

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
ASHTABULA COUNTY, OHIO

ENERTECH ELECTRICAL, INC., et al.,	:	O P I N I O N
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2009-A-0046
ASHTABULA AREA CITY	:	
SCHOOL DISTRICT BOARD	:	
OF EDUCATION, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 1032.

Judgment: Affirmed.

Alan G. Ross and Nick A. Nykulak, Ross, Brittain & Schonberg Co., L.P.A., 6480 Rockside Woods Blvd., South, Suite 350, Cleveland, OH 44131-2547 (For Plaintiffs-Appellants).

G. Samuel Wampler and Christopher L. McCloskey, Bricker & Eckler, L.L.P., 100 South Third Street, Columbus, OH 43215 (For Defendant-Appellee Ashtabula Area City School District Board of Education).

Richard Cordray, Attorney General, State Office Tower, 30 East Broad Street, Columbus, OH 43215-3428 and *Jon C. Walden, James E. Rook, and Kristin S. Boggs*, Assistant Attorneys General, 150 East Gay Street, 18th Floor, Columbus, OH 43215 (For Defendant-Appellee The Ohio School Facilities Commission)

TIMOTHY P. CANNON, J.

{¶1} Appellants, Enertech Electrical, Inc., Northern Ohio Chapter of Associated Builders & Contractors, Inc., and ABC of Ohio, Inc., appeal the judgment entered by the Ashtabula County Court of Common Pleas. The trial court overruled and denied

appellants' complaint for declaratory judgment and for permanent and preliminary injunctions against appellees, Ashtabula Area City School District Board of Education ("the board") and the Ohio School Facilities Commission ("OSFC"). The trial court also granted appellees' motion to dismiss since appellants failed to demonstrate they had any right to further relief.

{¶2} In August 2009, the board sought to construct five elementary school buildings. These five proposed buildings were combined into a single project. The project was then divided into five subcategories for bidding purposes, to wit: plumbing, fire protection, HVAC, electrical and technology, and general trade.

{¶3} The board issued its specifications for the prospective bids, one of which was the workers be paid on all contracts the "prevailing wage rates for Ashtabula County, Ohio, in effect on the date the Contract Documents are made available to bidders ***."

{¶4} ABC of Ohio is a trade association organized as a nonprofit corporation in Ohio. Northern Ohio Chapter of Associated Builders & Contractors is also a trade association and, together with other entities, forms ABC of Ohio. For purposes of this appeal, these organizations will collectively be referred to as "ABC". ABC supports "merit shop" contractors.

{¶5} Enertech is an Ohio corporation that focuses on construction projects, primarily electrical work. Enertech is a member of ABC. Enertech has a contract with a union; however, Enertech does not ordinarily pay its employees pursuant to the established prevailing wage. Enertech wished to bid on the elementary school project, but objected to the prevailing wage requirement.

{¶6} OSFC is an administrative agency in charge of allocating state financing for school construction projects. In 2007, OSFC issued Resolution 07-98, wherein it recognized the authority of individual school boards to require contractors to pay their employees the prevailing wage on construction projects.

{¶7} Appellants commenced this action by filing a complaint. Therein, appellants sought both a preliminary and a permanent injunction preventing appellees from receiving bids, entering into a contract, or performing work on the construction of the schools. In addition, appellants sought declaratory judgment, requesting that the court declare appellees acted contrary to statute and without discretion when requiring bids for the project be submitted with prevailing wage requirements. Finally, appellants asked the trial court to declare OSFC's Resolution 07-98 void. Thereafter, appellants filed a motion for a temporary restraining order.

{¶8} Appellees filed memoranda in opposition to appellants' motion for preliminary injunction and a motion to dismiss appellants' complaint. Appellees argued that the board had discretion to impose prevailing wage requirements on the project and that OSFC acted within its discretion when it issued Resolution 07-98. In addition, appellees questioned appellants' standing, since, at that point in time, neither Enertech nor another member of ABC had submitted a bid on the project.

{¶9} The matter proceeded to a bench trial. At the trial, the following witnesses testified: Ryan Martin, the President and CEO of Northern Ohio Chapter of Associated Builders & Contractors; Greg Haren, the CEO of Enertech Electrical; and Benjamin Pintabona, who works for Scaparotti Construction Group, the construction management firm for the project.

{¶10} Following the bench trial, the trial court issued a judgment entry ruling on the merits of the matter. The trial court found that appellants have standing. In addition, the trial court found appellees acted within their discretion by requiring payment of the prevailing wage as a bidding condition. The trial court overruled and denied appellants' complaint for injunctive, declaratory, and other relief.

{¶11} On October 5, 2009, appellants filed a timely notice of appeal.

{¶12} On October 8, 2009, Enertech submitted a bid for the electrical and technology portion of the project. This bid was submitted pursuant to the prevailing wage requirements. Enertech was the successful bidder and was awarded the contract for the electrical and technology portion of the project. Enertech began working on the project in November 2009.

{¶13} While this matter was pending in this court, appellees filed a motion to dismiss this appeal as moot in light of the fact that Enertech was the successful bidder on the project. Appellants filed a brief in opposition to appellees' motion to dismiss. This court issued a judgment entry stating that appellees' motion to dismiss would be held in abeyance until this court addressed the merits of the appeal.

{¶14} Appellants raise the following assignments of error:

{¶15} “[1.] The trial court erred in dismissing Plaintiffs' verified complaint, request for declaratory judgment and injunctive relief because the School Board and the OSFC abused their discretion and exceeded their authority by mandating Chapter 4115 prevailing wage and/or other minimum wage requirements on a school construction project.

{¶16} “[2.] The trial court erred by failing to enter declaratory judgment that the prevailing wage requirement in the construction contract for the project in question is

void, unlawful and unenforceable and as a result thereof, should have entered the injunctive relief requested.

{¶17} “[3.] The trial court erred by failing to enter declaratory judgment that OSFC Resolution 07-98 purportedly legitimizing imposition of prevailing wage requirements on school construction projects is void, unlawful and unenforceable and as a result thereof, should have entered the injunctive relief requested.

{¶18} “[4.] The trial court erred by failing to enter declaratory judgment that the OSFC has no authority or discretion to expend any state funds on school projects that require payment of prevailing wage and as a result thereof, should have entered the injunctive relief requested.

{¶19} “[5.] The trial court erred because it concluded that prevailing wage requirements imposed by the Board and the OSFC Resolution 07-98 did not constitute nebulous and unannounced criteria rendering the prevailing wage requirement void, unlawful and unenforceable.”

{¶20} Due to the similarity of appellants’ assigned errors, we will address them in a consolidated analysis.

{¶21} Initially, we address appellees’ argument that this case is moot as a result of Enertech’s submission of the winning bid and the fact it was awarded the contract for the electrical and technology portion of the project.

{¶22} The Supreme Court of Ohio has recently held:

{¶23} “A ““case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *** ‘It is not the duty of the court to answer moot questions, and when, pending proceedings *** in this court, an event occurs, without the fault of either party, which renders it impossible for the court to

grant any relief, it will dismiss the [case] ***** *State ex rel. Gaylor, Inc. v. Goodenow*, Slip Opinion No. 2010-Ohio-1844, at ¶10. (Internal citations omitted.)

{¶24} In addition, the court held:

{¶25} “In a construction-related case, if an unsuccessful bidder seeking to enjoin the construction of a public-works project fails to obtain a stay of the construction pending judicial resolution of its claims challenging the decision and construction commences, the unsuccessful bidder’s action will be dismissed as moot.” *Id.* at ¶11. (Citation omitted.)

{¶26} In this matter, Enertech was a *successful* bidder. This case presents a more difficult inquiry, in that strictly applying the *Gaylor* holding would require Enertech to seek a stay of *its own* construction on the project. Obviously, this places Enertech in a difficult position. The question that remains, however, is what relief this court could provide in relation to this project if we were to find appellants’ arguments meritorious. Would Enertech’s employees be asked to return the money they earned working for the prevailing wage? We do not believe this is an acceptable result. Moreover, the courts of this state have held that lost profits are not recoverable by an *unsuccessful* bidder. See *Meccon v. Univ. of Akron*, 182 Ohio App.3d 85, 2009-Ohio-1700, at ¶15, citing *Cementech, Inc. v. Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991, syllabus. Appellants have not provided any persuasive argument as to why a *successful* bidder would be able to recover lost profits.

{¶27} Since construction on this project has already begun and neither party sought a stay of the construction, this appeal is moot as it relates to the underlying project concerning the Ashtabula Schools.

{¶28} However, appellants also sought a declaration that OSFC’s Resolution 07-98 be declared void. Appellants argue this portion of their argument is not moot since this issue is capable of repetition, yet evading review.

{¶29} “[The capable of repetition, yet evading review] exception applies only in exceptional circumstances in which the following two factors are both present: (1) the challenged action is too short in duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the *same complaining party* will be subject to the same action again.” *State ex rel. Cincinnati Enquirer v. Ronan*, 124 Ohio St.3d 17, 2009-Ohio-5947, at ¶5. (Citation omitted.) (Emphasis added by *Cincinnati Enquirer* Court.)

{¶30} In this matter, OSFC’s Resolution 07-98 states that school boards have the discretion to include prevailing wage requirements in specifications for construction projects. As seen in this case, there is often a short time-period from the time the specifications are announced until the time construction is scheduled to begin on any given project. Further, since these construction projects are for schools, the chances of a party obtaining a stay of construction are reduced due to the “public interest” in the expeditious construction of new schools for the children of Ohio. Accordingly, we conclude that appellants’ challenge to OSFC’s Resolution 07-98 falls within the capable of repetition, yet evading review exception to the mootness doctrine.

{¶31} Next, we address appellees’ argument that appellants lacked standing to file the complaint since they had not submitted a bid for the project at that time.¹ Having

1. We note that appellees’ positions taken in this matter are somewhat troubling, in that they argue that a party does not have standing until it submits a bid for a project, at which time the case becomes moot. If both of appellees’ positions were adopted, judicial review of these cases would be nonexistent.

found that the issues concerning the underlying project at the elementary schools are moot, we only need to address whether appellants have standing to challenge OSFC's Resolution 07-98.

{¶32} “‘Standing’ is defined at its most basic as ‘(a) party’s right to make a legal claim or seek judicial enforcement of a duty or right.’” *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, at ¶27, quoting Black’s Law Dictionary (8th Ed.2004) 1442. Thus, a plaintiff’s establishment of standing is a prerequisite for the trial court’s consideration of the underlying merits of a case. *Id.* ““(T)he question of standing depends upon whether the party has alleged such a ‘personal stake in the outcome of the controversy ***’ as to ensure that ‘the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.’”” *Id.* (Citations omitted.)

{¶33} The Supreme Court of Ohio has held that an appellate court is to use a de novo standard of review when reviewing whether the established facts confer a party standing. *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, at ¶90. In addition, we note that this court, as well as other Ohio appellate districts, has employed the de novo standard of review when reviewing standing determinations. See *Hofer v. N. Perry Bd. of Zoning Appeals*, 11th Dist. No. 2007-L-165, 2008-Ohio-6876, at ¶7; *State ex rel. Butler Twp. Bd. of Trustees v. Montgomery Cty. Bd. of Commrs.*, 2d Dist. No. 22664, 2008-Ohio-6542, at ¶11; *Koehring v. Ohio State Dept. of Rehab. & Corr.*, 10th Dist. No. 06AP-396, 2007-Ohio-2652, at ¶11; and *State ex rel. N. Ohio Chapter of Associated Builders & Contractors, Inc. v. Barberton City School Bd. of Edn.*, 9th Dist. No. 24898, 2010-Ohio-1826, at ¶10. (Citations omitted.)

{¶34} In this matter the trial court found that appellants had standing as they were “real parties in interest.”

{¶35} We begin by addressing Eneritech’s standing.

{¶36} In their complaint, appellants asserted that Eneritech “has paid for and obtained bid specifications and contract documents for the Project [and] will submit a bid on the Project.”

{¶37} We note, in a similar case, the Ninth Appellate District concluded the trial court in that matter did not err by determining that the plaintiff contractor did not have standing. *State ex rel. N. Ohio Chapter of Associated Builders & Contractors, Inc. v. Barberton City School Bd. of Edn.*, 2010-Ohio-1826, at ¶19. The court held that the contractor’s argument—that it would have been the successful bidder if there was no prevailing wage requirement—was speculative. *Id.* at ¶17.

{¶38} The instant matter is distinguishable from *State ex rel. N. Ohio Chapter of Associated Builders & Contractors, Inc. v. Barberton City School Bd. of Edn.* because it does not appear that the plaintiffs in that case challenged OSFC’s Resolution 07-98. In the case sub judice, in addition to challenging the actions of the board, appellants specifically sought declaratory judgment that OSFC’s Resolution 07-98 be declared void.

{¶39} Therefore, in this matter, we conclude that Eneritech had standing.

{¶40} Moreover, we note that “[t]he lack of standing may be cured ***.” *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 77. Eneritech submitted a bid and was awarded the contract for the electrical and technology portion of the project. Eneritech was forced to bid on this project with the prevailing wage requirement, which it claims resulted in economic damages, as it would have been able to perform the project

less expensively without the prevailing wage requirements. Thus, alternatively, if Enertech did not initially have standing, the lack of standing was cured when Enertech bid on, and was awarded, the contract.

{¶41} Next, we address ABC's standing.

{¶42} "[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.'" *Ohio Contractors Assoc. v. Bicking* (1994), 71 Ohio St.3d 318, 320, quoting *Hunt v. Washington State Apple Advertising Comm.* (1977), 432 U.S. 333, 343.

{¶43} In addition, it must be demonstrated that one of the members of the association has suffered an "actual injury," which has been defined as "concrete" rather than "suspected" or "abstract." *Id.* (Citations omitted.)

{¶44} In this matter, we have concluded that Enertech, a member of ABC, had standing. In addition, we note that ABC's purpose was set forth in the complaint as follows:

{¶45} "The objective of ABC and its members is to provide high quality, low cost, and timely construction work which benefits businesses, consumers and taxpayers and to provide the best educational and entrepreneurial activities and ensure all of its members the right to work in a free and competitive business climate, regardless of union or non-union affiliation. ABC and its members all of which adhere to the merit shop, free enterprise philosophy that construction projects should be awarded based upon merit to the lowest responsible bidder."

{¶46} Accordingly, we conclude that ABC had standing.

{¶47} Turning to the merits of this matter, we must determine our standard of review.

{¶48} Generally, the “[d]ismissal of a declaratory judgment action is reviewed under an abuse-of-discretion standard.” *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, paragraph two of the syllabus. However, due to the fact that several issues in this matter involve statutory interpretation, we will review the trial court’s determinations regarding those legal questions de novo. *Ohio Academy of Nursing Homes v. Ohio Dept. of Job & Family Servs.*, 114 Ohio St.3d 14, 2007-Ohio-2620, ¶12, fn. 4, citing *Ohio Historical Soc. v. State Emp. Relations Bd.* (1993), 66 Ohio St.3d 466, 471. See, also, *Riedel v. Consol. Rail Corp.*, Slip Opinion No. 2010-Ohio-1926, at ¶6. (Citation omitted.)

{¶49} Appellants claim school boards are precluded from requiring the prevailing wage pursuant to the language in R.C. 4115.04. This statute mandates certain public entities require contractors use the prevailing wage when bidding on construction jobs.

{¶50} “(A)(1) Every public authority authorized to contract for or construct with its own forces a public improvement, before advertising for bids or undertaking such construction with its own forces, shall have the director of commerce determine the prevailing rates of wages of mechanics and laborers in accordance with section 4115.05 of the Revised Code for the class of work called for by the public improvement, in the locality where the work is to be performed. Except as provided in division (A)(2) of this section, that schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the bidding blanks where the work is done by contract. ***

{¶51} “(B) Sections 4115.03 to 4115.16 of the Revised Code do not apply to:

{¶52} “(3) Public improvements undertaken by, or under contract for, the board of education of any school district or the governing board of any educational service center.”

{¶53} Appellants contend the fact that schools are exempt from the mandate that they use the prevailing wage indicates the legislature has precluded them from using the prevailing wage. We disagree. As the trial court held:

{¶54} “[R.C. 4115.04(B)(3)] exempts school boards from the Prevailing Wage Law requirements, pursuant to [R.C. 4115.03 to 4115.16], *but does not prohibit* the OSFC and the Board from using the Prevailing Wage Law as a condition within a bid specification for a school project.” (Emphasis added.)

{¶55} Furthermore, there is evidentiary material in the record to support the trial court’s determination that OSFC acted within its discretion in permitting local school districts to determine if they wished to use prevailing wage requirements on a particular project. A 2004 letter from Senator George Voinovich, former Governor of the state of Ohio, was admitted at the trial. This letter provides, in part:

{¶56} “It became my understanding heretofore prevailing wage had been paid and that the decision about using prevailing wage standards could be left to the discretion and judgment of local school boards based on their differing community standards. School Boards, with members who are accountable at the local level, are knowledgeable and informed about the practices and preferences of their communities.”

{¶57} Since there is no statutory *preclusion* against school boards or the OSFC using prevailing wage requirements, those entities have the discretion to make prevailing wage requirements part of the specifications for a project.

{¶58} Appellants argue the fact that subsection (B)(4) of R.C. 4115.04 provides that county hospitals may elect whether to enact prevailing wage requirements for a given project is evidence of the legislature’s intent that it did not intend for school boards to have that same discretion. We disagree. If, as appellants contend, the legislature sought to *prohibit* school boards from including prevailing wage requirements in construction contracts, it could have specifically done so. Instead, the legislature merely exempted school boards from the *mandate* of using prevailing wage requirements.

{¶59} Appellants also argue that the prevailing wage requirements are contrary to R.C. 3313.46, which provides, in part:

{¶60} “(A) In addition to any other law governing the bidding for contracts by the board of education of any school district, when any such board determines to build, repair, enlarge, improve, or demolish any school building, the cost of which will exceed twenty-five thousand dollars, except in cases of urgent necessity, or for the security and protection of school property, and except as otherwise provided in division (D) of section 713.23 and in section 125.04 of the Revised Code, all of the following shall apply:

{¶61} “***

{¶62} “(6) None but the lowest responsible bid shall be accepted. The board may reject all the bids, or accept any bid for both labor and material for such improvement or repair, which is the lowest in the aggregate.”

{¶63} Appellants argue that, by definition, the lowest bid will not be achieved if prevailing wage requirements are in place. However, we note that the submitted bids must still meet the specifications of the project. R.C. 9.312 provides that bids be *responsive* and *responsible*. If a submitted bid does not comport to the prevailing wage

requirement, that bid may be *responsible*, but it is not *responsive*. “[F]or a bid to be deemed nonresponsive, the deviation must be substantial and must provide the bidder an advantage over his competitors.” *BFI Waste Sys. of Ohio v. Garfield Hts.* (1994), 94 Ohio App.3d 62, 72. (Citations omitted.) The prevailing wage requirement is no different than any other specification a school board elects to include in the specifications. For example, if a school board specified that the school would be constructed using all brick, a bid proposing to use another material would not be responsive to the specifications.

{¶64} The trial court did not err in refusing to declare OSFC’s Resolution 07-98 void.

{¶65} Appellants’ assignments of error one, two, and five are moot. Appellants’ assignments of error three and four are without merit.

{¶66} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J., concurs,

DIANE V. GRENDALL, J., dissents with a Dissenting Opinion.

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{¶67} I agree with the majority’s holding that “appellants’ challenge to OSFC’s Resolution 07-98 falls within the capable of repetition, yet evading review exception to the mootness doctrine” and that the parties have standing. However, I respectfully disagree with the majority’s assessment that the Ashtabula Area City School District

Board of Education and the Ohio School Facilities Commission have discretion to make prevailing wage requirements part of the specifications for a project. The school board and/or the OSFC do not have the statutory authority to specify a prevailing wage requirement in construction contracts according to the plain language of R.C. 4115.04(B)(3), R.C. 3313.46(A)(6), and R.C. 9.312. Accordingly, I dissent.

{¶68} Boards of education and administrative agencies, such as the OSFC, are creations of statute. See *Hall v. Lakeview Local School Dist. Bd. of Edn.* (1992), 63 Ohio St.3d 380, 383; *Verberg v. Bd. of Edn. Of the City School Dist. of Cleveland* (1939), 135 Ohio St. 246, 248. Their authority is limited to those powers either expressly granted by or clearly implied from statute. *Hall*, 63 Ohio St.3d at 383. Nowhere in the Revised Code are the appellees granted any authority, expressed or implied, to require a prevailing wage to be paid to workers for construction projects. See *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, at ¶39 (creatures of statute may exercise only those powers that are expressly granted or that may be reasonably inferred from an express grant of authority).

{¶69} R.C. 4115.04 specifically prohibits the school board from applying the prevailing wage law to the construction of any school facility, including the project in the instant case. R.C. 4115.04(B) provides a list of projects to which prevailing wage law does not apply; the statute explicitly exempts: “[p]ublic improvements undertaken by, or under contract for, the board of education of any school district or the governing board of any educational service center.” R.C. 4115.04(B)(3).

{¶70} Moreover, where the Legislature sought to give a public body the ability to elect prevailing wage, it specifically did so. The next subsection of the statute provides for hospitals to elect when prevailing wage is applicable to a construction project. See

R.C. 4115.04(B)(4) (“a county hospital or municipal hospital may elect to apply sections 4115.03 to 4115.16 of the Revised Code to a public improvement undertaken by, or under contract for, the hospital”). The statute does not include a provision allowing a school board to elect the application of prevailing wage to a project.

{¶71} “Statutes and regulations that relate to the same general subject matter may be read in pari materia in order to discover and carry out legislative intent.” *Sheet Metal Workers’ Internatl. Assn. v. Gene’s Refrig., Heating & Air Conditioning, Inc.*, 122 Ohio St.3d 248, 2009-Ohio-2747, at ¶38, citing *State ex rel. Ellis Super Valu, Inc. v. Indus. Comm.*, 115 Ohio St.3d 224, 2007-Ohio-4920, at ¶13. Here, the language of the statute, when read pari materia, prohibits boards of education from electing prevailing wage.

{¶72} Additionally, per statute, the school board is required to accept the lowest responsible bidder. R.C. 3313.46(A)(6) (“[n]one but the lowest responsible bid shall be accepted.”). Testimony demonstrated that applying the prevailing wage requirement in the instant case increased the total cost of the labor portion of the bid by 26%. The imposition of prevailing wage requirements in the instant case undermined the statutory mandate of the competitive bid process which was meant to result in the lowest bids being submitted and accepted.

{¶73} The OSFC’s Resolution is unlawful, given the Legislature’s mandate that school construction projects are excluded from Ohio’s prevailing wage law. The OSFC did not have statutory authority to usurp the will of the Legislature by passing a resolution in contravention of the Revised Code.

{¶74} The School Board and the OSFC did not have requisite authority to use prevailing wage law as a condition within a bid specification for a construction project.

Accordingly, I would remand this case to the trial court for the issuance of a declaratory judgment that the OSFC Resolution is void and that the OSFC has no authority or discretion to expend any state funds on school projects that require payment of prevailing wage.