

Ohio Supreme Court rules misapplied bid selection criteria

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The Ohio Supreme Court decided that the Board of Franklin County Commissioners abused its discretion in applying competitive bid criterion to a bidder for work performed on the Huntington Park baseball stadium.

In 2002, the Board of County Commissioners adopted by resolution a set of criteria, the "Qualitative Contracting Standards," for evaluating bids for public works contracts. In 2006, these criteria were incorporated into the invitation to bid for the County's Huntington Park baseball stadium construction. The Standards stated that a bidder must not have violated Ohio's prevailing wage laws more than three times in a two-year period within the last 10 years. The Board applied these criteria to mean that any noncompliance with the prevailing wage laws by the bidder during the applicable

time period was the equivalent of a prevailing wage violation.

Lowest bidder rejected
The County received two bids for the painting work at the new facility. The lowest bidder was The Painting Company, a non-union contractor, whose bid was \$46,000 less than the second bidder, a union contractor.

The County rejected The Painting Company's bid because the company allegedly had 14 prevailing wage complaints filed against it during the time period set forth in the bidding Standards. All of the prevailing wage complaints had been investigated by the Ohio Department of Commerce and many had been resolved through a settlement agreement where there was no admission of liability or wrongdoing. Other complaints were resolved by a determination there was either no liability or the violation was not intentional.

The Painting Company challenged the Board's rejection of its bid, but both the Franklin County Court of Common Pleas and the Court of Appeals held that the County had the authority to set relevant criteria to evaluate bids on public works

projects. Those courts found that the Board of County Commissioners did not abuse its discretion in rejecting the bid because The Painting Company did not meet the County's criterion of compliance with the prevailing wage laws.

The Ohio Supreme Court accepted review of the lower court's decision. The Supreme Court noted that the Director of the Ohio Department of Commerce enforces the prevailing wage laws and investigates complaints of alleged prevailing wage violations. The Director then makes a recommendation as to whether a violation occurred and whether that violation was intentional. This recommendation alone does not give rise to penalties or equate a finding of intentional misconduct.

Intentional vs. non-intentional violation
An intentional violation occurs when a contractor or subcontractor intentionally fails to submit payroll records, knowingly submits false payroll records, intentionally misclassifies employees for the purpose of reducing wages, intentionally fails to comply with the apprentice-to-skilled worker ratio or intentionally allows a barred contractor to perform work on the public improvement. The Director files with the Ohio Secretary of State the name

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of the contractor or subcontractor who has been prosecuted and convicted of intentionally violating the prevailing wage laws. That contractor or subcontractor is barred from contracting with any public authority for a period of one year. A second intentional violation within a five-year period results in a debarment of three years.

In non-intentional situations, a failure to comply with the prevailing wage laws may be excused by the Director. For example, if the Director makes a finding that an underpayment of wages was the result of a contractor or subcontractor's misinterpretation of the law or an erroneous preparation of payroll reports, no further enforcement action takes place if there is restitution of the underpaid amount. If either of these situations is not present, the Director reduces its initial recommendation to a finding and then can collect underpayments along with a penalty.

County's bid standards not preempted by State's Prevailing Wage Law

The Painting Company argued to the Supreme Court that the manner in which the County Commissioners interpreted and applied the bid evaluation criterion regarding prevailing wage violations effectively debarred the contractor, and did so in a more expansive manner than the prevailing wage laws. The Painting Company contended that the prevailing wage law preempts the Board from utilizing the bid criterion in such fashion.

The Court held that preemption is not applicable because the County's bid evaluation criterion is part of a policy adopted by the Board of County Commissioners and not a local law or ordinance. Preemption would only apply if

there were a local law in conflict with a state law.

Abuse of discretion analysis

It has long been recognized by the courts that public authorities are given broad discretion in determining the lowest and best or most responsive and responsible bidder. The courts will not interfere with the contract award determination unless the public authority has abused its discretion. Public authorities may establish criteria that supplement the statutory criteria of "lowest and best" or "lowest responsive and responsible bidder." The Supreme Court said that a bidder's history of compliance with the prevailing wage laws may be among the supplemental criteria a public authority could consider. But those supplemental criteria must be followed within the scope of that discretion.

The Supreme Court did find that the Board of County Commissioners abused its discretion in evaluating the bids by the manner in which it applied the evaluation criteria to The Painting Company's bid. In addition, the Court found the County abused its discretion by relying on its misapplication of that prevailing wage criterion to exclude consideration of all other evaluation criteria contained in its policy. In other words, once the County erroneously determined that The Painting Company had the requisite number of alleged prevailing wage violations to exclude it from consideration of its bid, the County did not look at the other bid criterion to determine if The Painting Company met the other bid criteria. The Court said the County should have considered its bid evaluation criteria as a whole when evaluating a bid, and not relied just on the one criterion that it misapplied.

Specifically, Section 8.2.4.15 of the Qualitative Contracting Standards requires the lowest responsive bidder to provide the County with:

"Information that the Bidder has not been debarred from public contracts or found by the state (after all appeals) to have violated prevailing wage laws more than three times in a two-year period in the last ten years."

The Supreme Court said that the term "violated" is imprecise, and is not defined in the Standards or in the prevailing wage statutes. The Standards do not indicate whether a violation refers only to intentional violations or to unintended or inconsequential violations. The Supreme Court concluded, however, that "the plain sense of the term 'violat[ion]' as used in Section 8.2.4.15, refers to the situation in which the director makes a formal finding that a contractor or subcontractor intentionally violated the prevailing wage laws, and all appeals are exhausted."

The Court said that the Director of Commerce's recommendation after completing a prevailing wage investigation is just the first step. The Director then must decide if the violation is intentional or nonintentional and what the sanction may be. A finding of a prevailing wage violation does not automatically equate to a finding of an intentional violation. The Court also stated that settlement agreements resolving prevailing wage disputes do not constitute evidence of a violation. A settlement usually means there was no final determination that any prevailing wage law was violated.

The Court concluded that the County's rejection of The Painting Company's bid was not consistent with the term "violated" as used in its Qualitative Contracting Standards. In reversing the lower courts and sending the case back to the trial court, the Supreme Court held that a public authority must apply its bid evaluation criteria in a manner consistent with the exercise of sound discretion.

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