



# THOMPSON HINE

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## CONSTRUCTION UPDATE

### **Ohio Supreme Court Finds Franklin County Board of Commissioners Abused Discretion in Disqualifying Lowest Bidder**

On March 25, the Supreme Court of Ohio issued a significant decision relevant to the construction industry, holding that the Franklin County Board of Commissioners abused its discretion when it did not award the painting contract on Columbus's Huntington Park to a contractor based on previous prevailing wage violation accusations and settlements that admitted no violations on the part of the contractor. The court held that, based on its review of the record, the county had abused its discretion when it disqualified the lowest bidder, The Painting Company, based upon the county's determination that The Painting Company had violated Ohio's prevailing wage law on more than one occasion. This holding marks the first time since 1981, when the court decided the case *City of Dayton ex rel. Scandrick v. McGee*, that the court has held that a public entity abused its discretion in awarding a public contract. It is significant because it re-establishes that a public owner must not act arbitrarily when it awards public contracts. Previous decisions over the past 30 years have discussed the standard but have not applied it to declare that a public owner's specific actions constituted an abuse of discretion.

In rejecting the low bid submitted by The Painting Company and awarding the contract to the second-lowest bidder, the county applied its Quality Contracting Standards, interpreting the contractor's settlement agreements with the Ohio Department of Commerce as prevailing wage "violations" and ruling that the contractor was barred from receiving the contract. The county had promulgated its Quality Contracting Standards for use in determining bidder responsibility. One of the standards deals with past violations of Ohio's prevailing wage law without defining what a "violation" actually is. The "violations" used to disqualify The Painting Company were based upon previous allegations of not paying prevailing wage on other unrelated projects in the past. However, as is common in the industry, The Painting Company had reached settlement agreements with the Department of Commerce in which it admitted to clerical errors but expressly disclaimed any liability or actual wrongdoing. The Ohio Supreme Court ruled that settlement of previous prevailing wage allegations with no admission of liability or wrongdoing did not constitute a "violation" sufficient to disqualify the otherwise lowest bidder. The court also held that, although a public owner may create a policy establishing criteria to evaluate bids for public work contracts, it must actually apply its bid evaluation criteria by exercising sound discretion. Perhaps most importantly, the prevailing wage component cannot be used as a "single criterion" to throw out otherwise qualified bids. Instead, the prevailing wage component can only be considered with all other bid criteria in the exercise of the county's sound discretion.

The ramifications of this decision are not yet fully known. Although Huntington Park is already built, the contractor can now continue to press its claims against the county for reimbursement of its cost of preparing its bid and possibly legal fees. This holding also brings into question what

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effect this decision will have on the contract that was entered into with the second low bidder. Even though the contract has been performed, longstanding Ohio law suggests that the contract is illegal and void and that payments should be returned.

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