

**IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

FRANKLIN COUNTY	:	
BOARD OF COMMISSIONERS	:	
	:	
PLAINTIFF,	:	Case No.
	:	
v.	:	Judge
	:	
THE STATE OF OHIO, et al.	:	
	:	
DEFENDANTS.	:	

MOTION OF PLAINTIFF FOR TEMPORARY RESTRAINING ORDER

Now comes Plaintiff, who hereby moves the Court pursuant to Civ. R. 65 for a temporary restraining order enjoining the application of the amendments made to Ohio Revised Code § 3517.13(I) and (J) by Amended Substitute House Bill No. 694 (“H.B. 694”) to contributions made prior to the effective date of H.B. 694. Plaintiff also requests that a hearing on its request for a preliminary and permanent injunction be set within 14 days of the granting of the TRO. The grounds for this Motion are set forth in the following Memorandum in Support.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. LEGAL STANDARD

This Court must consider and balance the following factors to determine whether to issue a temporary restraining order against Defendants:

- (1) Whether Plaintiff will suffer irreparable injury if the preliminary relief is not granted;
- (2) Whether Plaintiff has a substantial likelihood or probability of success on the merits;
- (3) Whether the preliminary injunction would unjustifiably harm third parties;
- (4) Whether the public interest would be served by issuing the preliminary injunction.

Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co. (Franklin County 1996), 109 Ohio App.3d 786, 790, 673 N.E. 2d 182; citing *Valco Cincinnati, Inc. v. N & D Machining Serv., Inc.* (1986), 24 Ohio St.3d 41, 492 N.E. 2d 814.

As set forth more fully below, the above factors are met in this case and the requested restraining order enjoining the enforcement and application of H.B. 694 to contributions made prior to its effective date is clearly warranted.

II. FACTS

The facts are set forth in the Complaint and accompanying affidavit.

III. ARGUMENT

A. Plaintiffs will suffer irreparable injury for which there is no adequate remedy at law.

Irreparable harm exists when there is a substantial threat of material injury that cannot be adequately compensated through monetary damages. *Garono v. State* (1988), 37 Ohio St.3d 171. In this action, the material injury is Plaintiff's inability to retain bond counsel to assist Plaintiff in the preparation and marketing of the general obligation bonds necessary to finance the construction of the new Franklin County common pleas courthouse. Without injunctive relief,

Plaintiff will be unable to market the general obligation bonds in time to satisfy its obligations under its contracts with the design professional and construction manager. The failure of Plaintiff to satisfy its contractual obligations will result in costly delays to the project for which there is no adequate remedy at law. Without the requested relief, Plaintiff will suffer irreparable harm that cannot be compensated solely with monetary damages. (Affidavit of Don Brown, Attached hereto as Exhibit A).

B. Plaintiff is likely to succeed on the merits of its claims.

Plaintiff is likely to succeed on its claim set forth in Count I of the Complaint. In Count I, Plaintiff challenges the applicability of the provisions of H.B. 694 as they pertain to contributions made prior its effective date, i.e. April 4, 2007. H.B. 694 repealed R.C. § 3517.13(M)(1), which exempted Plaintiff from the prohibitions set forth in R.C. § 3517.13(I) and (J). Thus, pursuant to H.B. 694, effective April 4, 2007, Plaintiff is prohibited from entering into contracts for goods or services with entities that made contributions exceeding the established threshold in the previous two calendar years.

To the extent H.B. 694 applies to contributions made prior to its effective date, the act clearly violates Section 28, Article II of the Ohio Constitution. Section 28, Article II of the Ohio Constitution provides that “the general assembly shall have no power to pass retroactive laws.” As the Ohio Supreme Court has noted, “[r]etroactive laws . . . have received the near universal distrust of civilization.” *Van Fossen, et al., v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 104, 522 N.E.2d 489. Further, in Ohio, statutes are presumed to be prospective unless specifically made retroactive. R.C. § 1.48; *State v. Consilio*, 9th Dist. No. 22761, 2006-Ohio-649, at ¶8. The Ohio Supreme Court has held that “[w]here there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its

enactment.” *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262, 503 N.E.2d 753. However, where a statute is *expressly* retroactive and substantive, rather than remedial, it is unconstitutional under Section 28, Article II. *State v. LaSalle*, 92 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, at ¶13; *Consilio*, at ¶8; R.C. §1.48.

Accordingly, the Ohio Supreme Court has formulated a two-part test to determine whether a statute is unconstitutionally retroactive. *LaSalle* at ¶14; *see also Babcock v. Wilcox* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489. First, the court must determine whether the legislature actually intended the statute to be applied retroactively. *Id.*; R.C. §1.48. Second, if the court determines that the legislature intended the statute to apply retroactively, it must then determine whether the statute is substantive or remedial. *State v. Cook*, 83 Ohio St.3d 404, 410, 1998-Ohio-291, 700 N.E.2d 570.

As set forth below, Plaintiff is likely to succeed on both of these issues.

1. By the express terms of Sections 3 and 4 of H.B. 694, it is clear that the General Assembly intended for the statute to have retroactive application.

The uncodified provisions of H.B. 694 found in Sections 3 and 4 provide as follows:

SECTION 3. Notwithstanding any provision of section 3517.13 of the Revised Code to the contrary, no agency or department of this state or any political subdivision shall be prohibited from awarding a state contract, as defined in section 3517.093 of the Revised Code, to an individual, partnership or other unincorporated business, association, estate, trust, corporation, or business trust as a result of any of the following:

* * *

(B) Any combination of contributions made prior to January 1, 2007, by any combination of the following:

* * *

SECTION 4. (A), If, on the effective date of this section, any of the following has awarded a contract and the performance of that contract has not yet been concluded, the contract shall be considered to have been awarded on the effective date of this act for the purpose of divisions (I)(2), (J)(2), (Y)(2), and (Z)(2) of section 3517.13 of the Revised Code:

* * *

The express language of H.B. 694 provides for retrospective application, at least to January 1, 2007.

2. The express language in R.C. § 3517.13(I) and (J) provides for a two-year look back period for contributions.

Revised Code § 3517.13(I) and (J) provide as follows:

* * *

(I)(1)(a) Subject to divisions (K), (L), (M), and (N) of this section, no agency or department of this state or any political subdivision shall award any contract for the purchase of goods costing more than five hundred dollars or services costing more than five hundred dollars to any individual, partnership or other unincorporated business, association, including, without limitation, a professional association organized under Chapter 1785 of the Revised Code, estate, or trust if any of the following has made, as an individual, within the two previous calendar years, one or more contributions totaling in excess of one thousand dollars to the holder of the public office having ultimate responsibility for the award of the contract or to the public officer's campaign committee:

* * *

(J)(1)(a) Subject to divisions (K), (L), (M), and (N) of this section, no agency or department of this state or any political subdivision shall award any contract, for the purchase of goods costing more than five hundred dollars or services costing more than five hundred dollars to a corporation or business trust, except a professional association organized under Chapter 1785 of the Revised Code, if any of the following has made, as an individual, within the two previous calendar years, taking into consideration only owners for all of that period, one or more contributions totaling in excess of one thousand dollars to the holder of a public office having ultimate responsibility for the award of the contract or to the public officer's campaign committee:

The amendment of the above referenced provisions took effect April 4, 2007, the overall effective date of H.B. 694. However, because R.C. § 3517.13(I) and (J) have a look back period for contributions made during the two calendar years prior to the year in which a contract is

awarded, there is a potential for retroactive application of the law to contracts awarded beginning April 4, 2007.¹ For example, the two year period for contracts awarded from April 4, 2007 through December 31, 2007 is January 1, 2005 through December 31, 2006. If the two year period is applied retroactively to categories of contracts that were previously exempt from the threshold, then individuals and businesses that were previously eligible to receive contracts when they made contributions to Plaintiff may now be barred from receiving contracts based on contributions that carried no such disqualification at the time they were made.

3. The retrospective application of H.B. 694 affects a substantive right and is, therefore, unconstitutional.

A retroactive statute is substantive and therefore unconstitutionally retroactive if it (1) impairs vested rights, (2) affects an accrued substantive right, or (3) imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction. *U.S.X. Cor. V. Ohio Unemployment Comp. Bd. of Review* (Franklin County 1990), 70 Ohio App.3d 566, 569, 591 N.E.2d 818. Accordingly, any application of H.B. 694's new prohibitions looking back two years prior to the effective date would achieve a trifecta of unconstitutionality, falling under each of these three considerations. The application of the additional burdens, obligations, and liabilities in H.B. 694 would apply adverse consequences, i.e. the inability to receive a public contract on something past, i.e. prior political contributions. *Discount Cellular, Inc. v. PUCO*, 112 Ohio St.3d 360, 2007-Ohio-53, 859 N.E.2d 957 (when PUCO applied its 1700 Order to dismiss a complaint alleging conduct that constituted a statutory violation prior to the effective date of the Order, it altered the legal significance of past conduct); *AFSCME, Local II, AFL-CIO v. Ohio School Facilities Comm.*, Franklin County App. Nos. 06AP-413 and 06AP-414, 2007-

¹ Plaintiff recognizes that the General Assembly apparently attempted to restrict the application of H.B. 694 to contributions made on or after January 1, 2007; however, inartful drafting rendered this exception inapplicable to

Ohio-297; Ohio Elections Commission Advisory Opinion 96ELC-02 (“the making of political campaign contributions is an exercise of First Amendment and other freedoms granted by the Constitution of the United States” and “any limitations placed thereon by state statute clearly apply to a substantive right rather than effecting some procedural remedy and would require a prospective application.”).

C. No unjustifiable harm will impact third parties.

Granting the relief sought by Plaintiff will not result in harm to third parties.

D. The public interest favors granting the requested preliminary injunction.

The public interest is served by granting the relief sought by Plaintiff. There is an obvious public interest in upholding rights guaranteed by the Constitution to all persons. There is also a public interest in preventing the County from experiencing contract and construction delays that would result in taxpayer expense.

IV. CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court issue a temporary restraining order enjoining the application of R.C. § 3517.13(I) and (J) to contributions made prior to the effective date of H.B. 694, and an order setting a preliminary and permanent injunction hearing on this matter.

political subdivisions such as counties as the exception only pertains to the award of “state contracts”, which political subdivisions simply cannot award. See H.B. 694, Section 3.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that the foregoing was sent via electronic and Regular U.S. Mail to the following on the _____ day of May, 2007:

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