

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL., NORTHERN OHIO)
CHAPTER OF ASSOCIATED BUILDERS)
& CONTRACTORS, INC., et al.,)

Appellants,)

v.)

BARBERTON CITY SCHOOLS BOARD)
OF EDUCATION, et al.,)

Appellees.)

Case No. 2010-0943

On Appeal from the
Summit County Court of Appeals,
Ninth Appellate District

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MERIT BRIEF OF APPELLEE BARBERTON CITY SCHOOLS
BOARD OF EDUCATION

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INTRODUCTION

The only issue before this Court concerns the standing of Appellants Dan Villers and Jason Antill (“the Taxpayers”). The decision of the Ninth District Court of Appeals (“Ninth District”) is correct in its determination that the Taxpayers in this case have no standing. The decision follows from the standing principles previously announced by this Court, that is, in order to have standing, a taxpayer must demonstrate some special interest in a matter by reason of which his or her own property rights are placed in jeopardy. Here, the Taxpayers, who purport to be aggrieved by the insertion of a prevailing wage requirement into a school construction contract, fail to demonstrate a special interest, and therefore fail to meet their burden. The Taxpayers’ claims are nothing more than a generalized grievance, available to any Barberton citizen about his or her taxes. The Taxpayers have not and cannot demonstrate a concrete and particularized injury that would support taxpayer standing. Neither, as the Taxpayers argue, does the Ninth District’s decision erect a new barrier to common law taxpayer suits; rather, it simply follows the existing boundaries of the law. Moreover, if this Court reverses the Ninth District’s decision, every taxpayer of an Ohio school district would have the unfettered ability to challenge any action of that school district. Under the Taxpayers’ theory of unlimited taxpayer standing, for the residents of Ohio’s 600-plus school districts, the courts of this state would cease to function as courts of law and would, instead, be cast in the role of general complaint bureaus. *Hein v. Freedom from Religion Foundation, Inc.* (2007), 551 U.S. 587, 127 S. Ct. 2552. As a result, this Court must affirm the decision of the Ninth District on the question of the Taxpayers’ standing. The Board of Education of the Barberton City School District adopts and incorporates by reference the Merit Brief of Appellee Ohio School Facilities Commission, as if fully written herein.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case arises from the attempt by the Northern Ohio Associated Builders and Contractors, Inc. ("ABC"), a national trade association comprised of merit shop construction industry associates, Fechko Excavating, Inc. ("Fechko"), a contractor and member of ABC, along with the Taxpayers, to permanently restrain the Barberton Board of Education ("Board of Education") from including a requirement that bidders pay their workers prevailing wages in a contract for its new middle school (the "Middle School Project").¹ (Amended Verified Complaint; App-8.)

In 2008, voters in the City of Barberton passed a 5.2 mill bond levy to fund various school construction projects, including the Middle School Project, in connection with the Board of Education's participation in the Classroom Facilities Assistance Program, made available through the Ohio School Facilities Commission ("OSFC"). (App-12, ¶18.) The OSFC is a state agency created by the Ohio Legislature to administer and fund school construction projects. (App-12, ¶19.) Proceeds from the bond levy will fund approximately forty percent of the construction costs for the Project, while state taxpayer monies received from the OSFC fund the remaining sixty percent of the construction costs for the Project. (App-12, ¶18-19.) The Board of Education and the OSFC are co-owners of the Middle School Project during its design and construction. (App-12, ¶16.)

In March 2009, the Board of Education requested bids for the initial site work on the Middle School Project, known to the parties as the "Early Site Work Package." (App-12, ¶15.)

¹ The Board objects to Appellants' statement of relevant facts and procedural history as they impermissibly rely upon allegations from the Second Amended Complaint and references to the depositions of Deanna McQuaide and Dennis Liddle, which were never part of the pleadings, and which are not properly before this Court. (App-55.) (denying Appellants' motion to file a second amended complaint). See, also, *State of Ohio v. Ishmail*, (1978), 54 Ohio St.2d 402, 377 N.E.2d 500, syllabus (finding that a court cannot add matters to the record before it, which were not a part of the trial court's proceeding and then decide the appeal on the basis of the new matter). Accord *Rice v. Flynn*, 9th. Dist. No. C.A. 22416, 2005-Ohio-4667.

The Board of Education specified in its request that bidders were to pay their workers prevailing wage rates, as provided for in R.C. 4115 et seq., and consistent with OSFC Resolution 07-98 and its attached model workforce standards. (App-12, ¶20, 38,45.) Fechko, “an Ohio corporation and a construction company doing business in the State of Ohio,” submitted a bid, which included the “applicable prevailing wage rates for Summit County.” (App-10-13, ¶¶6, 21.) On April 1, 2009, the Board of Education awarded the Early Site Work Package contract to Mr. Excavator. (App-13, ¶23.) It is uncontested that Mr. Excavator submitted the lowest bid for the Early Site Work Package. (Appellants’ Br. at 2.)

On April 3, 2009, ABC, Fechko and the Taxpayers (collectively, “Appellants”), filed a complaint seeking preliminary and permanent injunctive relief and a declaratory judgment with respect to the Early Site Work Package. Appellants subsequently filed an amended complaint to incorporate the OSFC and Mr. Excavator into the litigation. Specifically, the Appellants’ challenged the authority of the Board of Education to make the payment of prevailing wage rates a bidding requirement and contract term on the Early Site Work Package for the Middle School Project. The Appellants’ argued, among other things, that such a requirement exceeded the Board of Education’s authority, and, therefore, rendered the contract illegal. (App-9, ¶¶2-3, 28.) (Appellant Br. 3.) On May 28, 2009, the Board of Education sought to dismiss this action on the basis that the Appellants lacked standing to bring their complaint, and that their complaint failed to state a claim that would entitle them to relief. The OSFC and Mr. Excavator filed similar motions. Appellants opposed the motions. On July 6, 2009, Appellants requested leave to file a second amended complaint to incorporate information uncovered during the course of discovery.

On July 31, 2009, the trial court dismissed Appellants’ amended complaint. (App-50.) In its decision, the trial court determined that the Taxpayers lacked standing, as neither showed

that he had a unique or special interest different in character from all other taxpayers in the school district who were affected by the levy. (App-55.) In addition, the trial court found none of the plaintiffs “demonstrated that under any existing law that they have any right to relief.” (App-60.) In furtherance of its ruling, the trial court also denied Appellants’ motion to file a second amended complaint. (App-61.)

Appellants appealed the dismissal to the Ninth District and concurrently sought a stay of execution and injunctive relief pending a ruling on appeal. The Ninth District denied Appellants’ request for a stay of execution, as Appellants improperly filed the motion with the Ninth District rather than the trial court. (App-63.) (“App.R. 7(A) requires such motion first be made to the trial court”). On August 11, 2009, the Ninth District denied the Appellants’ petition for injunctive relief. (App-64.)

Appellants immediately appealed these denials to the Ohio Supreme Court in Ohio Supreme Court Case No. 2009-1466. On September 21, 2009, this Court denied the motion for a stay of execution and request for injunctive relief. (App-67.) On October 19, 2009 this Court dismissed the appeal entirely, as “appellant [did] not file[] a memorandum in support of jurisdiction * * * and therefore has failed to prosecute this cause with the requisite diligence.” (App-68.)

On October 7, 2009 and November 16, 2009, respectively, Appellants, and the Board and the OSFC, jointly, filed their briefs with the Ninth District. On April 28, 2010, the Ninth District issued a decision and journal entry affirming the trial court’s decision. (App-69.) With respect to the Taxpayers, the Ninth District held that “Taxpayers in this case cannot allege that, as a result of the Board and the OSFC’s actions, they have sustained any damages different in kind than

those sustained by any other taxpayer in Barberton whose property taxes are burdened by the 2008 levy.” (App-78, ¶21.)

On May 10, 2010, Appellants filed a motion to certify a conflict with the Ninth District. On June 6, 2010, Appellants filed a notice of appeal and memorandum in support of jurisdiction with this Court, asserting four (4) separate propositions of law. On July 8, 2010, the Ninth District denied the motion to certify a conflict “because no conflict exists between this case and the judgment of those courts.” (App-87.) On September 29, 2010, this Court accepted for review proposition of law number 1 (App-93.)

As a result, the only issue before this Court concerns the standing of the Taxpayers.

ARGUMENT

1. The Taxpayers Do Not Have Standing.

The Taxpayers contend that they have standing to challenge the Board of Education’s decision to include a prevailing wage requirement in the Early Site Work Package contract for the Middle School Project by virtue of their contribution to a special fund – “namely the 5.2 mill bond levy.” The Taxpayers argue that, through this contribution, they have a special interest and injury that differs from other taxpayers in the State of Ohio. (Appellants’ Br. at 9-13.) This generalized plea for standing must be rejected because: 1) the Taxpayers have not sustained an injury in a manner or degree different from that of any other school district taxpayer, and 2) no Ohio court has determined that property taxes paid to a school district pursuant to a bond levy constitute contributions to a “special fund” for purposes of establishing common taxpayer standing. Moreover, the Board of Education asserts that any issues raised by the Taxpayers regarding the merit of their underlying claims are not relevant to the issue of the Taxpayers’ standing, and are not issues properly before this Court.

In Ohio, the right of a taxpayer to institute and maintain a common law taxpayer action is recognized by specific statutes and by common law. See *Andrews v. Ohio Bldg. Auth.* (Sept. 11, 1975), Franklin App. No. 75AP-121, 1975 Ohio App. LEXIS 8467; *State ex rel. United McGill Corp. v. Hamilton* (1983), 11 Ohio App.3d 102, 463 N.E.2d 405, adopting dissenting opinion from *Andrews*, reinstated by *Gildner v. Accenture, L.T.D.*, 2009-Ohio-5335, at ¶24. In the absence of statutory authority, courts have held that taxpayers have a common law right in certain instances to enjoin the actions of public officials, including the misapplication of funds. See *Andrews*, 1975 Ohio App. LEXIS 8467, at *8.

However, this common law right is not without limitations. In *State ex rel. Masterson v. Ohio State Racing Commission* (1954), 162 Ohio St. 366, 55 O.O. 215, syllabus, this Court held that in order for litigants to have standing to bring a claim, they must demonstrate “some special interest therein by reason of which his [or her] own property rights are placed in jeopardy.” Subsequent court decisions have recognized two instances in which a taxpayer may demonstrate a “special interest,” sufficient to maintain a common law cause of action.

In the first instance, taxpayers possess the “special interest” necessary to maintain a common law taxpayer lawsuit if they suffer or are threatened with a “direct or concrete injury in a manner or degree different from that suffered by the public in general.” *Brown v. Columbus City Schools Bd. of Edn.*, 2009-Ohio-3230, at ¶13. In the second instance, taxpayers have a “special interest” by virtue of their membership in a “special class” of taxpayers who contribute to a special fund. *Masterson*, 162 Ohio St. at 369. See, also, *Racing Guild of Ohio v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317, 322, 503 N.E.2d 1025; Accord *State ex rel. Dann v. Taft* (2006), 110 Ohio St.3d 252, 2006-Ohio-3677, at ¶10.

A. The Taxpayers have not alleged or sustained an injury different from that suffered by the public in general.

It does not appear from the Taxpayers' arguments that they are asserting taxpayer standing under the first method of establishing a common law taxpayer suit – namely, that they have suffered an injury in a manner and degree different from that of other taxpayers of the Barberton City School District. (App-16-17 ¶44) (stating the inclusion of a prevailing wage requirement in the Board's contract "will result in economic harm to the Barberton taxpayers as a whole.") This is understandable, as the levy applies to everyone who owns real property in the Barberton City School District, not just to the Taxpayers.

Rather, now that the Taxpayers are confronted with the fact that they are no differently situated than any other Barberton school district taxpayer, they respond by claiming that they "have an interest and injury that differs from other taxpayers generally in the State of Ohio." (Appellant's Br. at 10.) Taxpayers offer no legal basis for this contention. Further, this Court has never held that the basis for determining a taxpayer's particularized injury is a comparison of the plaintiff's status to Ohio taxpayers as a whole. Where, as here, taxpayers bring an action against a board of education, it is axiomatic that any analysis of their injuries should be in the context of other taxpayers of the school district whose property is also burdened by the same levy. Regardless of the Taxpayers' contentions, the foregoing analysis for determining the Taxpayers particularized injury was properly utilized by both the trial court and the Ninth District, and is consistent with the decisions in *Masterson*, *Racing Guild*, *Dann* and *Brown*.

B. The Taxpayers have not established standing by showing they contributed to a special fund.

Similarly, Taxpayers lack standing under the second method of establishing a common law taxpayer lawsuit. Taxpayers' reliance on *Masterson*, *Racing Guild* and *Dann* is misplaced,

as those cases do not support the Taxpayers' contention that they have standing by virtue of their payment of general property taxes. Specifically, under *Masterson, Racing Guild* and *Dann*, taxpayers possess the "special interest" necessary to maintain a common law taxpayer suit only if they belong to a "special class" of taxpayers that contribute to a special fund. *Masterson*, 162 Ohio St. at 369. See, also *Racing Guild*, 28 Ohio St.3d at 319 (finding standing where clerk's interests in ensuring payment of licensing fees by all participants in the racing industry were different from those of ordinary taxpayers); *Dann*, 2006-Ohio-3677, at ¶10 (holding that *Dann* arguably has a special interest in the management of the Worker's Compensation Fund because he has paid into that fund as an employer). Accord *Brinkman v. Miami Univ. (C.P.)*, 2005-Ohio-7161, 861 N.E.2d 925, at ¶24 (finding taxpayers must belong to a "particular class of a people, more narrow than the class of taxpayers generally, that has contributed the funds out of which expenditures are made.")

The Taxpayers' "likening" of their property tax payments, attributable to the levy, as a contribution to a "special fund" is unsustainable. Rather, the levy is only one component of the general property tax levied on the Barberton City school district taxpayers, the proceeds of which are used to retire bonds or notes issued by the Board of Education to raise funds to pay the direct and related costs of permanent improvements such as the Middle School Project. See, *Dann*, 2006-Ohio-3677, at ¶9 (finding no standing based on citizens' status as a taxpayer of general taxes, including the gasoline tax). No court in Ohio has held that the payment of property taxes constitutes a "special fund" for purposes of common law taxpayer standing. To the contrary, in *Brown*, the Tenth District Court of Appeals rejected an attempt to extend common law taxpayer standing to the residents of a school district.

In *Brown*, the citizens of the Columbus City school district challenged the “funding method used by Columbus City Schools to allocate funds among the various schools within the district.” *Brown*, 2009-Ohio-3230, at ¶2. Despite their status as residents and taxpayers within the city of Columbus, the Tenth District held that the plaintiffs “lacked private standing to challenge Columbus City Schools’ method of funding within the school system.” *Brown*, 2009-Ohio-3230, at ¶13. Specifically, the court held that “[a]ppellants merely contributed to the school district’s funding as other citizens in the district generally contributed, as opposed to contributing to some special fund, thereby failing to demonstrate the funding method used by Columbus City Schools affected their pecuniary interests differently than the general taxing public.” *Id.* See, also, *Country Club Hills Homeowners Assn. v. Jefferson Metro. Hous. Auth.* (1981), 5 Ohio App.3d 77, 79, 449 N.E.2d 460 (holding that the residents of the school district lacked standing as “their alleged increase in taxation caused by the construction of subject public housing project would be the same as every other property owner and taxpayer in the Indian Creek School District.”) As a result, the Taxpayers’ “special fund” arguments must fail.

C. Taxpayers’ other arguments do not support taxpayer standing.

The Taxpayers’ reliance on *East Liverpool City School Dist. ex rel. Bonnell v. Bd. of Edn.*, 2006-Ohio-3482 and *Clay v. Harrison Hill City School Dist. Bd. of Edn.*, 102 Ohio Misc.2d 13, 723 N.E.2d 1149, as support for the proposition that the Seventh District has already recognized that a common law taxpayer has a “special interest” sufficient to enjoin the construction of a school project, is simply untenable. (Appellants’ Br. at 10, 12-13.) The Ninth District correctly found that the issue in *East Liverpool* was the propriety of attorney fees and that, because the underlying case was resolved through a stipulated dismissal, “it is unclear whether the issue of standing was ever fully addressed by the trial court.” (App-80, ¶24.) In

addition, the Taxpayers' reliance on *Clay* is similarly misplaced, as the trial court expressly rejected *Masterson*, finding "it was limited to its particular facts." *Clay*, 102 Ohio Misc.2d 13 at 19.

Finally, the Taxpayers cannot sustain the argument that their "special interest" arises from "the alleged unlawful application of [prevailing wage] requirements to a school construction project." (Appellants' Br. at 15.) Regardless of the Taxpayers' contention, the issue of prevailing wage rates under R.C. 4115.04(B)(3) or R.C. 3313.46, is not properly before this Court. Specifically, in its September 29, 2010 Entry, this Court accepted for review only Proposition of Law No. 1, which concerns the standing of the Taxpayers to bring a common law taxpayer lawsuit against a school board and the OSFC. (App-93.) Had this Court desired to hear arguments regarding the application of prevailing wage rates requirements to a school construction project, it could have done so by accepting Propositions of Law Nos. 3 and 4 propounded by Appellants in their Memorandum in Support of Jurisdiction.

Moreover, while Appellants attempt to incorporate prevailing wage arguments into the issue of standing, their arguments are immaterial. Regardless of whether the alleged unlawful expenditure originated from a prevailing wage or some other source, it is irrelevant for purposes of determining taxpayer standing. As a result, the Board of Education urges this Court to affirm the decision of the Ninth District and find that the Taxpayers have no standing in this matter.

2. Taxpayers Special Interest Cannot Be Presumed.

The Taxpayers also urge this Court to find that their "special interest" in the matter should be presumed under the Tenth District's decision in *State ex rel. Connors v. Ohio Dept. of Transp.* (1982), 8 Ohio App.3d 44, 455 N.E.2d 1331, as "the contracts were awarded in violation of both R.C. 4115.03(B)(3) and R.C. 3313.46(A)(6)." (Appellants Br. at 16-18.) *Connors*

addressed whether the doctrine of sovereign immunity barred an action against ODOT regarding a construction contract that contained an allegedly illegal bid condition concerning minority business enterprises. *Connors*, 8 Ohio App.3d at 45. The Taxpayers' reliance on this case is misplaced.

In *Connors*, the Tenth District held that, in some instances, damages to taxpayers may be presumed, including when a public contract is awarded in violation of statutory provisions requiring that such contract be awarded to the lowest bidder. *Connors*, 8 Ohio App.3d at 47. Such was the case in *Connors*, where the ODOT minority set-aside requirement prevented the potentially lowest bidder from bidding on the contract. *Id.* Assuming this decision accurately reflects taxpayer law in Ohio, a special interest cannot be presumed in this case, because the Taxpayers do not claim that the contract was awarded in violation of statutory requirements that the award be made to the lowest bidder.² By the Taxpayers' own admission, the Board of Education awarded the contract to the lowest bidder: Mr. Excavator. (Appellants' Br. at 2.) (stating that the Board "awarded the contract for the ESP to Mr. Excavator, the low bidder for the contract"); (App-13, ¶23.) ("Mr. Excavator [is] the purported low bidder on the Project.") Based upon the foregoing, no special interest can be presumed under the rubric established by the Tenth District in *Connors*.

In the alternative, the Taxpayers assert that the Ninth District ignored their "other arguments as to why damages should be presumed in this case." (Appellants' Br. at 18.) In addition to being outside the rule established in *Connors*, the Taxpayers' arguments regarding the "lawfulness" of the Board of Education's actions in the matter and the impact of those

² As noted by the Ninth District, the decision in *Connors* is the only known instance where an Ohio court has held that taxpayer injury should be presumed. (App-78, ¶22.) See, also, *Brown*, 2009-Ohio-3230, at ¶13, (taxpayers could not establish standing when "they could show no personal harm or damages that would result as separate from any harm suffered by the general taxpayer public.").

actions on the cost of the Project to the Taxpayers are purely conjectural. *Ohio Contract Carriers Assn. v. Pub. Util. Comm.* (1942), 140 Ohio St. 160, 23 O.O. 369, syllabus (holding appeal lies only on behalf of a party aggrieved by the final order appealed from). Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant). Based upon the foregoing, this Court must reject the Taxpayers' arguments that their special interest can be presumed in this matter.

CONCLUSION

Based upon the foregoing, the Board respectfully requests that this Court reject the arguments asserted in the Taxpayers' brief and affirm the Ninth District's decision, which found that the Taxpayers lacked standing to pursue their complaint in this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Appellee Barberton City Schools Board of Education was served by U.S. mail this 12 day of January, 2011, upon the following:

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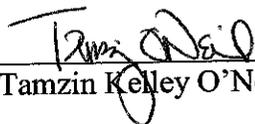
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APPENDIX



LEXSEE 1975 OHIO APP. LEXIS 8467

Nancy Ann Andrews, A taxpayer on behalf of herself and all others similarly situated, Plaintiff-Appellant, v. Ohio Building Authority et al., and Department of Public Works, and R. Wilson Neff, Director, Department of Public Works, and Carl E. Bentz, State Architect, and The State Controlling Board et al., and Gustav Hirsch, Inc., and Hatfield Electric Company, and Buckeye Union Insurance Company, Defendants-Appellees

No. 75AP-121

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

1975 Ohio App. LEXIS 8467

September 11, 1975

NOTICE:

PURSUANT TO RULE 2(G) OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS, UNPUBLISHED OPINIONS MAY BE CITED SUBJECT TO CERTAIN RESTRAINTS, LIMITATIONS, AND EXCEPTIONS.

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JUDGES: HOLMES, J., STRAUSBAUGH, P.J., concurs. McCORMAC, J., dissents.

OPINION BY: HOLMES**OPINION**

DECISION

HOLMES, J.

This matter involves the appeal of a judgment of the Common Pleas Court of Franklin County wherein that court dismissed the plaintiff-appellant's "taxpayer's action" as brought against the defendant-appellee Ohio Building Authority (OBA, hereinafter), and others, such dismissal being upon the basis that plaintiff had no standing to bring such taxpayer's suit.

The facts in brief upon which this suit was commenced, and is now before this court upon appeal, are as follows. The defendant OBA is an agency of the state of Ohio created under *Chapter 152 of the Ohio Revised Code*, and which was, among other responsibilities, charged with the responsibility of constructing the new [*2] State Office Tower in Columbus, Ohio.

The OBA, acting through and with the Ohio Department of Public Works, now the Department of Administrative Services, in furtherance of the construction of such state office building, advertised for bids for the various portions of the overall construction job. Included among such advertisements for bids was that for the work to be performed for the electrical facilities for such building.

Following such advertising for electrical contract bids, all of such bids were, pursuant to such notices, opened on August 17, 1971, and the lowest bidder was found to be the defendant Gustav Hirsch, Inc., whose bid was \$ 3,647,000. The next lowest bidder was the defendant Hatfield Electric Company, whose base bid was \$

4,550,000, a sum \$ 903,000 more than the Gustav Hirsch bid.

Gustav Hirsch Company, apparently realizing that it had made a rather grave error in its calculations upon such bid, requested permission from the OBA to withdraw its bid. The OBA did, prior to formal acceptance of such bid proposal, permit the withdrawal of the Gustav Hirsch bid, and then proceeded to accept the next lowest bid of the Hatfield Electric Company.

The plaintiff-appellant [*3] brought her action, alleging that she was a resident taxpayer of the state of Ohio, and that such procedure as followed by the OBA in allowing the withdrawal of the Gustav Hirsch bid was an act contrary to law, and not in the best interests of the state of Ohio, and that the state of Ohio and its citizens were, by such act, required to pay some \$ 903,000 more than the lowest bid for the electrical contract.

The plaintiff prayed that the court declare the contract between the OBA and the Hatfield Electric Company to be void; that a mandatory injunction issue ordering the OBA to award the electrical contract to the Gustav Hirsch Company; and that, if the latter refuse to enter into the contract, the bid proposal bond as guaranteed by the defendant Buckeye Union Insurance Company be declared forfeited, and that the sum of \$ 903,000 be paid into the General Fund of the state of Ohio.

In the alternative, the plaintiff in her complaint prayed that the contract between the OBA and Hatfield Electric Company be declared void, and that the court order that the contract be relet for new bids at the peril of the defendant Gustav Hirsch and its insurer to pay to the state of Ohio any differences [*4] between any newest low bid and the former bid as submitted by the Gustav Hirsch organization.

After considerable interim pleading by the parties, this matter came on to be heard by the trial court, and the court determined that the following issues were before it:

"1. Did Nancy Ann Andrews have standing to institute a taxpayer's action.

"2. Was the subject matter, namely, the construction of the new State Office Building by the Ohio Building Authority such an action as to be subject to a taxpayer's action, under any circumstances.

"3. Would the Gustav-Hirsch organization, on demonstration of a unilateral error, be permitted to withdraw its bid, even before formal acceptance.

"4. Would the Ohio Building Authority have the right to accept a higher bid, if they determined that such higher bid would still be the best bid for the work to be performed, without demonstrating that the Gustav-Hirsch organization would not have been able to perform in

accordance with the bid even though there may be a determination that such bid was the result of a unilateral error by the bidder and would result in financial loss."

On such issues the trial court found the following conclusions [*5] of law:

"1. The Court, in reaching its determination, felt that it would be proper to make a determination as to No. 1 and 2 set forth under Issues Involved above, before proceeding into 3 and 4 as well as any other matters that would be important to the eventual determination of the case.

"2. The Court finds that the Plaintiff, Nancy Ann Andrews, was a taxpayer and, in fact, such was stipulated. However, the Court fails to find that said Nancy Ann Andrews stood in any relationship different from other taxpayers in the State and had no special interest. See *Sun Oil Co. v. Ohio Turnpike*, 71 Abs. 465. See also *Lichter v. Land Title Guarantee*, 77 Abs. 321, and *State, ex rel Masterson v. Ohio State Racing Commission*, 162 *Oh. St.* 367.

"3. As to the second issue involved, the Court finds that the construction of the new State Office Building was not as the result of expenditure of taxpayers' monies or public funds and, accordingly, would not be the subject of a taxpayer's action. The uncontradicted evidence was that the monies utilized for the construction of said office building arose from funds borrowed from the Industrial Commission or Workmen's Compensation [*6] fund. Such funds basically are trust funds representing monies collected from employers pursuant to certain laws and are not derived from tax funds. Granted that the tenants of the new State Office Building would, although not required, be various state agencies who would lease space in the structure and the rents paid by the various agencies would be determined on the amortization of the debt incurred in the construction and maintenance of said structure, the fact remains that the monies for the original construction were not derived from tax monies and even though the rentals to be paid by various state agencies would arise from tax funds, this does not represent in the construction at least, the expenditure of tax monies."

The trial court concluded that the plaintiff did not have standing to institute such action, in that the funds allocated for the construction of the state office building were not "public funds" or "taxpayers' monies" and that the plaintiff had no "special interest" in the funds to be utilized for the construction of such building. The trial court, upon such aforesaid basis, thereupon dismissed the plaintiff's action as against the OBA, et al.

The plaintiff [*7] appeals to this court, setting forth the following assignments of error:

"1. The trial court erred in not finding that 'taxpayers' monies' were expended in the construction of the State Office Building.

"2. The trial court erred in finding that a taxpayer must show 'special damage' in order to bring a taxpayer's action."

Whether or not the plaintiff has standing to bring her "taxpayer's action" presents, as set forth in the assignments of error, an interesting two-pronged question. One, whether the funds with which this public agency was carrying out its proposed contract were in fact derived from any type of taxation, either general or special; and, two, if such be found to be tax funds, whether this taxpayer had a special interest in such funds.

Very generally, it may be stated that the right of a taxpayer to institute and maintain an action in a proper case for the protection of his own interests, and those of other taxpayers and the public generally, has been recognized in this state both by specific statutes and by the common law. See 52 Ohio Jurisprudence 2d, Taxpayers' Actions, section 1, page 2.

Most taxpayers' actions are brought pursuant to specific statutory [*8] enactments provided therefor. An example of such is *R.C. 309.13*, which provides for the bringing of an action by a taxpayer of a county concerning the expenditure of county funds on county contracts in instances where, upon written request, the county prosecuting attorney has failed to institute such action.

Relating to municipalities, *R.C. 733.59* provides that when a city solicitor has failed on request to bring an action relating to unlawful contracts and unlawful expenditure of municipal funds, a taxpayer may institute an action in his own name on behalf of the municipal corporation.

Additionally, as pointed out in 52 Ohio Jurisprudence 2d, Taxpayers' Actions, at section 4, page 5, a third general statutory provision for taxpayers' actions which is of importance appears in the Uniform Tax Levy Law, at *R.C. 5705.45*.

Generally speaking, even in the absence of statutory authority, taxpayers have been held to have a common law right in certain instances to maintain actions enjoining acts of public officials, including the misapplication of public funds. In the syllabus law of the case of *Green v. State Civil Service Commission* (1914), 90 Ohio St. 252, at paragraph one thereof, [*9] we find:

"1. A taxpayer may maintain an action to enjoin public officers or a public commission from the commission of acts in excess of legal authority, which contemplate the expenditure of public money."

Green involved an action to enjoin the state civil service commission from conducting a contemplated investigation concerning certain acts of the plaintiff, who was the mayor of the city of Urbana.

Also, in the case of *Hockett v. State Liquor License Board* (1914), 16 N.P. (N.S.) 417, affirmed in 91 Ohio St. 176, a taxpayer was recognized to have standing to bring an action to restrain the state liquor board from beginning operations under a constitutional amendment alleged to have been illegally adopted, which would involve the expenditure of public funds.

The Supreme Court recognized and approved the common law right of a taxpayer's suit against a municipality in the case of *Mayer v. Director of Department of Safety* (1938), 133 Ohio St. 458.

Similarly, we note that a taxpayer's common law right of action against county officials was exercised in the case of *Cowen v. State, ex rel. Donovan, a Taxpayer* (1920), 101 Ohio St. 387, wherein a taxpayer brought an [*10] action to enjoin the execution of a county road contract and the payment of any county funds therefor because of the failure of the state highway commission to comply with state laws.

In like manner, the Supreme Court recognized the right of a taxpayer to bring an action against a school board for advertising for, and accepting, improper bids on a new schoolhouse, in the case of *Perkins et al., Board of Education, v. Bright* (1923), 109 Ohio St. 14.

However, having stated the broad general rule as to the common law right of a taxpayer to bring an action against a public official regarding the expenditure of public funds, we must now set forth the limitations thereon that have evolved through decisional law as pronounced by our courts.

In essence, such limiting element as imposed by our Supreme Court requires the showing by the plaintiff in a taxpayer's suit that he has some special interest in the expenditure of public funds by reason of which his own property rights are placed in jeopardy. As stated within 52 Ohio Jurisprudence 2d, Taxpayers' Actions, at section 24, pages 36 and 37:

"Indeed, it seems that at common law, and apart from statute, a taxpayer cannot bring an [*11] action to prevent the carrying out of a public contract or the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are put in jeopardy. In other words, in order to obtain an injunction, a taxpayer, like any other party to a proceeding in equity, must show that some act is about to occur which will result in some material injury to him and for which he has no other adequate remedy, and it is

said that the taxpayer's interest must be a financial interest. * * *

The leading case in Ohio which sets forth the legal principle of such limitation upon taxpayers' suits is that of *State, ex rel. Masterson, v. Ohio State Racing Commission* (1954), 162 Ohio St. 366, wherein we find the syllabus law of the case to be as follows:

"1. In the absence of statutory authority, a taxpayer lacks legal capacity to institute an action to enjoin the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy.

"2. Under the provisions of Section 1079-10, General Code (Section 3769.10, Revised Code), a taxpayer may not maintain an action to enjoin the [*12] expenditure of funds by the Ohio State Racing Commission without alleging and proving a special interest therein."

In *Masterson*, the action was brought by the relator, a taxpayer of the state of Ohio, for the purpose of obtaining an injunction to restrain the respondent Ohio Racing Commission from expending funds coming into its possession, or issuing permits for the conducting of horse-racing in this state.

In approaching the limited question of the standing of the relator to bring a taxpayer's action, the Supreme Court quoted the general rule set forth in 39 Ohio Jurisprudence 2, at section 2, as follows:

"Even in the absence of legislation, a taxpayer has a right to call upon a court of equity to interfere to prevent the consummation of a wrong such as occurs when public officers attempt to make an illegal expenditure of public money, or to create an illegal debt, which he, in common with other property holders of the taxing district, may otherwise be compelled to pay."

The Supreme Court then pronounced the limiting factors as set forth in the following language of the opinion:

"It is equally fundamental that at common law and apart from statute, a taxpayer can not [*13] bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are put in jeopardy. In other words, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally. 39 Ohio Jurisprudence, 22, Section 12; 52 American Jurisprudence, 3, Section 3."

The Supreme Court determined that the relator was not such a taxpayer that had a special interest in the fund

in question. The court used the following language, to be found at page 369 of the opinion:

"From these provisions [of the act providing for the Ohio Racing Commission], it is apparent that the respondent commission is not authorized to expend public funds in excess of the revenues it collects from a special class of taxpayers. It is clear, too, that no part of such expenditures can involve funds collected from taxpayers generally. Furthermore, the relator does not claim to be in the special class of taxpayers from whom these revenues are collected.

"Hence, as held by the lower courts, the [*14] relator taxpayer has no special interest in the funds here involved, and he lacks the legal capacity to institute this action."

Two additional cases of considerable significance in this area of concern are those of *Sun Oil Company v. Ohio Turnpike Commission* (1955), 71 Ohio Law Abs. 465, and *Lichter v. Land Title Guarantee Co.* (1955), 77 Ohio Law Abs. 321.

The opinions in both reported cases, as rendered by Judge Robert Leach, then judge of the Common Pleas Court of Franklin County, cited and followed *Masterson*. The fourth headnote of *Sun Oil* sets forth the law as was specifically applicable to the facts of that case, which involved the special funds of the Ohio Turnpike Commission, as follows:

"A taxpayer cannot maintain an action against the Ohio Turnpike Commission as a 'taxpayer for or on behalf of itself and all other taxpayers of the State of Ohio,' to enjoin illegal conduct or compel legal conduct on the part of the Commission where all of the funds of such Commission are derived solely from the sale of bonds and the receipt of tolls from motorists using the turnpike, together with receipt of funds from persons using the turnpike on a concession basis [*15] for the sale of products and services, and are not derived from any type of taxation."

Judge Leach, in *Sun Oil*, compared the facts in that case to those as found in the *Masterson* case in the following language, as to be found at page 473 of the opinion:

"The instant case appears to be a much stronger for denying the capacity of a taxpayer to sue than was the *Masterson* case. There the fund in question was derived from taxation but taxation as to a special class of taxpayers whereas plaintiff sued as a general taxpayer. If plaintiff therein as a general taxpayer had no 'special interest' in the funds there involved because such funds were derived from a special class of taxpayers, it should be obvious that plaintiff herein as 'a taxpayer for and on behalf of itself and all other taxpayers of the State of Ohio'

would have no 'special interest' in the funds of the Turnpike Commission which are not derived from any type of taxation. All of the funds of the Turnpike Commission are derived solely from the sale of bonds and the receipt of tolls from motorists using the turnpike after it is opened, together with receipts of funds from persons using the turnpike on a concession [*16] basis for the sale of products and services."

In similar manner, Judge Leach, in *Lichter*, held that a taxpayer did not have standing to maintain an action for recovery into the funds of the Ohio Turnpike Commission of monies paid out of such fund to a land title company under a void contract, in that such funds was derived solely from the sale of bonds. Judge Leach specifically pointed out that "It should be obvious that plaintiff herein as a 'taxpayer,' would have no 'special interest' in the funds which were not derived at all from any type of taxation, either general or special."

The question of whether the funds within the current matter were in fact the type of public funds of the nature which would be subject to an action by this taxpayer is not as clear as to be found within the cases of *Masterson*, *Sun Oil*, or *Lichter*, *supra*. The public funds in *Masterson* were those as collected from racetrack operator fees and mutual betting funds, which monies were paid into and maintained in the Ohio Racing Commission fund, a special fund of the state of Ohio, rather than the general revenue fund of the state.

The funds that were the subject of the action within the cases [*17] of *Sun Oil* and *Lichter* were revenues from the bonds issued for the construction of the Ohio Turnpike, and the tolls as collected from the motorists who were using such turnpike after the construction of such toll road, and monies from the concessions being operated in and about such Ohio Turnpike. Again, the latter funds did not involve funds acquired through general taxation; in fact, in these particular instances no tax dollars were involved at all.

In contrast to the funds concerned within those cited cases, appellant argues rather convincingly that funds in the present case are, in the final analysis, general revenue funds derived from general taxation throughout Ohio.

Appellant concedes that the original monies as acquired for the construction of the state office building by the OBA were acquired by loan from another state agency, that of the Industrial Commission of the state of Ohio, specifically from the workmen's compensation insurance fund. Such fund, although a public fund, is a special trust fund of the state of Ohio derived from special taxes levied upon employers, and is not a general revenue fund derived from general taxation.

However, appellant argues that [*18] such borrowed funds will be repaid by the OBA out of revenues earned through the entering into contracts with, and the leasing of space in such state office building to, various state agencies, and that such rental payments made by such agencies, pursuant to such leases, will come from the general revenue fund of the state of Ohio.

The full cycle of the appellant's argument is that the rentals charged these state agency tenants were to be determined and based upon the total cost of the building, and consequently the result of the higher total cost of the building, due to not requiring Gustav Hirsch to perform according to its bid, is to place an additional burden upon the general revenue fund - thence, upon the taxpayers - for additional rental payments in the amount of \$ 903,000.

Although this argument is very persuasive, we feel that it would be inappropriate to look behind the initial fund acquired by loan and to trace the monies in payment thereof to this taxpayer. We hold that at the time the contract was entered into herein, and funds paid out to this subcontractor thereunder, they were funds derived from the workmen's compensation insurance fund, a special fund, rather than [*19] from the general revenue fund of the state of Ohio.

The plaintiff-appellant does not claim to be in the special class of taxpayers, i.e., employers, who contribute to the workmen's compensation fund, in that she brings her action only as a general taxpayer. Therefore, in this sense, the plaintiff cannot claim to have a "special interest" in this fund as conceivably could members of this special class of taxpayers in a given case.

Even though we had concluded that we could trace the loan repayment funds here to this general taxpayer, we believe that the holding in *Masterson* would require us to take the further step and determine whether the plaintiff, a general taxpayer, has shown any reason that such complained of action has affected her pecuniary interests differently than the general taxpaying public.

This court accordingly has recently denied standing to a general taxpayer, who had brought an action against a public official claimed to have unlawfully expended public funds, in the unreported case of *Max Graf v. Joseph T. Ferguson*, case number 74 AP-298 (1974 Decisions, page 2807), decision rendered on October 22, 1974.

This court, citing *Masterson*, stated:

"In [*20] this case, there being shown no statutory authority and no showing that the taxpayer has some special interest by reason of which his own property rights are placed in jeopardy, we find that the trial court

was correct in its ruling that the plaintiffs herein lacked legal capacity to institute this action. * * *

We find that the plaintiff-appellant has not, as would be required by *Masterson*, shown any special interest in the expenditure of these funds by reason of which her own property rights are placed in jeopardy. Therefore, we must hold that the plaintiff does not have standing to bring this instant action.

Based upon all of the foregoing, the assignments of error of the plaintiff-appellant are hereby dismissed, and the judgment of the Common Pleas Court of Franklin County is hereby affirmed.

McCORMAC

McCORMAC, J., dissenting.

I dissent as I strongly believe that appellant should be permitted to pursue this action on the merits for the benefit of the only persons who will be injured if there was an illegal expenditure, the general taxpayers of Ohio.

The allegations of the complaint are that the Ohio Building Authority illegally permitted Gustav Hirsch, Inc., [*21] to withdraw their bid for electrical facilities for the state office building, thereby requiring taxpayers to pay \$ 903,000 more for construction of this building. Those allegations have never been tested on the merits as the case, at all levels, has been dismissed on the basis that the general taxpayers do not have a sufficient interest to bring this lawsuit and that the construction did not involve the expenditure of tax monies. As I will point out in this dissenting opinion, neither of those conclusions are justified by the facts of this case as applied to the common law of Ohio.

The facts show that the Ohio Building Authority is an agency of the state of Ohio created, among other things, to construct the new State Office Tower in Columbus, Ohio. In order to pay for the initial construction of the building, money was borrowed from the trust funds of the Industrial Commission. It is clear that the various agencies of the state of Ohio who became tenants of the new state office building will amortize this loan by payment of rent. The money to pay the rent will come from general revenue tax funds. Consequently, if illegal expenditures caused the state office building to cost [*22] an additional \$ 903,000, the general taxpayer will need to contribute this additional amount. It is clear, then, that the general taxpayers are the persons that will bear the burden of higher cost of the state office building. The contributor to the trust fund of the Industrial Commission will not be affected as, regardless of the cost of

the building, that fund will receive repayment according to the terms of the loan.

As pointed out in oral argument, the majority holding would not be altered had the Ohio Building Authority borrowed the money from a commercial bank, who would once again be fully protected for the amount borrowed regardless of whether that amount included an illegal expenditure. Thus, it is clear to me that the only persons who stand to ultimately be hurt by an illegal expenditure in the construction of this building are the general taxpayers. Yet the trial court and the majority decision hold that that class of persons has no standing to complain.

Two bases are stated for the majority decision. The first basis is that it would be inappropriate to look behind the initial fund acquired by loan and to trace the monies in payment thereof to the taxpayers. If this [*23] holding were adopted as law, it would mean that a state agency or official could insulate itself from challenge of an illegal expenditure otherwise subject to general taxpayer attack by use of a loan from a third party or other imaginative two-step procedure, although the loan must be paid off by general taxpayer funds. The hazards of that holding are apparent on its face and should be rejected. The crucial issue is who must ultimately accept the burden of the expenditure; and, in this instance, it is the general taxpayer. While, conceivably, the passing on of the burden to the general taxpayer in some cases is so remote as to preclude the general taxpayer from suing, that is not true in this case.

The second ground for summarily dismissing the taxpayer's action is that the general taxpayer has not shown any special interest in the expenditure of these funds by reason of which her own property rights are placed in jeopardy, and therefore she does not have standing to bring this action. That holding is a result of a misapplication of the *Masterson* case, as here, as in *Masterson*, we are met with the sometimes conflicting principles that government is operated for the benefit [*24] of all its citizens, and that any citizen has an interest in compelling public officials to perform their duties properly, as opposed to the theory that public officials should not be subjected to constant judicial interference. The principle by way of compromise has evolved that, in the absence of a statute conferring such right, private citizens must possess something more than a common concern for obedience to laws before they will be permitted to maintain certain actions against public officials.

Therefore, the Supreme Court properly held in *Masterson* that a taxpayer may not maintain an action to enjoin the expenditure of funds by the Ohio State Racing Commission without alleging and proving a special interest in that fund placed in jeopardy by the expenditure.

There were others directly affected who were the proper parties to complain in *Masterson*, rather than only someone with an abstract desire to "see the law enforced." That case, however, should not be interpreted to preclude a general taxpayer from maintaining an action for alleged illegal expenditure of general revenue funds to which he has contributed. The general taxpayer, on behalf of his class, is the only [*25] person who has a special interest to raise such challenge in this case. The special interest alluded to in the syllabus of the *Masterson* case should not be interpreted to require a nonexistent special interest not possessed by anyone other than the general taxpayer, as in the instant case.

In these days when an ordinary middle-class taxpayer is expending at least one-third of his income for

taxes, certainly he has a special interest by reason of which his own property rights are placed in jeopardy when the funds created by that taxation are illegally used. While the illegal expenditure, as alleged in this case, of \$ 903,000 may be insignificant as proportioned among the several million taxpayers in the state of Ohio, it is frequently the accumulation of these "insignificant expenditures" that becomes the straw that breaks the taxpayer's back.

Consequently, the decision of the lower court should be reversed and the general fund taxpayers should be permitted an opportunity to have this case decided on its merits, rather than forever sweeping the case under the rug on the basis that no one possesses the interest necessary to maintain the action.

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

STATE EX. REL., NORTHERN OHIO
CHAPTER OF ASSOCIATED BUILDERS &
CONTRACTORS, INC., *et al.*

Plaintiffs,

v.

THE BARBERTON CITY SCHOOLS
BOARD OF EDUCATION,

Defendant

-and-

The Ohio School Facilities Commission
C/O Executive Director
Michael C. Shoemaker
10 West Broad Street, Suite 1400
Columbus, Ohio 43215

-and-

Mr. Excavator
C/O Timothy A. Fletcher
8616 Euclid-Chardon Road
Kirkland, Ohio 44094,

Defendants.

) CASE NO. 2009 04 2636

) JUDGE: LYNNE S. CALLAHAN

) MAGISTRATE: JOHN SHOEMAKER

) AMENDED VERIFIED COMPLAINT
) FOR INJUNCTIVE, DECLARATORY
) AND OTHER RELIEF

INTRODUCTION

NOW COMES Plaintiff The Northern Ohio Chapter of Associated Builders & Contractors, Inc., Plaintiff Fechko Excavating, Inc., a construction contractor who submitted a bid for the New Barberton Middle School Project, and Plaintiff Taxpayers Dan Villers and Jason

Antill, by and through the undersigned counsel, and for their Amended Verified Complaint against Defendants Barberton City Schools Board of Education (the "Board"), the Ohio School Facilities Commission (the "OSFC") and Mr. Excavator attest and allege as follows:

1. This action is, among other things, a taxpayer action seeking preliminary and permanent injunctive relief to restrain and enjoin the Board and the OSFC from expending public funds and/or executing any agreement or contract, and/or performing any work upon any such agreement or contract already executed for the construction of the New Barberton Middle School Project, Project Number 08-834-J, located in Barberton, Ohio (the "Project").
2. This Complaint also seeks a declaratory judgment pursuant to Section 2721.03 of the Ohio Revised Code, requesting the Court to declare null, void, and otherwise unconstitutional, the actions of the Board and/or the OSFC which, among other things, incorporated a prevailing wage requirement in its bid specifications and construction documents for the Project contrary to R.C. 4115.04(B)(3) and R.C. 3313.46(A)(6), and/or doing so on any other construction contracts for construction at the New Barberton Middle School or any other facility Plaintiffs claim to be exempt under R.C. 4115.04(B)(3).
3. Prior to instituting this civil action, Plaintiffs made a written application to the Law Director for the City of Barberton, as well as to the Board's outside legal counsel requesting that they take corrective actions with regards to the unlawful actions undertaken by the Board pursuant to R.C. 3313.35. Attached hereto and marked as Exhibit "A" is the written request submitted by the taxpayers.

4. To date, the Law Director for Barberton, Barberton's outside legal counsel, and the Board itself has failed to take any corrective actions requested in the taxpayers' written application.

THE PARTIES

5. Plaintiffs, Dan Villers ("Villers") and Jason Antill ("Antill"), are taxpayers of the City of Barberton and Summit County, Ohio. Villers owns a home and resides at 1167 Shannon Avenue, Barberton, Ohio 44203, and Antill owns a home and resides at 1288 Valley Avenue, Barberton, Ohio 44203.
6. Plaintiff, Fechko Excavating, Inc. ("Fechko") is an Ohio corporation and a construction company doing business in the State of Ohio that received bid specifications for the Project and submitted a bid for the Project. The contractor's place of business is located at 865 West Liberty Street, Medina County, Ohio.
7. Plaintiff Northern Ohio Chapter of Associated Builders and Contractors, Inc. ("ABC") is a non-profit corporation organized under the laws of the State of Ohio located at 9255 Market Place West in Broadview Heights, Ohio.
8. ABC is a local chapter of Associated Builders and Contractors, Inc., which is a national trade association consisting of over twenty-five thousand Merit Shop construction industry associates and contractors. The objective of ABC and its members is to provide high quality, low cost, and timely construction work which benefits businesses, consumers and taxpayers.
9. The Northern Ohio Chapter of ABC represents over three hundred and fifty Merit Shop associate members and construction contractors, including contractors located in Summit

County and contractors employing residents of Summit County and the City of Barberton.

10. Plaintiff ABC has associational standing to bring this action as a representative of its members who bid on the Project or may bid on projects Plaintiffs claim are exempt from prevailing wage laws under R.C. 4115.04(B)(3) and would otherwise have standing to sue in their own right. Plaintiff Fechko, which bid on the Project, is a member of the Northern Ohio Chapter of ABC. ABC's associational standing is established as it represents members that would otherwise have standing to sue in their own right, the interests ABC seeks to protect are related to the trade association's purpose, and neither the claims asserted, nor the relief requested, requires the participation of individual members in this lawsuit. ABC is filing this action on behalf of its individual member contractors who have been and will continue to be injured by the loss of business opportunity resulting from the Board's and the OSFC's unlawful imposition of Chapter 4115 on the Project, and other projects at the New Barberton Middle School, or other projects Plaintiffs claim are exempt from prevailing wage laws under R.C. 4115.03(B)(3).
11. Defendant, Barberton City Schools Board of Education ("Board"), is located in Barberton, Ohio and is a board of education organized under the Laws of the State of Ohio, pursuant to R.C. 3313.01 *et seq.*
12. Defendant Ohio School Facilities Commission ("OSFC") was created by Senate Bill 102 to administer financial assistance to school districts for the acquisition or construction of classroom facilities in accordance with sections 3318.01 to 3318.33 of the Revised Code and is a body corporate and politic capable of being sued pursuant to R.C. 3318.30.

13. Defendant Mr. Excavator is a construction contractor and Ohio Corporation who was awarded the contract for the site work on the Project. Mr. Excavator's place of business is located at 8616 Euclid-Chardon Road, Kirkland, Ohio 44094.

RELEVANT FACTS

14. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 13 above as if fully rewritten herein.
15. On or about March 3, 2009, the Board issued an advertisement for sealed bids for the site work for the Project. (The advertisement for sealed bids is attached hereto as Exhibit "B").
16. Plaintiffs are informed and believe that the Board and the OSFC are co-owners of the construction Project during the design and construction of the Project.
17. Plaintiffs are informed and believe that the Project is a public improvement undertaken by, or under contract with, the Board.
18. Plaintiffs are informed and believe that the Project is being funded in part by taxpayer funds as a 5.2 mill levy was passed by Barberton taxpayers in March of 2008 to fund at least 40% of the construction costs for the Project.
19. Plaintiffs are informed and believe that 60% of the construction costs for the Project are being funded by taxpayer monies received from the Ohio School Facilities Commission ("OSFC"), a state agency created by the 122nd Ohio General Assembly to fund school construction projects.
20. The March 3, 2009 advertisement for sealed bids issued by the Board included an unlawful requirement stating "PREVAILING WAGE RATES APPLY; BIDDERS SHALL COMPLY WITH CHAPTER 4115 OF THE OHIO REVISED CODE."

21. Plaintiffs are informed and believe that all contractors who submitted bids for the Project submitted their bids using wage rates supplied by the Board in its bid specifications, which the contractors believed to be the applicable prevailing wage rates for Summit County, to calculate their labor costs for the Project, although no wage determination was ever requested by the Board as required by R.C. 4115.04(A) or determined pursuant to R.C. 4115.05.
22. The sealed bids were to be submitted to the Treasurer of the Barberton City School District at 479 Norton Ave., Barberton, Ohio 44203 on March 25, 2009 by 1:00 p.m. and opened and read immediately thereafter.
23. On or about April 1, 2009, the Board held a special session in which it awarded the contract for the site work for the Project to Mr. Excavator, the purported low bidder on the Project. Plaintiffs' are informed and believe that Mr. Excavator utilized what it believed to be the applicable prevailing wage rates for Summit County in preparing its bid for the Project as described in Paragraph 21 above.
24. Although the bid for the site work was awarded by the Board to Mr. Excavator, to the best of Plaintiffs' knowledge and belief, as of April 3, 2009, no contract was executed and no work had commenced on the Project by Mr. Excavator in accordance with bid award.
25. On April 3, 2009, at the hearing on Plaintiffs' Motion for Temporary Restraining Order, upon questioning by the Court of the Board concerning whether a contract had been signed between Mr. Excavator and the Board, representatives for the Board responded that no contract had been entered into for the Project.

26. In an effort to circumvent the issuance of injunctive relief, the Board entered into a contract with Mr. Excavator to perform work on the Project on April 6, 2009, incorporating within its provisions the unlawful imposition of Chapter 4115.

COUNT I

27. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 26 above as if fully rewritten herein.
28. The prevailing wage requirement included by the Board in the bid specifications for Project that are to be made part of the contract for the site work renders the contract illegal and/or constitutes an abuse of the Board's discretion, as the Board exceeded its authority under the law resulting in a misappropriation and misuse of public funds. The advertisement for bids for the Project evidencing that the Board exceeded its statutory authority, because the Board is requiring compliance with Chapter 4115, Ohio's Prevailing Wage Law, is set forth in Exhibit "B," and in the contract containing the illegal imposition of Chapter 4115 is set forth in Exhibit "C."
29. Ohio Revised Code Section 4115.03(B)(3) specifically exempts any board of education from the requirements of Ohio's Prevailing Wage Law, Chapter 4115, when undertaking the construction of a school facility. As such, the Board entered into an illegal contract and/or exceeded its authority and abused its discretion by mandating compliance with Ohio's Prevailing Wage Law on the Project.
30. In 1997, the Ohio 122nd General Assembly in Senate Bill No. 102, amended Ohio's Prevailing Wage Law, adding R.C. 4115.04(B)(3) to Chapter 4115 in order to specifically exclude every board of education from compliance with Chapter 4115 in order to save money on school construction Projects. Senate Bill No. 102 not only exempted

secondary school construction projects from Chapter 4115, but also created the OSFC to fund school construction projects.

31. Any public funding received from the OSFC does not trigger compliance with Ohio's Prevailing Wage Law, as the OSFC is also exempt from the requirements of Chapter 4115 through the operation of R.C. 4115.03(B)(3).
32. When funding a school construction project undertaken by a board of education, the OSFC does not require, nor can it require, the application of Ohio's Prevailing Wage Law to the Project.
33. Plaintiffs are informed and believe that the OSFC makes the election of a prevailing wage requirement to a school construction project undertaken by a board of education a matter solely to be decided by the board of education receiving OSFC construction funds.
34. However, the OSFC enacted Resolution 07-98 on July 26, 2007, including Attachment A, "Model Responsible Bidder Workforce Standards" unlawfully allows, encourages or otherwise recommends boards of education receiving OSFC administered taxpayer funds to apply Chapter 4115 to construction projects from which the boards of education are otherwise exempt in violation of Ohio law and public policy. The OSFC Resolution is attached as Exhibit "D."
35. Under Ohio law, the Board is mandated to only accept the lowest responsible bid on all construction contracts, pursuant to R.C. § 3313.46(A)(6), and other relevant statutory sections of the Ohio Revised Code.
36. Boards of education are creatures of statute and as such, have only such jurisdiction or authority as thus conferred by statute. They may not, under their rule-making or otherwise confer upon themselves further jurisdiction or authority.

37. Hence, in mandating the application of Chapter 4115, and the payment of prevailing wages for all work performed on the Project, the Board has exceeded its statutory authority under the law, abused its discretion and has failed as required by law to accept the lowest responsible bid for the Project and renders the contract illegal under R.C. 4115.03(B)(3) and/or R.C. 3313.46(A)(6).
38. The contract entered into between Mr. Excavator, the Board and the OSFC for work on the Project is an illegal contract.
39. The Board's unlawful actions will result in the misapplication and misuse of taxpayer funds on the Project, as application of Ohio's Prevailing Wage Law to the Project has inflated and increased the construction costs for the Project and is mandated by an illegal and void contract.
40. Plaintiff Fechko attests that its bid for the site work on the Project would have been \$26,000.00 lower, or \$863,751.88, if it had bid the site work for the Project without taking into consideration the applicable prevailing wage rates for Summit County, Ohio and compliance with Chapter 4115.
41. In bidding the Project at the prevailing wage rates applicable for Summit County, Fechko's labor costs on the Project increased by approximately \$10 per hour.
42. Mr. Excavator's prevailing wage bid was \$874,000.00 for the site work on the Project.
43. Fechko's prevailing wage bid was \$889,751.88 for the site work on the Project.
44. If the Board and the OSFC did not unlawfully require the application of Chapter 4115 and the payment of prevailing wages on the Project, Plaintiff Fechko's non-prevailing wage bid would have resulted in a net \$10,248.12 savings on the construction costs for

the Project to Barberton taxpayers, the loss of which will result in economic harm to the Barberton taxpayers as a whole.

45. The contract awarded by the Board to Mr. Excavator mandating compliance with Chapter 4115 to the Project is unenforceable, unlawful and otherwise void.

46. Because the contract awarded by the Board is unlawful, the Board and/or the OSFC must be required to re-bid work on the Project without the inclusion of the unlawful prevailing wage requirement.

47. Unless performance of this construction contract is enjoined by the court, the Plaintiffs will suffer immediate, substantial and irreparable harm.

48. The Board and Mr. Excavator having entered into a contract for the Project after this action was filed, as warned by the Court on April 3, 2009, have "proceeded at their own risk" that an injunction could be granted by the Court.

49. The injunction is appropriate because Plaintiffs have no other adequate remedy of law.

COUNT II

50. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 49 above as if fully rewritten herein.

51. The prevailing wage requirement included in the bid specifications issued by the Board and/or the OSFC is vague and ambiguous, seriously impairing the competitive bidding process and denying every contractor bidding on the project their constitutionally guaranteed procedural and substantive due process rights under the law.

52. The Project at issue is subject to competitive bidding laws under State law.

53. Plaintiffs are informed and believe that the Ohio Department of Commerce, the administrative agency statutorily charged with the interpretation and enforcement of

Chapter 4115, will not, and can not in anyway, provide any of the investigative or multiple administrative services to aid the Board in the application or enforcement of Chapter 4115 to work performed on the Project.

54. Plaintiffs are informed and believe that it is the position of the Ohio Department of Commerce that it is without statutory jurisdiction or authority to enforce or apply Chapter 4115 to the Project, because the Project is exempt from requirements of Chapter 4115 through operation of R.C. 4115.04(B)(3).
55. Without the investigative, administrative, and enforcement services from the Ohio Department of Commerce needed in order to administer and properly enforce the requirements of Chapter 4115 to the Project, any contract awarded for the Project containing such a requirement is void, ambiguous and unenforceable, and subject every contractor bidding on the Project to unlawful and unannounced bidding criteria.
56. Even if Chapter 4115 could apply to the Project, all bids are void because the Board has failed to perform the following tasks:
 - a. To have the Director of Commerce determine the prevailing rates of wages of mechanics and laborers called for by the public improvement in the locality where the work is to be performed, prior to advertising for bids in violation of R.C. 4115.04 and R.C. 4115.08;
 - b. Attach a schedule of wages determined and issued by the Ohio Department of Commerce to the construction/bidding documents in violation of R.C. 4115.04;
 - c. Designate a prevailing wage coordinator and failed to have the Director of Commerce appoint a coordinator in its stead in violation of R.C. 4115.032.

57. Chapter 4115 mandates that no public authority may commence a prevailing wage project without first complying with the above Revised Code Sections.
58. Furthermore, Ohio's Prevailing Wage Law, R.C. 4115.99 contains a criminal provision deeming any violations of Ohio's Prevailing Wage Law to be criminal offenses.
59. To follow any of the statutory procedures enumerated in the Ohio Revised Code without the administrative and investigative services of the Ohio Department of Commerce causes the Board's contract to be unconstitutionally void for vagueness such that people of common intelligence must necessarily guess at its meaning and differ as to its application.
60. Unless the Board and the OSFC's actions to include a Chapter 4115 requirement on the Project are declared unconstitutionally void for vagueness, or declared otherwise void ambiguous and unlawful, Plaintiffs will suffer immediate, substantial and irreparable harm.
61. Plaintiffs are entitled to injunctive relief from the court to prevent performance of the unlawful and invalid contract. Unless performance of the work on the Project is enjoined by the court, the Plaintiffs' will suffer immediate, substantial and irreparable harm.
62. The injunction is appropriate because Plaintiffs have no other adequate remedy of law.

COUNT III

63. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 62 above as if fully rewritten herein.
64. Pursuant to R.C. 2721.03, Plaintiffs are entitled to a declaration of the rights, duties and responsibilities of the parties to this action arising from the Board exceeding its authority

and abusing its discretion in mandating compliance with Chapter 4115 which establish a clear violation of State law.

65. As such, Plaintiffs request the Court to declare:

- a. The Board exceeded its statutory authority and abused its discretion in mandating compliance with Chapter 4115 on the Project;
- b. Find the contract awarded and/or executed by the Board to Mr. Excavator is void, unlawful and unenforceable;
- c. Find that the bid specifications and the advertisement for bids containing the Chapter 4115 requirement is unlawful and in violation of competitive bidding laws as it contained unlawful and unannounced criteria;
- d. Find the Board's resolution, contract and other bid specifications mandating compliance with Chapter 4115 to be constitutionally void for vagueness; and,
- e. Find that a board of education and/or the OSFC cannot require compliance with Chapter 4115 on a construction project undertaken by a board of education pursuant to R.C. 4115.04(B)(3) and/or R.C. 3313.46.

66. Plaintiffs are entitled to a declaration of the rights, duties and responsibilities of the parties to this action arising from the OSFC's unlawful use, recommendation, approval and inclusion of unlawful Model Responsible Bidder Workforce Standards attached hereto as Exhibit D.

67. Plaintiffs request that the Court declare the Model Responsible Bidder Workforce Standards attached hereto as Exhibit D to be void, unenforceable and contrary to Ohio law and public policy.

68. The Board and the OSFC's unlawful actions described above are capable of repetition and may evade review if not decided by this Court.
69. An actual and justiciable dispute exists between the Parties for which Plaintiffs lack an adequate remedy at law and are entitled to a declaration of rights from the Court.

COUNT IV

70. Plaintiffs incorporate by reference the allegations set forth in paragraphs 1 through 69 above as if fully rewritten herein.
71. Plaintiff Fechko incurred expenses in preparing its bid for contract for the site work on the Project.
72. The Board's actions of including an unlawful, ambiguous and unenforceable Chapter 4115 requirement in the bid specifications and in the contract for the Project violated Ohio's competitive bidding laws.
73. The Board's inclusion of the unlawful Chapter 4115 requirement on the Project as fully alleged herein, caused all bids submitted on the Project by all contractors, including Plaintiff Fechko, to be void and unlawful, thereby causing any contract issued thereafter by the Board to any contractor to be void, unlawful and unenforceable.
74. As a direct and proximate result of the Board's unlawful actions Fechko has been damaged and is entitled to recover its bids costs from the Board.
75. The exact amount of expenses Fechko incurred in submitting a bid on a void and unenforceable contract is yet to be determined.

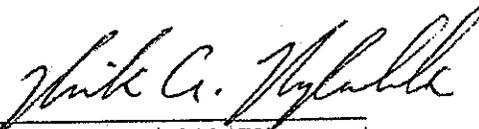
CONCLUSION

WHEREFORE, Plaintiffs pray that this Court grant the relief specified in this Verified Complaint and enter an order:

- (1) Declaring that the Board abused its discretion and exceeded its statutory authority by including a requirement that bidders comply with Chapter 4115 of the Ohio Revised Code in the construction Project issue herein or any other construction project undertaken by the Board;
- (2) Restraining and enjoining the Board and/or the OSFC from awarding or executing any contracts for any project that contain a clause requiring compliance with Chapter 4115 of the Ohio Revised Code, or from commencing any site work on the Project with contract(s) already awarded which contain a Chapter 4115 requirement or making any payments to any contractor on the Project regarding the same;
- (3) Declaring the Board's and/or the OSFC's actions in requiring compliance with Chapter 4115 to be unconstitutionally void for vagueness;
- (4) Declaring all contracts awarded by the Board and/or the OSFC for the Project or all bid specifications set forth for the Project containing a Chapter 4115 requirement to be unenforceable, ambiguous unlawful and void, including the contract awarded and/or executed with Mr. Excavator;
- (5) Declaring that the bid specifications and the advertisement for bids containing the Chapter 4115 requirement is unlawful and in violation of competitive bidding laws as it contained unlawful, unenforceable and unannounced criteria;

- (6) Declaring that a board of education and/or the OSFC cannot require compliance with Chapter 4115 on a construction project undertaken by a board of education pursuant to R.C. 4115.04(B)(3) and/or R.C. 3313.46(A)(6).
- (7) Declaring that the OSFC's "Model Responsible Bidder Workforce Standards" attached hereto as Exhibit D allowing, promoting or encouraging the use of Chapter 4115 requirements to be void, unenforceable and contrary to Ohio law and public policy.
- (8) Awarding Plaintiff Fechko its bid costs from the Board.
- (9) Awarding the Plaintiffs their attorneys' fees and costs in bringing this action; and
- (10) Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,



Alan G. Ross, Esq. (0011478)
Nick A. Nykulak, Esq. (0075961)
Ryan T. Neumeyer, Esq. (0076498)
Ross, Brittain & Schonberg Co., L.P.A.
6480 Rockside Woods Blvd. South, Suite 350
Cleveland, Ohio 44131
Tel: 216-447-1551 ~ Fax: 216-447-1554
Email: alanr@rbslaw.com
nickn@rbslaw.com
rneumeyer@rbslaw.com

COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Amended Verified Complaint for Injunctive, Declaratory and Other Relief has been served via electronic and regular U.S. mail, postage prepaid upon the following:

Ms. Tamzin O'Neil, Esq.
McGown, Markling & Whalen, Co. LPA
1894 North Cleveland-Massillon Road
Akron, Ohio 44333
toneil@servingyourschools.com

Counsel for Defendant Barberton City Schools Board of Education

-and-

Mr. Jon C. Walden, Esq.
Assistant Attorney General
150 E. Gay Street, Floor 18
Columbus, Ohio 43215
www.ohioattorneygeneral.gov

Counsel for the Ohio School Facilities Commission

-and-

Mr. Andrew Natale, Esq.
Mr. James T. Dixon, Esq.
Frantz Ward LLP
2500 Key Center
127 Public Square
Cleveland, Ohio 44114
jdixon@frantzward.com
anatale@frantzward.com

Counsel for Defendant Mr. Excavator

this 23rd day of April 2009.


Counsel for Plaintiffs

State of Ohio)

)

)

) ss

VERIFICATION

County of Cuyahoga)

)

)

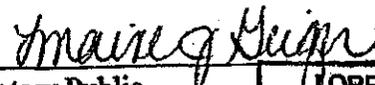
I, Ryan Martin, the President of the Northern Ohio Chapter of Associated Builders and Contractors, Inc., (ABC) being first duly sworn, deposes and says that ABC represents contractors that were willing, able and ready to bid on the Project, as well as contractors that submitted a bid on the Project and that ABC is one of the Plaintiffs in this action; I have read the foregoing Verified Complaint for Injunctive, Declaratory and Other Relief, and that it is true and correct to the best of my knowledge and belief.



Ryan Martin

SWORN TO BEFORE ME AND SUBSCRIBED in my presence this 21st day of April,

2009.



Notary Public

LORRAINE J. GEIGER
Notary Public, State of Ohio
Cuyahoga County
My Comm. Expires April 19, 2010

State of Ohio)

)

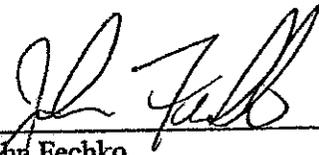
County of Medina)

)

ss

VERIFICATION

I, John Fechko, Vice President of Fechko Excavating, Inc., being first duly sworn, deposes and says that I am a contractor and bidder on the Project which is the subject matter of this Complaint and one of the Plaintiffs in this action; that I have read the foregoing Verified Complaint for Injunctive, Declaratory and Other Relief, and that it is true and correct to the best of my knowledge and belief.



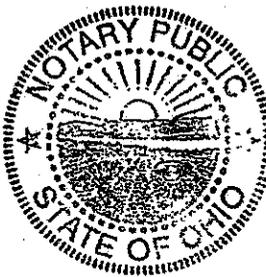
John Fechko

SWORN TO BEFORE ME AND SUBSCRIBED in my presence this 16th day of April,

2009.



Notary Public



KATHRYN M. TRUMAN, Attorney at Law
Notary Public - State of Ohio
My Commission has no expiration date
Sec. 147.03 R.C.

State of Ohio)
)
)
County of Summit)

ss

VERIFICATION

I, Dan Villers, being first duly sworn, deposes and says that I am a taxpayer in the City of Barberton, Summit County, Ohio and one of the Plaintiffs in this action; that I have read the foregoing Verified Complaint for Injunctive, Declaratory and Other Relief, and that it is true and correct to the best of my knowledge and belief.



Dan Villers

SWORN TO BEFORE ME AND SUBSCRIBED in my presence this _____ day of April, 2009.



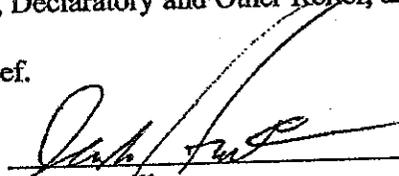
Notary Public

Roberta A. Haldrick
Resident Summit County
Notary Public, State of Ohio
My Commission Expires: 08/21/10

State of Ohio)
)
County of Summit)

ss VERIFICATION

I, Jason Antill, being first duly sworn, deposes and says that I am a taxpayer in the City of Barberton, Summit County, Ohio and one of the Plaintiffs in this action; that I have read the foregoing Verified Complaint for Injunctive, Declaratory and Other Relief, and that it is true and correct to the best of my knowledge and belief.



Jason Antill

SWORN TO BEFORE ME AND SUBSCRIBED in my presence this 20 day of April, 2009.



Notary Public

Roberta A. Haidnick
Resident Summit County
Notary Public, State of Ohio
My Commission Expires: 09/21/10

Anthony A. Baucco
Brian K. Britain
Scott Coghlan
Chad A. Fine
Scott W. Gedeon
Tricia L. Hurst

**ROSS,
BRITAIN
&
SCHONBERG
CO., L.P.A.**

Ryan T. Neumeier*
Nick A. Nykulak
Alan G. Ross
Evelyn P. Schonberg
Carol D. Strassman
Michael K. Zbawiony
*Also licensed in Illinois

March 23, 2009

SENT VIA FACSIMILE AND CERTIFIED MAIL TO:

Ms. Tamzin Kelly O'Neil, Esq.
Legal Counsel, Barberton Board of Education
1894 North Cleveland-Massillon Road
Akron, Ohio 44333
Tel: 1.330.670.0005
Fax: 1.330.670.0002

Ms. Lisa Miller, Esq.
Law Director, City of Barberton
576 W. Park Avenue, Room 301
Barberton, Ohio 44203
Tel: 1.330.848.6728
Fax: 1.330.861.7209

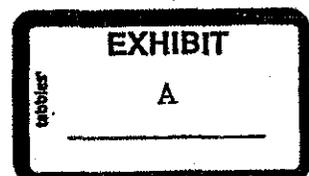
Re: Taxpayers' Request to Investigate and Institute an Action Against the Barberton Board of Education as Contemplated by Ohio Revised Code § 3313.35 with regard to an Unlawful Contract Provision Mandating Compliance Ohio's Prevailing Wage Law for the Construction of the New Barberton Middle School Project ("Project").

Dear Ms. O'Neil and Ms. Miller:

Please be advised that our law firm represents the Northern Ohio Chapter of Associated Builders & Contractors, Inc. ("ABC"), certain construction contractors ("Contractors") who intend to bid on the above referenced Project, as well as certain Taxpayers of the City of Barberton ("Taxpayers"). Pursuant to § 3313.35 of the Ohio Revised Code, this letter constitutes a written request to the Law Director of the City of Barberton to institute a civil action to prevent the Barberton Board of Education (the "Board") from letting any contracts for the above referenced Project that contain a provision which mandates compliance with Ohio's Prevailing Wage Law, R.C. 4115.03 to R.C. 4115.16. In short, it is the contention of the Taxpayers, ABC and Contractors that the Board is about to authorize or enter into contracts in direct contravention of Ohio law that will result in the misapplication of taxpayer funds. The particulars upon which this request is based are delineated below.

On March 25, 2009, the Board plans on opening bids submitted by construction contractors for the site work for the above referenced Project. The bid specifications released by the Board require all contractors performing work on the Project to comply with the requirements of Ohio's Prevailing Wage Law, including the payment of union wages to all employees who work on the Project. Currently, only about fourteen percent (14%) of construction contractors performing work in the State of Ohio are unionized, while the remaining eighty-six percent (86%) of the construction industry workforce is non-union. Requiring the payment of union prevailing wages for all construction work performed on the Project, when unionized workers make up a small minority of the construction

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Cleveland, OH 44131
216-447-1551 Fax: 216-447-1554
Website: www.rbslaw.com



Barberton Taxpayer Letter
March 23, 2009
Page 2 of 3

workforce, will significantly increase the overall cost of the Project resulting in the misapplication of taxpayer funds.

The Taxpayers are responsible for paying forty percent (40%) of the construction costs for the Project. Sixty percent (60%) of the Project is being funded by the Ohio School Facilities Commission ("OSFC") which does not require the application of Ohio's Prevailing Wage Law in order for the Board to receive funding for the Project. In March of 2008, the Taxpayers approved a six (6) mill levy to fund Barberton's portion of the Project's construction costs. The Taxpayers are extremely troubled that after much lobbying and the passage of this additional six (6) mill levy, the Barberton Board of Education would now rather subsidize the inflated wages of unionized construction workers rather than to build the Project at the least cost possible and use the money saved on construction for the education of the students of Barberton. However, regardless of the unreasonableness of the Board's decision, the Board's actions are clearly unlawful.

Boards of education are creatures of statute and have only such jurisdiction and authority as is conferred upon them by the Ohio Legislature. A school board may not, under their rule-making power granted by statute, by contract, or otherwise confer upon themselves additional jurisdiction or authority. *Verberg v. Board of Education* (1939), 135 Ohio St. 246, 20 N.E. 2d 368. That said, Section 3313 *et seq.* of the Revised Code, does not confer any authority whatsoever to the Board to include a prevailing wage requirement in any public improvement project undertaken by the Board. Not only does the Board lack authority under Section 3313.01, but the Ohio Legislature made clear with the enactment of R.C. 4115.04(B)(3), that a board of education project is to be exempt from all prevailing wage law requirements. Therefore, the Board, or any other such school district, lacks the statutory authority to include a prevailing wage clause in a construction contract. Pursuant to Ohio law, the Board is strictly obligated to only accept the lowest responsible bid. R.C. 3313.46(A)(6). Requiring the payment of prevailing wage on the Project violates this fundamental premise.

Moreover, not only is the prevailing wage condition included in the bid specifications unlawful, being contrary to Ohio law, but the condition is also void and unenforceable. The condition referring to the application of Ohio's prevailing wage law to the Project is vague and ambiguous. The Ohio Department of Commerce, the administrative agency responsible for the application and enforcement of Ohio's prevailing wage law, has already stated that it will not administratively aid this Board, (or any other school board), in applying or enforcing the prevailing wage law on this Project because the Project is exempt and the Department is without jurisdiction. (For more detail regarding the position of the Department of Commerce, please see the attached March 5, 2009 correspondence sent by our Office to Mr. Tom Hamden explaining this point further).

As such, even if the Board had the authority to apply a prevailing wage requirement by contract, without the Department's assistance, it would be impossible for the Board to enforce or apply the law on the Project. By simply including a reference to the prevailing wage law without sufficient

Barberton Taxpayer Letter
March 23, 2009
Page 3 of 3

detail as to what aspects of the Ohio's prevailing wage law would apply, and the administrative mechanisms by which compliance will be measured, interpreted, and enforced-- effectively denies all bidders, both successful and not, their right to substantive and procedural due process causing every bid submitted on the Project to be defective, invalid and void. *Perez v. Cleveland* (1997), 78 Ohio St.3d 376, 378, 1997 Ohio 33, 678 N.E.2d 537; *Chavez v. Hous. Auth. of El Paso* (C.A.5, 1992), 973 F.2d 1245, 1249. Needless to say, the Revised Code sections of the prevailing wage statute describe in detail every administrative and enforcement mechanism, including all aspects of substantive and procedural due process afforded to contractors and subcontractors, thereby requiring the aid and statutory involvement of the Department of Commerce and the Ohio Attorney General to properly apply and enforce the statute. Therefore, the imposition of the prevailing wage law as written, is unconstitutional, and further, is contrary to the Ohio Supreme Court's decision in *City of Dayton, Ex. Rel. Scandrick v. City of Dayton* (1981), 67 Ohio St. 2d 356, 423 N.E.2d 1095, the imposition of which will expose all bidders, subcontractors and suppliers to "unannounced bidding" criteria.

Based on the facts and arguments set forth above, it is respectfully requested that your office immediately investigate the unlawful actions taken by the Board in including a prevailing wage requirement in the bid specifications issued for the Project. It is the position of the Taxpayers of Barberton that the Board is about to perform, authorize or award contracts in direct contravention of the laws of the State of Ohio, resulting in the misapplication of taxpayer funds.

Please be advised that if we do not hear a positive response from the Board or from your office regarding this matter prior to the awarding of bids for the above referenced Project, it is the intention of our clients to proceed in your stead and to take all necessary legal actions available to them, including seeking declaratory and injunctive relief.

Very truly yours,



Alan G. Ross
Nick A. Nykulak

Cc: Ryan Martin, President ABCNOC
Barberton Taxpayers

Nykulak, Nick A.

From: Nykulak, Nick A.
Sent: Thursday, March 05, 2009 12:41 PM
To: 'tharnden@barbertonschools.org'
Cc: Ross, Alan G; Ryan Martin
Subject: New Barberton Middle School Project

Dear Mr. Hamden:

I, along with Alan Ross, represent certain construction contractors who will be bidders on the above referenced Project as well as certain Barberton taxpayers. We recently had a discussion with the Ohio Department of Commerce Superintendent, Robert Kennedy, and his legal counsel from the Ohio Attorney General's Office, Dan Belville, regarding the application of Ohio's Prevailing Wage Law, R.C. 4115.03 to R.C. 4115.16, on this Project. Mr. Kennedy is charged with the enforcement of Ohio's Prevailing Wage Law for the Ohio Department of Commerce.

We were subsequently informed by Mr. Kennedy that because the Barberton School Board is exempt from the requirements of Ohio's Prevailing Wage Law under Chapter 4115.04(B)(3), the Ohio Department of Commerce is without jurisdiction to require, implement or to enforce prevailing wage laws on the Project. As such, the Ohio Department of Commerce will not itself enforce, nor will it aid the Barberton School Board in applying or requiring contractors to comply with the provisions of Chapter 4115.

Needless to say, there are many requirements that a public authority must fulfill with the direct assistance of the Ohio Department of Commerce in order to implement, enforce and ensure compliance with the provisions of Chapter 4115 on public improvement projects. Because the Department of Commerce will not aid the School Board in anyway with fulfilling these necessary statutory requirements, the enforcement or application of Chapter 4115 on the Project would be impossible, and the bid requirements as set forth in the contract specifications as written are completely ambiguous. A cursory review of Chapter 4115 would illustrate the various provisions of Ohio's Prevailing Wage Law that would not be enforceable or applicable to this Project without the direct assistance of the Ohio Department of Commerce, including, but not limited to, the determination of prevailing wages for the Project and the direct enforcement of the law on contractors and subcontractors performing work on the Project.

As such, requiring Chapter 4115 to be complied with by contract, when the Department of Commerce lacks jurisdiction to properly implement and enforce the law, would subject every contractor submitting a bid on the Project to "unannounced criteria" and ambiguity, causing all bids submitted for the Project to be deemed invalid if a civil action is filed.

Furthermore, because the School Board is specifically exempt from the requirements of Chapter 4115, and this intent was made clear by the Ohio Legislature in enacting R.C. 4115.04(B)(3), it is also our position that the imposition of Chapter 4115 on the Project by contract would be deemed unlawful under Ohio Law. Taxpayers of Barberton do not take kindly to paying increased property taxes to fund a construction project with prevailing wages when the project is specifically exempted by statute. In this regard, the taxpayers of Barberton agree that the funds saved by the School Board in not requiring the payment of prevailing wages on the Project is better spent on the education of their children, rather than being used to fund the increased construction costs of a building due to the unlawful application of R.C. 4115. The taxpayers contend that it is the School Board's statutory duty to accept only the lowest and best bids submitted for this Project and the

3/23/2009

APP-32

R.C. Chapter 4115 requirement should be removed from the construction contract.

Please contact me or Mr. Ross to discuss this matter further. Our clients would prefer to amicably resolve this issue with the School Board, rather than to force the School Board and the taxpayers of Barberton to incur legal fees and costs to defend the School Board's unlawful actions. However, we are prepared to seek all legal means of redress to protect the interests of our clients and the rights of the taxpayers of Barberton should the School Board continue to proceed in requiring the application of Chapter 4115 on this Project. Bids are due for this Project on March 25, 2009. Should you wish to discuss this matter directly with Mr. Kennedy, his phone number is 614-728-8686. We look forward to hearing from you soon.

Nick A. Nykulak
Attorney at Law

Ross, Brittain & Schonberg Co., L.P.A.

[Address] 6480 Rockside Woods Blvd. South, Suite 350
Cleveland, Ohio 44131

[Phone] 216.447.1551 x134

[Cell] 216.409.2869

[Fax] 216.447.1554

[E-mail] nickn@rbslaw.com

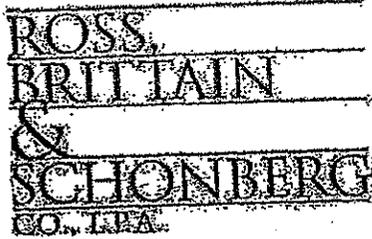
[Web] www.rbslaw.com

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3/23/2009

APP-33

Anthony A. Baucio
Brian K. Brittain
Scott Coghlan
Chad A. Fine
Scott W. Gedeon
Tricia L. Hurst



Ryan T. Neumeyer*
Nick A. Nykulak
Alan G. Ross
Evelyn P. Schonberg
Carol D. Strassman
Michael K. Zbawiony
*Also Licensed in Illinois

March 5, 2009

Sent via Email and Facsimile

Mr. Tom Harnden
OSFC Owners Representative
476 Norton Avenue
Barberton, Ohio 44203
Facsimile: 330-848-8726
Tharnden@barbertonschools.org

RE: New Barberton Middle School Project.

Dear Mr. Harnden:

I, along with Alan Ross, represent certain construction contractors who will be bidders on the above referenced Project as well as certain Barberton taxpayers. We recently had a discussion with the Ohio Department of Commerce Superintendent, Robert Kennedy, and his legal counsel from the Ohio Attorney General's Office, Dan Bellville, regarding the application of Ohio's Prevailing Wage Law, R.C. 4115.03 to R.C. 4115.16, on this Project. Mr. Kennedy is charged with the enforcement of Ohio's Prevailing Wage Law for the Ohio Department of Commerce.

We were subsequently informed by Mr. Kennedy that because the Barberton School Board is exempt from the requirements of Ohio's Prevailing Wage Law under Chapter 4115.04(B)(3), the Ohio Department of Commerce is without jurisdiction to require, implement or to enforce prevailing wage laws on the Project. As such, the Ohio Department of Commerce will not itself enforce, nor will it aid the Barberton School Board in applying or requiring contractors to comply with the provisions of Chapter 4115.

Needless to say, there are many requirements that a public authority must fulfill with the direct assistance of the Ohio Department of Commerce in order to implement, enforce and ensure compliance with the provisions of Chapter 4115 on public improvement projects. Because the Department of Commerce will not aid the School Board in anyway with fulfilling these necessary statutory requirements, the enforcement or application of Chapter 4115 on the Project would be impossible, and the bid requirements as set forth in the contract specifications as written are completely ambiguous. A cursory review of Chapter 4115 would illustrate the various provisions of Ohio's Prevailing Wage Law that would not be enforceable or applicable to this Project without the direct assistance of the Ohio Department of Commerce, including, but not limited to, the determination of prevailing wages for the Project and the direct enforcement of the law on contractors and subcontractors performing work on the Project.

6480 Rockside Woods Blvd. South - Suite 350
Cleveland, OH 44131
216-447-1551 Fax: 216-447-1554
Website: www.rbslaw.com

Letter to Mr. Hamden
March 5, 2009
Page 2 of 2

As such, requiring Chapter 4115 to be complied with by contract, when the Department of Commerce lacks jurisdiction to properly implement and enforce the law, would subject every contractor submitting a bid on the Project to "unannounced criteria" and ambiguity, causing all bids submitted for the Project to be deemed invalid if a civil action is filed.

Furthermore, because the School Board is specifically exempt from the requirements of Chapter 4115, and this intent was made clear by the Ohio Legislature in enacting R.C. 4115.04(B)(3), it is also our position that the imposition of Chapter 4115 on the Project by contract would be deemed unlawful under Ohio Law. Taxpayers of Barberton do not take kindly to paying increased property taxes to fund a construction project with prevailing wages when the project is specifically exempted by statute. In this regard, the taxpayers of Barberton agree that the funds saved by the School Board in not requiring the payment of prevailing wages on the Project is better spent on the education of their children, rather than being used to fund the increased construction costs of a building due to the unlawful application of R.C. 4115. The taxpayers contend that it is the School Board's statutory duty to accept only the lowest and best bids submitted for this Project and the R.C. Chapter 4115 requirement should be removed from the construction contract.

Please contact me or Mr. Ross to discuss this matter further. Our clients would prefer to amicably resolve this issue with the School Board, rather than to force the School Board and the taxpayers of Barberton to incur legal fees and costs to defend the School Board's unlawful actions. However, we are prepared to seek all legal means of redress to protect the interests of our clients and the rights of the taxpayers of Barberton should the School Board continue to proceed in requiring the application of Chapter 4115 on this Project. Bids are due for this Project on March 25, 2009. Should you wish to discuss this matter directly with Mr. Kennedy, his phone number is 614-728-8686. We look forward to hearing from you soon.

Sincerely

Alan G. Ross
Nick A. Nykulak

* * * Communication Result Report (Mar. 23. 2009 3:50PM) * * *

Fax Header) Ross, Britain

Date/Time: Mar. 23. 2009 3:45PM

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 E. 3) No answer
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E. 2) Busy
 E. 4) No facsimile connection

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 GmD. 0101
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 MmC. 0101

FAX COVER PAGE

TO/RECIPIENT Mr. Lisa Miller, Esq.	DATE 3/23/09	TIME 3:41 PM	SEARCHED COVER E
FROM/SENDER Law Director, City of Sebastian	NAME Alan O. Ross / Nick A. Nylund		
DESTINATION 1.330.861.7209			
Please see attached.			

IF YOU HAVE ANY PROBLEMS RECEIVING THIS FAX, CALL THE OPERATOR AT (202) 497-1554

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600 Northside West Blvd., Suite 200
 Cleveland, OH 44115
 Tel: 441.4241 Fax: 216-497-1554
 Website: www.faxdirect.com

ADVERTISEMENT

Sealed bids will be received by the Treasurer, Barberton City School District, at 479 Norton Ave, Barberton, OH 44203 (Board Office), until 1:00 p.m., local time, on March 25, 2009, for the New Barberton Middle School (Site work) Project, in accordance with the Drawings and Specifications prepared by FMD Architects. Bids will be opened and read immediately afterwards. The Construction Manager is Richard L. Bowen + Associates Inc. (RLBA) in association with Foreman PCM, 13000 Shaker Blvd., Cleveland, Ohio 44120; 216-377-3823; Submit all questions to Gavin Smith at RLBA in writing at gsmith@rlba.com.

A pre-bid meeting will be held at 11:00 am local time, March 11, 2009, at the Barberton City School District Board Offices located at, 479 Norton Ave, Barberton, OH 44203.

Contract Documents may be obtained from eBlueprint, 1915 W. Market St., Akron, Ohio 44313, (330) 865-4800-5303 by providing a refundable \$200 deposit per set, payable to Barberton City School District. (All Shipping Costs by Contractor)

Contract Documents may be reviewed without charge during business hours at Akron Builders Exchange (Akron), Builders Exchange of East Central Ohio (Youngstown), Cleveland Builders Exchange (Cleveland) and F.W. Dodge (Cleveland).

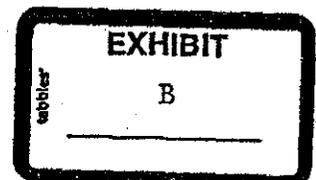
DOMESTIC STEEL USE REQUIREMENTS AS SPECIFIED IN SECTION 153.011 OF THE REVISED CODE APPLIES TO THIS PROJECT. COPIES OF SECTION 153.011 OF THE REVISED CODE CAN BE OBTAINED FROM ANY OF THE OFFICES OF THE DEPARTMENT OF ADMINISTRATIVE SERVICES.

PREVAILING WAGE RATES APPLY; BIDDERS SHALL COMPLY WITH CHAPTER 4115 OF THE OHIO REVISED CODE.

All bids must be accompanied by a Bid Guaranty in the form of either a Bid Guaranty and Contract Bond for the full amount of the bid (including all add alternates) or a certified check, cashier's check, or an irrevocable letter of credit in an amount equal to 10% of the bid (including all add alternates), as described in the Instructions to Bidders.

No Bidder may withdraw its bid within sixty (60) days after the bid opening. The Owner reserves the right to waive irregularities in bids, to reject any or all bids, and to conduct such investigation as necessary to determine the responsibility of a bidder.

Visit the following for additional advertisements: <http://barbertonschools.org/ei/content/view/135>



State of Ohio
Ohio School Facilities Commission

CONTRACT FORM

THE CONTRACT, evidenced by this Contract Form, is made and entered into by and between:

Mr. Excavator, Inc

8616 Euclid Chardon Road

Kirtland, OHIO 44094

(the "Contractor") and the State of Ohio (the "State"), through the President and Treasurer of the Barberton City School District Board (the "School District Board") on the date executed by the School District Board.

In consideration of the mutual promises herein contained, the School District Board and Contractor agree as set forth below:

ARTICLE 1

- 1.1 The Contractor shall perform the entire Work described in the Contract Documents and reasonably inferable as necessary to produce the results intended by the Contract Documents, for:

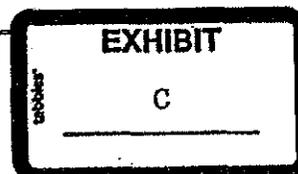
*Site Work
Barberton Middle School
452 Newell Street
Barberton, OH 44203
Summit County, Ohio*

ARTICLE 2

- 2.1 The School District Board shall pay the Contractor for the performance of the Contract, subject to additions and deductions as provided in the Contract Documents, the amount of \$874,000 (the "Contract Sum"), based upon the Bid Form, dated 25th March 2009 submitted by the Contractor and comprised of the following:

*Base Bid Amount \$874,000
No Alternates apply*

- 2.2 The School District Board shall pay the Contractor upon receiving Applications for Payment submitted by the Contractor and approved by the School District Board and the Commission as provided in the Contract Documents.



ARTICLE 3

- 3.1 The Contractor shall diligently prosecute and complete all Work such that Final Acceptance occurs by *10th July, 2009*, unless an extension of time is granted by the School District Board and the Commission in accordance with the Contract Documents. The period established in this paragraph is referred to as the "Contract Time."
- 3.2 The Contractor shall perform and complete all Work under the Contract within the established Contract Time, and each applicable portion of the Work shall be completed upon its respective Milestone date, unless the Contractor timely requests, and the School District Board and the Commission grant, an extension of time in accordance with the Contract Documents.
- 3.3 The Contractor's failure to complete all Work within the period of time specified, or failure to have the applicable portion of the Work completed upon any Milestone date, shall entitle the School District Board and the Commission to retain or recover from the Contractor, as Liquidated Damages, and not as a penalty, the applicable amount set forth in the following table for each and every day thereafter until Contract Completion or the date of completion of the applicable portion of the Work, unless the Contractor timely requests, and the School District Board and the Commission grant, an extension of time in accordance with the Contract Documents.

<u>Contract Amount</u>	<u>Dollars Per Day</u>
\$1 to \$50,000	\$150
More than \$50,000 to \$150,000	\$250
More than \$150,000 to \$500,000	\$500
More than \$500,000 to \$2,000,000	\$1,000
More than \$2,000,000 to \$5,000,000	\$2,000
More than \$5,000,000 to \$10,000,000	\$2,500
More than \$10,000,000	\$3,000

- 3.4 The amount of Liquidated Damages is agreed upon by and between the Contractor and the School District Board and the Commission because of the impracticality and extreme difficulty of ascertaining the actual amount of damage the State would sustain.
- 3.5 The School District Board's and the Commission's right to recover Liquidated Damages does not preclude any right of recovery for actual damages.

ARTICLE 4

- 4.1 The Contract Documents embody the entire understanding of the parties and form the basis of the Contract between the School District Board and the Contractor. The Contract Documents are incorporated by reference into this Contract Form as if fully rewritten herein.
- 4.2 The Contract and any modifications, amendments or alterations thereto shall be governed, construed and enforced by and under the laws of the State of Ohio.

- 4.3 If any term or provision of the Contract, or the application thereof to any Person or circumstance, is finally determined, to be invalid or unenforceable by a court of competent jurisdiction, the remainder of the Contract or the application of such term or provision to other Persons or circumstances, shall not be affected thereby, and each term and provision of the Contract shall be valid and enforced to the fullest extent permitted by law.
- 4.4 The Contract shall be binding on the Contractor, the School District Board and the Commission, their successors and assigns, in respect to all covenants and obligations contained in the Contract Documents, but the Contractor may not assign the Contract without the prior written consent of the School District Board.

ARTICLE 5

- 5.1 It is expressly understood by the Contractor that none of the rights, duties and obligation described in the Contract Documents shall be valid or enforceable unless the School District Board Treasurer first certifies there is a balance sufficient to pay the obligations set forth in the Contract.
- 5.2 The Contract shall become binding and effective upon execution by the School District Board and approval by the Commission.

ARTICLE 6

- 6.1 This Contract Form has been executed in several counterparts, each of which shall constitute a complete original Contract Form which may be introduced in evidence or used for any other purpose without production of any other counterparts.

ARTICLE 7

- 7.1 The Contractor represents and warrants that it is familiar with all applicable ethics law requirements, including without limitation, ORC Sections 102.04 and 3517.13, and certifies that it is in compliance with, and will continue to adhere to, such requirements.
- 7.2 In accordance with Executive Order 2007-01S, the Contractor, by signature on this document, certifies that it: (1) has reviewed and understands Executive Order 2007-01S, (2) has reviewed and understands the Ohio ethics and conflict of interest laws, and (3) will take no action inconsistent with those laws and this order. The Contractor understands that failure to comply with Executive Order 2007-01S is, in itself, grounds for termination of this contract and may result in the loss of other contracts with the State of Ohio.

ARTICLE 8

- 8.1 The Contractor represents and warrants that it is not subject to an "unresolved" finding for recovery under ORC Section 9.24. If this representation and warranty is found to be false, the Contract is void, and the Contractor shall immediately repay to the Owner any funds paid under this Contract.

ARTICLE 9

- 9.1 The Contractor represents and warrants that it has not provided any material assistance, as that term is defined in ORC Section 2909.33(C), to an organization that is identified by, and included on, the United States Department of State Terrorist Exclusion List and that it has truthfully answered "no" to every question on the "Declaration Regarding Material Assistance/Non-

assistance to a Terrorist Organization ("DMA"). The Contractor further represents and warrants that it has registered with the Ohio Business Gateway to file for DMA pre-certification and has provided, or shall provide, it's DMA to the Commission prior to execution of this Contract Form. If these representations and warranties are found to be false, the Contract is void and the Contractor shall immediately repay to the Owner any funds paid under this Contract.

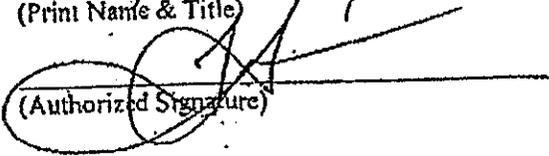
IN WITNESS WHEREOF, the parties hereto have executed this Contract.

CONTRACTOR

Mr. Excavator, Inc.
(Company Name)

Timothy A. Flasher / Executive V.P.
(Print Name & Title)

By:


(Authorized Signature)

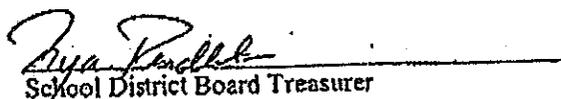
Date: April 6, 2009

STATE OF OHIO, BY AND THROUGH SCHOOL DISTRICT BOARD


School District Board President

Date: April 8, 2009

Dennis Liddle, Jr.
(Print Name)


School District Board Treasurer

Date: April 8th, 2009

Ryan Pendleton
(Print Name)

APPROVAL BY:

OHIO SCHOOL FACILITIES COMMISSION
SECTION 3318.10, ORC

Michael C. Shoemaker
Executive Director

CERTIFICATE OF FUNDS
(Section 5705.41, ORC)

In the matter of: **Mr. Excavator, Inc.**

IT IS HEREBY CERTIFIED that the moneys required to meet the obligations of the Board of Education of the Barberton City School District under the foregoing Contract have been lawfully appropriated for such purposes and are in the treasury of the Barberton City School District or are in the process of collection to an appropriate fund, free from any previous encumbrance.

BARBERTON CITY SCHOOL DISTRICT

By: *[Signature]*
Treasurer

Dated: April 8th, 2008

Exhibit E

**COMMITMENT TO PARTICIPATE
IN THE
EDGE BUSINESS ASSISTANCE PROGRAM**

Bidder: Mark only one option.

Use "✓" or "X" to mark option included in Bid

If marking Option B, also show percentage of proposed participation.

Option A

Bidder commits to *meet or exceed* the advertised EDGE Participation Goal of 5 percent of the Contract award amount, calculated as a portion of the Base Bid plus all accepted Alternates, by using certified EDGE Business Enterprise(s).

Bidder agrees that if selected for consideration of the Contract, it shall provide (if not provided with the Bidder's Bid) a *Certified Statement of Intent to Contract and to Perform* form for each certified EDGE Business Enterprise proposed for use by the Bidder if awarded the Contract for this Project.

Option B (also indicate percentage -- see text)

Bidder *does not meet* the advertised EDGE Participation Goal percentage, but, if awarded the Contract for this Project, *commits to provide* _____ % of the Contract award amount, calculated as a portion of the Base Bid plus all accepted Alternates, by using certified EDGE Business Enterprise(s).

Bidder acknowledges it understands the requirement for it to provide and agrees to provide, if selected for consideration of the Contract, a detailed *Demonstration of Good Faith* describing its efforts undertaken prior to submitting its Bid to meet the advertised EDGE Participation Goal percentage for the Contract for this Project.

Bidder agrees that if selected for consideration of the Contract, it shall provide (if not provided with the Bidder's Bid) a *Certified Statement of Intent To Contract and To Perform* form for each certified EDGE Business Enterprise proposed for use by the Bidder if awarded the Contract for this Project.

Option C

Bidder declares that the Bidder is a certified EDGE Business Enterprise and that if awarded this Contract, the EDGE Participation percentage will be 100% of the Contract award amount.

RESOLUTION 07-98

**THE OHIO SCHOOL FACILITIES COMMISSION
JULY 26, 2007****AMENDING MODEL RESPONSIBLE BIDDER REQUIREMENTS LIST
AND APPROVING ADDITIONAL BIDDER CRITERIA
RELATED TO THE CONSTRUCTION WORKFORCE**

WHEREAS, the 122nd Ohio General Assembly established the Ohio School Facilities Commission (Commission) under Chapter 3318 of the Ohio Revised Code (ORC); and

WHEREAS, the Commission is committed to ensuring that schools are built by responsible contractors employing a qualified workforce; and

WHEREAS, Section 3313.46 of the Ohio Revised Code requires School Districts to award contracts to contractors submitting the lowest responsible bid after competitive bidding; and

WHEREAS, Section 3318.10 of the Ohio Revised Code provides discretion for a Board of Education, subject to Commission approval, to determine which contractor is the lowest responsible bidder; and

WHEREAS, the Commission is committed to allowing additional local control to individual School Districts which will ultimately own the school buildings, and have responsibility for the upkeep and maintenance of the school buildings; and

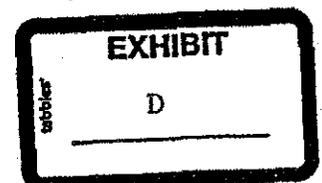
WHEREAS, on February 15, 2007, the Commission adopted Resolution 07-16 which included Attachment A; Model Responsible Bidder Requirements which would be approved if adopted, in whole or in part, by a School District without further Commission approval; and

WHEREAS, the Commission has determined it is necessary to amend the Model Responsible Bidder Requirements adopted on February 15, 2007 as Attachment A to Resolution 07-16; and

WHEREAS, the Commission has determined to allow, subject to Commission approval, a School District participating in a Commission program to determine additional standards related to the construction workforce.

NOW, THEREFORE BE IT RESOLVED THAT:

1. A School District participating in a Commission program shall have authority by resolution of its Board of Education to establish responsible bidder criteria to ensure the projects are completed by responsible contractors employing a qualified workforce.



2. The responsible bidder criteria adopted by the Board of Education are subject to Commission approval. Subject to legal review by the Commission, all submissions by Boards of Education which contain any or all of the responsible bidder criteria as set forth in Attachment A to this Resolution shall be considered approved by the Commission. The responsible bidder criteria set forth in Attachment A to this Resolution, entitled Model Responsible Bidder Workforce Standards, replaces those responsible bidder criteria entitled Model Responsible Bidder Requirements set forth in Attachment A to Resolution 07-16 adopted by the Commission on February 15, 2007.
3. The Commission authorizes its Executive Director to approve of additional responsible bidder criteria submitted by a Board of Education to the Commission for approval.
4. Following the adoption of a Resolution of a Board of Education to establish responsibility criteria for bidders and following approval by the Commission, the Commission authorizes the Executive Director to permit a School District to include the responsible bidder criteria in the contract documents.
5. For projects advertised after October 1, 2007, the Executive Director shall only approve contracts in which the Bidder has certified that it, and its subcontractors or any other contractor performing work on the project covered under the contract of the Bidder, it has implemented a written safety program, that each member of its job site workforce has completed an OSHA 10 or 30 Hour Construction Course, and that all project supervisors and all project foremen have completed an OSHA 30 hour Construction Course.
6. The Executive Director is authorized to waive or amend provisions of a School District's Project Agreement to facilitate the implementation of this Resolution.
7. The provisions of this Resolution shall not be used to contravene Ohio's Encouraging Diversity Growth and Equity ("EDGE") Program as established by the Ohio General Assembly and implemented by the Commission.

In witness thereof, the undersigned certifies the foregoing Resolution was duly adopted at an open meeting held on July 26, 2007 by the members of the Ohio School Facilities Commission.


J. Pari Sabety, Chair

Attachment A

**THE OHIO SCHOOL FACILITIES COMMISSION
MODEL RESPONSIBLE BIDDER WORKFORCE STANDARDS**

The following responsible bidder criteria may be included, by a resolution of a Board of Education, in the construction contracts for school building projects undertaken pursuant to Chapter 3318 of the Ohio Revised Code. These responsible bidder criteria are reasonably related to performance of the contract work within the statutory framework set forth in Section 9.312 of the Ohio Revised Code. The responsible bidder criteria shall be evaluated in accordance with Section 3.4.3 of the Instructions to Bidders.

1. As a condition precedent to contract award after bid, The Board of Education may undertake with the Bidder a Constructability and Scope review on projects of One Hundred Thousand Dollars (\$100,000.00) or more to verify that the Bidder included all required work.
2. The Low Bidder whose bid is more than twenty percent (20%) below the next lowest bidder shall list three (3) projects that are each within seventy-five percent (75%) of the bid project estimate for similar projects and that were successfully completed by the bidder not more than five (5) years ago. This information shall be provided if necessary at the post-bid scope review.
3. The Bidder shall certify it will employ supervisory personnel on this project that have three (3) or more years in the specific trade and/or maintain the appropriate state license if any.
4. The Bidder shall certify it has not been penalized or debarred from any public contracts for falsified certified payroll records or any other violation of the Fair Labor Standards Act in the last five (5) years.
5. The Bidder shall certify it has not been debarred from public contracts for prevailing wage violations or found (after all appeals) to have violated prevailing wage laws more than three times in the last ten years.
6. The Bidder shall certify it is in compliance with Ohio's Drug-Free Workplace requirements, including but not limited to, maintaining a substance abuse policy that its personnel are subject to on this project. The Bidder shall provide this policy or evidence thereof upon request.
7. The Bidder for a licensed trade contract or fire safety contract shall certify that the Bidder is licensed pursuant to Ohio Revised Code Chapter 4740 as a heating, ventilating, and air conditioning contractor, refrigeration contractor, electrical contractor, plumbing contractor, or hydronics contractor, or certified by the State Fire Marshall pursuant to R.C. 3737.65.

8. The Bidder shall certify it has not had a professional license revoked in the past five years in Ohio or any other state.
9. The Bidder shall certify it has no final judgments against it that have not been satisfied at the time of award in the total amount of fifty percent (50%) of the bid amount of this project.
10. The Bidder shall certify it has complied with unemployment and workers compensation laws for at least the two years preceding the date of bid submittal.
11. The Bidder for a trade licensed pursuant to Ohio Revised Code Chapter 4740 or requiring certification of the State Fire Marshall pursuant to R.C. 3737.65, shall certify that the Bidder will not subcontract greater than twenty-five percent (25%) of the labor (excluding materials) for its awarded contract, unless to specified subcontractors also licensed pursuant to Ohio Revised Code Chapter 4740 or certified by the State Fire Marshall pursuant to R.C. 3737.65
12. The Bidder shall certify it does not have an Experience Modification Rating of greater than 1.5 (a penalty rated employer) with respect to the Bureau of Workers Compensation risk assessment rating.
13. The Bidder shall certify that it will provide a minimum health care medical plan for those employees working on this project, and shall provide the policy or evidence thereof upon request.
14. The Bidder shall certify it will contribute to an employee pension or retirement program for those employees working on this project, and shall provide the plan or evidence thereof upon request.
15. The Bidder shall certify it shall use only construction trades personnel who were trained in a state or federally approved apprenticeship program or Career Technical program, or who are currently enrolled in a state or federally approved apprenticeship program or Career Technical Program, or who can demonstrate at least three years experience in their particular trade.
16. The Bidder shall certify it has not been debarred from any public contract; federal, state or local in the past five years.
17. The Bidder shall certify that it, and its subcontractors or any other contractor performing work on the project covered under the contract of the Bidder, shall pay the prevailing wage rate and comply with the other provisions set forth in Ohio's Prevailing Wage Law, R.C. 4115.03 through 4115.16, and O.A.C. 4101:9-4-01 through 4101:9-4-28. This includes, but is not limited to, the filing of certified payroll reports.

18. The Bidder shall certify that it, and its subcontractors or any other contractor performing work on the project covered under the contract of the Bidder, shall comply with the requirements of a project labor agreement adopted for use on the project.

A material breach of the responsible bidder criteria prior to, or during the contract performance, shall subject the contractor to all contractual remedies, including, but not limited to, termination for cause.

DANIEL M. HERRIGAN

2009 JUL 31 PM 2:36

IN THE COURT OF COMMON PLEAS
COUNTY OF SUMMIT

SUMMIT COUNTY
CLERK OF COURTS

STATE EX. REL., NORTHERN OHIO
CHAPTER OF ASSOCIATED BUILDERS
& CONTRACTORS, INC., et al,
Plaintiffs,

CASE NO. CV 2009 04 2636

JUDGE CALLAHAN
MAGISTRATE SHOEMAKER

-vs-

BARBERTON CITY SCHOOL BOARD OF
EDUCATION, et al,
Defendant

JUDGMENT ENTRY
(FINAL AND APPEALABLE)

This matter comes on before the Court upon Motions to Dismiss pursuant to Civil Rule 12(B) filed by Defendants, the Barberton City School Board of Education (Board), the Defendant, Mr. Excavator and the Defendant, the Ohio School Facilities Commission, (OSFC). The Plaintiffs, Northern Ohio Chapter of the Association of Builders & Contractors, Inc., (ABC), FECHKO Excavating (FECHKO), Dan Villers, (Villers), Jason Antill, (Antill) filed replies to the same.

The Court finds this is in reference to the Magistrate. The Court however, will proceed to consider these Motions and rule on the same in the interest of judicial efficiency, judicial economy and to assist all the parties to a speedy and just resolution of the issues in this case.

Briefly put, the focus of this lawsuit centers upon the Plaintiffs' April 24, 2009 Amended Complaint whereby it seeks to enjoin the Board and OSFC from allowing the excavating contractor, Mr. Excavator, from proceeding or otherwise going forward with its

portion of the new Barberton Middle School project. Plaintiffs' five-count complaint asserts as a general proposition that the Board's inclusion of what's known as the Prevailing Wage Law as otherwise established by Ohio Revised Code 4115 within the project's bid specifications provided to prospective bidders, such as FECHKO and Mr. Excavating, was illegal and also renders the ultimate contract which was awarded to Mr. Excavator illegal, or in the alternative constitutes an abuse of discretion by the Board as such contract will result in misappropriation and misuse of public monies. The Plaintiffs also assert within the body of the amended complaint that that prevailing wage requirement within the bid specifications, and as established by OSFC, which is a partner in this school project, is vague and ambiguous.

It is further found by the Court in reviewing the documents in regard to these Motions and response thereto that it is beyond dispute or argument that the Board and OSFC can best be described as a co-venturers in this new school construction project inasmuch as approximately 40% of the cost of such project is derived from a Levy passed in 2008 by Barberton taxpayers, and the other approximate 60% being funded, or otherwise supplied, by the OSFC. OSFC is a statutorily-created governmental agency of the State of Ohio created by the legislature with the statutory purpose to assist in funding school construction projects across the State of Ohio.

Likewise, there can be found no dispute that on or about March 3, 2009 the Board published by public advertisement notice that it would be accepting sealed bids with reference here to the specific excavating work, and that such notice unambiguously stated within the body of the information presented to prospective bidders that, "prevailing wage rates apply: bidders shall comply with Chapter 4115 of the Ohio Revised Code." As such, all prospective bidders who sought to obtain the excavating work, such as Mr. Excavator and FECHKO, were required when constructing the monetary amounts as a bid for the excavation portion of the work, to

incorporate prevailing wage calculations within their bid. In fact, this is exactly what both parties did, that is, Mr. Excavator and FECHKO, inasmuch presented their bids to the Board for review on March 25, 2009, included within the body of their bids the necessary monetary calculations taking into consideration the labor costs for the excavation portion of the project as otherwise required by the RC 4115.04 (A). When the bids were opened and presented to the Board for review, such review taking place on or about April 1, 2009 at a special session, the Board awarded the contract for the excavation site work to the Defendant, Mr. Excavator.

A further review of these matters establishes that at no point can it be disputed that any of the bidders for the excavation portion of the project, which includes Mr. Excavator and FECHKO, ever offered any objections to the bid language or otherwise offered any complaint or objections to the bidding language requiring them to incorporate the prevailing wage law prior to submission of their respective bids. Additionally, there can be found no dispute by any of the parties in this matter that when OSFC is a partner in such school construction projects, and pursuant to Ohio Revised Code 3318.10 that the School Board was obligated because of this relationship to accept the "lowest, responsible bids." Thus, the criteria for acceptance is the lowest monetary amount, and coupled with that, the prospective bidder has to be responsible.

The Plaintiffs in their claim in this lawsuit have not argued, or otherwise asserted, that Mr. Excavator's bid was not the lowest, nor that it was not a responsible bidder. Further, there has been no argument or showing by the Plaintiffs in their complaint and amended complaint that the procedures in regard to the bidding matters, to include the advertisement, the acceptance of such bid, the opening of such bid, the calling of the meeting to evaluate such bid, and the awarding of such bid to Mr. Excavator, were tainted by fraud, corruption or favoritism or any other blatant legal error on the face of such procedures. Plaintiffs have narrowed their

objection to the process upon the sole argument that the Board and OSFC erred when they required, within the body of the bid specifications, that all bidders must submit bids including wage calculations based on the prevailing wage law, as it was illegal to do, and that such requirement, should not have been used within the bid submitted by interested parties and any bid submitted that included the prevailing wage cannot be accepted. However, if it was in violation of the law, as FECHKO now argues, then FECHKO willfully ignored that problem and knowingly submitted its bid in violation of the law which included the prevailing wage conditions.

The Court finds that it was noteworthy that FECHKO, when it submitted its bid, did not object in any form to the Defendant's use of the prevailing wage law in the bid specification, nor did FECHKO offer any caveat or other contingency that if its bid was accepted, it would then be able to decide not to pay its workers under the prevailing wage law concept as set out by the aforementioned Revised Code and as it had committed to do when it submitted its bid but could have the contract less any requirement to abide by the prevailing wage law. Nor, in its response to the Motions in this matter, FECHKO never addressed the fact as to what it would do if the Board would have awarded the contract for excavation to FECHKO when it had in fact incorporated within the body of its bid the calculations as related to the duty of complying with the prevailing wage law.

In brief procedural history, on May 28, 2009 the Board filed its Motion seeking to dismiss the Plaintiffs' Amended Complaint pursuant to Civ.R. 12(B)(1) and 12(B)(6). Plaintiffs replied to the Board's Motion on June 5, 2009 in a joint response to OSFC's Motion to Dismiss which it filed on May 28, 2009 asserting Civ.R. 12(B)(6). Thereafter, on June 17, 2009 Mr.

Excavator filed its own Civ.R. 12(B)(1) and (B)(6) Motion to Dismiss the Amended Complaint. On June 5, 2009 Plaintiffs collectively filed their reply to the Motions of the Board and OSFC.

Though the claims for dismissal by the OSFC, Board and Mr. Excavator are substantially similar, the Court will address the claims of each separately within the body of this Judgment Entry.

1. Ohio School Facilities Commission's Motion to Dismiss and Barberton City Schools Board of Education's Motion to Dismiss.

The Motion to Dismiss filed by OSFC contains an assertion that itself and the Board had the lawful discretion to require the payment of prevailing wages in school contracts such as the instant matter. A review of RC 4115.04(B)(1) does in fact provide an exemption to the statutorily mandated rule that prevailing wages must be paid except in regard to school districts. Plaintiffs' argument in regard to this matter is that since RC 4115.04 exempts school boards from complying with the prevailing wage law, the bidding instructions were illegal, as was letting the contract as to Mr. Excavator. It was also the intent of the legislature that the law was to be construed as meaning that a school board, or a school board in partnership with OSFC, cannot at their discretion choose to require bidders to pay prevailing wages in contracts let out for bid. However, as argued by OSFC, being exempted from a statutory requirement, does not then by means of some matter of transmutation or as otherwise argued by the Plaintiffs that OSFC and the Board should now be prohibited from including the use of the prevailing wage law as a term within a contract or the bid specifications upon subcontract. Plaintiffs' arguments are just that, arguments, and are without any valid basis. Plaintiffs provide no credible statutory or case law to support such a claim.

Additionally, the argument offered by OSFC is that the Plaintiffs, Villers and Antill, as taxpayers seeking to enjoin further work on this project with specific reference to the excavation matters, should not be allowed under existing law to seek relief by the lawsuit filed in their name in the Amended Complaint. Again without reciting the foregoing analysis of the Court, the Court concludes that both Mr. Villers and Mr. Antill are situated no differently than any other landowner taxpayer within the City of Barberton who, as property owners, had their property burdened with the levy referred to above. In short, Mr. Antill and Mr. Villers are, along with everyone else living within such levy area who is a property owner and taxpayer, all subject to their tax dollars utilized as provided for in the levy to build this new school. In short, neither Mr. Villers nor Mr. Antill can demonstrate that they individually have any unique or special interest separate, apart, or different in character from all other landowners taxpayers in the district such that they may sustain is different in character from all harm to all of the general taxpayers in the area of the Barberton City School District affected by the levy. It is specifically concluded that any economic harm they claim to assert as taxpayers is no different than any of the other landowner taxpayers. Under Ohio law, it does not allow them separate standing to complain as they have done in this lawsuit. *Brinkman, Jr. v. Miami Univ.*, 12 Dist. No. CA2006-12-313, 2007-Ohio-4372; *State ex rel. Dann v. Taft*, 110 Ohio St.3d 252, 2006-Ohio-3677, at p9.

Additionally, the Court concludes that the Plaintiff FECHKO has not asserted any claim for injury or any right which would entitle it under existing Ohio law to recover any of its monetary expenditures in its bidding activities as damages as an unsuccessful bidder as it was in this matter. It is found that FECHKO knowingly and intentionally, through its officers, agents or employees, prepared a bid to do the excavation work in this area, and included within such bid

was FECHKO's computation of the prevailing wage law for its laborers which would have to be paid per the prevailing wage rates, if it were awarded the contract. When FECHKO now says it was illegal to require such of bidders, that argument is disingenuous. Noteworthy is the fact that it never, at any point until such suit was filed, objected to such matter, as it well could have. Nor did it, within its bid, reserve any right to any later objection to the prevailing wage law requirement after the bid was let to a bidder. However, now that FECHKO is unhappy with the fact that it was not awarded the bid, it makes the sniveling complaint that the law was violated. All of these arguments are without merit.

This Court specifically concludes the monetary amount specified in the FECHKO bid incorporated the prevailing wage law. As it did as such, FECHKO has waived any right to now complain that Mr. Excavator was the successful bidder or that the process was legally flawed. With no evidence showing that either one was not a responsible bidder, the contract would have in all likelihood been awarded to FECHKO, had its monetary amount been the lesser. FECHKO would then have been required, pursuant to its bid, to comply with the prevailing wage law. It cannot, as it seeks to do in this matter, submit a bid including a requirement of the prevailing wage law within its calculations, stand silent to that matter, and wait and see if its bid was accepted and then, if not, act as an unsuccessful bidder, complaining about the matter. If FECHKO's logic is accepted, it would allow a bidder to knowingly violate the contract like the one at issue here; but if unsuccessful, to then turn around and say the process was fatally defective. If such a practice were to be adopted in Ohio, it would create chaos in public contract bidding and encourage dishonest bidding practices.

The Court further concludes that, if for argument sake, FECHKO's actions offering as it did its bid to the Board, knowing that it contained computation of the prevailing wage, and

which it now says was illegal, shows at the very least the Plaintiff FECHKO was acting illegally seeking to be awarded a contract obtained in contravention of the law it claims was inappropriate. Had FECHKO's bid been accepted, it would likely never have raised the prevailing wage issue. The alternative conclusion is that if FECHKO, knowing the illegal nature of the contract specifications, nevertheless proceeded to then bid, it has an ulterior motivation such that if it were successful, it would then claim it had been awarded the contract but would have then repudiated that portion relating to the prevailing wage as being illegal. In either case, FECHKO, in its perfidious action presented to the Board a bid that the Board had no reason to believe was other than honest, and that the bidder here, FECHKO, had no problem with the terms and would stand behind it if awarded the bid. In short, the Board justifiably relied on bids as presented to it, including FECHKO's, as it had no reason to know about what the Court concludes was the hidden agenda of FECHKO. As such, the Court concludes that FECHKO has waived any right to assert and any illegality in the bid specifications and it is to be estopped from now asserting same.

Further, the Court goes on to address the Board's claim that the Northern Ohio Chapter of Associated Builders & Contractors, Inc. ("ABC") lack of standing in this matter. It is first of all concluded that such Plaintiff has not been demonstrated to have one of its members named in this case as a party Plaintiff. Nowhere in Plaintiffs' Amended Complaint of April 24, 2009 is there any assertion that Plaintiff FECHKO is a member of Plaintiff ABC. And further, even if for argument sake, had FECHKO been shown to be a member, Plaintiff ABC cannot demonstrate that its member, for discussion purposes, FECHKO, suffered the type of injury which would otherwise allow Plaintiff ABC, as an independent body in trade association, to participate in a claim such as this. As such, the Court concludes that the Northern Ohio Chapter

of Associated Builders & Contractors, Inc.'s claims are without merit as to all designated Plaintiffs. Plaintiff ABC must successfully demonstrate that it meets the tripart test for standing long recognized in Ohio. Plaintiff ABC absolutely fails in this regard. *Warth v. Seldin* (1975), 422 U.S. 490; *State ex rel. Connors v. Ohio Dept. of Transp.* (1982), 8 Ohio App.3d 44; *Ohio Academy of Nursing Homes, Inc. v. Barry* (1987), 37 Ohio App.3d 46; *Tiemann v Univ. of Cincinnati* (1998), 127 Ohio App.3d 312.

Additionally, the Court concludes that FECHKO has not demonstrated under any existing Ohio law that as an unsuccessful and disappointed bidder it is entitled to any monetary relief for any damages that it incurred as a result of preparing its bid and submitting the same.

As such, this Court concludes that the Barberton City School Board's assertion that the Plaintiffs' Amended Complaint be dismissed pursuant to 12(B)(1) and 12(B)(6) is well taken. Additionally, the Court finds that the claims against the OSFC fail and are dismissed pursuant to Civ.R.12(B)(6). As such, the Amended Complaint is dismissed against the Barberton City Schools and Ohio School Facility Commission at the cost to all the Plaintiffs.

2. Mr. Excavator's Motion to Dismiss.

The Court next turns to the arguments asserted by Mr. Excavator, the demonstrated successful bidder on the contract in this matter. Mr. Excavator filed its Motion to Dismiss June 17, 2009. Plaintiffs' brief in opposition filed on June 26, 2009, with a reply to such filed by Mr. Excavator on July 7, 2009. Mr. Excavator likewise moves to dismiss this matter and in conjunction, thereto asserts a Motion based upon Civ.R. 12(B)(1) addressing jurisdiction and Civ.R. 12(B)(6) as upon a failure to state a claim.

Mr. Excavator makes an argument which is similar to arguments made by the other party Defendants in this matter. That is the two taxpayers, Mr. Antill and Mr. Villers, are simply

members of the overall landowner taxpayers category within the tax levying district of the City of Barberton, and their complaint fails to allege any special interest in a special fund, and any special damage they will suffer which is separate and distinct from all other taxpayers in the district, or that they have any independent right that is unique to them as opposed to all other taxpayers who live within the district and who are property owners that have their property subject to such levy. In short, neither has a special interest upon which they are placed in jeopardy unique to them and under Ohio law have no standing to assert their claim in this lawsuit. These two Plaintiffs provided no evidence that they are participants in any "special fund" or have any equitable ownership in any such fund. As such, these Plaintiffs' arguments are fully unpersuasive and the Court finds that both lack standing to pursue their claims.

Brinkman, supra.

Also correctly asserted by Mr. Excavator is the position that both FECHKO and ABC lack standing. FECHKO does not assert any known legal injury under Ohio law as a result of its being an unsuccessful bidder. FECHKO also fails to address the fact that it, along with Mr. Excavator, submitted its bid for consideration by the Board, incorporating therein the prevailing wage law calculations into the bid and otherwise complied with the requirements in the bidding instructions. Further, neither FECHKO nor ABC have been shown to have challenged the bidding procedure prior to FECHKO'S bid submission.

Also correctly presented by Mr. Excavator is that ABC is simply an association without any valid assertion to make such a claim. ABC could only assert such claim where it had a member and that such member would have standing in their own right to make a claim. Mr. Excavator correctly concludes that FECHKO does not have such standing. This Court

restates its conclusion that there is no evidence that FECHKO was ever a member of the trade association known as ABC at all times material.

Further Mr. Excavator also correctly asserts, under the existing law, that just because the Board is exempt from utilizing prevailing wages pursuant to RC 4115, in its contracts for construction work, that does not therefore stand for the proposition that it could not elect to choose to include such prevailing wage requirements within its bid requirements should it choose to do so. Simply put, the exclusion of the Board from compliance with the mandatory prevailing wage language, does not create the opposite effect, meaning it cannot use such. Arguments by the Plaintiffs in regard to this can only be accomplished by tortured and otherwise unreasonable logic. A plain reading of the statute and the case law precludes such application as the Plaintiffs seek in this matter. The Plaintiffs' interpretation of this Statute is clearly misplaced.

As such, the Court concludes that Mr. Excavator's motion, based upon Civ.R. 12(B)(1) and 12(B)(6) is to be granted in that not only do parties such as Mr. Antill and Mr. Villers, as well as ABC and FECHKO lack standing, but even if the standing argument were accepted, none of the Plaintiffs have demonstrated that under any existing law that they have any right to relief. It is concluded beyond doubt from Plaintiffs' Amended Complaint that none of the Plaintiffs can prove any set of entitlement by any of the Plaintiffs to recover.

Ohio law is well settled as to the standards Court must apply in reviewing Motions pursuant to 12(B)(1) and 12(B)(6). In general, Motions to Dismiss pursuant to Civ.R. 12(B)(6) are designed to test the sufficiency of the party's complaint. In any ruling upon such Civ.R. 12(B)(6) Motions, the evaluating tribunal is required to take all allegations in the complaint as true and draw all reasonable inferences in favor of the non-moving party. The trial court can only dismiss a complaint made upon a Civ.R. 12(B)(6) motion after it has been shown plaintiff

can show no set of facts which would entitle it to relief. It is concluded beyond doubt from Plaintiffs' Amended Complaint that they can prove no set of facts entitling any of the Plaintiffs to recover.

In the instant matter, the Court has considered such guidance in evaluating the Motion for 12(B)(6) as filed by the parties in this matter. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d. 242; *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192; *Bourke v. Carnahan*, 163 Ohio App.3d 818, 2005-Ohio-5422, at p.9.

The Court has also considered the guidance trial courts must utilize when ruling upon a Civ.R. 12(B)(1) motion. The standard review for dismissal pursuant to Civ.R. 12(B)(1) is whether any cause of action cognizable by the forum has been raised in the complaint. *State ex rel. Bush v Spurlock* (1980), 42 Ohio St.3d 80; *Avco Fin. Services, Inc. v. Hale* (1987), 36 Ohio App.3d 65.

Plaintiffs, collectively, have by this Judgment Entry all of their respective claims against all designated Defendants dismissed with prejudice at Plaintiffs' cost.

The Court further concludes that in light of the foregoing ruling, Plaintiffs' Motion to file a Second Amended Complaint is denied.

It is so ordered. No just cause for delay. This is a final appealable order.

Pursuant to Civ. Rule 58(B) the Clerk of Courts shall serve upon all parties in this matter notice of this order and state upon the journal of this court.

IT IS SO ORDERED.

JUDGE LYNNE S. CALLAHAN

cc: Alan R. Ross
Nick A. Nykulak
Ryan T. Neumeyer
Tamzin Kelley O'Neil
James T. Dixon
William C. Becker
Jon C. Walden

so

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
DANIEL M. HORRIGAN

STATE EX. REL. NORTHERN OHIO -6 PM 3:07 C.A. No. 24898
CHAPTER OF ASSOCIATED BUILDERS & CONTRACTORS, INC. SUMMIT COUNTY
et al. CLERK OF COURTS

Appellants

v.

THE BARBERTON CITY SCHOOLS
BOARD OF EDUCATION, et al.

JOURNAL ENTRY

Appellees

Appellants have moved this Court to stay the trial court's July 31, 2009, order and to issue an injunction to maintain the status quo between the parties pending appeal. The motion for stay is denied, as App.R. 7(A) requires such a motion to first be made to the trial court.

As for appellants' request for an injunction, appellees will have until August 10, 2009, in which to respond to the motion. Appellees shall address in that response the appropriate amount of bond should an injunction be granted.



Judge

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COURT OF APPEALS
DANIEL M. HERRIGAN

STATE EX. REL. NORTHERN OHIO
CHAPTER OF ASSOCIATED BUILDERS & CONTRACTORS
et al.

AUG 11 AM 9:48

C.A. No. 24898

SUMMIT COUNTY
CLERK OF COURTS

Appellants

v.

THE BARBERTON CITY SCHOOLS
BOARD OF EDUCATION, et al.

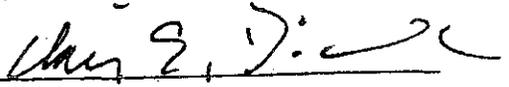
JOURNAL ENTRY

Appellees

Appellants have moved this Court for an injunction restraining the Barberton Board of Education, the Ohio School Facilities Commission and related parties from 1) accepting any bids, awarding any contracts or executing any contracts for the construction of the New Barberton Middle School Project that contain a clause requiring compliance with Chapter 4115 of the Ohio Revised Code; 2) permitting any bidder to perform any work pursuant to any agreement that contains such a provision; 3) allowing any work to commence or continue under any unlawful contract containing such clause; or 4) expending any taxpayer monies on any board of education construction project requiring bidders to pay prevailing wages. Appellees have responded in opposition.

In determining whether to grant injunctive relief, courts consider four factors: (1) the likelihood or probability of a plaintiff's success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to the plaintiff; (3) what injury to others will be caused by the granting of the injunction; and (4) whether the public interest will be served by the granting of the injunction. *Mt. Eaton Community Church, Inc. v.*

Upon consideration of the parties' arguments and the four factors listed above, the Court denies appellants' motion for an injunction.


Judge

STATE OF OHIO)

)ss:

COUNTY OF SUMMIT)

COURT OF APPEALS
DANIEL M. HERRIGAN

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE EX. REL. NORTHERN OHIO AN 8:57
CHAPTER OF ASSOCIATED
BUILDERS & CONTRACTORS IN COUNTY
et al. SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 24898

Appellants

v.

THE BARBERTON CITY SCHOOLS
BOARD OF EDUCATION, et al.

JOURNAL ENTRY

Appellees

Appellees have moved to dismiss the appeal as moot. Appellants have responded in opposition. The motion to dismiss is denied at this time.



Judge

The Supreme Court of Ohio

FILED

SEP 21 2009

CLERK OF COURT
SUPREME COURT OF OHIO

State ex rel. Northern Ohio Chapter of
Associated Builders & Contractors, Inc.,
et al.

Case No. 2009-1466

ENTRY

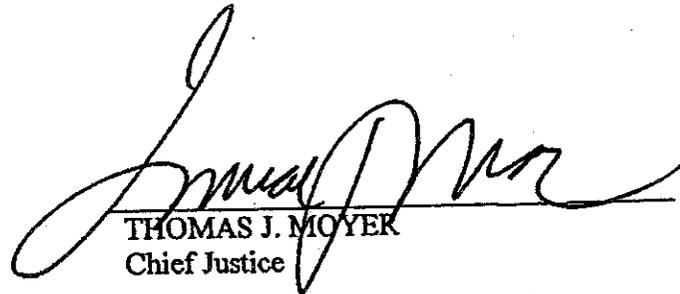
v.

The Barberton City Schools Board of
Education et al.

This cause is pending before the Court as a discretionary appeal. Upon consideration of appellants' motion for stay of execution of the court of appeals judgment and request for injunction,

It is ordered by the Court that the motion for stay and the request for injunction are denied.

(Summit County Court of Appeals; No. 24898)



THOMAS J. MOYER
Chief Justice

FILED

SEP 21 2009

CLERK OF COURT
SUPREME COURT OF OHIO

The Supreme Court of Ohio

State ex rel. Northern Ohio Chapter of
Associated Builders & Contractors, Inc.,
et al.

Case No. 2009-1466

ENTRY

v.

The Barberton City Schools Board of
Education et al.

This cause is pending before the Court as a discretionary appeal. It appears from the records of the Court that the appellant has not filed a memorandum in support of jurisdiction, due September 25, 2009, in compliance with the Rules of Practice of the Supreme Court and therefore has failed to prosecute this cause with the requisite diligence. Upon consideration thereof,

It is ordered by the Court that this cause is dismissed sua sponte.

(Summit County Court of Appeals; No. 24898)


THOMAS J. MOYER
Chief Justice

COURT OF APPEALS
DANIEL M. HERRIGAN
STATE OF OHIO)
2010 APR 28 AM 7:56
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

SUMMIT COUNTY
STATE EX. REL. NORTHERN OHIO COURTS
CHAPTER OF ASSOCIATED BUILDERS
& CONTRACTORS, INC., et al.

C.A. No. 24898

Appellants

v.

BARBERTON CITY SCHOOL BOARD
OF EDUCATION, et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2009 04 2636

Appellees

DECISION AND JOURNAL ENTRY

Dated: April 28, 2010

WHITMORE, Judge.

{¶1} Plaintiff-Appellants, Associated Builders & Contractors, Inc. ("ABC"), Fechko Excavating, Inc. ("Fechko"), Dan Villers, and Jason Antill appeal from the judgment of the Summit County Court of Common Pleas, dismissing for lack of standing. This Court affirms.

I

{¶2} In 2008, voters in the City of Barberton passed a 5.2 mill levy to aid the Barberton City School District in building a new middle school. The Barberton Middle School Construction Project ("the Project") is estimated to cost approximately \$30 million dollars and is scheduled to be completed in several phases. In addition to the use of levy monies from Barberton taxpayers, the Project is also being funded by the Ohio School Facilities Commission ("the OSFC"), a state agency created by the Ohio Legislature to administer and fund school construction projects.

{¶3} In March 2009, the Barberton City School District Board of Education (“the Board”) sought bids for the first phase of the construction, known as the Early Site Work (“ESW”). In its request for proposals, the Board specified that all bids were to include prevailing wage rate requirements as set forth in R.C. 4115 et seq. Eligible bids were to be submitted to the Board by no later than March 25, 2009. Fechko, who is a member of the Northern Ohio Chapter of ABC, timely submitted a bid, incorporating into its bid the requisite prevailing wage rates for Summit County. ABC, a national trade association comprised of merit shop construction associates and contractors throughout the country, aids its members in addressing issues that are of concern industry-wide.

{¶4} On or about April 1, 2009, the Board awarded the ESW contract to Mr. Excavator. On April 3, 2009, Fechko and ABC (collectively “Bidders”), along with Barberton residents Dan Villers and Jason Antill (collectively “Taxpayers”), filed a verified complaint seeking to permanently enjoin the Board and the OSFC from applying Ohio’s prevailing wage requirement to the ESW project. Their complaint also sought a declaration that the bidding requirements and subsequent contracts imposing a prevailing wage requirement were an abuse of the Board’s discretion and unlawful. Simultaneously, they filed motions seeking a preliminary injunction, temporary restraining order, and expedited discovery. The trial court held a hearing, at which the magistrate denied the motions for a temporary restraining order and expedited discovery and set the preliminary injunction and declaratory judgment for hearing on April 15, 2009.

{¶5} On April 8, 2009, the Board entered into a written contract with Mr. Excavator for completion of the ESW project. On April 13, 2009, the Board filed a motion to dismiss Bidders and Taxpayers’ complaint under Civ.R. 12(B)(7) based on a failure to join an indispensable party

pursuant to Civ.R. 19, namely the OSFC. In response, Bidders and Taxpayers filed an amended verified complaint naming the OSFC and Mr. Excavator as defendants, in addition to the Board. In May, the magistrate held a pretrial hearing at which he established a discovery schedule and set a trial date for mid-August.

{¶6} On May 28, 2009, the Board filed a motion to dismiss under Civ.R. 12(B)(1) and (B)(6), arguing that Bidders and Taxpayers lacked standing to bring their complaint and that they had failed to state a claim which would entitle them to relief. On that same day, the OSFC also filed a motion to dismiss arguing the same. Mr. Excavator likewise filed a motion to dismiss on June 17, 2009. Bidders and Taxpayers opposed the foregoing motions and the parties proceeded with discovery.

{¶7} In early July, Bidders and Taxpayers requested leave to file a second amended verified complaint based on information they learned in their discovery depositions. The Board, the OSFC, and Mr. Excavator opposed the request for leave, arguing that there were dispositive motions pending before the court, and further, that the second amended verified complaint presented claims that were not yet ripe, as they dealt with future phases of the Project for which bids had not yet been requested or bid requirements issued.

{¶8} On July 31, 2009, the trial court granted the motions to dismiss filed by the Board, the OSFC, and Mr. Excavator. In doing so, it concluded that Bidders and Taxpayers lacked standing and had failed to state a claim under Civ.R. 12(B)(6). The trial court also denied Bidders and Taxpayers' motion to amend their second verified complaint. Bidders and Taxpayers timely appealed and sought a stay of the trial court's decision as well as an injunction. This Court denied the motion for stay and request for injunction, which Bidders and Taxpayers appealed to the Ohio Supreme Court. In the interim, the Board and the OSFC filed a motion to

dismiss the appeal as moot, arguing that the ESW project had been completed. Bidders and Taxpayers opposed the motion to dismiss and this Court subsequently denied it. On September 21, 2009, the Ohio Supreme Court denied Bidders and Taxpayers' motion for stay and request for injunctive relief.

II

First Assignment of Error

"THE TRIAL COURT ERRED IN DISMISSING THE AMENDED VERIFIED COMPLAINT AND HOLDING NONE OF THE PLAINTIFFS HAD STANDING TO BRING THIS ACTION UNDER CIV. R. 12(B)(1)."

{¶9} In their first assignment of error, Bidders and Taxpayers argue that the trial court erred in concluding that they lacked standing to pursue the causes of action set forth in their complaint. We disagree.

{¶10} "The issue of standing is a threshold test that, once met, permits a court to determine the merits of the questions presented." *Hicks v. Meadows*, 9th Dist. No. 21245, 2003-Ohio-1473, at ¶7. "A person has standing to sue only if he or she can demonstrate injury in fact, which requires showing that he or she has suffered or will suffer a specific, judicially redressible injury as a result of the challenged action." *Fair Hous. Advocates Assn., Inc. v. Chance*, 9th Dist. No. 07CA0016, 2008-Ohio-2603, at ¶5. "Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court." *State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77. Accordingly, a motion to dismiss for lack of standing is properly brought pursuant to Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted. *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, at ¶4. See, also, *Kiraly v. Francis A. Bonanno, Inc.* (Oct. 29, 1997), 9th Dist. No. 18250,

at *1. Because standing presents this Court with a question of law, we review the matter de novo. *Zagrans v. Elek*, 9th Dist. No. 08CA009472, 2009-Ohio-2942, at ¶7.

Bidders and Taxpayers' Amended Verified Complaint

{¶11} In their amended verified complaint, Bidders and Taxpayers challenge the use of prevailing wages as a bidding requirement and contractual term for work on the ESW project. Ohio's prevailing wage law, as set forth in R.C. 4115 et seq., "require[s] contractors and subcontractors for public improvement projects to pay laborers and mechanics the so-called prevailing wage in the locality where the project is to be performed." *Northwestern Ohio Bldg. & Constr. Trades Council v. Ottawa Cty. Improvement Corp.*, 122 Ohio St.3d 283, 2009-Ohio-2957, at ¶14, quoting *J.A. Croson Co. v. J.A. Guy, Inc.* (1998), 81 Ohio St.3d 346, 349. The Ohio Department of Commerce is charged with enforcing the prevailing wage law. See generally, R.C. 4115.10, R.C. 4155.13, and R.C. 4115.16. The statute, however, specifically identifies several exceptions to the prevailing wage law provisions, including "public improvements undertaken by, or under contract for, the board of education of any school district[.]" R.C. 4115.04(B)(3). Consequently, school boards are not required to pay prevailing wages when entering into a public improvement project, such as the construction of a middle school. See R.C. 4115.03(C) (defining "public improvement" to include "all buildings *** constructed by a public authority" which would include a school board under the definition of "public authority" set forth in R.C. 4115.03(A)).

{¶12} In their amended verified complaint, Bidders and Taxpayers allege that the "prevailing wage requirement included by the Board in the bid specifications for [the Project] that are to be made part of the contract for the [ESW] renders the contract illegal *** as the Board exceeded its authority under the law resulting in a misappropriation and misuse of public

funds.” Therefore, they allege that “the Board exceeded its authority under the law resulting in a misappropriation and misuse of public funds” and “entered into an illegal contract and/or exceeded its authority *** by mandating compliance with Ohio’s [p]revailing [w]age [l]aw on the Project.” Additionally, Taxpayers and Bidders maintain that “the OSFC does not require, nor can it require, the application of Ohio’s [p]revailing [w]age [l]aw to the Project.”

{¶13} The trial court concluded that Bidders and Taxpayers lacked standing to pursue the aforementioned claims alleged in their complaint. Given that Bidders and Taxpayers arrive at their basis for standing in different manners, we address each party’s argument separately.

Fechko’s Standing

{¶14} Fechko alleges that the trial court failed to apply the correct standard of review in deciding the Board, the OSFC, and Mr. Excavator’s motions to dismiss because the trial court did not accept Fechko’s factual allegations as true and draw all reasonable inferences in its favor. Fechko points to several excerpts in the trial court’s entry to support its claim that the trial court discredited the assertions set forth in its complaint and instead, “drew adverse inference against [it].” These arguments, however, have little bearing on Fechko’s ability to assert that it has standing in this matter. Consequently, we focus our analysis on Fechko’s assertion that, as a bidder on the ESW project, it has standing to challenge the award of the bid and subsequent contract to another contractor, even if the bid award unlawfully incorporates prevailing wage requirements. Though Fechko provides ample citations to case law which support its assertion that a party must have actually bid on a project in order to have standing to later challenge the bid award, those cases provide only the threshold requirement necessary to challenge the propriety of a bid award. See *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St.3d 318, 320 (concluding that association lacked standing to pursue cause of action in representative capacity

to challenge legality of bidding procedure because none of its members submitted a bid on the project); *State ex rel. Associated Bldrs. & Contrs., Cent. Ohio Chapter v. Jefferson Cty. Bd. of Commrs.* (1995), 106 Ohio App.3d 176, 182 (concluding that contractors and contractors' association lacked standing because neither the contractors nor one of the association's members had submitted a bid). That is, while Fechko correctly notes that a bidder must, in fact, submit a bid on a project in order to have standing and allege an actual injury, it incorrectly concludes that if a party submits a bid, it is able to demonstrate actual injury simply by having done so. Such is not the case.

{¶15} This Court has defined "actual injury" in terms of standing as "an invasion of a legally protected interest that is concrete and particularized." *Haley v. Hunter*, 9th Dist. No. 23027, 2006-Ohio-2975, at ¶12, quoting *Lujan v. Defenders of Wildlife* (1992), 504 U.S. 555, 560-61. Moreover, in order to have standing, "[a] plaintiff must have a personal stake in the matter; the plaintiff's injury cannot be merely speculative but must be palpable and, also, must be an injury to himself personally or to a class." *Hicks* at ¶7, citing *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312, 325. An actual injury is one that is "concrete and not simply abstract or suspected." *Ohio Contractors Assn.*, 71 Ohio St.3d at 320.

{¶16} Fechko argues that it has suffered an "actual injury" by expending costs to prepare and submit a bid in response to "unlawful" bidding requirements imposed upon it by the Board and the OSFC. Under the authority of *Meccon, Inc. v. Univ. of Akron*, 10th Dist. No. 08AP-727, 2009-Ohio-1700, Fechko alleges that as "an unsuccessful bidder on a public project [it is] entitled to recover its bid costs due to unlawful conduct by the governmental authority[.]" In *Meccon Inc.*, however, the University of Akron awarded construction contracts to a bidder in direct contradiction to the express terms of the University of Akron's bidding requirements and

corresponding statutory language of R.C. 4115. *Meccon, Inc.* at ¶4 (noting that both the bid documents and statute governing bidding “prohibit[ed] withdrawal of a bid ‘when the result would be the awarding of the contract on another bid of the same bidder,’” which is what occurred when the bidder withdrew its combined bid, but was still awarded two stand-alone bids). Thus, Meccon, Inc. was able to demonstrate an actual injury as a result of the bidding process because it was a wrongfully rejected bidder. The Tenth District therefore concluded that the Court of Claims was vested with jurisdiction to hear Meccon Inc.’s claims for bid preparation costs and attorney fees. Unlike Meccon Inc., however, Fechko was not the wrongfully rejected bidder for the ESW contract. Fechko’s complaint evidences that Mr. Excavator’s bid was approximately \$15,000 less than Fechko’s. Thus, Mr. Excavator was properly awarded the ESW contract because it was the lowest responsible bidder.

{¶17} Fechko asserts in its complaint that, but for having to use prevailing wages in calculating its bid for the ESW project, its bid would have been approximately \$10,000 less than Mr. Excavator’s. Therefore, Fechko speculates that, had there been no requirement for use of prevailing wages, it would have been the lowest bidder, but based on the Board’s “unlawful” application of R.C. 4115, it was not. Based on such speculation, we conclude Fechko’s assertion that the prevailing wage requirement caused it any actual injury is “abstract [and] suspect[,]” at best. *Ohio Contractors Assn.*, 71 Ohio St.3d at 320. Consequently, this assertion cannot serve as the foundation for Fechko’s standing argument.

{¶18} Additionally, Fechko argues that it is entitled to recover its bid costs under the authority of *Cementech, Inc. v. Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991. There, the Supreme Court left intact the award of bid costs to an unsuccessful bidder on appeal, despite concluding the bidder was not entitled to lost profits. Again, we note that *Cementech, Inc.*,

presents a case factually inapposite to the case at bar, given that the bidder in *Cementech, Inc.*, had submitted the “lowest and best bid [which] by law, [meant it] should have been awarded the bid.” *Cementech, Inc. v. Fairlawn*, 160 Ohio App.3d 450, 2005-Ohio-1709, at ¶15, overruled by *Cementech, Inc. v. Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991. Fechko was not the “lowest and best bid[der]” and is therefore not entitled to recover its bid costs, having been unsuccessful in its attempts to obtain the ESW contract.

{¶19} While this Court is obligated to accept Fechko’s factual allegations as true, and make all reasonable inferences in its favor, doing so still fails to support a conclusion that Fechko suffered any actual injury as a result of the Board and the OSFC’s requirement that bidders utilize prevailing wages in their bids. Fechko was unable to demonstrate to the trial court or to this Court on appeal any instance where a bidder who was not the lowest responsible bidder was able to pursue a cause of action to recover its bid costs. Accordingly, the trial court did not err in finding that Fechko lacked standing in this matter.

ABC’s Standing

{¶20} ABC argues that it has associational standing to pursue relief on behalf of one of its trade association members, Fechko. The Ohio Supreme Court has explained that:

“[A]n association has standing on behalf of its members when ‘(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.’ However, to have standing, the association must establish that its members have suffered actual injury.” *Ohio Contractors Assn.*, 71 Ohio St.3d at 320.

Based on our determination that Fechko lacked standing to bring this action based on the absence of any actual injury, we necessarily conclude that ABC lacked standing as well. Accordingly, the trial court did not err in dismissing its complaint.

Taxpayers' Standing

{¶21} Taxpayers argue that, as residents and taxpayers of Barberton who have paid into a “special fund” by way of the bond levy that is financing the Project, they have standing to pursue this action because they have an interest which differs from other taxpayers in Ohio. They rely on the seminal case for taxpayer standing, *State ex rel. Masterson v. Ohio State Racing Commission* (1954), 162 Ohio St. 366, in support of this proposition. In that case, Masterson sought to challenge the expenditure of revenues collected by the Ohio State Racing Commission. The revenues were not general taxpayer moneys, but were revenues generated from taxes and fees paid into the “state racing commission fund.” *Masterson*, 162 Ohio St. at 369. Because Masterson did not contribute to this special fund and the Ohio State Racing Commission did not spend general taxpayer money, the Supreme Court reasoned that Masterson lacked standing to sue. The Supreme Court held that “[i]n the absence of statutory authority, a taxpayer lacks legal capacity to institute an action to enjoin the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy.” *Id.* at paragraph one of the syllabus. The high court explained that a person’s “property rights are [] in jeopardy” when the person can “allege and prove damage to themselves different in character from that sustained by the public generally.” *Id.* at 368. Like Masterson, Taxpayers in this case cannot allege that, as a result of the Board and the OSFC’s actions, they have sustained any damages different in kind than those sustained by any other taxpayer in Barberton whose property taxes are burdened by the 2008 levy.

{¶22} We similarly reject Taxpayers’ attempts to argue that this is a case where damages or injury should be presumed. The only instance where a court chose to do so was where a contract was awarded to a bidder in violation of the statutory requirements that the

“award [] be made to the lowest bidder[.]” *State ex rel. Connors v. Ohio Dept. of Transportation, et al.* (1982), 8 Ohio App.3d 44, 47, quoting 74 Am.Jur. 2d 190, Taxpayers’ Actions, Section 4. Taxpayers in this case fall outside of the rubric where damages could be presumed. As we have previously indicated, the contract awarded to Mr. Excavator was not done so in violation of any statutory requirements because Mr. Excavator was the lowest responsible bidder on the ESW project and was rightfully awarded the ESW contract.

{¶23} Taxpayers gain no additional support for their assertion of standing based on the principles espoused by the Supreme Court in *Racing Guild of Ohio, Local 304, Service Employees Intern. Union, AFL-CIO, CLC v. Ohio State Racing Comm.* (1986), 28 Ohio St.3d 317. In *Racing Guild*, several racetrack clerks sued the Ohio State Racing Commission, seeking injunctive relief on multiple grounds. The clerks asserted that they had standing on three different bases: as general taxpayers, as contributors to a special fund, and as members of the racing industry. The Court determined that the clerks had standing based on their “status as contributors to a special fund” and therefore “no other basis of standing need be addressed.” *Racing Guild of Ohio*, 28 Ohio St.3d at 322. Consequently, *Racing Guild* controls only in cases where the plaintiffs have contributed to a special fund, which is not the case here. Accord *State ex rel. Dann v. Taft* (2006), 110 Ohio St.3d 252, 2006-Ohio-3677, at ¶10 (noting that “Dann arguably has a ‘special interest’ in the management of the Worker’s Compensation Fund because he had paid into that fund as an employer”); *Gildner v. Accenture, L.L.P.*, 10th Dist. No. 09AP-167, 2009-Ohio-5335, at ¶18 (noting that the *Dann* Court recognized his standing on the basis of his contribution to a special fund, but not on the basis that he was a general taxpayer); *Brown v. Columbus City Schools Bd. of Edn.*, 10th Dist. No. 08AP-1067, 2009-Ohio-3230, at ¶13 (explaining that plaintiffs “merely contributed to the school district’s funding as other citizens in

the district generally contributed, as opposed to contributing to some special fund” and therefore lacked standing).

{¶24} Taxpayers ask this Court to align itself with the Seventh District’s decision in *East Liverpool City School Dist. ex rel. Bonnell v. East Liverpool City School Dist. Bd. of Edn.*, 7th Dist. No. 05 CO 32, 2006-Ohio-3482, where the court indicated that a taxpayer had standing to enjoin a school board from further construction and renovation of schools. We note, however, that the only matter before the Seventh District in that case was the propriety of attorney fees, so there was no analysis of taxpayer standing undertaken by the court in that matter. *East Liverpool City School Dist. ex rel. Bonnell* at ¶17-54. Additionally, the underlying case which formed the basis for the appeal in *Bonnell* was resolved by a stipulated dismissal, and based on the trial court’s summarization of the proceedings, it is unclear whether the issue of standing was ever fully addressed by the trial court. *East Liverpool City School Dist. ex rel. Bonnell* at ¶14 (recounting the trial court’s entry in which it denied Bonnell’s request for attorney fees, and noted that “[e]ven if the Court were inclined to consider [Bonnell’s] complaint as a common law taxpayer’s action *** [Bonnell] obtained no judgment against Respondents[and i]n fact, [] failed to obtain a single ruling in his favor during the pendency of his two complaints”). Therefore, we are not persuaded that Bonnell’s taxpayer standing was ever scrutinized in that case. Instead, we are persuaded by the thorough analysis and sound reasoning of the Tenth and Twelfth Districts, which have held that a taxpayer who pays into a general revenue fund lacks standing to challenge the expenditure of those funds, unless he can satisfy *Masterson*’s requirement of proving damages that were different in kind. *Gildner* at ¶8-25; *Ohio Concrete Constr. Assn. v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-905, 2009-Ohio-2400, at ¶19-25; *Brown* at ¶6-15; *Brinkman v. Miami Univ.*, 12th Dist. No. CA2006-12-313, 2007-Ohio-4372, at ¶30-48.

{¶25} Based on the foregoing analysis, we conclude that the trial court did not err in concluding that Bidders and Taxpayers lacked standing to pursue their complaint. Accordingly, their first assignment of error is overruled.

Second Assignment of Error

“THE TRIAL COURT ERRED IN HOLDING THAT PLAINTIFFS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED UNDER CIV. R. 12 (B)(6) WHEN PLAINTIFFS ALLEGED THAT DEFENDANTS ABUSED THEIR DISCRETION AND EXCEEDED THEIR AUTHORITY UNDER THE LAW BY MANDATING BIDDERS COMPLY WITH CHAPTER 4115 ON A SCHOOL CONSTRUCTION PROJECT.”

{¶26} In their second assignment of error, Bidders and Taxpayers argue that the trial court erred in dismissing their complaint for their failure to state a claim. Because we have already determined that Bidders and Taxpayers lacked standing in this matter, this assignment of error is moot and we decline to address it. App.R. 12(A)(1)(c).

Third Assignment of Error

“THE TRIAL COURT ERRED IN DENYING PLAINTIFFS LEAVE TO FILE A SECOND AMENDED COMPLAINT FOLLOWING THE DISCOVERY (sic) OF NEW EVIDENCE.”

{¶27} In their third assignment of error, Bidders and Taxpayers argue that the trial court erred in denying their motion for leave to file a second amended verified complaint. We disagree.

{¶28} The decision to grant or deny a motion for leave to amend a pleading is within the discretion of the trial court. *Hoover v. Sumlin* (1984), 12 Ohio St.3d 1, 6. “[T]he language of Civ.R. 15(A) favors a liberal amendment policy and a motion for leave to amend should be granted absent a finding of bad faith, undue delay or undue prejudice to the opposing party.” *Id.* However, “[w]here a plaintiff fails to make a *prima facie* showing of support for new matters sought to be pleaded, a trial court acts within its discretion to deny a motion to amend the

pleading.” *Wilmington Steel Products, Inc. v. Clev. Elec. Illum. Co.* (1991), 60 Ohio St.3d 120, at syllabus. This Court has held that “[a]n attempt to amend a complaint following the filing of a motion [to dismiss] raises the spectre of prejudice.” *Brown v. FirstEnergy Corp.*, 9th Dist. No. 22123, 2005-Ohio-712, at ¶6, quoting *Johnson v. Norman Malone & Assoc., Inc.* (Dec. 20, 1989), 9th Dist. No. 14142, at *5. A party is not “permitted to sit by for this period and bolster up their pleadings in answer to a motion [to dismiss].” *Brown* at ¶6, quoting *Eisenmann v. Gould-Natl. Batteries, Inc.* (E.D.Pa.1958), 169 F.Supp. 862, 864. Consequently, we will not reverse such a decision unless the trial court has abused its discretion. See *Hoover*, 12 Ohio St.3d at 6. An abuse of discretion is more than an error of law or judgment; it is a finding that the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Under this standard, an appellate court may not merely substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶29} Bidders and Taxpayers argue that they discovered “new facts” in the course of discovery of which they were unaware at the time they filed, and later amended, their complaint. Specifically, Bidders and Taxpayers allege that during the discovery depositions of several board members they learned that: 1) the Board intended to mandate compliance with R.C. 4115 for every phase of the Project; and 2) the Board’s purpose for mandating compliance with R.C. 4115 was based on discriminatory and unlawful motives, given that board members had articulated a desire to ensure that “Mexicans” were not employed to work on the Project.

{¶30} The record reveals that Bidders and Taxpayers filed their complaint for injunctive relief and declaratory judgment on April 3, 2009. Following the Board’s first motion to dismiss, Bidders and Taxpayers amended their complaint on April 24, 2009 to include the OSFC and Mr.

Excavator as defendants. Thereafter, the trial court set August 10, 2009, as the trial date on the matter. Both the Board and the OSFC filed motions to dismiss on May 28, 2009, and Mr. Excavator's motion was filed on June 17, 2009. It was not until July 6, 2009, that Bidders and Taxpayers requested leave to file a second amended complaint in the matter, asserting new claims as to future requests for bids on subsequent phases of the Project.

{¶31} Bidders and Taxpayers reflect in their appellate brief that they objected to the trial court's scheduling decision by noting it resulted in an "extraordinary three month delay" for a decision in this matter. They now complain, however, that the trial court erred by denying their request to amend their complaint, filed nearly two months later, which by their own description would have resulted in "additional claims [based on] newly discovered facts[.]" Moreover, Bidders and Taxpayers' request for leave to amend was untimely, as it was filed less than a month out from the trial date, while dispositive motions were pending. See, e.g., *Trustees of Ohio Carpenters' Pension Fund v. U.S. Bank Natl. Assn.*, 8th Dist. No. 93295, 2010-Ohio-911, at ¶25 (affirming the trial court's denial of a motion to amend following the deposition of witnesses, the filing of dispositive motions, and a trial date seven weeks out). The request for leave to amend was also prejudicial, in that it altered the nature of the case by incorporating a request for relief on portions of the Project not yet put out for bid and alleged, for the first time, discriminatory conduct upon the part of the Board. *Id.* See, also, *Marx v. Ohio State Univ. College of Dentistry* (Feb. 27, 1996), 10th Dist. No. 95APE07-872, at *4 (concluding that plaintiff's request for leave to amend was properly denied because it sought to alter the initial request for injunctive relief by adding claims, as opposed to merely correcting an oversight or omission contained in the original complaint). Furthermore, having failed to identify any basis upon which the provision exempting school boards from use of the prevailing wages somehow

constitutes a prohibition of the same, Bidders and Taxpayers are unable to make "at least a *prima facie* showing [that they] can marshal support for the new matters sought to be pleaded." *Wilmington Steel Products, Inc.*, 60 Ohio St.3d at 122, quoting *Solowitch v. Bennett* (1982), 8 Ohio App.3d 115, 117. Accordingly, Bidders and Taxpayers' argument that the trial court erred by denying them leave to amend lacks merit and is overruled.

III

{¶32} Bidders and Taxpayers' first and third assignments of error are overruled. Bidders and Taxpayers' second assignment of error is moot. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.


BETH WHITMORE
FOR THE COURT

MOORE, J.
CONCURS

DICKINSON, P. J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶33} I agree with the majority's judgment and most of its opinion. I write separately to note my enlistment in Judge Fain's war on "the most unfortunate formulation to appear in Ohio appellate jurisprudence: "The term "abuse of discretion" connotes more than an error of law or of judgment.'" *Enquip Techs. Group Inc. v. Tycon Technoglass S.R.L.*, 2nd Dist. Nos. 2009 CA 42, 2009 CA 47, 2010-Ohio-28, at ¶123-124 (Fain, J., concurring). The majority's talismanic repetition of this nonsensical phrase in ¶28 of its opinion adds nothing to the resolution of this appeal.

APPEARANCES:

ALAN G. ROSS, NICK A. NYKULAK, and RYAN T. NEUMEYER, Attorneys at Law, for Appellants.

TAMZIN KELLY O'NEAL, and PATRICK S. VROBEL, Attorneys at Law, for Appellees.

RICHARD CORDRAY, Ohio Attorney General, WILLIAM C. BECKER, JON C. WALDEN, and JAMES E. ROCK, Assistant Attorneys General, for Appellee.

COURT OF APPEALS
DANIEL M. HARRIGAN

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STATE OF OHIO)

COUNTY OF SUMMIT)

SSUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE EX. REL., NORTHERN OHIO
CHAPTER OF ASSOCIATED
BUILDERS & CONTRACTORS

C.A. No. 24898

Appellant

v.

THE BARBERTON CITY SCHOOL
BOARD OF EDUCATION

JOURNAL ENTRY

Appellee

Appellant has moved, pursuant to App.R. 25, to certify conflicts between the judgment in this case, which was journalized on April 28, 2010, and several judgments from various districts. Appellee has responded to the motion.

Article IV, Section 3(B)(4) of the Ohio Constitution requires this Court to certify the record of the case to the Ohio Supreme Court whenever the "judgment *** is in conflict with the judgment pronounced upon the same question by any other court of appeals in the state[.]" "[T]he alleged conflict must be on a rule of law -- not facts." *Whitelock v. Gilbane Bldg. Co.* (1993), 66 Ohio St. 3d 594, 596.

Appellant has proposed that conflicts exist between the districts on the following issues:

(1) "Whether standing to bring a common law taxpayer action against a school district is sustainable by a showing that the taxpayer(s) whose taxes will be burdened by a school levy, are residents and taxpayer(s) of the school district, thereby creating their 'special interest' sufficient to sustain their common law

taxpayer cause of action, or must taxpayer(s) show that they have sustained damages different in kind than those sustained by any other taxpayer in a school district whose property taxes are burdened by the same levy?"

(2) "Whether damages and/or injury (sic) are presumed in a common law taxpayer action which alleges that the execution of a public construction contract violated the mandatory provisions of statutes respecting such contracts or alleges that the expenditure of public funds for an unlawful purpose, such that the foregoing is sufficient to confer standing on such common law taxpayers, or is standing of such common law taxpayers limited and restricted to only those situations where a public contract was awarded to a bidder in violation of the statutory requirement that the award be made to the 'lowest and best bidder?'"

(3) "Does a contractor/bidder have to be the apparent low bidder whose bid was subsequently rejected by a governmental entity in order to have standing to challenge unlawful bid specifications on the project, or is submitting a bid on the project sufficient to establish standing to challenge unlawful bid specifications?"

As to the first issue, Appellant argues that this Court's judgment is in conflict with *East Liverpool City School Dist. ex rel. Bonnell v. East Liverpool City School Dist. Bd. of Edn.*, 7th Dist. No. 05 CO 32, 2006-Ohio-3482. As to the second issue, Appellant argues that this Court's judgment is in conflict with *State ex rel. Connors v. Ohio Dept. of Transportation, et al.*, (1982), 8 Ohio App.3d 44. As to the third issue, Appellant argues that this Court's judgment is in conflict with *Connors, supra, Cedar Bay Constr., Inc. v. Fremont* (Nov. 18, 1988), 6th Dist. No. CA S-87-36, and *C.E. Angles, Inc. v. Evans*, (Dec. 14, 1982), 10th Dist. No. 82AP-635.

"Whether standing to bring a common law taxpayer action against a school district is sustainable by a showing that the taxpayer(s) whose taxes will be burdened by a school levy, are residents and taxpayer(s) of the school district, thereby creating their 'special interest' sufficient to sustain their common law taxpayer cause of action, or must taxpayer(s) show that they have sustained damages different in kind than those sustained by any other taxpayer in a school district whose property taxes are burdened by the same levy?"

In essence, Appellant argues our judgment conflicts with that of the *Bonnell* Court as to whether a taxpayer must demonstrate that he has a "special interest" in order to sustain a common law cause of action. We conclude there is no conflict on this matter, as the *Bonnell* Court did not address this question of law. In *Bonnell*, the Seventh District addressed the propriety of awarding attorney fees in common law and/or statutory taxpayer actions. The Seventh District held that the taxpayer-plaintiff was not entitled to attorney fees and that a hearing on the matter was not required. This Court acknowledged the *Bonnell* decision when reviewing the underlying matter, noting that standing was not raised as an issue in the *Bonnell* appeal. As the *Bonnell* case progressed through the trial court, several named defendants were dismissed from the suit for unidentified reasons, which resulted in plaintiff-taxpayer dismissing the balance of his complaint, yet seeking reimbursement for his attorney fees. *N. Ohio Chapter of Associated Builders & Contrs., Inc. v. Barberton City School Bd. of Edn.*, 9th Dist. No. 24898, at ¶24. The basis for the trial court's dismissals is not apparent from the *Bonnell* decision, however, it is evident that the Seventh District's holding dealt only with the propriety of attorney fees in taxpayer actions; it did not address the requisite showing necessary to sustain a common law taxpayer action. Because the *Bonnell* Court did not address the same question of law as was before this Court in the above captioned matter, we conclude that no conflict exists between the two cases.

"Whether damages and/or injury (sic) are presumed in a common law taxpayer action which alleges that the execution of a public construction contract violated the mandatory provisions of statutes respecting such contracts or alleges that the expenditure of public funds for an unlawful purpose, such that the foregoing is sufficient to confer standing on such common law taxpayers, or is standing of such common law taxpayers limited and restricted to only those situations where a public contract was awarded to a bidder in violation of the statutory requirement that the award be made to the 'lowest and best bidder?'"

The second question advanced by Appellants alleges a conflict between the districts as to whether actual damages can be presumed in the case of a common law taxpayer action. In *State ex rel. Connors v. Ohio Dept. of Transportation, et al.*, (1982), 8 Ohio App.3d 44, the Tenth District held that sovereign immunity did not bar “[a]n action against the Ohio Department of Transportation *** seeking declarative and injunctive relief from performance of a construction contract containing an allegedly invalid bid condition dealing with minority business enterprises[.]” *Connors*, 8 Ohio App.3d at paragraph one of the syllabus. The Court further held that “[t]axpayers of the State of Ohio who are specially affected by the bid conditions” had standing to pursue the foregoing type of action. *Connors*, at paragraph two of the syllabus. In concluding that standing was properly conferred to the plaintiff-taxpayers for that specific cause of action, the Tenth District noted limited instances in which a plaintiff-taxpayer’s injuries could be presumed. It held that damages could be presumed in certain circumstances, including “the award of public contracts in violation of statutory requirements that such award must be made to the lowest bidder, *** in the execution of public contracts in violation of mandatory provisions of a statute respecting such contracts, or in the expenditure of funds for an unlawful or unconstitutional purpose.” *Connors*, 8 Ohio App.3d at 47. As indicated in this Court’s decision, the contract awarded in this case was awarded to the lowest responsible bidder. *N. Ohio Chapter of Associated Builders & Contrs., Inc.*, at ¶16-19, 22. Additionally, this case falls outside of the express language utilized in the Tenth District’s holding that limited its standing analysis to the cause of action brought in that case. *Connors*, 8 Ohio App.3d at paragraph two of the syllabus (providing four different bases for standing in the case of a

minority set-aside contract put out for bid by the Ohio Department of Transportation). Accordingly, this Court's judgment does not conflict with the Tenth District's judgment on a matter of law.

"Does a contractor/bidder have to be the apparent low bidder whose bid was subsequently rejected by a governmental entity in order to have standing to challenge unlawful bid specifications on the project, or is submitting a bid on the project sufficient to establish standing to challenge unlawful bid specifications?"

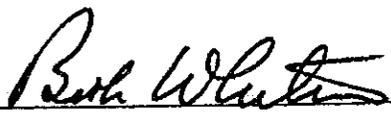
Appellant's third question proposes that this Court's judgment conflicts with several courts as to whether standing can be conferred on a bidder by virtue of their having submitting a bid, irrespective of whether they were the wrongfully rejected lowest bidder. We held that the bidder in this case, Fechko, lacked standing because it had failed to demonstrate any "actual injury" that was discrete and particularized as a result of it having submitted an unsuccessful bid. *N. Ohio Chapter of Associated Builders & Contrs., Inc.*, at ¶14-19. Again, we note that the *Connors* Court specifically limited its holding to permit standing in circumstances where a bidder was "seeking *** relief from performance of a construction contract [issued by the Ohio Department of Transportation] containing an allegedly invalid bid condition dealing with minority business enterprises." *Connors*, 8 Ohio App.3d at paragraph two of the syllabus. Accordingly, the same question of law is not presented by this case.

The remaining cases are authority advanced by Appellant for the first time in its motion to certify a conflict. Appellant argues that the Sixth District's decision in *Cedar Bay Constr., Inc. v. Fremont* (Nov. 18, 1988), 6th Dist. No. CA S-87-36 and Tenth District's decision in *C.E. Angles, Inc. v. Evans*, (Dec. 14, 1982), 10th Dist. No. 82AP-635 are in conflict with the decision of this Court. In *Cedar Bay Constr., Inc.*, the disappointed bidder,

who had submitted the second-lowest bid, challenged the determination to award the construction contract to the lowest bidder, arguing that the lowest bidder had not complied with all of the bid specifications. The Sixth District allowed the disappointed bidder's suit, noting that no other party, including a taxpayer, could seek such relief based on the nature of the harm alleged by the bidder. It is undisputed that Appellant in this case complied with all the bid requirements in that it included prevailing wage rates in its bid; Appellant was not challenging the application of or compliance with the bidding requirements, but challenged the bidding requirements themselves. Based on these material distinctions in the facts underlying the case, the resultant judgment of the court did not address the same issue of law. Accordingly, it is not in conflict with the judgment of this Court.

Finally, in *C.E. Angles*, the bidder was challenging the constitutionality of Ohio's prevailing wage law. That case challenged the constitutionality of the law itself, and did not address the issue of actual injury as related to the bidding requirements. Likewise, it is not in conflict with the judgment of this Court.

Appellant's motion to certify is denied with respect to all three questions presented in its motion because no conflict exists between this case and the judgment of those courts.



Judge

Concur:
Dickinson, P.J.
Moore, J.

The Supreme Court of Ohio

FILED

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SUPREME COURT OF OHIO

State ex rel. Northern Ohio Chapter of
Associated Builders & Contractors, Inc.,
et al.

Case No. 2010-0943

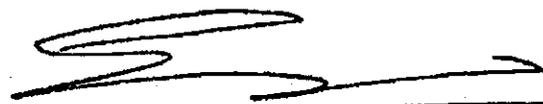
ENTRY

v.

Barberton City School Board of Education
et al.

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal on Proposition of Law No. I. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Summit County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Summit County Court of Appeals; No. 24898)



ERIC BROWN
Chief Justice