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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

THE AFFILIATED CONSTRUCTION
TRADES FOUNDATION,

Plaintiff,

v.

THE WEST VIRGINIA DEPARTMENT
OF TRANSPORTATION, et al.,

Defendants.

Civil Action No. 04-C-3189

Judge Stucky

FILED
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CATHY S. STUCKY, CLERK
KANAWHA COUNTY CIRCUIT COURT

ORDER

Pending before the Court is a motion for summary judgment ("Motion") by defendant Nicewonder Contracting, Inc. ("NCI"). NCI seeks summary judgment on the ground that Plaintiff Affiliated Construction Trades Foundation ("ACT") lacks standing to pursue the claims set forth in its complaint, as amended. Based on the briefs submitted, the arguments of counsel, and the record in this matter, the Court hereby GRANTS NCI's Motion for the reasons set forth below.

I. Findings of Fact

1. ACT is an unincorporated division of the West Virginia Building and Construction Trades Council, AFL-CIO ("Council"). The Council itself is a labor organization that represents various local unions involved in the construction trades. The Council's membership is made up of these local union organizations - not the individuals who belong to those local unions. ACT is essentially the government relations or lobbying arm of the Council that engages in various activities to promote issues in the interest of organized labor.

2. NCI is a West Virginia corporation engaged in construction activities in West Virginia. NCI's workforce is not represented by any union organization.

3. West Virginia Department of Transportation, Division of Highways ("WVDOT") is a State agency responsible for construction and maintenance of State roads and highways.

4. The West Virginia Board of Education is a state agency that, at times relevant to this action, was supervising and/or managing public schools in Mingo County.

5. The Mingo County Redevelopment Authority is a public body promoting economic development in Mingo County, West Virginia.

6. This case arises out of an agreement between NCI and WVDOT, entered in May 2004, for construction of the roadbed for what is known as the "Red Jacket" section of the King Coal Highway ("KCH"). The KCH itself is an approximately 93-mile section of the proposed I-73/I-74 corridor that runs through southern West Virginia. The Red Jacket section makes up approximately 11.4 miles of the KCH. The Federal Highways Administration ("FHWA") is providing approximately 80% of the funding for the project with WVDOT providing the balance.

7. WVDOT, with the concurrence of FHWA, entered into an agreement with NCI for construction of the Red Jacket section without soliciting bids from other contractors. This decision was based primarily on WVDOT's and FHWA's determination that, given NCI's unique circumstances, no other proposal for the construction of the roadbed for the Red Jacket section could possibly offer the WVDOT the substantial cost savings associated with the NCI proposal. NCI owned or controlled a large portion of the surface and mineral properties situate along the proposed route for the Red Jacket section of the KCH. Under the traditional method of highway construction, WVDOT would likely have to condemn by eminent domain such properties along the route of the proposed highway and pay each property owner fair market

value for the property. Disputes over what constitutes fair market value inevitably occur and WVDOT spends untold amounts of time and money not only litigating what constitutes fair market value (appraisal costs, legal fees, etc), but also paying fair market value for the property, which increases the cost of road construction. NCI also possessed expertise in large earth moving projects in southern West Virginia and had readily available equipment and labor nearby to employ in constructing the project.

8. Because of its unique position, NCI could simultaneously perform the engineering and earthwork necessary to create a roadbed in the rugged mountainous terrain of southern West Virginia, and also obtain value from the recovery of incidental coal reserves encountered that could not otherwise economically be mined. NCI could then sell the recovered coal, and use portions of that revenue to partially offset WVDOT's costs associated with construction of the Red Jacket section. All told, FHWA and WVDOT estimated that a partnership with NCI to build the Red Jacket section's roadbed would save the federal government and the State of West Virginia between \$170,000,000 and \$193,000,000 as compared to traditional construction methods using eminent domain and private contractors. In addition to the tremendous cost savings for the Red Jacket section, NCI would also donate and prepare a suitable site, approximately 75 acres, for construction of Mingo Central High School, likely saving the State millions of dollars that would otherwise have been necessary to acquire and prepare the property for construction of a school.

9. Work commenced on the Red Jacket section shortly after the agreement was finalized. Construction has now been underway for approximately six years. NCI estimates that construction of the roadbed should be complete during the first half of 2011. Paving, installation of guard rails, lighting, and other work necessary to completely finish the highway have been,

and will be, performed by other contractors selected by WVDOT through a competitive bidding process.

10. ACT commenced this action in 2004 by filing a complaint in this Court alleging that the agreement between NCI and WVDOT is improper for essentially two reasons: (1) the agreement allegedly does not comply with West Virginia and federal law governing competitive bidding for highway construction projects; and (2) the agreement allegedly does not comply with West Virginia and federal law governing payment of “prevailing wages” (commonly known as Davis-Bacon Act provisions) to certain persons employed on highway construction projects. ACT is not a party to the agreement for the Red Jacket section of the KCH.

11. Before any pleadings were filed in response to ACT’s complaint, NCI removed the case to the District Court for the Southern District of West Virginia on the basis of federal question jurisdiction. Judge John T. Copenhaver presided over the case.

12. In April 2006, ACT moved for summary judgment on its claims. By order dated September 5, 2007, Judge Copenhaver denied ACT’s motion as to the competitive bidding claim under federal law, and instead awarded judgment in favor of the defendants. Judge Copenhaver ruled that federal regulations expressly provided an exception to the general public bidding requirement for this type of project.¹ With regard to the prevailing wage claim under federal law, Judge Copenhaver initially concluded that the agreement should have contained a provision addressing payment of prevailing wages to persons who worked on the project.² Since by the time this order was entered the project had already been underway for three years, Judge Copenhaver requested that the parties submit briefing on the appropriate remedy for the absence

¹ See *Affiliated Construction Trades Foundation v. West Virginia Department of Transportation, et al.*, 2007 WL 2577690 (No. 2:04-1344, September 5, 2007) (hereafter “September 5, 2007 Order”).

² September 5, 2007 Order at *13-15.

of a prevailing wage provision in the agreement.³ Judge Copenhaver did not rule on ACT's claims under West Virginia law.

13. As a remedy for the federal law prevailing wage claim, ACT requested that Judge Copenhaver void the agreement, which would have put NCI's employees out of work, and further sought an award of damages in favor of NCI's employees for the difference, if any, between the "prevailing wages" and the actual wages paid. NCI opposed an award of back wages on the grounds that ACT did not have standing to seek relief on behalf of NCI's non-union workforce, and no private right of action exists under federal law to challenge the absence of a prevailing wage provision in a highway construction contract.⁴

14. After receiving the parties briefing, Judge Copenhaver treated NCI's brief as a motion to reconsider ACT's standing to assert the prevailing wage claim and ordered the parties to further brief the issue of whether ACT had judicial standing to assert a violation of the "prevailing wage" laws.⁵ In support of its argument for standing, ACT alleged that the absence of a prevailing wage provision in NCI's agreement harmed its purported members, individual construction workers, by depriving them of jobs and depressing wages for construction workers in West Virginia. ACT further alleged that its revenues were reduced because of the lost work opportunities for the individual union members.

15. By order entered September 30, 2009, Judge Copenhaver agreed with NCI that ACT lacked judicial standing to pursue the prevailing wage claim.⁶ Under federal law, as described in Judge Copenhaver's order, a party must satisfy three essential elements to establish judicial

³ September 5, 2007 Order at *15.

⁴ *Universities Research Association, Inc. v.outu*, 450 U.S. 754, 770 (1981).

⁵ *Affiliated Construction Trades Foundation v. West Virginia Department of Transportation, et al.*, No. 2:04-1344 (Order entered March 18, 2008).

⁶ *Affiliated Construction Trades Foundation v. West Virginia Department of Transportation, et al.*, 2009 WL 3188694 (No. 2:04-1344, September 30, 2009) (hereafter "September 30, 2009 Order").

standing to assert a cause of action: (1) a “concrete and particularized” injury that is actual or imminent as opposed to conjectural or hypothetical; (2) a causal connection between the alleged injury and the defendant’s alleged conduct; and (3) the ability of judicial action to redress the injury.⁷ Judge Copenhaver found that neither ACT nor its purported members could have suffered any “injury-in-fact” from the absence of a prevailing wage provision in the agreement for construction of the Red Jacket section. This is so, according to Judge Copenhaver, for basically two reasons.

16. First, ACT did not allege any cognizable injury to itself. Before Judge Copenhaver, ACT claimed that the NCI agreement caused it to suffer a decrease in revenue. As found by Judge Copenhaver, ACT’s revenue is derived from a “per capita tax” paid by the local union organizations that is based on each hour worked by the individual union members. The “per capita tax” is a fixed amount that does not vary by wage rate earned by the individual. A local union pays the same “per capita tax” on each hour worked regardless of the wage rate earned by a union member. In other words, whether a union member earns \$20.00 per hour or \$30.00 per hour, the local union pays the same per capita tax. Therefore, the wage rate paid to any individual (not to mention individuals who are not union members, like NCI’s workforce) does not affect ACT’s revenue, and ACT suffers no decreased revenue even if lower wages are paid to individual union members.

17. Second, Judge Copenhaver found that ACT does not represent the individual construction workers whom ACT claims have been harmed by the NCI agreement. According to its constitution, the membership of the Council, of which ACT is a division, is comprised of local union organizations. Those local unions represent individual workers who belong to the respective locals (e.g. carpenters, steelworkers, electricians, etc.). The Council’s membership,

⁷ September 30, 2009 Order at *3 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

however, and by extension ACT's membership, is comprised of the local unions only - not the individual union members. Judge Copenhaver concluded that ACT presented no evidence to demonstrate how the local union organizations suffered any injury from the absence of a prevailing wage provision in NCI's agreement with WVDOT:

[ACT] has failed to identify any injury that may have been suffered by any member union. Nor does the court perceive any injury that a union may have suffered from the evidence presented. Thus, no member union would have standing inasmuch as [ACT] has failed to demonstrate that any such member has suffered an injury in fact. Accordingly, [ACT] lacks standing to sue on behalf of any member union inasmuch as the member lacks standing to sue on its own behalf.⁸

18. In the alternative, Judge Copenhaver concluded that no private right of action exists under the applicable federal prevailing wage law for a worker to challenge the absence of a prevailing wage provision in a highway construction contract.⁹ Since the individual workers could not bring a claim to challenge the absence of a prevailing wage provision in NCI's agreement, ACT could not bring such a claim on their behalf (even if it did represent them).

19. Accordingly, Judge Copenhaver vacated the portion of his September 5, 2007 order addressing the prevailing wage claim, and dismissed ACT's prevailing wage claim under federal law. Judge Copenhaver allowed the ruling on the federal law competitive bidding claim to stand. Having addressed all the federal claims, Judge Copenhaver declined to continue to exercise jurisdiction over the state law claims, and remanded those to this Court for disposition.

20. ACT did not pursue an appeal of Judge Copenhaver's decision and the time to do so has long since passed. The facts found by Judge Copenhaver were found on a record essentially the same as that before the Court. The added affidavit filed in opposition to the motion does not

⁸ September 30, 2009 Order at *5.

⁹ September 30, 2009 Order at *7.

materially vary from the facts found by Judge Copenhaver. Moreover, ACT has not challenged Judge Copenhaver's factual findings in brief or oral argument before this Court.

21. The only claims remaining for disposition by the Court are ACT's claim under West Virginia law governing payment of prevailing wages on highway construction projects, W. Va. Code § 21-5A-1 *et seq.*, and ACT's claim under West Virginia law governing competitive bidding for highway construction projects, W. Va. Code § 5-22-1 *et seq.* The basis for NCI's summary judgment on both remaining claims is that ACT lacks standing to assert them, a conclusion reached by Judge Copenhaver on at least the federal law prevailing wage claim. As noted above, Judge Copenhaver did not address whether ACT established standing to assert the federal law competitive bidding claim.

II. Conclusions of Law

1. W. Va. R.C.P. 56(c) provides for summary judgment in favor of a moving party when "there is no issue as to any material fact" or if the case "only involves a question of law."¹⁰ When ruling on a motion for summary judgment, the trial court must determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law.¹¹ If it appears that no genuine issue of material fact is involved, it is the duty of the court to grant the motion.¹² A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact.¹³ If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either: (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence

¹⁰ *Miller v. City Hosp., Inc.*, 475 S.E.2d 495, 499 (W. Va. 1996).

¹¹ *Floyd v. Equitable Life Assurance Soc'y*, 264 S.E.2d 648 (W. Va. 1980).

¹² *Spangler v. Fisher*, 159 S.E.2d 903 (W. Va. 1968).

¹³ *Thomas v. Goodwin*, 266 S.E.2d 792 (W. Va. 1980).

showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) or the West Virginia Rules of Civil Procedure.¹⁴

2. West Virginia law generally requires that contracts for construction of “public improvements” such as highways should contain a provision that requires payment of “prevailing wages” to individuals who work on the project.¹⁵ The “prevailing wages” are established by the West Virginia Department of Commerce, Division of Labor. The Prevailing Wage Act, as it is commonly known, is written as a directive to State agencies who are letting contracts for public projects.

3. West Virginia law requires most contracts for construction projects be let through a public bidding process.¹⁶ The respective State agency letting the contract is charged with the responsibility for determining whether public bidding is required.

4. In *Findley v. State Farm*, the West Virginia Supreme Court of Appeals adopted the same three-part test applied by the federal courts and Judge Copenhaver to determine a litigant’s standing to bring a claim: (1) a “concrete and particularized” injury that is actual or imminent as opposed to conjectural or hypothetical; (2) a causal connection between the alleged injury and the defendant’s alleged conduct; and (3) the ability of judicial action to redress the injury.¹⁷ *Findley* even cites to the same United States Supreme Court precedent as relied on by Judge Copenhaver.¹⁸ More importantly, *Findley* applied these standing elements to claims asserted under the West Virginia Uniform Declaratory Judgments Act (“DJA”) - W. Va. Code § 55-13-1

¹⁴ Syl. Pt. 3, *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W. Va. 1995).

¹⁵ W. Va. Code § 22-5A-1 *et seq.*

¹⁶ W. Va. Code § 5-22-1 *et seq.*

¹⁷ Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002); (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

¹⁸ *Findley v. State Farm Mutual Automobile Insurance Company*, 576 S.E.2d 807, 821 (W. Va. 2002); September 30, 2009 Order at *3 (both citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

et seq. “It is a primary requirement of the Declaratory Judgments Act that plaintiffs demonstrate they have standing to obtain the relief requested.”¹⁹ Therefore, the essential elements of judicial standing under West Virginia law and federal law are identical and apply equally to claims asserted under the DJA.

5. Organizations such as ACT can establish standing to assert claims in their own right or on behalf of their members. For an organization to have standing to pursue claims on behalf of its members (1) the members must have standing to sue in their own right; (2) the interests sought to be protected are germane to the organization’s purpose; and (3) the participation of the members in the lawsuit is not required.²⁰

6. In order for ACT to establish standing to pursue its prevailing wage claim under West Virginia law, ACT must demonstrate (1) an injury in fact to either ACT or its members; (2) that was caused by the absence of a prevailing wage provision in NCI’s agreement for construction of the Red Jacket section; and (3) that can be redressed by a favorable court decision.

7. In order for ACT to establish standing to pursue its competitive bidding claim under West Virginia law, ACT must demonstrate (1) an injury in fact to either ACT or its members; (2) that was caused by WVDOT entering into an agreement with NCI for the Red Jacket section without soliciting bids from other contractors; and (3) that can be redressed by a favorable court decision.

8. Under the “law of the case” doctrine, Judge Copenhaver’s findings concerning ACT’s standing to assert the prevailing wage claim under federal law are now binding on the parties for the remainder of the litigation. “The law of the case doctrine provides that a prior decision in a case is binding upon subsequent stages of litigation between the parties in order to promote finality.”²¹

¹⁹ Findley v. State Farm Mutual Automobile Insurance Company, 576 S.E.2d 807, 822 (W. Va. 2002) (quoting Shobe v. Latimer, 253 S.E.2d 54, 58 (W. Va. 1979)).

²⁰ Syl. Pt. 2, Snyder v. Callaghan, 284 S.E.2d 241 (W. Va. 1981).

²¹ State ex rel. TermNet Merchant Services, Inc. v. Jordan, 619 S.E.2d 209, 215 n. 14 (W. Va. 2005).

Additionally, this Court will not disturb those findings absent some extraordinary circumstances. “The essence of this doctrine is that a court of general jurisdiction, not sitting as an appellate court, may not overrule the decision of another court of general jurisdiction.”²² Even if Judge Copenhaver’s decision were not binding, the Court is persuaded by it and upon independent review of the record and law, as explained below, finds that decision to be sound.

9. In its memorandum opposing NCI’s summary judgment motion, ACT argues that since its claims are asserted under the DJA, and those claims involve the expenditure of public funds, the standing requirements are different than those applied by Judge Copenhaver and set forth in *Findley*. More precisely, ACT claims that in order to establish standing to challenge the NCI agreement, ACT need only show that the agreement has an “impact” on either ACT or its members. The impact alleged by ACT is the lost employment and depressed wages purportedly suffered by individual union members. ACT has not claimed any injury to itself in the briefing submitted to this Court in support of its standing to assert its claims under West Virginia law.

10. ACT’s arguments are based on a series of decisions handed down by the West Virginia Supreme Court between 1975 and 1980, before the high Court endorsed the three-part standing test in *Findley*. To the extent any of these cases can be interpreted as rendering the standing threshold less stringent than the three-part test adopted by *Findley* in 2002, those cases would have been effectively overruled by *Findley*. A review of those decisions, however, reveals that each is distinguishable from the instant matter and the plaintiffs in each of those cases would have satisfied *Findley*’s three-part standing test.

²² *Armstrong v. Armstrong*, 496 S.E.2d 194, 197 (W.Va. 1997).

11. ACT first relies on the 1979 decision of *West Virginia Utility Contractors Association v. Laidley Field Athletic and Recreational Center Governing Board* (“*Laidley*”).²³ In that case, an association of contractors filed suit under the DJA after a government agency awarded a construction contract to a contractor without allowing other contractors to submit bids for the project. In concluding that the association had standing to bring the action, the court reiterated the following syllabus point: “When significant interests are directly injured or adversely affected by governmental action, a person so injured has standing under the Uniform Declaratory Judgments Act, W.Va. Code § 55-13-1 *et seq.*, to obtain a declaration of rights, status, or other legal relations.”²⁴ In *Laidley*, the association had standing because its members were contractors who would have bid on the project at issue had the agency solicited bids. The association members’ economic interests in having the opportunity to bid on the project were directly injured by the agency’s decision to award the contract without soliciting bids, and that injury gave them standing to challenge the agency’s actions.²⁵ The three standing elements were satisfied: (1) an injury from being denied the opportunity to bid on the project; (2) that was caused by the agency’s decision to award the contract without bidding; and (3) the ability of a court to redress that injury by requiring a public bidding process.

12. By contrast, ACT does not have the sort of direct interest presented by the contractors in *Laidley*. As explained in NCI’s supporting memorandum of law, and as found by Judge Copenhaver, ACT is not a contractor and admitted in discovery that it would not have submitted

²³ *West Virginia Utility Contractors Association v. Laidley Field Athletic and Recreational Center Governing Board*, 260 S.E. 2d 847 (W. Va. 1979).

²⁴ *West Virginia Utility Contractors Association v. Laidley Field Athletic and Recreational Center Governing Board*, 260 S.E. 2d 847, 849 (W. Va. 1979) (quoting Syl. Pt. 1, *Shobe v. Latimer*, 253 S.E.2d 54 (W. Va. 1979)).

²⁵ *West Virginia Utility Contractors Association v. Laidley Field Athletic and Recreational Center Governing Board*, 260 S.E. 2d 847, 849 (W. Va. 1979)

a bid on the Red Jacket section had the public bids been solicited.²⁶ There is no evidence that ACT's members are contractors who would have submitted bids on the Red Jacket section. Therefore, *Laidley* does not support ACT's standing in the instant case because, unlike the contractor association in *Laidley*, neither ACT nor its members suffered any direct injury from the decision to enter into an agreement with NCI without soliciting other bids.

13. ACT next cites to another 1979 case, *Shobe v. Latimer*.²⁷ In *Shobe* a riparian landowner and a recreational fisherman filed a DJA action to challenge a contract between the state and a local public service district for withdrawal of water from a trout stream. The landowner alleged that the water withdrawal had drastically lowered the flow of the stream and prevented him from using the stream to irrigate his orchard. The fisherman alleged that the trout population was being decimated by the water withdrawal. Even though the plaintiffs were not party to the water withdrawal contract, the court concluded they had standing to challenge the contract because “[f]or standing under the Declaratory Judgments Act, it is not essential that a party have a personal legal right or interest.”²⁸ ACT essentially argues that this language means a party need not establish the three essential standing elements to bring a claim under the DJA. This contention is untenable. By acknowledging that a party need not have a “personal legal right or interest” to assert a DJA claim, *Shobe* was simply acknowledging that certain non-economic interests, such as “aesthetic, conservational, and recreational” interests, can suffice to establish standing.²⁹ “We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here.”³⁰

²⁶ See paragraph 20 below.

²⁷ *Shobe v. Latimer*, 253 S.E.2d 54 (W. Va. 1979).

²⁸ Syl. Pt. 2, *Shobe v. Latimer*, 253 S.E.2d 54 (W. Va. 1979).

²⁹ *Shobe v. Latimer*, 253 S.E.2d 54, 60 (W. Va. 1979).

³⁰ *Shobe v. Latimer*, 253 S.E.2d 54, 60 (W. Va. 1979).

14. The plaintiffs in *Shobe* clearly satisfied the three standing elements. First, they themselves suffered a particular injury from the withdrawal of water from the stream. Second, their injury was directly caused by the contract authorizing the water withdrawal. Third, their injury was redressable through court action - i.e. stopping the water withdrawals.

15. ACT's third case is the 1980 decision in *Kisner v. City of Fairmont*.³¹ In *Kisner* a group of contractors challenged the validity and interpretation of a building code adopted by ordinance by the City of Fairmont that required a building permit for replacement of more than 25% of a roof in any one twelve month period.³² Relying on *Shobe*, the court held that the contractors had standing to challenge the ordinance based on two factors. First, the contractors had a "significant economic interest in a proper interpretation of the code and its application to the conduct of their business."³³ Second, the contractors were at risk of fines and even criminal penalties for failure to comply with the ordinance.³⁴ Again, like *Laidley* and *Shobe*, the plaintiffs in *Kisner* satisfied the three standing elements: (1) an injury in the form of increased costs for obtaining building permits and possible fines or even criminal prosecution; (2) caused by the city's adoption and interpretation of the building code; and (3) that could be remedied by court action (voiding or interpreting the code).

16. ACT's fourth case is the 1975 decision of *Pioneer Company v. Hutchinson*, which is similar to *Laidley* in that it involved a contractor's challenge to a contract awarded without completing a competitive bidding process.³⁵ ACT appears to cite this decision for the proposition that competitive bidding statutes "are enacted for the benefit of the public, to protect

³¹ *Kisner v. City of Fairmont*, 272 S.E.2d 673 (W. Va. 1980).

³² *Kisner v. City of Fairmont*, 272 S.E.2d 673, 674 (W. Va. 1980).

³³ *Kisner v. City of Fairmont*, 272 S.E.2d 673, 675 (W. Va. 1980).

³⁴ *Kisner v. City of Fairmont*, 272 S.E.2d 673, 675 (W. Va. 1980).

³⁵ *Pioneer Company v. Hutchinson*, 220 S.E.2d 894 (W. Va. 1975).

public coffers, and confer no rights upon individual contractors.”³⁶ However, the holding that contractors have no standing to challenge an alleged violation of the competitive bidding statutes was later overruled in *E.D.S. Federal Corporation v. Ginsburg*.³⁷ In any event, there is no evidence that either ACT or its members are contractors who would have bid on the Red Jacket section, and therefore neither ACT nor its members suffered any direct injury from the NCI agreement.

17. As the above review reveals, the plaintiffs in each of the cases relied upon by ACT established standing under the three essential elements later formally adopted by *Findley* - injury in fact, causation, and redressability. To the extent any of those cases suggest that standing requirements are somehow relaxed for cases involving public contracts and the Declaratory Judgments Act, that notion was foreclosed by *Findley* - a case squarely addressing standing in the context of a DJA claim. In any event, the Legislature may not reduce the standing threshold for claims asserted before the judicial branch of government below the constitutional minimum established by *Findley*.³⁸

18. Applying *Findley*'s three-part standing test to ACT's claim under West Virginia prevailing wage law, the Court reaches the same conclusion as Judge Copenhaver - that ACT has failed to demonstrate an “injury in fact” from the absence of a prevailing wage provision in the NCI agreement. The Court agrees with Judge Copenhaver that ACT cannot establish standing based on the alleged harm to the individual union members because those individuals are not members of ACT. ACT's membership is comprised of local union organizations - not the

³⁶ Response at 10 (quoting *Pioneer Company v. Hutchinson*, 220 S.E.2d 894, 900 (W. Va. 1975)).

³⁷ Syl. Pt. 1, *E.D.S. Federal Corporation v. Ginsburg*, 259 S.E.2d 618 (W. Va. 1979) (“An unsuccessful bidder, who has been unlawfully deprived of a contract by agency action under the State purchasing statutes, W.Va. Code, 5A-3-1 Et seq., has standing to prosecute an action in mandamus to require that the contract be awarded to him or for an injunction to enjoin violation of the requirement that contracts be awarded to the lowest responsible bidder. Syllabus pt. 2 of *Pioneer Co. v. Hutchinson*, W.Va., 220 S.E.2d 894 (1975) is overruled.”).

³⁸ *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 100 (1979)(citations omitted).

individual construction workers who belong to those local union organizations. The Court further agrees with Judge Copenhaver that ACT has not demonstrated any injury suffered by the local union organizations themselves by the absence of a prevailing wage provision in the NCI agreement.

19. Assuming *arguendo* that individual construction workers are members of ACT, the alleged harms are not sufficiently “concrete and particularized” to give rise to standing. Below is ACT’s description of the purported harm that ACT seeks to redress through its claims:

The matter before this Court has had and will continue to have an adverse impact on construction workers, including but not limited to lost wages and work time, overtime, employment opportunities, future pension and insurance benefits, lives, working conditions and morale of the construction worker members of ACT. The harm includes the depression of wages, the reduction in apprenticeship and other training, and loss of employment opportunities for West Virginia union construction workers.³⁹

The unspoken premise for these harms is the following: since individual union members were not afforded a chance to be employed on the Red Jacket section, and NCI allegedly paid its non-union workforce wages less than called for by the prevailing wage statute, the project therefore deprives ACT’s union members of employment and depresses their wages. The fallacy of this logic is revealed when one considers that all non-union construction projects would contribute to these alleged harms. Any time a project is undertaken without union labor, union workers are not working or training on the project and union wages are not being paid to a union workforce. ACT has not identified any legally protected interest in having union labor employed on the Red Jacket section of the KCH. Even assuming such harm exists, the NCI agreement for the Red Jacket section would not contribute to these alleged harms any more than other non-union construction projects would. ACT’s alleged harms are more akin to a “generalized grievance.” As the Fourth Circuit noted in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corporation*, “[t]he injury-in-fact

³⁹ Response at 15.

requirement precludes those with merely generalized grievances from bringing suit to vindicate an interest common to the entire public.”⁴⁰ A plaintiff “must somehow differentiate himself from the mass of people who may find the conduct of which he complains to be objectionable only in an abstract sense.”⁴¹ ACT has only a mere generalized grievance about the contract in the abstract sense - one that could be shared by any member of the public - that non-union projects are bad as a matter of public policy because, according to ACT, non-union projects deprive union members of employment and depress wages. This is insufficient to establish standing. In the words of *Gaston Copper*, ACT has not differentiated itself from the mass of people who may believe that construction contracts that do not require payment of “prevailing wages” are objectionable in an abstract sense.⁴² ACT has no more standing to pursue its claims than a general member of the public who either opposes non-union construction projects or favors higher wages in general. ACT has simply failed to allege any “concrete and particularized injury” to a legally protected interest caused by the absence of a prevailing wage provision in NCI’s agreement for construction of the Red Jacket section of the KCH.

20. These alleged harms likewise fail to satisfy the “injury” prong of the standing test for the competitive bidding claim. In *Laidley*, the West Virginia Supreme Court recognized that an association of contractors who were denied the opportunity to submit bids for a publicly funded construction project had standing to challenge the decision to award the contract without a bidding process. By contrast, ACT admitted in discovery that it would not have submitted a bid on the Red Jacket section even if WVDOT had solicited bids:

Request to Admit 1: Admit that ACT, as an entity, would not bid, contract, or work on the project that is the subject of this action even were it allowed to bid, contract or work on the project.

⁴⁰ *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000).

⁴¹ *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000).

⁴² *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 156 (4th Cir. 2000).

Response: Admit.⁴³

Given this stark concession, ACT cannot establish standing in its own right to challenge WVDOT's decision to award NCI a contract for the Red Jacket section without a public bidding process.

21. ACT has not demonstrated standing through its membership either. There is no evidence that any of ACT's members would have bid on the on the Red Jacket section even if such an opportunity were available. ACT concedes as much in its memorandum in opposition to NCI's summary judgment motion by stating that the local unions that purportedly make up ACT's membership "have collective bargaining agreements with contractors who have been denied the opportunity to submit bids for consideration for construction of the King Coal Highway because the contract for construction of that public project was awarded without competitive bidding."⁴⁴ ACT does not claim to represent these contractors, and these contractors are not before the Court. A person that would not bid on a construction project does not suffer an "injury in fact" if bids are not solicited.

22. Even if ACT's alleged harms were sufficient to satisfy the "injury in fact" element, ACT has failed to demonstrate how those alleged harms were caused by either the absence of a prevailing wage provision in the NCI contract or the lack of a public bidding process. In order to satisfy the causation element, a plaintiff must show that his or her "injury" is "fairly traceable" to the challenged action of the defendant.⁴⁵ ACT has failed to submit any evidence that the alleged "harms" suffered by the individual construction workers are fairly traceable to the NCI contract or its method of procurement. Lost time, employment, training, depressed wages, etc. can be linked to a variety of economic factors. They are consequences of capitalism and fluctuations in the

⁴³ Plaintiff's Responses to Defendant Nicewonder Contracting, Inc.'s First Set of Interrogatories, Requests to Produce, and Requests for Admission to Plaintiff, served April 29, 2005. Attached as Exhibit 8 to NCI's memorandum of law in support of its summary judgment motion.

⁴⁴ Plaintiff's Response to Defendant Nicewonder Contracting, Inc.'s Motion for Summary Judgment Based on Plaintiff's Lack of Standing at 16.

⁴⁵ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

economy. As mentioned above, all non-union construction contracts would contribute to the alleged harms. ACT has not demonstrated that the absence of a prevailing wage provision in NCI's contract in particular has caused the harms ACT claims to have befallen the individual construction workers. Likewise, there is no evidence that the absence of a public bidding process contributed to ACT's harms. In *Laidley*, the contractors alleged injury - denial of the opportunity to bid on the public project - was directly linked to the government agency's decision to award the contract without public bidding. By contrast, the alleged injuries to individual construction workers do not flow from the absence of a public bidding process. Had public bids been solicited, these injuries may have occurred nonetheless. For example, if another contractor had been awarded the contract for the Red Jacket section through public bidding, and did not choose to employ union labor on the project, the individual union workers would presumably suffer the same alleged harms. In other words, the absence of a public bidding process is not a "but for" cause of the alleged injuries.

23. Finally, ACT has not pointed to any evidence to demonstrate that the harms alleged can be redressed by a favorable court decision. In order to satisfy the final standing element of redressability, ACT must demonstrate that it is *likely*, rather than "merely speculative," that the alleged injuries will be redressed by a favorable decision.⁴⁶ Again, ACT has submitted no evidence that the alleged harms to the construction workers will be remedied to any ascertainable degree by either a bidding process for the Red Jacket section or payment of different wages to NCI's non-union employees. There is no evidence that soliciting bids or paying different wages to NCI's non-union workforce will even incrementally affect the employment or wages of individual union workers. As mentioned above, ACT has not shown that either it or its members

⁴⁶ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

would bid on the Red Jacket section anyway, and the construction workers ACT claims to represent do not work on the current project. ACT has not shown that it is likely that the local union construction workers would be employed and have higher wages if the project were open to public bids. In fact, there is no evidence that any particular contractor would be awarded the contract through a public bidding process - much less a contractor who has a collective bargaining agreement with ACT's local union organizations. Again, the injury alleged by ACT is not a lost opportunity to bid, it is the alleged lost opportunity to be employed on a project, and there is no evidence that a public bidding process would likely result in more employment for individual union members - particularly where neither ACT, its member unions, nor the individual workers would have bid on the project. Therefore, ACT has not established that any remedy this court may grant is likely to address the alleged injuries - even if ACT did represent the individual construction workers.

24. In short, summary judgment is appropriate because ACT cannot establish standing to maintain this action. As the West Virginia Supreme Court held in *Findley*, claims asserted under the DJA, whether they involve public contracts or not, are subject to the same constitutional standing requirements applicable to all cases brought before the judicial branch of government. ACT cannot satisfy those standing requirements because the harms it alleges are not "concrete and particularized" injuries. The persons who allegedly suffered the "harms" are not even members of ACT, and ACT has not asserted any cognizable harm to itself as an organization. To the extent such harms exist, they are not "fairly traceable" to NCI's contract any more than other non-union construction projects or fluctuations in the economy. As such, those "harms" cannot be redressed by a favorable court decision or any resulting remedy that could be granted

to address the WVDOT's decision to enter into an agreement with NCI for the Red Jacket section or omit a prevailing wage provision from that agreement.

WHEREFORE, the Court hereby GRANTS NCI's summary judgment motion. ACT's claims are hereby dismissed with prejudice and this action removed from the Court's active docket. The Clerk is directed to send certified copies of this order to all counsel of record.

IT IS SO ORDERED THIS 7 DAY OF May, 2010.

James C. Stucky
James C. Stucky, Judge

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 10th
DAY OF May 2010
CATHY S. GATSON CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA