial on the Merits and Final Judgment* ("Trial Court Decision") in which it rejected each of Plaintiffs' claims, dismissed the complaint, and entered final judgment in favor of the Commissioners. The Court of Appeals for Franklin County, Tenth Appellate District, affirmed. *State ex rel. Associated Builders & Contractors of Cent. Ohio v. Franklin County Bd. of Comm'rs* (Franklin App. June 13, 2008), No. 08AP-301, 2008-Ohio- 2870.

On December 3, 2008, 2009, this Court accepted limited jurisdiction over this case on Appellants' Proposition of Law No. III. *State ex rel. Associated Builders & Contractors of Cent. Ohio v. Franklin County Bd. of Comm'rs* (2008), 120 Ohio St.3d 1415. Appellants' Proposition of Law No. 3 dealt with one narrow issue:

Appellees' *de facto* debarment rule is preempted by R.C. Chapter 4115, a comprehensive scheme balancing the competing public interests in prevailing wage compliance and competition for public contracts.

Appellants' Memorandum in Support of Jurisdiction at 10. The Court did not accept jurisdiction with regard to Appellants' other propositions of law, including Proposition of Law No. 1, in

which they asserted that Franklin County's quality contracting criteria violated the Painting Company's procedural due process rights. Notwithstanding the narrow confines this Court established for its consideration of this case, Appellants' brief herein devotes a great deal of its argument to their due process contentions. See Appellants' Brief at 15-18. Because this Court has determined that it would not hear this case on Appellants' due process proposition of law, the Court should disregard that portion of the Appellants' Brief.

ARGUMENT

Amici Curiae's Proposition of Law:

THE PREVAILING WAGE LAW DOES NOT PREEMPT A LOCAL GOVERNMENT'S ADOPTION AND USE OF QUALITY CONTRACTING CRITERIA TO EVALUATE BIDS ON PUBLIC CONSTRUCTION CONTRACTS.

Plaintiffs argue that the County's quality contracting standards—or at least the standard relating to prevailing wages—are preempted by the prevailing wage law. Plaintiffs assert that the County's standards are a "de facto debarment" rule that conflicts with the debarment provisions of the prevailing wage law. Appellants' Brief at 11-13. Both the trial court and the court of appeals properly rejected this argument, and Plaintiffs have offered no reason for this Court to disturb the lower courts' determination.

This Court long ago held that Ohio's competitive bidding statutes are designed primarily to protect the interests of taxpayers. *State, ex rel. Ross v. Board of Educ.* (1884), 42 Ohio St. 374. Indeed, this Court recently stated that "[t]he 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." *Cementech, Inc. v. City of Fairlawn* (2006), 109 Ohio St.3d

475, 477, 2006-Ohio-2991 at ¶ 9 (citing *Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgt. Dist.* (1995), 73 Ohio St.3d 590, 1995-Ohio-301).

The statute applicable to counties specifically requires that contracts be awarded to "the lowest and *best* bidder." R.C. 307.90(A) (emphasis added). The contracting authority is vested with "the discretion of determining who under all the circumstances is the *lowest and best* bidder for the work in question." *Cedar Bay Constr., Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 21 (quoting *Atschul v. City of Springfield* (Clark App. 1933), 48 Ohio App. 356, 362) (emphasis in original). "[A] public agency is not automatically required to award a public contract to the company with the lowest dollar bid; instead, it is allowed to engage in a qualitative analysis as to which bid is better." *Rein Constr. Co. v. Trumbull County Bd. of Comm'rs* (Trumbull App. 2000), 138 Ohio App.3d 622, 629 (citations omitted).

Generally, courts in this state should be reluctant to substitute their judgment for that of city officials in determining which party is the "lowest and best bidder." "The rule is generally accepted that, in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and not to have acted illegally but regularly and in a lawful manner. All legal intendments are in favor of the administrative action." In *Atschul v. Springfield* (1933), 48 Ohio App. 356, the court explained how the bidding process should be construed, by noting:

"* * * [W]hen the statute provides for the acceptance of the lowest and best bid the city is not limited to an acceptance of merely the lowest dollar bid.

"The statutes of this state as to most public work provided some years ago for the acceptance of only the lowest bid. That was subsequently amended so as to read 'lowest and best bid.' This amendment clearly indicates that the Legislature recognized that an element other than the mere low dollar bid often enters into the letting of a contract. Hence the amendment providing that the contract should be let to the lowest and best bidder followed.

"This amendment, therefore, places in the hands of city authorities the discretion of determining who under all the circumstances is the lowest and best bidder for the work in question.

"This discretion is not vested in the courts and the courts cannot interfere in the exercise of this discretion unless it clearly appears that the city authorities

in whom such discretion has been vested are abusing the discretion so vested in them."

Cedar Bay Constr., Inc., 50 Ohio St.3d at 21 (some citations omitted).

"The meaning of the term 'abuse of discretion' * * * connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude * * *." "Arbitrary" means "without adequate determining principle; * * * not governed by any fixed rules or standard." "Unreasonable" means "irrational."

City of Dayton, ex rel. Scandrick, v. McGee (1981), 67 Ohio St.2d 356, 359 (citations omitted).

The General Assembly has expressly authorized county contracting authorities to establish the parameters for those with which it will contract:

(B) Notices [of competitive bidding] shall state all of the following:

(1) *A general description of the subject of the proposed contract and the time and place where the plans and specifications or itemized list of supplies, facilities, or equipment and estimated quantities can be obtained or examined;*

(2) The time and place where bids will be opened;

(3) The time and place for filing bids;

(4) *The terms of the proposed purchase;*

(5) *Conditions under which bids will be received;*

(6) The existence of a system of preference, if any, for products mined and produced in Ohio and the United States adopted pursuant to section 307.90 of the Revised Code.

R.C. 307.87(B) (emphasis added). See also R.C. 9.312 ("The factors that the state agency or political subdivision shall consider in determining whether a bidder on the contract is responsible include the experience of the bidder, the bidder's financial condition, *conduct and performance on previous contracts*, facilities, management skills, and ability to execute the contract properly.") (emphasis added). "If a public contracting authority's "decision [is] based upon the

criteria set forth in the bid proposal, it [does] not abuse its discretion in rejecting [a lower] bid."

Prime Contractors, Inc. v. Girard (Trumbull App. 1995), 101 Ohio App.3d 249, 259.

Under these standards, it is clear that Plaintiffs failed to establish that the Commissioners abused their discretion with regard to the award of the Huntington Park painting contract. The Commissioners repeatedly advised potential bidders that Huntington Park construction contracts would be evaluated under its quality contracting standards. The standards were contained in Resolution Nos. 421-02 and 422-02 and reaffirmed in Resolution No. 476-06. The Huntington Park Project Manual expressly advised all potential bidders that "[t]he conduct and performance of the Bidder on previous contracts . . . shall include . . . compliance with prevailing wage laws" Plaintiffs' Exhibit 7 (Project Manual) at 13 (Appellants' Appendix at 110). The specific standards were then repeated in ¶ 8.2.4 of the Huntington Park Project Manual, which was made available to all bidders. The prevailing wage standard set forth in ¶ 8.2.4.15 constituted nothing more than the County's guideline for its consideration of the bidders' "conduct and performance on previous contracts," consideration of which is mandated by Ohio law. The Commissioners did nothing other than give advance notice of their bidding criteria and then award the painting contract in conformity with announced bidding criteria. Its award can hardly, therefore, be considered an abuse of discretion.

Nevertheless, Plaintiffs argue that the County's quality contracting standards are "preempted" by state law in general, and by the prevailing wage law in particular. Appellants begin by citing this Court's decision in *Geauga County Bd. of Comm'rs v. Munn Road Sand & Gravel* (1993), 67 Ohio St.3d 579, 1993-Ohio-55, for the proposition that "[a] non-chartered county like Franklin County lacks home rule authority," Appellants' Brief at 26, and, therefore, lacked the authority to adopt quality contracting standards. This argument is without merit.

Appellants assert in their brief that the County's quality contracting standards should be subject to the same analysis the Court uses to determine whether a home rule municipality's ordinance is displaced by state law. Appellants' Brief at 7-9. This Court has not, however, subjected the County contracting decisions to "home rule" analysis. Rather, the Court has merely asked whether the General Assembly has affirmatively granted counties the authority to act. *Geauga County Bd. of Comm'rs*, 63 Ohio St.3d at 583.

As noted above, the General Assembly has affirmatively granted counties the authority to contract. Moreover, the General Assembly has directed counties to let most contracts through competitive bidding and has affirmatively vested counties with the authority and discretion to determine which bidder is "lowest and best."

The County has not enacted a statute or regulation. It has simply set forth the standards it will use in determining which persons and entities with which it will contract. On its face, Franklin County Resolution No. 421-02 (April 9, 2002) provided that it was designed "to ensure that the County's contractors are compliant with the law, financially stable, and capable of executing construction contracts in a competent and professional manner" Franklin County Resolution No. 421-02 (Appellants' Appendix at 38). As noted above, R.C. 307.90 and this Court's precedent vest the County with such authority. The County used that authority to advise potential bidders of the criteria it would consider in awarding construction contracts in general, and for Huntington Park in particular. Indeed, the Court has repeatedly held that a contracting authority's use of *unannounced* criteria in awarding a contract constitutes an abuse of discretion. *Cedar Bay Constr., Inc.*, 50 Ohio St.3d at 22.⁴

⁴Appellants also direct this Court's attention to the United States Supreme Court's decision in *Wisconsin Dep't of Indus., Labor & Human Relations v. Gould, Inc.* (1986), 475 U.S.

Furthermore, contrary to Plaintiffs' assertion, nothing in R.C. Chapter 4115 indicates that public authorities may not consider a contractor's history of compliance with the prevailing wage law in evaluating whether bidders on public construction contracts have submitted the "lowest and best" bid. The Ohio Prevailing Wage Law, R.C. Chapter 4115, has for many decades protected the private sector collective bargaining agreements of union construction tradesmen by preventing the undermining of the collective bargaining process, *i.e.*, limiting the potential for the slashing of wage rates on public construction. *State, ex rel. Evans v. Moore* (1982), 69 Ohio St.2d 88, 91. See also *Harris v. Van Hoose* (1990), 49 Ohio St.3d 24, 26. The law was enacted as a means of fostering and encouraging collective bargaining as the preferred method of resolving labor disputes. *State, ex rel. Evans v. Moore*, 69 Ohio St.2d at 91.

Nothing in R.C. Chapter 4115's enforcement scheme limits a public contracting authority from considering a bidder's history of compliance—or, in the Painting Company's case, its lengthy history of non-compliance—when awarding public construction contracts. The Director of Commerce is required to investigate alleged violations of the prevailing wage law. R.C. 4115.13(A). If the Director determines that a violation has occurred and that the violation was "intentional," see R.C. 4115.13(G) (setting forth evidence the Director may consider in determining whether a violation was intentional) & 4115.13(H) (defining "intentional violation"), or if a contractor has been prosecuted and convicted for violations of the prevailing wage law, see R.C. 4115.99, the offending contractor is "debarred," *i.e.*, "prohibited from

282, a case presenting "a strikingly similar issue" Appellants' Brief at 21. In *Gould, Inc.*, however, the Court applied federal preemption principles in an area—industrial relations—in which Congress had "largely displaced state regulation" *Gould, Inc.*, 475 U.S. at 286. In contrast, the General Assembly has explicitly vested counties with authority to make contracting decisions and with the responsibility to determine which bid is "lowest and best." The analysis in *Gould, Inc.*, therefore, is inapplicable in this case.

contracting directly or indirectly with any public authority for the construction of a public improvement or from performing any work on the same as a contractor, subcontractor, or officer of a contractor or subcontractor" R.C. 4115.133(B). An offending contractor is "debarred" for a period of one year for the first intentional violation or conviction, and for a period of three years for the second intentional violation or conviction within five years. R.C. 4115.133(B). Thus, what is meant by "debarment" under the prevailing wage law is set forth in the law itself.

In contrast to debarment under R.C. 4115.133, the County has merely determined that it will not contract with bidders that have a significant history of violating the law. It has not "debarred" a contractor within the meaning of R.C. 4115.133(B). The County's decision not to contract with a bidder applies only to the County. The County does not purport to impose a contract bar on a bidder or to impose its responsible contracting criteria upon other public contracting authorities. It simply chose not to contract with the Painting Company.⁵

The consideration of a contractor's history of compliance with the law is part the contractor's conduct and performance on past contracts. Contracting authorities should consider bidder's history of compliance with the law, including the prevailing wage law, in determining which bidder is "best."

⁵Appellants' assertion that the County's quality contracting standards "imposes debarment more broadly" and "on harsher terms" than R.C. Chapter 4115, see Appellants' Brief at 10, is utterly without merit. Even if the County's refusal to contract with the Painting Company can be considered some form of debarment, it can hardly be considered broader or harsher than debarment under R.C. 4115.133(B). The County's quality contracting standards apply only to County contracts, and the Painting Company is free to continue to do business with the state and all other political subdivisions, provided that those contracting entities determine, in the exercise of their discretion, that the Painting Company has submitted the "lowest and best," or "lowest responsive and responsible" bid.

Several courts have expressly ruled that Ohio public authorities may indeed consider a bidder's history of compliance with the prevailing wage law in awarding construction contracts. In *State, ex rel. Navratil v. Medina County Comm'rs* (Medina App. 1995), 2 Wage & Hour Cas.2d 1643, *appeal denied* (1996), 75 Ohio St.3d 1412, 1996-Ohio-692, the court noted that the apparent low bidder had previously been "cited for not paying the prevailing wage to some of its employees on a construction contract," but had settled the determinations. The low bidder asserted, *inter alia*, that rejecting its bid effectively debarred it from performing construction work for the county and was, therefore, preempted by the prevailing wage law's debarment provisions. The Court rejected this argument:

[S]tate authorities confirmed that [the contractor] had been cited for violating the law on several occasions. The commissioners were concerned that this pattern of alleged prevailing wage violations indicated [the contractor] might not perform the work according to specifications. The board was not prohibiting [the contractor] from contracting with the county; it merely decided not to award the plumbing contract to [the contractor] this time. As noted above, the board has broad discretion to consider all relevant factors, including prevailing wage violations, when determining which contractor is the "lowest and best."

State, ex rel. Navratil, 2 Wage & Hour Cas.2d at 1646. See also *Steingass Mechanical Contracting, Inc. v. Warrensville Heights Bd. of Educ.* (Cuyahoga App. 2003), 151 Ohio App.3d 321, 2003-Ohio-28 (school board did not abuse its discretion in rejecting apparent low bidder on a construction contract after its review of a "fact book" that detailed, *inter alia*, the contractor's "problems . . . following prevailing wage laws"); *TP Mechanical Contractors, Inc. v. Franklin County Bd. of Comm'rs* (Franklin C.P. Jan. 14, 2008), No. 08-CVH-03-3328, slip op. at 19 ("Prevailing wage is the law of Ohio, and having public officials monitor compliance with it hardly amounts to an abuse of discretion."), *appeal dismissed as moot*, (Franklin App. Dec. 23, 2008), No. 08AP-108, 2008-Ohio-6824. Indeed, this Court has itself observed that "both the

public authority and the contractor are charged with ensuring compliance with the prevailing wage provisions when entering into a public improvement contract." *Ohio Asphalt Paving, Inc. v. Ohio Dep't of Indus. Relations* (1992), 63 Ohio St.3d 512, 516.

The Trial Court herein also ruled that the County properly considered the Painting Company's history of non-compliance with the prevailing wage law and discussed Appellants' preemption argument at length:

It is important to recognize that 8.2.4.15 is not a statute, law, ordinance or even a governmental regulation. Rather, 8.2.4.15 is a factor used by the Commissioners in determining whether to do business with a particular contractor. The Commissioners do not debar contractors from doing business with any agency of state or local government, as R.C. 4115.133 does, rather the Commissioners' standards operate to define with which contractors Franklin County desires to do business.

Public agencies may consider various factors in their evaluation of who the "best" bidder may be. See, e.g. R.C. 9.312. The Quality Contracting Standards, and 8.2.4.15 in particular, are not in conflict with Ohio's prevailing wage laws. If a bidder is debarred for an intentional violation of R.C. Chapter 4115, that bidder is excluded from being awarded a contract in Franklin County. Nothing in R.C. Chapter 4115, however, prevents the Commissioners from considering violations of the prevailing wage laws, such as those found in R.C. 4115.13(C), when determining with whom the County wishes to conduct business. The Commissioners have wide discretion in deciding what factors are important in the determination of who is the "best" bidder, so long as those factors are disclosed. The Commissioners [*sic*] decision to consider violations, whether serious or not, of Ohio's prevailing wage laws in determining who to do business with is not a usurpation of the Legislature's power to create prevailing wage statutes.

It is further worth noting that, while Plaintiffs/Relators argue that quality contracting standards, such as that found in 8.2.4.15, have become a popular tool used throughout Ohio (and nationwide) by unions in an attempt to discredit and disallow non-union contractors from bidding on public contract [*sic*], the Court was not presented with any authority which found that similar standards preempted state prevailing wage laws.

Accordingly, as the Commissioners are afforded broad discretion in determining which contractor is the lowest and best bidder, are free to determine which factors they deem important in making that determination, and 8.2.4.15 is

not in direct conflict with Ohio's prevailing wage laws, the Court finds that 8.2.4.15 is not preempted by R.C. Chapter 4115. * * *

Trial Court Decision at 7-8 (some citations omitted) (Appellants' Appendix at 21-22).

The Court of Appeals herein reached the same conclusion:

Appellants assert that, since the state has debarment provisions that disqualify bidders on the basis of past prevailing wage disputes, Franklin County could not create a harsher standard when considering its own bids. Appellants are unable to point to any provision in R.C. Chapter 4115 that prohibits public authorities from considering a contractor's history of compliance or non-compliance with prevailing wage law when considering which bid is the lowest and best for a particular job. To the contrary, at least two Ohio courts have considered comparable exclusions for contractors not otherwise debarred from public bidding under state law, and found no prohibition to such heightened standards. Because we can find neither authority nor rationale that establishes a conflict between Franklin County's reliance on past prevailing wage violations to exclude a contractor and the state's general scheme of prevailing wage regulation, we find that Sec. 8.2.4.15 is not invalid on this basis.

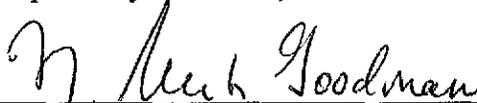
State ex rel. Associated Builders & Contractors of Cent. Ohio, 2008-Ohio- 2870 at ¶ 15 (citations omitted) (Appellants' Appendix at 12). The courts below were unquestionably correct, and this Court should, therefore, affirm the decision of the Court of Appeals.

Finally, the County's act of determining with which businesses it will contract in no way conflicts with or usurps the Department of Commerce's enforcement authority under R.C. Chapter 4115. The County is not taking, and has never taken, responsibility for enforcement of the prevailing wage law—enforcement has always rested primarily with the Department. Rather, the County has merely taken proper notice of the Department's enforcement actions in determining with which bidders it will contract. There is simply no support for Plaintiffs' argument that the prevailing wage law preempts the County's legitimate contracting decisions, and this Court should, therefore, affirm the Court of Appeals' decision in this case.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Defendants-Appellees, *Amici Curiae* the Ohio State Building and Construction Trades Council, AFL-CIO and the Columbus/Central Ohio Building & Construction Trades Council, AFL-CIO, respectfully urges this Court to affirm the decision of the Court of Appeals for Franklin County, Tenth Appellate District.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent via regular U.S.

Mail Service, postage prepaid, this 23rd day of March, 2009 to the following:

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Appendix

R.C. 9.312 Factors to determine whether bid is responsive and bidder is responsible.

(A) If a state agency or political subdivision is required by law or by an ordinance or resolution adopted under division (C) of this section to award a contract to the lowest responsive and responsible bidder, a bidder on the contract shall be considered responsive if the bidder's proposal responds to bid specifications in all material respects and contains no irregularities or deviations from the specifications which would affect the amount of the bid or otherwise give the bidder a competitive advantage. The factors that the state agency or political subdivision shall consider in determining whether a bidder on the contract is responsible include the experience of the bidder, the bidder's financial condition, conduct and performance on previous contracts, facilities, management skills, and ability to execute the contract properly.

For purposes of this division, the provision of a bid guaranty in accordance with divisions (A)(1) and (B) of section 153.54 of the Revised Code issued by a surety licensed to do business in this state is evidence of financial responsibility, but a state agency or political subdivision may request additional financial information for review from an apparent low bidder after it opens all submitted bids. A state agency or political subdivision shall keep additional financial information it receives pursuant to a request under this division confidential, except under proper order of a court. The additional financial information is not a public record under section 149.43 of the Revised Code.

An apparent low bidder found not to be responsive and responsible shall be notified by the state agency or political subdivision of that finding and the reasons for it. Except for contracts awarded by the department of administrative services pursuant to section 125.11 of the Revised Code, the notification shall be given in writing and by certified mail. When awarding contracts pursuant to section 125.11 of the Revised Code, the department may send such notice in writing by first class mail.

(B) Where a state agency or a political subdivision that has adopted an ordinance or resolution under division (C) of this section determines to award a contract to a bidder other than the apparent low bidder or bidders for the construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decoration of a public improvement, it shall meet with the apparent low bidder or bidders upon a filing of a timely written protest. The protest must be received within five days of the notification required in division (A) of this section. No final award shall be made until the state agency or political subdivision either affirms or reverses its earlier determination. Notwithstanding any other provisions of the Revised Code, the procedure described in this division is not subject to Chapter 119. of the Revised Code.

(C) A municipal corporation, township, school district, board of county commissioners, any other county board or commission, or any other political subdivision required by law to award contracts by competitive bidding may by ordinance or resolution adopt a policy of requiring each competitively bid contract it awards to be awarded to the lowest responsive and responsible bidder in accordance with this section.

Effective Date: 09-20-2002

R.C. 307.87 Notice of competitive bidding.

Where competitive bidding is required by section 307.86 of the Revised Code, notice thereof shall be given in the following manner:

(A) Notice shall be published once a week for not less than two consecutive weeks preceding the day of the opening of bids in a newspaper of general circulation within the county for any purchase, lease, lease with option or agreement to purchase, or construction contract in excess of twenty-five thousand dollars. The contracting authority may also cause notice to be inserted in trade papers or other publications designated by it or to be distributed by electronic means, including posting the notice on the contracting authority's internet site on the world wide web. If the contracting authority posts the notice on that location on the world wide web, it may eliminate the second notice otherwise required to be published in a newspaper of general circulation within the county, provided that the first notice published in such a newspaper meets all of the following requirements:

- (1) It is published at least two weeks before the opening of bids.
- (2) It includes a statement that the notice is posted on the contracting authority's internet site on the world wide web.
- (3) It includes the internet address of the contracting authority's internet site on the world wide web.
- (4) It includes instructions describing how the notice may be accessed on the contracting authority's internet site on the world wide web.

(B) Notices shall state all of the following:

- (1) A general description of the subject of the proposed contract and the time and place where the plans and specifications or itemized list of supplies, facilities, or equipment and estimated quantities can be obtained or examined;
- (2) The time and place where bids will be opened;
- (3) The time and place for filing bids;
- (4) The terms of the proposed purchase;
- (5) Conditions under which bids will be received;
- (6) The existence of a system of preference, if any, for products mined and produced in Ohio and the United States adopted pursuant to section 307.90 of the Revised Code.

(C) The contracting authority shall also maintain in a public place in its office or other suitable public place a bulletin board upon which it shall post and maintain a copy of such notice for at least

two weeks preceding the day of the opening of the bids.

Effective Date: 09-26-2003

R.C. 307.90 Contract award - preferences.

(A) The award of all contracts subject to sections 307.86 to 307.92 of the Revised Code shall be made to the lowest and best bidder. The bond or bid guaranty of all unsuccessful bidders shall be returned to them by the contracting authority immediately upon awarding the contract or rejection of all bids. The contracting authority may reject all bids.

(B) With respect to any contract for the purchase of equipment, materials, supplies, insurance, services, or a public improvement into which a county or its officers may enter, a board of county commissioners, by resolution, may adopt the model system of preferences for products mined or produced in Ohio and the United States and for Ohio-based contractors promulgated pursuant to division (E) of section 125.11 of the Revised Code. The resolution shall specify the class or classes of contracts to which the system of preferences apply, and once adopted, operates to modify the awarding of such contracts accordingly. While the system of preferences is in effect, no county officer or employee with the responsibility for doing so shall award a contract to which the system applies in violation of the preference system.

Effective Date: 04-19-1988

R.C. 4115.13 Investigations - recommendations.

(A) Upon the director's own motion or within five days of the filing of a complaint under section 4115.10 or 4115.16 of the Revised Code, the director of commerce, or a representative designated by the director, shall investigate any alleged violation of sections 4115.03 to 4115.16 of the Revised Code.

(B) At the conclusion of the investigation, the director or a designated representative shall make a recommendation as to whether the alleged violation was committed. If the director or designated representative recommends that the alleged violation was an intentional violation, the director or designated representative shall give written notice by certified mail of that recommendation to the contractor, subcontractor, or officer of the contractor or subcontractor which also shall state that the contractor, subcontractor, or officer of the contractor or subcontractor may file with the director an appeal of the recommendation within thirty days after the date the notice was received. If the contractor, subcontractor, or officer of the contractor or subcontractor timely appeals the recommendation, within sixty days of the filing of the appeal, the director or designated representative shall schedule the appeal for a hearing. If the contractor, subcontractor, or officer of the contractor or subcontractor fails to timely appeal the recommendation, the director or designated representative shall adopt the recommendation as a finding of fact for purposes of division (D) of

this section. The director or designated representative, in the performance of any duty or execution of any power prescribed by sections 4115.03 to 4115.16 of the Revised Code, may hold hearings, and such hearings shall be held within the county in which the violation of sections 4115.03 to 4115.16 of the Revised Code is alleged to have been committed, or in Franklin county, whichever county the person alleged to have committed the violation chooses. For the purpose of the hearing, the director may designate a hearing examiner who shall, after notice to all interested parties, conduct a hearing and make findings of fact and recommendations to the director. The director shall make a decision, which shall be sent to the affected parties. The director or designated representative may make decisions, based upon findings of fact, as are found necessary to enforce sections 4115.03 to 4115.16 of the Revised Code.

(C) If any underpayment by a contractor or subcontractor was the result of a misinterpretation of the statute, or an erroneous preparation of the payroll documents, the director or designated representative may make a decision ordering the employer to make restitution to the employees, or on their behalf, the plans, funds, or programs for any type of fringe benefits described in the applicable wage determination. In accordance with the finding of the director that any underpayment was the result of a misinterpretation of the statute, or an erroneous preparation of the payroll documents, employers who make restitution are not subject to any further proceedings pursuant to sections 4115.03 to 4115.16 of the Revised Code.

(D) If the director or designated representative makes a decision, based upon findings of fact, that a contractor, subcontractor, or officer of a contractor or subcontractor has intentionally violated sections 4115.03 to 4115.16 of the Revised Code, the contractor, subcontractor, or officer of a contractor or subcontractor is prohibited from contracting directly or indirectly with any public authority for the construction of a public improvement or from performing any work on the same as provided in section 4115.133 of the Revised Code. A contractor, subcontractor, or officer of a contractor or subcontractor may appeal the decision, within sixty days after the decision, to the court of common pleas of the county in which the first hearing involving the violation was heard. If the contractor, subcontractor, or officer of a contractor or subcontractor does not timely appeal the recommendation of the director or designated representative under division (B) of this section, the contractor, subcontractor, or officer of a contractor or subcontractor may appeal the findings of fact, within sixty days after the recommendations are adopted as findings of fact, to the court of common pleas within the county in which the violation of sections 4115.03 to 4115.16 of the Revised Code is alleged to have been committed or in Franklin county, whichever county the person alleged to have committed the violation chooses.

(E) No appeal to the court from the decision of the director may be had by the contractor or subcontractor unless the contractor or subcontractor files a bond with the court in the amount of the restitution, conditioned upon payment should the decision of the director be upheld.

(F) No statement of a contractor, subcontractor, or officer of a contractor or subcontractor and no recommendation or finding of fact issued under this section is admissible as evidence in a criminal action brought under this chapter against the contractor, subcontractor, or officer of a contractor or subcontractor.

(G) In determining whether a contractor, subcontractor, or officer of a contractor or subcontractor intentionally violated sections 4115.03 to 4115.16 of the Revised Code, the director may consider as evidence either of the following:

(1) The fact that the director, prior to the commission of the violation under consideration, issued notification to the contractor, subcontractor, or officer of a contractor or subcontractor of the same or a similar violation, provided that the commission of the same or a similar violation of sections 4115.03 to 4115.16 of the Revised Code at a subsequent time does not create a presumption that the subsequent violation was intentional;

(2) The fact that, prior to the commission of the violation, the contractor, subcontractor, or officer of a contractor or subcontractor used reasonable efforts to ascertain the correct interpretation of sections 4115.03 to 4115.16 of the Revised Code from the director or of the Revised Code, provided that a violation is presumed not to be intentional where a contractor, subcontractor, or officer of a contractor or subcontractor complies with a decision the director or designated representative issues pursuant to a request made under section 4115.131 of the Revised Code.

(H) As used in this section, "intentional violation" means a willful, knowing, or deliberate failure to comply with any provision of sections 4115.03 to 4115.16 of the Revised Code, and includes, but is not limited to, the following actions when conducted in the manner described in this division:

(1) An intentional failure to submit reports as required under division (C) of section 4115.071 of the Revised Code or knowingly submitting false or erroneous reports;

(2) An intentional misclassification of employees for the purpose of reducing wages;

(3) An intentional misclassification of employees as independent contractors or as apprentices;

(4) An intentional failure to pay the prevailing wage;

(5) An intentional failure to comply with the allowable ratio of apprentices to skilled workers as required under section 4115.05 of the Revised Code and by rules adopted by the director pursuant to section 4115.12 of the Revised Code;

(6) Intentionally allowing an officer of a contractor or subcontractor who is known to be prohibited from contracting directly or indirectly with a public authority for the construction of a public improvement or from performing any work on the same pursuant to section 4115.133 of the Revised Code to perform work on a public improvement.

Effective Date: 07-01-2000

R.C. 4115.133 Filing list of convicted contractors, subcontractors, and officers of contractors and subcontractors.

(A) The director of commerce shall file with the secretary of state a list of contractors, subcontractors, and officers of contractors and subcontractors who have been prosecuted and convicted for violations of or have been found to have intentionally violated sections 4115.03 to 4115.16 of the Revised Code. The director shall not include on the list a contractor, subcontractor, or officer of a contractor or subcontractor until the expiration of any applicable appeal period relative to the finding, or if appealed, until the date of the final judgment of a court.

(B) Each contractor, subcontractor, or officer of a contractor or subcontractor who has been prosecuted and convicted for violations of or is found to have intentionally violated sections 4115.03 to 4115.16 of the Revised Code is prohibited from contracting directly or indirectly with any public authority for the construction of a public improvement or from performing any work on the same as a contractor, subcontractor, or officer of a contractor or subcontractor for a period of one year from the date of the expiration of the applicable period for filing an appeal, or if appealed, from the date of the final judgment of a court. If the contractor, subcontractor, or officer of a contractor or subcontractor is found to have intentionally violated sections 4115.03 to 4115.16 of the Revised Code another time within five years after the date specified under division (B) of this section, the contractor, subcontractor, or officer of a contractor or subcontractor is prohibited from so contracting or performing work for a period of three years from the date of the expiration of the applicable period for filing an appeal, or if appealed, from the date of the final judgment of a court.

(C) No public authority shall award a contract for a public improvement to any contractor, subcontractor, or officer of a contractor or subcontractor during the time that the contractor's, subcontractor's, or officer's name appears on such list. The filing of the notice of conviction or of the finding with the secretary of state constitutes notice to all public authorities.

Effective Date: 07-01-2000

FINAL APPEALABLE ORDER

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

TP MECHANICAL CONTRACTORS,
INC.,

Plaintiff,

vs.

FRANKLIN COUNTY
BOARD OF COMMISSIONERS, *et al.*,

Defendant.

TERMINATION NO. *6*
BY *[Signature]*

Case No. 08 CVH-01-304

(JUDGE FRYE)

FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
JAN 14 AM 9:55
CLERK OF COURTS

OPINION OF THE COURT FOLLOWING TRIAL,
AND
FINAL JUDGMENT

1. ***Introduction***

This case concerns competitive bidding for several contracts to be awarded by Franklin County for a new baseball stadium called Huntington Park, presently under construction in the Arena District of Columbus. The Park is primarily intended as the home field for the Columbus Clippers, and is supposed to be completed in the spring of 2009 immediately prior to the opening of the International League (Triple A) baseball season. Complaint, ¶¶ 13 – 14.

TP Mechanical Contractors, Inc. asserts in its Complaint that it is an Ohio corporation, and “is a non-union specialty contractor specializing in, among other things, the construction, reconstruction and design of plumbing, HVAC, and fire protection systems on both public and private construction contracts.” Complaint, ¶¶ 1-2. TP Mechanical brought suit on Monday January 7, 2008. It contends the Board of Commissioners of Franklin County (and individual Commissioners) used unannounced bid criteria, and otherwise acted irrationally in proposing to reject TP Mechanical’s combined bid for both the plumbing work and the HVAC work, in order to award separate plumbing and HVAC contracts

resulting in a higher cost for the project. All of this is contended to demonstrate an abuse of the Commissioners' discretion and to justify intervention by the court.

2. *Procedural Background*

This case was filed in anticipation of a formal meeting of the County Commission scheduled for the following morning January 8. Plaintiff anticipated adverse action would occur on its bids for plumbing and HVAC work at Huntington Park.

Counsel for plaintiff applied for a Temporary Restraining Order during the afternoon of January 7. After a conference on the record with all counsel this court denied injunctive relief, believing that the facts and circumstances had continued to evolve over the preceding month, and that it was impossible to predict with certainty whether the Commissioners would ultimately act favorably or unfavorably to TP Mechanical.

The Commissioners' 2-1 vote on the plumbing contract, which practically speaking eliminated TP Mechanical's proposal to build a combination of plumbing and HVAC work, occurred on the morning of January 8. That triggered plaintiff's re-application for a Temporary Restraining Order to maintain the *status quo* pending a full evidentiary hearing. After hearing counsel for both sides on the record the court granted a limited stand-still restraining order to prevent final signatures to a plumbing contract with W.G. Tomko, Inc. pending a hearing on Friday, January 11. In addition, the court directed plaintiff and the County to hold a bid protest meeting and address TP Mechanical's concerns consistent with the intent of Section 8.3.1.2.1 of the Invitation to Bid and Contracting Documents.¹ That meeting was, in fact, held by the parties and their counsel on Thursday, January 10 but failed to resolve their disagreements.

¹ There is a maxim that "equity regards substance rather than form." 41 *O.Jur3d*, at 396; Equity §63 (1998). While as explained orally certain written notices were never exchanged, and no formal written rejection of the combined bid was issued by the County, it seemed evident to this court that TP Mechanical's apparent difficulties with the prevailing wage criteria lay at the heart of the matter and were of the type, in substance, intended to be addressed using § 8.3.1.2.1. Accordingly, the court ordered that meeting to occur in the event it might resolve the dispute without further court action.

At the second temporary restraining order hearing held January 8, plaintiff moved pursuant to Civ. R. 65(B) to consolidate trial on the merits with the preliminary injunction hearing. As discussed more fully in a previous Order filed January 9 in this case, this court granted plaintiff's request recognizing that it is undisputed that time is of the essence in resolving this dispute to attempt to keep the \$55 million Huntington Park project within the construction schedule and avoid potential harm to (and possibly delay claims by) the baseball team or other contractors.

Surprisingly, at the outset of the court hearing on Friday morning, Jan. 11 TP Mechanical abruptly reversed course and requested that this court only hear the preliminary injunction, not a final trial on the merits. The explanation offered was that the plaintiff anticipated moving to amend its complaint, in order to mount a broader legal or constitutional claim against the power ostensibly reserved by Franklin County at §8.3.3 of its bidding documents "to reject any or all of the bids on any basis without disclosure of a reason." Franklin County and the individual defendants objected, again primarily due to the time pressure of the project schedule. The court directed that it would proceed to decide the case once and for all on the merits. Accordingly, the Motion for leave to file a First Amended Complaint filed by TP Mechanical at 8:42 a.m. on the morning of January 14, 2008 is untimely, and is **DENIED**.

As explained hereinafter, in the end this court concludes that the County did not rely upon §8.3.3 in taking any action complained of by TP Mechanical. Likewise, the court's resolution of the factual and legal issues does not turn directly or indirectly upon §8.3.3 so a determination of the power of Franklin County to reject any bids on any basis and without disclosure of a reason must await another case, and another day.

On January 11 the court heard from four witnesses and considered 23 Exhibits. The following constitute the court's findings of fact and conclusions of law.

3. ***Project History***

a. **The Bidding**

In October 2007 Franklin County issued Invitation to Bid #3, soliciting proposals on 11 components of the Huntington Park construction project. Among them were plumbing and HVAC. Contractors could price plumbing and HVAC work individually, or as a combined or combination bid.

Awarding work using a combined bid can sometimes prove less costly to a project owner than awarding individual contracts performed by different contractors. This cost-savings occurs when bidders perceive the total package of work (such as here plumbing and HVAC) to be related, so that performing both packages (and a larger amount of work at one site) permits cost savings through more efficient use of manpower and equipment mobilization. Anticipated cost savings to a contractor can then be passed along in a lower bid to the owner.

On November 16 seven contractors bid the plumbing work, four bid the HVAC, and four submitted combined bids. TP Mechanical's \$4.3 million combined bid for the plumbing and HVAC was the lowest. TP was also low on the individual bid for HVAC at approximately \$1.8 million. Another contractor, which happens to be a union shop, was low on the stand-alone plumbing contract.

In submitting the bid TP Mechanical was required to answer dozens of questions, including a Homeland Security questionnaire asking whether it was "an organization on the U.S. Department of State Terrorist Exclusion List." (Ex. 9, p. 47) The primary focus in this case is Item 15 of the bid, entitled "Bidder's Certification" referenced by the County as its "quality contracting standards."

The County demands that bidders certify 24 different things, deemed to be "material and not mere recitals," in order to be responsive to Item 15. They cover a wide range of issues. At one end of the spectrum are relatively straightforward and unremarkable contract-performance requirements, such as that the Bidder has read and understands the Contract Documents, and that the Bidder has visited the Project site and become familiar with local conditions there. Ex. 9, Item 15, ¶¶ 1, 3. At the other extreme are requirements addressed to the workforce that will perform the public contract, and which appear to exceed

otherwise applicable legal requirements in the general economy. For instance, Franklin County requires certification that bidders provide “a minimum health care medical plan for those employees working on this project,” that the contractor “contributes to an employee pension or retirement program for those employees working on this project,” and that the contractor will make a good faith effort to ensure that all of their employees on the Project site do not sell, use, or possess illegal drugs or alcohol. Item 15, ¶¶ 10, 11, 17. Falling in the middle, conceptually, are a variety of requirements geared to the contractor’s compliance with state and federal laws having general applicability. These range from certification that the “Bidder’s construction license has not been revoked in any state” to certification of compliance with the Fair Labor Standards Act, prevailing wage, OSHA worker safety, unemployment compensation, and workers compensation laws. Item 15, ¶¶ 20, 14-16, 24.

Prevailing wage requirements are applicable to contractors working at Huntington Park. Under R.C. 4115.03, *et seq.*, contractors performing work on essentially any public project in Ohio are required to pay prevailing wages. Two separate provisions in Item 15 focus bidders on such requirements. Paragraphs 6 and 15 required bidders to certify to Franklin County that:

“6. The Bidder understands that the Contract is subject to all the provisions, duties, obligations, remedies and penalties of Chapter 4115, ORC, “Wages and Hours on Public Works,” and that the Bidder shall pay any wage increase in the locality during the term of the Contract.

15. The Bidder certifies that Bidder has not 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.”

b. The Initial Evaluation of the Bids

The bid price is not wholly determinative of the award of public contracts. This is true for the simple reason that a fly-by-night contractor could low-ball the price but be unable to complete the work, or might only perform in a shoddy manner. Accordingly, bids are evaluated to determine which contractor has

submitted the "lowest and best" bid using criteria in Section 8.1 of Franklin County's standard "Invitation to Bid and Contract Documents." Pltf. Ex. 10.

A "scope review" meeting was held with TP Mechanical, as is customary, following bid-opening. The intent of such meetings is to elicit further information from the bidder appearing to be low. As a result of requests for information communicated at that meeting by the County's "construction manager" Turner Construction Company, the "owner's representative" Nationwide Realty Investors, Ltd., and/or Richard Myers, a fulltime county executive assigned as the County's "project representative" for Huntington Park, a sizeable packet of additional information was prepared by TP Mechanical and sent for review. Plaintiff's Ex. 4. Plaintiff used the standard format of a "Responsible Bidder Information Form" for a portion of the response, followed by many pages of attachments that included financial statements, biographical information on TP's management employees, TP's corporate substance abuse policy, certificates documenting TP's liability insurance, and other material.

The "Responsible Bidder Information Form" included the following specific question:

"6. Indicate all occurrences of the following in the last 4 years (if none, so state). For verification by the state, attach documentation, and/or provide sufficient and appropriate detail information such as: Project name, Owner, contact person and phone number, Contract amount, etc. a) Prevailing Wage violations or judgments."

Ed O'Brien, Columbus Regional Manager for TP Mechanical, responded on the form: "Please see the attached 'Item #6.a. Prevailing Wage Violations or Judgments.'" "Item #6.a. Prevailing Wage Violations or Judgments" is a stand-alone page within many pages of unnumbered attachments to the "Responsible Bidder Information Form."

The Responsible Bidder Information Form separately asked in question 2 for the "overall experience of the bidder *** including the years in business *** under present and former business names. TP Mechanical responded "**54 Years in Business ...**" (emphasis and ellipsis in original.) Immediately underneath

that statement Mr. O'Brien listed eight past business names, including J.A. Croson, Inc.

Mr. O'Brien testified at trial that as presently constituted TP Mechanical is a business that resulted from a "buy-out" of Croson-Teepe LLP, but Mr. O'Brien is unaware of the corporate details. He reported to work at the same office the day before and the day after the buy-out that resulted in TP Mechanical. However, the chronology of corporate history is relevant to this story, and it was in fact further described in TP Mechanical's own answer on the "Item 6.a" attachment page. In responding to the County's question relative to past prevailing wage violations, TP Mechanical stated that:

"TP Mechanical Contractors, Inc. has not been named under any Prevailing Wage dispute. Three companies were combined in April 1999 to form Croson-Teepe LLP (what is now called TP Mechanical Contractors, inc.) J.A. Croson, Franklin Fire, and Teepe's River City Mechanical. These companies would often get reviewed for Prevailing Wage discrepancies. As TP Mechanical Contractors, inc. is a non-union company, complaints are typically filed by union-affiliated representatives and result in minor determinations (less than 1% of job payroll.) *Below is a list of jobs (and year paid) where we paid judgements [sic] in the past four years. We are currently undergoing reviews on other past jobs of which no assessment has yet to be finally paid.*" (emphasis added)

Following that introductory statement, TP Mechanical listed 17 jobs with prevailing wage difficulties by project names, with the "year paid." 16 of them were identified for 2002, and the last one as "settled 5/13/2004." Although the introductory paragraph on Item 6.a. referred only to judgments paid "in the past four years" (and 2002 was more than four years prior to 2007) no explanation was included as to why the 16 prevailing wage violations paid in 2002 had been included in the disclosure. More importantly, no disclosures were made about prevailing wage difficulties in 2005-2007.

One plausible explanation is that TP Mechanical simply copied its prevailing wage violations list from an old submission on another, unrelated public project, and neglected to review or update it. Moreover, Mr. O'Brien

testified his company has neither a separate paper record-keeping system nor computerized records from which it can readily review past prevailing wage violations. All prevailing wage records are maintained only in individual project files to which they pertain. There is no "master" index that captures all violations, even though by TP Mechanical's own admission the company "would often get reviewed for Prevailing Wage discrepancies." Item 6.a., *supra*.

TP Mechanical's OSHA compliance was also addressed during the review of its bids. OSHA information was requested on the second page of the "Responsible Bidder Information Form," although there was thereafter some ambiguity about how far back in time such information was actually sought based upon TP Mechanical's discussions with Turner Construction. The OSHA record of TP Mechanical has earned recognition under the U.S. Department of Labor's "Voluntary Protection Program (VPP) Mobile Workforce Star Demonstration Program" since 2003, according to Plaintiff's Exhibits 20-22 and testimony of Mr. O'Brien. While the Minutes of General Session of the County Commission held January 8, 2008, suggest Commission President Kilroy and Commissioner Brown had some concern over apparent OSHA violations reflected in TP Mechanical's bidding documents (Pltf. Ex. 11, at pp. 7 and 8) that was not the primary focus of their decision. Accordingly, OSHA compliance need not be addressed further in this Opinion.

On December 5, Turner Construction as "construction manager" made a written recommendation that Franklin County award to TP Mechanical as "lowest and best" bidder for the combined plumbing and HVAC contracts. Pltf. Ex. 17. Nationwide Realty Investors as the "owner's representative" responsible to lead the Huntington Park project did likewise, by letter dated December 7. (Pltf. Ex. 15) At trial their Vice President for "Development and Construction" James Rost (a civil engineer by training) again recommended TP Mechanical for the combined plumbing-HVAC contracts. On December 14, 2007, a contract for the combination of plumbing and HVAC work was forwarded from Turner Construction by email to Mr. O'Brien, although Turner's cover note prudently memorialized "that this does not guarantee that the County will be awarding the contract to TP Mechanical." Pltf. Ex. 6.

c. The December 18 Commissioners' Meeting

Plaintiff's Ex. 12 consists of the Minutes of the Commissioners' regular meeting held December 19, 2007. Resolution 1111-07 to formally award the combined contracts to TP Mechanical was one of a great many items of business considered that day.

Deputy County Administrator Bill Flaherty formally recommended the award of the combined bids to TP Mechanical, although the Minutes and the evidence at trial show he was joined in that recommendation by Mr. Rost of Nationwide and Mr. Myers of the County administrative staff. Following Mr. Flaherty's presentation, Commissioner Brown immediately moved to table the Resolution until the next meeting "pending some information that still needs to be checked out." Ex. 12, at pp. 20-21. In further discussion reflected in the Minutes, County Prosecutor Ron O'Brien stated he had been asked two questions that morning that he could not answer immediately, resulting in a need for "time to look into it."

It appears clear that the plumbing work ties into pouring concrete and other foundation work, and is on what contractors view as the "critical path" to timely completion of the baseball field. HVAC is not on the critical path. While Mr. Rost of Nationwide was emphatic on December 18 about the time-sensitive or "critical" nature of moving forward with much of the construction contracting, in order to meet the scheduled completion date for Huntington Park, an oral Resolution to table Resolution 1111-07 until the Commissioners' next scheduled January 8 meeting was passed unanimously. Ex. 12, pp. 21-22.

d. Communication after December 18

A letter dated December 18 was transmitted (according to the letter in evidence) by fax and mail to County Commissioners, along with members of Columbus City Council and the state Attorney General. It was sent by a purported "non-profit research organization" named "Laser, Inc" and included news clippings and other information about TP Mechanical and, to a lesser extent, its predecessor businesses J.A. Croson Company and Croson-Teepe. Whether this information was actually received before the Commissioners' meeting on December 18 (and provided one reason for Commissioner Brown's

concern that things “still need to be checked out”) is unclear. What is relevant is that an investigation of four alleged prevailing wage “complaints” against TP Mechanical began in late December, 2007.

e. TP Mechanical’s Undisclosed Prevailing Wage Issues

Following the Commissioner’s meeting Turner continued to “stand by its recommendation *** to award the plumbing and HVAC bid to T.P. Mechanical.” Plaintiffs Ex. 16.

Nevertheless, Mr. Myers investigated TP’s prevailing wage record and summarized his findings in a letter dated January 4, 2008, specifically regarding the “HVAC bid package.” Pltf. Ex. 13. Mr. Myers’ letter forwarded copies of five separate “Prevailing Wage Complaints” that he had obtained through inquiry to the Labor and Workers Safety Division of the Ohio Department of Commerce. That office supervises compliance with prevailing wage laws in Ohio. Its records are “public” but are not posted on any website, or otherwise available without a specific request.

Mr. Myers testimony was that it was purely an oversight that he had not independently investigated TP Mechanical’s compliance with prevailing wage requirements before mid-to-late December, and the court so finds. Mr. Myers’ January 4 letter and the state documents he obtained tie to the same prevailing wage complaint numbers and projects identified in Laser, Inc.’s letter dated December 18, although Mr. Myers did not recall ever seeing that Laser letter.

Mr. Myers concluded in his January 4 letter that TP Mechanical had more than three prevailing wage violations within a two-year period, within the last ten years, contrary to § 8.2.4.15 of the County’s “bid evaluation” criteria. Mr. Myers further concluded that based upon this information “T.P. Mechanical Contractors is not eligible for award of this [HVAC] contract.” By necessary inference, in Mr. Myers’ mind this also eliminated TP Mechanical from further consideration for an award of the combined contracts.

State documents reflected that in May 2005 a disgruntled former employee named Luke Dysinger had filed four prevailing wage charges against TP Mechanical relative to work at The Ohio State University, and one as to work at Ohio University. Trial testimony by Robert Kennedy, Superintendent of the state

office that operates the prevailing wage program and custodian of those records, explained the process followed when complaints are made. He said that following an initial investigation (in which payroll records are gathered from both the contractor and the public owner, and an audit is done by a state investigator) there is a "predetermination letter" sent to the contractor setting forth any potential liability for a prevailing wage violation. If the contractor pays in response to the predetermination letter, then the state considers "there is some violation there" according to Mr. Kennedy. When a contractor pays at that post-audit stage the state accepts and distributes the funds to the contractor's employees. If a contractor contests the state's predetermination, there apparently can be either informal discussions and negotiations leading to resolution, or more formal due process afforded to the contractor. Plaintiff's witness Mr. O'Brien suggested the more formal use of the prevailing wage process can prove expensive, and require use of legal counsel.

TP Mechanical makes much of the fact the state never sent a "final" determination letter because, on four of the five predeterminations, TP simply paid the claimed shortfall for prevailing wages. (The fifth case, involving Ohio University, was a \$0 determination amount, because there was "no project listing in database" from which to determine what, if any prevailing wages were due.)

Mr. O'Brien testified he does not believe the actual complainant (Mr. Dysinger) ever received any money based upon his claims, but that is uncertain and in any event is legally irrelevant. Superintendent Kennedy confirmed that TP Mechanical did respond to the state with a letter on at least one of the four cases. It also is clear that TP Mechanical actually paid the state \$2,635.87, \$492.25, \$737.70, and \$160.93 on those four "prevailing wage complaints" involving work at OSU. Pltf. Ex. 13 shows all four were ultimately "paid in full" in January 2007, suggesting the state did not agree to drop any claim or to accept any lower figure(s) despite letters or other negotiations. Those state records show all four prevailing wage complaints satisfied the temporal requirement that there be more than three "violations" within a two-year period in the last decade, assuming they in fact constitute "violations" under §8.2.4.15 of the County's bidding criteria.

f. TP Mechanical's Response

Both testimony and the letter marked plaintiff's Exhibit 7 show that TP Mechanical gained informal advance notice from Nationwide of Franklin County's concern over prevailing wage violations before Mr. Myers letter dated January 4. Accordingly, on January 3 Mr. O'Brien wrote the Commissioners, with copies shown to Governor Strickland, and Scott Teepe, company president whose office is in Cincinnati. Mr. O'Brien relayed not only information about prevailing wage concerns with TP Mechanical, but also negative information about W.G. Tomko, "an out of State contractor" asserted to have had "over seventeen (17) OSHA violations that were for the most part listed as serious in the last three (3) years along with one (1) potential death of an employee." W.G. Tomko is now in line to be awarded the plumbing contract rather than TP Mechanical

Another important fact must be noted in this same time frame following the December 18 meeting of the County Commission, but before they acted again on these contracts. It comes out of a telephone contact between Mr. O'Brien and Mr. Myers.² Told in a telephone conversation that the County was considering breaking the "combined" package apart, Mr. O'Brien said he was "shocked" and told Mr. Myers that his company would not honor its bid for the HVAC contract alone. There was, he recalled, not much dialogue after he said that. Remarkably, Mr. O'Brien testified that in making the statement he did not reflect on the potentially dire consequences for TP Mechanical of refusing to accept a contract award on its separate low-bid for HVAC.³ The point is, however, ultimately irrelevant because Franklin County has never indicated it took adverse action on

² The court takes information exchanged in such informal telephone calls with a grain of salt. While plaintiff relies heavily upon a telephone call between O'Brien and Myers on December 6, taped surreptitiously by O'Brien, in which Mr. Myers advised "the Commissioners or Administration" – he used both words – were leaning toward awarding separate contracts for the plumbing and HVAC, the court does not regard this as some sort of "smoking gun." Taken in context it was an informal communication in which Mr. Myers was communicating that the County still was investigating TP Mechanical and considering its options, and Myers' preliminary point of inquiry was simply whether TP might accept one stand-alone contract it had bid (for HVAC) rather than proceed under its separate combined bid.

³ Item 15 of the Bidder's Certification in the Bid Form (Ex. 9) provides, at ¶7, "[t]he Bidder will enter into and execute the Contract Form with the County. If a contract is awarded on the basis of this bid, and if the Bidder does not execute the Contract Form for any reason, other than as authorized by law, the Bidder and the Bidder's Surety are liable to the County as provided in the Instructions to Bidders."

any of TP Mechanical's bids premised upon that inflammatory comment by Mr. O'Brien or, for that matter, for some other improper reason such as out of retaliation for this lawsuit.

g. Final Action by the County Commissioners

On Tuesday, January 8 the Commissioners met again in General Session. Those Minutes, subject only to final editorial corrections and formal approval at the next meeting of the Commissioners, are Plaintiff's Ex. 13.

In the course of acting on a number of other resolutions, the Commission voted 2 – 1 to approve Resolution 014-08 to award the contract for plumbing work at Huntington Park to W.G. Tomko, Inc. The Commissioners found it was the "lowest and best bid of the seven plumbing bids received." Ex. 11, p. 5. It was directly addressed that the combined mechanical bid was the lowest cost financially, and in fact Commissioner Brooks voted against the award to Tomko because she did not believe "the business case has been made in terms of de-linking the two contracts." Ex. 11, p. 8.

Following the granting of a Temporary Restraining Order by this court on January 8 in order to allow, in substance, the informal meeting process set out in Section 8.1 of the Invitation to Bid and Contracting Documents to be held with TP Mechanical, the County Commission re-convened on Thursday, January 11 and formally ratified the decision to separate the combined bids, and award the plumbing portion to W.G. Tomko, Inc. pursuant to Resolution 014-2008. Def. Exhibit "A".

In passing the court notes two legal points relevant to the procedure followed in this accelerated case. First, the main focus of a permanent injunction trial, as opposed to the somewhat looser four factor-test customarily used at a preliminary injunction hearing, is that "instead of the plaintiff proving a 'substantial likelihood' of prevailing on the merits, the plaintiff must prove that he *has* prevailed on the merits. [citations omitted]" *Great Plains Exploration, LLC v. City of Willoughby* (11th Dist.) Case No. 2006-L-022, 2006-Ohio-7009, 2006 Ohio App. LEXIS 6958, at ¶ 12; *see also, Ohio Service Group, Inc. v. Integrated & Open Systems, L.L.C.* (10th Dist.), Case No. 06AP-433, 2006-Ohio-6738, 2006 Ohio App. LEXIS 6633, at ¶ 11 and case cited.

Second, during trial on Friday, January 11 the court denied the defendants' motion for directed verdict at the close of plaintiff's case. Largely the court did so because it understood – perhaps mistakenly – that it was obligated at that juncture to construe all the evidence most strongly in favor of the plaintiff. More practically speaking, the court did not want to have this case fall into a procedural quagmire in which an appellate court might deem it necessary to remand the case so that this trial court could “fulfill its role as the trier of fact” as discussed by Judge Klatt in *Jarupan v. Hanna* (10th Dist.), 173 Ohio App.3d 284, 2007-Ohio-5081, at ¶ 14. Thus, the reader should draw no conclusion about the strength of plaintiff's case from this court's pragmatic election to proceed to hear the defense case.

4. General Ohio law on bid protest litigation

In a very recent decision the Supreme Court of Ohio summarized the law that, in part, governs this case. *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991, at ¶¶9-10, held as follows (internal citations omitted):

{¶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. *** 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.

{¶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. *** 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. *** 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.” ***

Ohio law is that “in the absence of evidence to the contrary, public officers, administrative officers and public boards, within the limits of the jurisdiction conferred by law, will be presumed to have properly performed their duties and

not to have acted illegally but regularly and in a lawful manner. [citations omitted]" *Cedar Bay Constr., Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 21. When the law provides for the acceptance of the lowest and best bid, a government entity is not limited to an acceptance of the lowest dollar bid. *Id.* Yet, because protection of the taxpayer and prevention of excessive cost is one goal of the law in this area, price considerations cannot be ignored. *E.g., Cleveland Construction, Inc. v. City of Cincinnati* (1st Dist.), 169 Ohio App.3d 627, 2006-Ohio-6452, at ¶ 24 (case argued in Ohio Supreme Court on January 9, 2008, and awaiting decision.)

The test pertinent to cases over what is the "lowest and best bid" is whether it has been proven that a public authority has "abused its discretion." This is a legal test. It is defined to mean that there is proof of "more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude." *Cedar Bay Constr., supra*, at 22. In this context the word "unreasonable" has been held to mean "irrational." *Id.* However, if a governmental entity employs unannounced criteria to examine a bid and determine which is "best" that may well violate Ohio law. *Id., citing Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356.

Finally, the burden of proof in any injunction case is by "clear and convincing evidence." This has been defined as "[t]hat measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. [citation omitted]" *Cincinnati Bar Assoc. v. Massengale* (1991), 58 Ohio St.3d 121, 122.

Against this backdrop, plaintiff argues that the Franklin County Commissioners have been shown, clearly and convincingly, to have abused their discretion in essentially two respects. First, they elected to separate the two contracts for which they initially considered awarding a combined bid for all plumbing and HVAC work. Second, they improperly disqualified TP Mechanical from that combined bid. Absent success on those issues, as the defendants point

out, TP Mechanical may lack standing to sue, for it was not the lowest bidder on the stand-alone plumbing contract proposed to be awarded to W.G. Tomko, Inc.

Before stating its conclusions on those two questions, however, brief mention must be made of the defendants' threshold defense that TP Mechanical lacks standing to sue.

5. TP Mechanical's Standing to Sue

"Standing" is a legal concept addressed to whether or not a particular litigant can bring a case in court. Without taking this decision off into the subtleties of the standing doctrine, here it is clear that TP Mechanical has standing to sue Franklin County.

Franklin County invited combined bids, and TP Mechanical not only submitted them, but also participated in the scope review meeting and in other post-bid work in reliance upon Franklin County's good faith in seeking a combined bid. TP Mechanical was lower in price than any other bidder for the combined work. While the evidence is not absolutely clear, it does appear that TP Mechanical's combined bid would have resulted in savings of between \$138,000 and \$214,000 over the best stand-alone plumbing and HVAC prices if those two contracts are awarded separately.

The general rule is that "[i]n order to have standing to challenge the award of a contract on a public construction project in Ohio, a contractor must have submitted a bid on the project. [citation omitted]" *State ex rel. Associated Bldrs. & Contrs., Cent. Ohio Chapter v. Jefferson Cty. Bd. of Commrs.* (7th Dist. 1995), 106 Ohio App.3d 176, 182. Defendants' argument that only if TP Mechanical were *low bidder on the plumbing contract* would it have standing to sue must be rejected under the facts presented here where it not only bid, but was the low bidder on the package requested by Franklin County that included that plumbing contract.

6. The Court's Conclusions on the Merits

With all of this as prologue, the court turns to the arguments of TP Mechanical not already addressed.

First, there is no clear and convincing evidence that Franklin County used any unannounced bid criteria.

Second, Franklin County has not been clearly and convincingly shown to have abused its discretion. It cannot be disputed that Franklin County's rather late discovery of prevailing wage issues was disruptive to the contract award process. However, as TP Mechanical was explicitly told in mid-December when the draft combined contract was forwarded for signature before the December 18 General Session meeting, tendering the document did not necessarily indicate that Commissioners would follow the recommendations of Nationwide, Turner, or subordinate County executives. The prevailing wage statutes are the law of Ohio. The fact that they may primarily impact non-union employers like TP Mechanical was surely considered in the General Assembly. Moreover, there was credible testimony at this trial that even unionized employers must give attention to prevailing wage-type requirements so that they do not staff their jobs with apprentice laborers to artificially depress their payroll (and perhaps end up with substandard work on their public jobs.)

TP Mechanical's primary argument to the Commissioners and before this court is that the four situations relied upon were not true "violations" of prevailing wage law. § 8.2.4.15 of the Invitation to Bid and Contract Documents states the requirement that the Bidder "has not been *** 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." There are two answers to plaintiff's argument. First, as noted earlier, Mr. Kennedy of the state considered there were "violations" when an employer paid money sought under a predetermination letter. Second, it is within the broad discretion of Commissioners to reach that same conclusion since, as noted above, mere errors of law or of judgment do not constitute an "abuse of discretion" justifying a court intervention in bidding for public contracts.

TP Mechanical's argument in this regard is fundamentally flawed once one understands how the prevailing wage system operates. If contractors could justifiably claim in their competitive bidding that they had never been found to have "violated" prevailing wage law by the simple expedient of paying every

amount sought in “predetermination letters,” and thereby shortcutting the state process, there would never be anyone found to have violated prevailing wage law. Savvy contractors would effectively buy their way out of the prevailing wage regulatory system whenever they were caught, simply by capitulating at a stage of the state regulatory process before an absolutely final “violation” notice was issued.

Once the system for supervising prevailing wage law in Ohio is understood, it would be foolish to demand Commissioners simply disregard contractors who pay sums in “settlement” at the predetermination stage. The quality contracting criteria in Franklin County have been published and in use for about five years. TP Mechanical bids both private and public work. Pltf. Ex. 1. It was suggested at trial TP Mechanical had done one prior project for Franklin County. One might infer that plaintiff anticipated that its own history of prevailing wage violations (albeit in previous corporate forms as reviewed above) might invite very close scrutiny under those Franklin County bid evaluation criteria and concluded in January of last year to simply pay the state on all four OSU-related prevailing wage complaints at the predetermination stage, allowing this argument later that those situations never matured into final “violations.” The contrary explanation offered, it was just too much trouble to fight these four separate prevailing wage allegations, seems somewhat contrived because – as Superintendent Kennedy testified – TP Mechanical actually did respond by letter to at least one predetermination by the state, and presumably could easily have contested them all simply using in-house personnel rather than purportedly “expensive” outside legal counsel.

In any event, whether the four payments to the state in January 2007 were made because the prevailing wage amounts involved were too trivial to contest, or were made for some other reason, Franklin County Commissioners had a basis to find that § 8.2.4.15 had not been satisfied. In a similar case involving the Medina County Commissioners and a plumbing contractor, the Court for Appeals for the Ninth District likewise recognized that a Board was within its “broad discretion to consider all relevant factors, including alleged prevailing wage violations, when determining which contractor is the ‘lowest and best’.” *State ex rel. Navratil v.*

Medina Cty. Commr's (9th Dist. Oct. 11, 1995), Case No.2424-M, 1995 Ohio App. LEXIS 4541, 2 Wage & Hour Cas.2d (BNA) 1643. Prevailing wage is the law of Ohio, and having public officials monitor compliance with it hardly amounts to an abuse of discretion.

It follows from what has been said that the arguably *de minimus* dollar amounts in the four prevailing wage cases was likewise a matter for the Commissioners' informed consideration. The evidence is that the amounts paid to the state by TP Mechanical were only .077% of total wages paid on the four OSU projects. Yet, it seems to this court like an argument that they are only misdemeanors rather than felonies. Weighing the seriousness of violations – or choosing instead a straightforward three violations or more and you are disqualified approach regardless of seriousness - falls squarely within the judgment of the County Commissioners. They could sensibly conclude that it is not merely the dollar amount but also the frequency of violations that matters; and, in the end, that it is the predictive impact of *any* violations of the law which is appropriately considered in examining TP Mechanical's anticipated future compliance with Ohio law – should it be awarded any Franklin County contract. Getting a "good" contractor so that Huntington Park is constructed well and timely is really the issue presented by not only § 8.2.4.15 but also the other criteria used for bid evaluation.

Turning its argument that its violations were at most *de minimus* completely around, TP Mechanical also makes an argument based upon one isolated statement recorded at page 7 of the Board's Minutes of the January 8 meeting. Pltf. Ex. 11. Commission President Kilroy, plaintiff argues, let slip that some previously unknown subjectivity was actually used to evaluate noncompliance with the County's quality contracting criteria. The Minutes paraphrase Mrs. Kilroy as saying "[w]e have been going through bid documents here, and trying to make sure that all the contractors in all of our projects live up to these standards. *In some instances we try to quantify violations, in other words, in other places we might look for the, whether or not a violation is willful or not.*" (emphasis added) These oral comments lend no real support to TP Mechanical's claim. First, the statement was generic and does not reflect any

considered statement of policy even if the comment was recorded completely accurately in the Minutes. Such an isolated, unscripted oral comment is a slender reed upon which to rest plaintiff's case, when Franklin County has published carefully written and detailed criteria to evaluate public bidders. More fundamentally, unless taken completely out of context Mrs. Kilroy's comment reflects no intention to disregard published criteria for responsive bidders.

To be sure, dissenters from the course taken by the majority of the Board of Commissioners include Nationwide Realty, Turner Construction, and even at the final votes one Commissioner. They felt prevailing wage difficulties involving TP Mechanical were not enough to justify breaking-up the combined bid package, and paying a somewhat higher price for the work. Two Commissioners disagreed. Whether those two Commissioners were making "mistakes" in judgment is not the legal test. Plainly, they were exercising judgment and trying to do so sensibly. That is all the law demands.

In the end, TP Mechanical's arguments largely depend upon taking bits of statements by Mr. Myers, and other pieces of the overall story out of context, and then trying to make much of matters such as that prevailing wage difficulties were identified only late in the final contracting process. But, in the immortal words of baseball great Yogi Berra: "it ain't over 'till its over." Defendant Commissioners were not obligated to act on December 18 when TP Mechanical looked like a shoo-in for the combined contract. Final actions taken to the contrary in January may not be enjoined.

FINAL JUDGMENT

Plaintiff's application for a declaratory judgment under Count One of the Complaint is **GRANTED** in part, consistent with the foregoing Decision and the previous oral ruling of this court relative to the County's obligation to provide a bid protest meeting consistent with §8.3.1.2.1 of the Instructions to Bidders and Contract Documents. The court further finds and declares that there is no basis in Ohio law to enjoin the immediate effectiveness of County Resolution No. 015-08. The Temporary Restraining Order previously entered to suspend final award

of the plumbing contract to W.G. Tomko, Inc. is hereby **DISSOLVED**.
Plaintiff's request for a permanent injunction and related relief is **DENIED**.

Court costs shall be paid equally by the plaintiff and defendants
(collectively) since each side prevailed on certain portions of this case.

In all other respect, plaintiffs' Complaint is hereby dismissed, and final
judgment is rendered in favor of all defendants.

*** This is a final Appealable order. ***

IT IS SO ORDERED.


RICHARD A. FRYE, JUDGE

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