STATE OF MICHIGAN
COURT OF APPEALS

ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN,

Plaintiff-Appellant,

v.

DEPARTMENT OF TECHNOLOGY, MANAGEMENT & BUDGET,

Defendant-Appellee,

and

MICHIGAN BUILDING AND CONSTRUCTION TRADES COUNCIL,

Intervening Defendant-Appellee.

Court of Appeals Case No. 363601

L/C Case No. 22-000111-MZ
Hon. Douglas Shapiro

APPELLANT'S REPLY BRIEF

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other state governmental action is invalid.

REPLY BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN

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1. The lower court correctly found that ABC has standing and was not a "disappointed bidder."

DTMB argues that ABC lacks standing to challenge the constitutionality of its prevailing-wage requirement, and that the disappointed-bidder doctrine applies. Neither argument is correct, and the lower court correctly held that ABC has standing.

DTMB contends that "Michigan's appellate courts have repeatedly held that litigants like ABC's members lack standing to challenge a public bid process." (DTMB Merits Br at page 8.) Yet every case they cite is inapplicable since these all dealt with an unsuccessful bidder who was challenging the contract after it was made, and thereby sought to undo the contract. That is not what is happening here. Here, ABC is challenging the authority of DTMB to create and enforce such a policy prospectively. Moreover, the Michigan Supreme Court has stated that challenges such as ABC's request for injunction are the appropriate way to challenge the enforcement of a law related to prospective public contracts. "Again, it is apparent that, if frauds may be perpetrated in that way [passing over the lowest qualified bidder], there is a remedy by injunction to prevent the making of a contract with the next higher bidder." *Talbot Paving Co v Detroit*, 109 Mich 657, 660, 662; 67 NW 979 (1896).

The opinions cited by DTMB make it clear why a bidder cannot challenge the contracting process after the contract has been made. Those bidders lacked subject-matter jurisdiction because the relevant statute is not meant to provide them an after-the-fact cause of action for their loss. "The Court's rationale is that the loser is not within the class of persons intended to be benefitted by the legislation." *Rayford v City of Detroit*, 132 Mich App 248, 256; 347 NW2d 210 (1984). But plaintiff is not seeking to undo a public contract. In *Rayford*, supra, for example, Detroit police officers sought reinstatement after layoffs, and therefore brought a suit under the Uniform

Budgeting and Accounting Act, challenging the process retroactively. In *MCNA Insurance Co v DTMB*, 326 Mich App 740; 929 NW2d 817 (2019), the court reviewed a challenge by a losing bidder to undo the awarding of the contract to another bidder. The court in *MCNA Insurance Co* provided the rationale for not allowing challenges after the fact: "The Court went on to observe that '[l]itigation aimed at second-guessing the exercise of discretion by the appropriate public officials in awarding a public contract will not further the public interest; it will only add uncertainty, delay, and expense to fulfilling the contract.'" *MCNA* at pages 743-744, citing *Groves v Dept of Corrections*, 295 Mich App 1, 8; 811 NW2d 563 (2011). And in *Groves*, "plaintiffs filed suit requesting an order nullifying the contract and requiring a rebid." This was another challenge made after the fact to undo a specific contract. *Groves* at page 4. *Groves* provided additional rationale for not allowing after-the-fact challenges, stating: "Opening the floodgates of litigation to every disappointed bidder that believes it has been aggrieved by the bidding process would serve the interests of neither the government nor the citizen-taxpayers that the bidding process is designed to advance." *Groves* at page 8 (citing *Great Lakes Heating v Troy School Dist*, 197 Mich App 312, 315; 494 NW2d 863 (1992)). Again, the rationale for denying the after-the-fact challenge has no bearing here where ABC only seeks prospective relief.

Detroit v Wayne Circuit Judges, 128 Mich 438, 439-440; 87 NW 376 (1901) also challenged a contract that had been made, and sought to have the already-existing contract be remade, naming the plaintiff as the successful bidder. *Cedroni Assoc Inc v Tomblinson, Harburn Associates, Architects & Planners Inc*, 492 Mich 40; 821 NW 2d 1 (2012) similarly involved an unsuccessful bidder who sued, using a claim of tortious interference with a business expectancy – again, to seek redress for a contract which it had already lost.

None of these opinions are applicable here. The prospective relief ABC seeks will not nullify any existing contract. An injunction or declaration will not add uncertainty, delay, and expense to fulfilling existing contracts. The rationales for retroactively denying standing to an unsuccessful bidder do not apply.

Further, the Michigan Supreme Court made it clear that seeking an injunction before a contract is made is the proper method of challenging an improper process. *Talbot*, at page 662. This is precisely what ABC seeks to do – prevent future contracts from being made under this improper prevailing wage requirement. And while it is true that ABC has not pled fraud here, it is also true that awarding contracts under an invalid law is akin to fraud and is certainly an injustice. "The exercise of discretion to accept or reject bids [involving public contracts] will only be controlled by the courts when necessary to prevent fraud, injustice or the violation of a trust." *Cedroni*, supra at 53, citing *Leavy v Jackson*, 247 Mich 447, 450; 226 NW 214 (1929). Requiring a contractor to perform a certain action as a legal condition, when that law is invalid and was not enacted properly, is very much like fraud in the inducement. "Michigan also recognizes fraud in the inducement ... [which] occurs where a party materially misrepresents future conduct under circumstances in which the assertions may reasonably be expected to be relied upon and are relied upon." *Samuel D Begola Serv, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

The lower court correctly determined that this was not a disappointed bidder case and ABC had standing. "In this case, plaintiff is challenging defendant's authority to enforce the prevailing-wage policy—not its decision to enter into a specific contract. Thus, the disappointed bidder doctrine does not preclude plaintiff's lawsuit." Order at page 7.

2. The lower court correctly found that ABC has standing under MCR 2.605.

"[I]t is sufficient to establish standing to seek a declaratory judgment when a litigant meets the requirements of MCR 2.605." *UAW v Cent Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). Under MCR 2.605, a party simply needs to demonstrate a live controversy and that the plaintiff has a particularized, substantial interest in the outcome that is different or more specific than the generalized interest of the public at large. *Id*; see *Lansing Sch Educ Ass'n v Lansing Bd of Educ*, 487 Mich 349, 392; 792 NW2d 686 (2010).

The discussion in *UAW* illustrates why ABC has standing. In *UAW*, the union asked the court to declare that Central Michigan University's policy, regarding employees who run for public office, violated Michigan's Political Activities by Public Employees Act. *UAW* at page 489. This court held that the union had standing to assert a claim for declaratory judgment even though none of its members had run for political office, observing that "the purpose of a declaratory judgment" is "to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law or a breach of contract, or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants." *Id*. at page 496. The court reasoned that:

> There is an actual controversy between the parties because the CMU officials promulgated a policy that is allegedly at odds with a state statute. And although no university employee has yet sought to run for office, ***it is appropriate for the Union to seek an adjudication of its members' rights and responsibilities before the candidacy policy causes actual injury*** or ripens into a violation of the law by interfering with the employees' ability to engage in off-duty political activity.

Id. at page 496-97 (emphasis added).

The same is true here. ABC has not pled that its members have been harmed yet (although that is likely the case). Rather, as regular bidders on state contracts, ABC's members' rights are affected and it is appropriate for them to seek adjudication of their rights and responsibilities.

There is an "actual controversy" for purposes of MCR 2.605. "The essential requirement of an 'actual controversy' under the rule is that the plaintiff pleads and proves facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *UAW*, 295 Mich App at 495. ABC, representing bidders, seeks to determine those bidders' future rights and responsibilities in bidding on state contracts. It has not been contested that ABC represents these bidders. If their bids are made pursuant to a particular rule or law, they have a right to have a court determine the validity of that rule or law to guide their future conduct.

ABC's members have a particularized interest in the outcome that is different and more specific than the generalized interest of the public at large, as is required by *Lansing Schools Educ Assc*, at page 392. ABC represent bidders on state contracts who have a very different interest in the bidding process than the public at large. Specifically, they will be denied the ability to prevail on a bid unless they pay a prevailing wage determined by collective bargaining agreements with unions and organize their workforce as determined solely by union contracts. ABC has stated via affidavit that, *inter alia*:

> 5. The prevailing wage policy locks companies into craft demarcations and training policies which happened to be in effect a half-century ago. Again, this favors companies that are less up-to-date than those represented by ABC.
>
> 6. For example, prevailing wage does not set a rate for "helpers," which is a category that contains more workers than the total number of drywall installers, concrete finishers, insulation workers, roofers, ceiling tile installers, tapers, lathers, plasterers and stucco masons, carpet installers, floor layers, glaziers, stone masons, tile setters, pipelaying fitters, and pipelayers, combined. If a contractor uses helpers, they must be paid journeymen rates. Again, this results in an advantage for companies that operate in often outdated ways; and hurts the more streamlined and up-to-date contractors represented by ABC.
>
> 7. If the prevailing wage rules are not enjoined, the contractors represented by ABC will lose state contracts and business opportunities.

Affidavit of Jimmy E. Greene, attached as Exhibit M, pages 50-51 in the Appendix.

All of these outcomes specifically impact bidding contractors in a way that is different from any direct impacts on the general public. An allegation that any taxpayer could hypothetically submit a project bid should be unpersuasive. Any taxpayer could hypothetically undertake any action that the other members of the general public could, and would therefore be prohibited from having standing for the purposes of MCR 2.605. That would make MCR 2.605 meaningless.

The lower court agreed with ABC, and should be affirmed in this regard.

> Likewise, although plaintiff does not allege that defendant has denied its members a contract based on the prevailing-wage requirements, the Court concludes that, as a representative for bidders on state contracts, plaintiff has demonstrated an adverse interest that is distinct from the public at large and that necessitates a sharpening of the issues at this juncture. Plaintiff's injury is not purely hypothetical because its members must alter their business practices to obtain a state-government contract. Plaintiff has standing to sue for declaratory relief, and its claim is ripe for this Court's review.

Order at page 8.

3. The subsequent legislative developments do not affect this case.

The Legislature passed, and the Governor signed, legislation ordering prevailing wage to be paid on state contracts. DTMB acknowledges that this law will not take effect until March 2024. Therefore, the actions of DTMB being challenged here are still in effect and are likely to remain so. This challenge is not moot. Furthermore, even when this new legislation goes into effect, it will not render the current policies and actions of the DTMB invalid, nor guarantee that they cease. The legislation, Public Act 10 of 2023 ("2023 PA 10"), is silent on DTMB's relevant authority. It neither rescinds, confirms, nor expands DTMB's authority which they are claiming to act under here.

Rather, 2023 PA 10, attached here as Exhibit T in the Appendix, pages 106-111, shows how illegitimate DTMB's actions here have been. 2023 PA 10 provides the two very specific grants of legislative authority which ABC has shown are lacking in the Management and Budget

Act which DTMB has claimed as its authorization – the two grants of authority that are present in every state and at every time when such a policy has been enacted. First, it provides specific and explicit authorization for the prevailing-wage policy. (2023 PA 10, Sec 2(1), Appendix at page 107.) DTMB does not have this specific and explicit authorization. Second, it provides specific and explicit authorization for the commissioner of the Department of Labor and Economic Opportunity, not DTMB, to determine, publish and enforce the prevailing wage. (2023 PA 10, Sec 4, Appendix at page 108.) No officer at DTMB has any such explicit authority for this policy.

Therefore, the recent 2023 PA 10 does not end the current policy that is being challenged here. DTMB has not asserted that it will cease to use its claimed authorization to set wages on state contracts. In fact, DTMB went out of its way to describe how its policy is different than the previous, repealed, statutory policy. (DTMB Merits Br at 4.) DTMB's policy is likewise different in many ways from 2023 PA 10.

Our courts are reluctant to declare an action moot based on the promises of a defendant that it will cease its challenged activities. *Dep't of Social Services v Emmanuel Baptist Preschool*, 434 Mich 380, 425; NW 2d 1 (1990), Cavanagh, J, concurring, quoting *United States v W T Grant Co*, 345 US 629, 633; 73 SCt 894 (1953). Here, DTMB has not stated that it will cease this policy. It has only asserted without proof or discussion that the new law will supersede its current policy. And even if the current challenged policy does end next spring, DTMB would be free to enforce its unconstitutional requirement until that time. It has stated that "this case will be moot in March 2024," and not before. (DTMB Merits Br at 6, fn 2.) As a result, this matter is not moot and this Court should rule that DTMB's policy is an unconstitutional exercise of power not granted to it by the legislature.

4. **The Management and Budget Act does not confer discretion to require prevailing wage.**

The lower court erred and DTMB is wrong when they conclude that the Management and Budget Act gives DTMB discretion to require a prevailing wage. In its brief, DTMB provides no reference to an explicit authorization, improperly interprets the enabling act, and employs circular logic which cannot support its conclusions. ABC, in its merits brief, has already shown how the enabling statute, MCL 18.1261, provides a list of mandatory requirements, as well as several options where DTMB is granted its discretionary powers. (ABC's Merits Br at page 12.) DTMB asserts that its power to enact prevailing wage comes from additional parts of the Management and Budget Act. But the portions they cite to not support their claim, and actually contradict it.

DTMB cites MCL 18.241(1). This statute provides them the power to make procedures, not policies that have always and everywhere been enacted explicitly by legislation. MCL 18.241(1) goes on to say "The procedures shall require a competitive solicitation in the award…" Competing on price and wages has always been part of the competitive bidding process, unless specifically superseded by statute as it was with the prevailing wage requirement of 1965 PA 166, which was repealed by 2018 PA 171.

DTMB then goes on to cite MCL 18.1241(4), which requires them to consider the bidder's financial resources, technical capabilities, professional experience, past performance, insurance and bonding capacity, price, technical design, technical approach, proposed personnel and management plans. They then assert that these statutory requirements allow them to require that bidders pay the prevailing wage, or the bidders will not be in compliance with all bid specifications. However, these factors do not mandate or allow prevailing wage as a criteria. (DTMB Merits Br at pages 17-18.) If DTMB is asserting, as it appears to be, that the payment of union wages and the use of union job classifications is required to meet these requirements of competency and quality, then this is a clear violation of Fair and Open Competition in Governmental Construction

Act, MCL 408.871 *et seq*. This act, which applies to the DTMB, prohibits discrimination against a bidder on the basis of having or lacking a collective bargaining agreement. (ABC's Merits Br at pages 12-14.) Yet here DTMB appears to argue that paying unions' wages and using the unions' job classifications is determinative of whether a bidder can meet the criteria found in MCL 18.1241(4)(a)-(c). In effect, DTMB argues, having a collective bargaining agreement or voluntarily submitting to the terms of other parties' collective bargaining agreements is a sort of proxy for meeting these criteria.

DTMB emphasizes that paying union wage scale and using employee union classifications in its bid documents is the only way to prevail on a bid. ABC's Exhibit O, in the Appendix at pages 60-61, shows how bidding requirements are set based solely by surveying union-designated job classifications such as "journeyman" and "apprentice."[1] Nothing else is allowed. ABC's uncontested Affidavit of Jimmy Greene, supra, at paragraphs 5 and 6, showed how such job classifications work to exclude bidders without collective bargaining agreements, unless the bidders copy such collective bargaining agreements in their business organization and pay scale.

That bidders who do not pay prevailing wage can meet the criteria explicit in MCL 18.1241(4)(a)-(c) can be inferred from the fact that such criteria could be met during the years when the prevailing wage law was repealed.

[1] DTMB assert that this survey is not a bid specification. This is true that the survey itself is not a bid specification, but it is the process by which the bid specifications are determined. This is how DTMB sets wage rates for the different job classifications based on collective bargaining agreements with unions. DTMB has not denied that this is how the bid specifications and job classifications are set – indeed, that is the whole point of the policy. In essence, they imply that discrimination in the input survey, by only considering certain union practices, does not result in discrimination in the output specification. This is illogical and a distinction without a difference. Nor has DTMB denied that the whole point of this requirement is to mandate such pay scale and organization.

DTMB asserts that, "In sum, the Management and Budget Act sets forth certain criteria for the selection of responsive and responsible best value bidders, including compliance with a bid's specification and requirements." (DTMB Merits Br at 18.) This is circular logic. DTMB essentially argues that requiring prevailing wage is an allowable requirement and in compliance with the bidding requirements because it has been made a bidding requirement. DTMB has no such authorization or discretion and it never did. It had no such discretion when the previous prevailing wage law was in effect, it has none now, and it is not granted that power by 2023 PA 10, which grants that power solely to the commissioner of the Department of Labor and Economic Opportunity. In exercising such power, DTMB has been acting ultra vires and, as an executive-branch administrative agency, it has been usurping the powers of the legislature and thereby violating the separation of powers and the nondelegation doctrine.

5. The DTMB's lack of discretion means that it should have been subject to the APA rulemaking process.

DTMB argues that it was exempt from the APA process when enacting its prevailing wage policy. But, for the reasons cited above, it never had the permissive statutory power it claims to have had. And, therefore, it cannot have been exempt from the rulemaking requirements of the APA because the prevailing wage enactment was not a "decision by an agency to exercise or not to exercise a permissive statutory power…" pursuant to MCL 24.207(j).

Dated: April 14, 2023

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