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IN THE SUPREME COURT OF OHIO

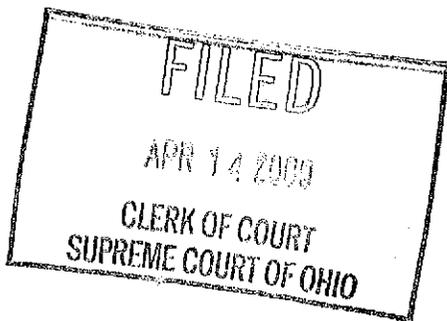
State ex rel. Associated Builders & Contractors of Central Ohio, et al. :
: Appellants, :
: v. :
: Franklin County Board of Commissioners, et al. :
: Appellees. :

Case No. 08-1478
Appeal From the Tenth District Court of Appeals

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. Although public authorities have broad discretion to choose the lowest and best bidder, they are preempted from adjudicating prevailing wage violations.

The Board and amici argue issues that are not dispositive of this appeal. First, they focus on the public authorities' discretion in their role as a procurement official, which is not questioned in this appeal. Second, they argue cases focused on abuse of discretion, which is not the standard applicable to this appeal. They argue that:

- Public authorities have discretion to choose the lowest and best bidder for public contracts. (Merit Brief of Appellees Franklin County Board of Commissioners (“Board Br.”) at 7, 8, 9; *Amicus Curiae* Brief of NECA, MCA-NWO on Behalf of Appellee Franklin County (“NECA Br.”) at 5, 6-7; Brief of *Amici Curiae* the Ohio State Building and Trade Council and the Columbus/Central Ohio Building and Construction Trades Council, in Support of Appellees (“Trades Council Br.”) at 7-8, 12 n.5.)
- Absent an abuse of discretion, courts will not overturn a public authority’s contracting decision as it relates to weighing the experience of bidders. (Board Br. at 7, 10, 16; NECA Br. at 6; Trades Council Br. at 1-2, 8, 8-9, 10.)
- A public authority may announce criteria for judging bidders in advance of bidding. (Board Br. at 9-11; NECA Br. at 6.)
- A public authority may consider prevailing wage violation enforcement “results” of the Ohio Department of Commerce. (NECA Br. At 6.)

Appellants do not dispute these chestnuts of public contracts law. Though legally sound, they fail to address whether a public authority acting in the capacity of a procurement official may distort that role to include adjudicating whether a contractor has violated prevailing wage law. The Franklin County Commissioners recognized expressly in their resolution declaring The

Painting Company ineligible that their discretion was based solely upon alleged adjudications of “the State.” Contrary to the briefs of counsel, the Commissioners exercised no discretion whatsoever. They merely misreported the actions of the state.

The appropriate analogy would be if a public board voted against an employment applicant and found him “ineligible” due to a conviction for theft in the past three years. If in fact the applicant had been arrested and charged with theft, but was never actually convicted, the issues would be similar to the case at bar. Whether the public authorities would have discretion to consider the convictions of the person is different from deciding whether the public authorities had discretion to find the person guilty in the first instance. Even if the County Commissioners had the discretion to find a person guilty of a crime in the first instance, that authority would not stem from their authority to select bidders and sign contracts.

II. Allegations that lack support in the record are not fit to be considered by this Court.

Amicus briefs are not excused from following the rules of this Court. S.Ct.Prac.R. VI, Section 6(A). All merits briefs must include “[a] statement of the facts *with page references, in parentheses, to supporting portions of both the original transcript of testimony and any supplement filed in the case.*” Id., Section 2(B)(3). The amicus brief of the Trades Council contains a four-page “Statement of the Case and the Facts.” (Trade Council Br. at 2-6.) Few of the factual statements in this section are cited to the record. (Id.); see also S.Ct.Prac.R. V Section 1 (defining “record”). Most troubling is the Trade Council’s unsupported portrayal of Appellant The Painting Company as a willful violator of state law. (Trade Council Br. at 4 n.3.) The Trades Council asserts that “the record reveals” information not contained anywhere in the record. (Id.) The only citation for these serious allegations is a web site never mentioned in the record of this case. (Id.) The Trades Council tries to assert new facts that were never offered

into evidence. It does not substantially comply with the S.Ct.Prac.R., and should be stricken from consideration in this appeal or given no weight.

Furthermore, the record does not support the Board's contention that it decided that The Painting Company was not the "lowest and best" bidder for the painting scope of work. (Board Br. at 21; see also Trades Council Br. at 12.) The Board never even considered The Painting Company's experience and qualifications. (Tr. Stip. 75, Supp. at 2, 18; Pls' Ex. 16, Supp. at 117.) It ignored the recommendations of both the construction manager and the owner's representative to award to The Painting Company. (Tr. Stip. 41, 47, 65-67, Supp. at 2, 13, 16). It did not compare the bids of The Painting Company and other contractors based on enumerated factors. (Compare Board Br. at 2, 12 (citing Section 8.2.3 "factors"); with Pls' Ex. 16, Supp. at 117 (citing Section 8.2.4.15 ineligibility.)) The record reflects the uncontroverted discretion exercised by the Board when it declared The Painting Company "not eligible for award." (Pls' Ex. 16, Supp. at 117.) The Painting Company's bid was thus rejected automatically, as "a ministerial function," (NECA Br. at 7,) and not as an exercise of discretion as to which bid was best. The Board relies solely upon the wide procurement discretion of the Board, but ignores the words the Board used to exercise that discretion because it does not support the spin they try to place on the Board's decision to effectively debar The Painting Company and all similarly situated contractors.

III. The briefs of the Board and amici state no reason why R.C. Chapter 4115 does not preempt the Board's debarment scheme.

This appeal turns on this Court's line of cases holding that the State Constitution limits the powers of *both municipalities and counties* to contradict the General Assembly.¹ E.g.,

¹ Appellee Franklin County Board of Commissioners ("the Board") and an amicus recognize that the wording of Appellants' proposition of law changed between the jurisdictional brief and the

Cincinnati v. Baskin, 112 Ohio St.3d 279, 2006-Ohio-6422 at ¶ 9; *Geauga Cty. Bd of Commrs. v. Munn Rd. Sand & Gravel* (1993), 67 Ohio St.3d 579, 582-83, 621 N.E.2d 696. Contrary to the Board's argument, the Home Rule Amendment is not the basis for preemption; it is an exception to the superiority of general state laws. (Compare Board Br. at 6, 15-16; with *Cincinnati*, 2006-Ohio-6422 at ¶ 11.) Nor has this Court ever required express statutory preemption; nor has it applied federal preemption principles to conflicts between state and local law. (Contra NECA Br. at 10-11 (citing no authority.)) Instead, three elements establish that a state statute preempts a local enactment: (1) the local law conflicts with the state statute; (2) the local law is not part of the home rule power; and (3) the state statute is a general law. *Cincinnati*, 2006-Ohio-6422 at ¶ 10. Appellants' merit brief demonstrated that each element is present, and that the Board's debarment of the Painting Company is therefore foreclosed by R.C. Chapter 4115. The briefs of the Board and amici largely affirm that conclusion by ignoring Appellant's cases and citations of authority.

A. The opposing briefs further demonstrate that the Board's policy conflicts with R.C. Chapter 4115.

Appellants' Merit Brief identified four areas in which the Board's prevailing wage policy conflicts with state law:

- (1) it imposes debarment more broadly than R.C. Chapter 4115;
- (2) it imposes debarment on harsher terms than R.C. Chapter 4115;
- (3) it imposes debarment without the procedural protections that R.C. Chapter 4115 requires; and
- (4) it usurps the Department of Commerce's enforcement authority under R.C. Chapter 4115.

merits brief, and express "concern." (Board Br. at 5 n.2; NECA Br. at 3). The difference is superficial, and not intended to modify the arguments in this appeal.

(Appellants' Merit Br. at 10-11.) The briefs of and in support of the Board fail to show otherwise. In fact, they either admit that conflicts exist or introduce arguments that highlight the conflicts.

1. The Board cannot avoid conflict by calling its policy a "criterion."

The Board seeks to avoid the conflict between its policy and state law by calling its policy a "criterion." The Board and amici do not oppose Appellants' interpretation of the Board policy and its application to The Painting Company. (Appellants' Merit Br. at 12 (Painting Company ineligible under Board policy "*until 2015.*") Instead, the Board argues that Section 8.2.4.15 of its Project Manual for Huntington Park, which implements the prevailing wage enforcement policy at issue, "does not establish any further duty on a bidder" and is therefore a "criterion" rather than an "ordinance." (Board Br. at 17.) This is one of several attempts by the Board and amici to assert form over substance. (See also, e.g., Trades Council Br. at 10.) This argument exposes the need for uniformity in "finding" prevailing wage violations, so that public authorities cannot label and treat contractors as violators under the guise of a lowest and best determination. The Board ignores the fact that all bidders on all Franklin County contracts are required to "*certify that they have not been found by the state to have violated the prevailing wage law more than three times in any two-year period in the last ten years.*" (Franklin Cty. Res. 421-02, Apx. at 40 item 5 (emphases added.)) A contractor that cannot so certify is not considered for award. (Id.) Neither the Board nor amici deny the existence of this policy. The Board can call its policy a rule, a regulation, a criterion or a "guiding principle," (Board Br. at 13,) but it cannot deny the policy's effect: it automatically debar The Painting Company and all similarly situated contractors. Nor can the Board deny that its debarment lasts longer than the

three years permitted by R.C. Chapter 4115, a significant conflict. (Appellants' Merit Br. at 14-15); R.C. 4115.133(B).

2. **NECA's brief highlights that R.C. 4115's debarment requires a finding of intent, but the Board's policy does not.**

The opposing briefs confirm that the Board's debarment provision conflicts with R.C. Chapter 4115 by using a count system rather than requiring a finding of intent. Amicus NECA recognizes that reversing the decision below would spare contractors "negative consideration by a public authority, [where] the state never made a finding of actual intent." (NECA Br. at 9.) Of course, R.C. Chapter 4115 *requires* either a criminal conviction or a finding of intent before disqualifying contractors. R.C. 4115.13(D). If an accused was tried but acquitted and the Board decided that they had been "found" by the state prosecutor to have been guilty based upon an independent review of the Board, as is now suggested by the Appellant and amici, it would be double jeopardy. The same should be the result here, by analogy, because the state actually considered the allegations against The Painting Company and did not proceed to adjudication. Although NECA apparently does not agree with the policy choice of requiring an adjudication of intent, it presents no legal grounds for either the Board or this Court to override the General Assembly.

3. **Contrary to the Board's argument, the procedural protections of R.C. Chapter 4115 are crucially important in this appeal.**

Moreover, the opposing briefs show that the Board is imposing debarment without required procedures. Both the Board and NECA take issue with Appellants' argument that R.C. 4115 requires debarment to be imposed only through certain procedures, with the Board calling it "irrelevant and improper." (Board Br. at 13; see also NECA Br. at 3.) They conflate that argument, which is in Appellants' merits brief, (Appellants' Merit Br. at 15-18,) with the due

process argument in Appellants' jurisdictional brief, (Mem. Supp. Jurisdiction of Appellants at 6-10). Although the U.S. Constitution and the Ohio Constitution require certain procedures when the state deprives individuals of protected interests in liberty and property, Section 16, Article 1, Ohio Constitution; Amendment 14, U.S. Constitution, this appeal addresses preemption only. (Decision and Entry, 12/3/08.) Therefore, arguments based on the standards of *constitutional* due process would be inapt.

On the other hand, the conflicts between the Board's policy and R.C. Chapter 4115 are *the main issue* in this appeal. See *Cincinnati*, 2006-Ohio-6422 at ¶ 18 (conflict "the crucial issue" in preemption analysis). R.C. Chapter 4115 contains procedures that ensure fair and proper application of the severe sanction of debarment. R.C. 4115.13, 4115.133. The history of Ohio prevailing wage law reflects the General Assembly's longstanding concern that free and open competition for public contracts not be unduly limited by debarments imposed without adequate process. Am.S.B. 201, 131 Ohio Laws 996 (1965), Apx. at 145; Am. Sub.H.B. 350, 145 Ohio Laws 5572, 5577-5581, Apx. at 146, 148-50. The conflicts between the Board's implementation of its policy and the procedural protections of R.C. Chapter 4115 are therefore important to this appeal, especially when *the Board concedes that it lacks appropriate procedures* to impose debarment. (Board Br. at 20.) This is a fundamental conflict with R.C. Chapter 4115.

4. **The opposing briefs show that the Board's policy interferes with state prevailing wage enforcement.**

NECA's brief supports Appellants' position that the Board's action interferes with state prevailing wage policy. A decade ago, NECA joined disappointed bidders in a legal battle to force the State to enforce its debarment provision. See *State ex rel. National Elec. Contractors Assn. v. Ohio Bureau of Employment Svcs.* (1998), 83 Ohio St.3d 179, 699 N.E.2d 395. As

NECA points out, “previous state enforcement policy was to settle every claim in such a way that no determination of intent was made.” (NECA Br. at 8-9 (citing *State ex rel. National Elec. Contractors Assn. v. Ohio Bureau of Employment Svcs.* (2000), 88 Ohio St.3d 577, 728 N.E.2d 395.)) The issue in those cases was whether state officials were following R.C. Chapter 4115. Here, NECA supports the Board’s actions stepping in to correct perceived deficiencies in state prevailing wage enforcement. However, as NECA’s prior legal victories demonstrate, *it is the State’s responsibility to enforce R.C. Chapter 4115.* See *State ex rel. NECA* (1998) (mandamus appropriate to compel prevailing wage enforcement). Counties have only a limited role. (Appellants’ Merit Br. at 18-19.) Neither NECA, the Board, nor the other amicus disputed Appellants’ statement that local enforcement of R.C. 4115 hinders the State’s ability to perform its greater statutory role. (Appellants’ Merit Br. at 19-20.) The Board’s actions will deter contractors from settling violations with the state, greatly interfering with Department of Commerce enforcement. (Appellants’ Merit Br. at 20-21.)

If local officials, like NECA, are unsatisfied with the State’s enforcement actions, they have several options. They can always seek a political change in enforcement policy. They can prosecute violators as authorized by R.C. 4115.99. Any convictions would result in automatic debarment. R.C. 4115.133(A). They may even have recourse through mandamus. See *State ex rel. NECA* (1998), *supra*. But no law authorizes counties to take matters into their own hands and debar contractors without a finding of intent. That is what the Board did here, a serious conflict with state law.

B. The Board admits that it lacks Home Rule authority, and provides no other basis that allows it to override R.C. Chapter 4115.

The parties agree that the Board lacks any authority under the Home Rule Amendment. (Board Br. at 6, 16; Appellants’ Merit Br. at 25-27.) The Home Rule Amendment allows

municipalities to govern themselves without interference by the State. Section 3, Article XVIII, Ohio Constitution. Thus, in evaluating a municipal ordinance, this Court has often had to determine whether it is a matter of self-governance or an exercise of the police power. E.g., *Cincinnati*, 2006-Ohio-6422 at ¶ 11. The Home Rule Amendment protects self-governance ordinances of municipalities, but not counties, *even if they contradict a general state law*. *Id.* Municipalities' police power ordinances must yield to a conflicting general state law, even when the Home Rule Amendment applies. *Id.* Because the Home Rule Amendment does not apply to the Board, the distinction between police power and self-government is not an issue in this appeal. Every county enactment that conflicts with state law is unconstitutional. (Appellants' Merit Br. at 25-28.)

The Board argues that it is exempt from having its policies reviewed for conflicts with state law, because “[t]he [preemption] cases do not address or concern non-municipal action where the public authority has the statutory authority to act.” (Board Br. at 15.) It argues that R.C. 307.90 is the statutory authority for its prevailing wage enforcement policy. (Board Br. at 7.) The Board's argument is essentially that the State's grant of discretion to select the lowest and best bidder allows it to contradict state laws, because preemption only applies to municipalities. This argument is inconsistent with the Ohio Constitution. Counties are subdivisions of the State, and cannot act without its authorization. *Cincinnati W. & Z. Rd. Co. v. Com'rs of Clinton County* (1852), 1 Ohio St. 77, 89; *Bundy v. Five Rivers Metroparks*, 152 Ohio App.3d 426, 787 N.E.2d 1279, 2003-Ohio-1766 at ¶ 42. R.C. 307.90 is not a grant of plenary authority. It authorizes counties to select suitable contracting partners; it does not authorize them to violate the Revised Code. The Board's position is untenable. If the Board's actions contradict state statute, as shown above, (see *supra* at III.A.) then they cannot be authorized by statute.

The Board is not immune to having its policies preempted by state law. Because the Board's prevailing wage debarment policy contradicts R.C. Chapter 4115, it cannot stand.

C. R.C. Chapter 4115 is a general law of statewide concern.

Neither the Board nor amici argue to overturn this Court's decision in *State ex rel. Evans v. Moore* (1982), that R.C. Chapter 4115 is a general law. 69 Ohio St.2d 88, 92. Additionally, they do not argue against prevailing wage law being a matter of statewide concern. (See Appellants' Merit Br. at 28-29.) This Court should find that Appellants have established the third element of preemption, that R.C. Chapter 4115 is a general law.

CONCLUSION

The Resolution meets all three elements of the test this Court set forth in *Cincinnati v. Baskin*, 2006-Ohio-6422 at ¶ 9-10. First, the Board's prevailing wage enforcement policy seriously conflicts with R.C. Chapter 4115. Second, the Board has no authority to contradict the state's prevailing wage policy. Third, R.C. Chapter 4115 is a general statute that forecloses contrary local action. Therefore, both the Board's policy and its application to The Painting Company are unconstitutional. This Court should overturn the decision below and remand this case for further consistent proceedings.

Respectfully Submitted,



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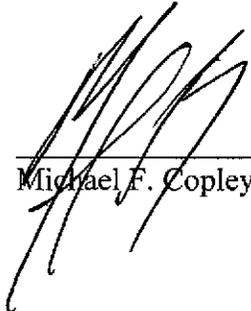
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