**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA**

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| ACROPOLIS CONSTRUCTION, INC., and CALVIN E. RUNDIO, Plaintiff | : | |
| v. | : | NO. 99-00,823 |
| SOUTH WILLIAMSPORT AREA SCHOOL DISTRICT, Defendant | : | |

**OPINION and ORDER**

In this case the court is asked to decide whether either or both dplaintiffs may challenge the South Williamsport Area School District's award of a contract to renovate its high school football stadium.

In a democracy, governmental action is usually open to challenge, but not by anyone and everyone. If any citizen could haul a city, state, or school district into court at the drop of a hat, the bureaucratic wheels of government would quickly grind to a halt. The concept of "standing" exists as a barrier to ensure that only certain individuals may sue a governmental entity. By limiting the potential challengers, our system thus strives to create a balance between permitting too much interference with the discretion of government officials, and too little.

Acropolis Construction, Inc., originally filed this suit by virtue of its status as the company who submitted the lowest bid but was not awarded the contract. Mr. Rundio later joined in the suit by virtue of his status as a taxpayer of the District. Both potential challengers face major legal hurdles to establish themselves as proper plaintiffs. Only Mr. Rundio has succeeded in overcoming these obstacles. Therefore, the suit will go to trial without Acropolis as a plaintiff.

## DISCUSSION

Pennsylvania law provides that when a municipal authority is planning any construction or repair work costing more than $10,000 the contract must be awarded to the lowest responsive bidder after a proper bidding process. 53 P.S. § 312(A); 73 P.S. § 1622. The purpose of the rule is to invite competition and to guard the public against favoritism, improvidence, extravagance, fraud, and corruption in the awarding of governmental contracts. Berryhill v. Dugan, 89 Pa. Cmwlth. 46, 491 A.2d 950, 952 (1985). Both plaintiffs want the opportunity to prove that the South Williamsport School District did not follow the proper procedure in awarding the contract.

### A. Standing of Acropolis

The rule regarding awarding of public contracts exists solely to protect the public–not the bidders. J.P. Mascaro & Sons, Inc. v. Township of Bristol, 95 Pa. Cmwlth. 376, 505 A.2d 1071 (1986). Therefore, Pennsylvania courts have routinely held that an action challenging the award of a public contract may be brought only by a taxpayer of the municipality that has created the governmental entity awarding the contract. A disappointed bidder may bring an action only if the bidder is a taxpayer of the contracting jurisdiction. General Crushed Stone v. Caernarvon Tp., 146 Pa. Cmwlth. 306, 605 A.2d 472 (1992); James T. O'Hara, Inc. v. Borough of Moosic, 148 Pa. Cmwlth. 535, 611 A.2d 1332 (1992); C.O. Falter Construction Corp. v. Towanda Municipal Authority, 149 Pa. Cmwlth. 74, 614 A.2d 328 (1992); Mascaro, supra. Acropolis is located in Williamsport. It is not a resident of the South Williamsport School District and pays no taxes to the District.

Acropolis, however, insists that somehow it actually *is* a taxpayer of the South Williamsport School District because it pays state and federal taxes, which in turn are used to provide funding to the School District in general and this project in particular. While this sort of "I am a Berliner" proclamation was wildly successful for President Kennedy in Germany, it inspires no cheers from this court.

The rule limiting standing to taxpayers of a municipality exists in order to ensure that only those individuals directly affected by the governmental action can challenge it. This is a result of the long-standing suspicion built into our adversarial system that only parties with a direct interest will be motivated to effectively litigate a case. It would make little sense to allow a resident of the Philadelphia School District to challenge a South Williamsport contract award simply because some minuscule portion of their federal and state tax payments end up in South Williamsport. It would be just as senseless to grant standing to Acropolis, a Williamsport taxpayer. Although the company resides just across the Susquehanna, its interest is no less remote.

Pennsylvania courts have already soundly rejected Acropolis' argument. In J.P. Mascaro & Sons, Inc. v. Bristol Township, 95 Pa. Cmwlth. 376, 505 A.2d 1071 (1986), the court held that a Pennsylvania corporation with offices in Montgomery County had no standing to challenge a Bucks County contract award. In C.O. Falter Constr. v. Municipal Auth., 149 Pa. Cmwlth.74, 614 A.2d 328 (1992), a disappointed bidder who was not a Towanda resident was denied standing to challenge the Towanda Municipal Authority's grant of a contract. The Commonwealth Court rejected the argument that standing was appropriate simply because the bidder paid state and federal taxes, even though the contract project was

funded in part by state and federal money. Similarly, in James T. O'Hara, Inc., supra, a bidder was denied standing to challenge a contract that was funded in part by a loan from the Pennsylvania Infrastructure Investment Authority.[1] In the face of such precedents, Acropolis bravely tries to argue that the cases are not applicable for two reasons. First, Acropolis points out that none of the cases involve a school district as the governmental entity. Acropolis fails to explain, however, why that distinction makes any difference. And finally, Acropolis argues that none of the cases involve the level of state and federal funds that the South Williamsport School District receives.[2] This argument must be rejected based upon the holding in General Crushed Stone Company v. Caernarvon Township, 146 Pa. Cmwlth. 306, 605 A.2d 472 (1992). In that case a disappointed bidder who lived outside the municipality awarding the contract was denied standing even though the company paid liquid fuels tax, which comprised funding for 60% of the project's funding.

Acropolis hangs its hat on one lone case: Regional Scaffolding v. City of Philadelphia, 593 F. Supp. 529 (1984). From Acropolis' summary of the case, one might well conclude that the court explicitly granted standing to a company that was not a resident of the municipality granting the contract. However, any such illusion is immediately dispelled upon reading the case. In fact, the court did not even address the standing issue, except to state:

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[1] By contrast, in Facchiano Contracting v. Turnpike Com'n., 621 A.2d 1059 (Pa. Cmwlth. 1993), a Pennsylvania taxpayer had standing to challenge a contract awarded by the Turnpike Commission because the Commission was an agency created by the Pennsylvania Legislature to perform tasks for the Commonwealth.

[2] It is interesting to note that Acropolis does not even give a rough estimate of the governmental funding received by the school district.

> This Court has determined, solely for the purpose of this motion for a preliminary injunction, that the plaintiff does have standing. However, the Court reserves the right to reconsider at a future date in this litigation the issue of Regional's standing. In any event, for the reasons set forth below, the Court has determined that Regional has failed to show that it is entitled to a preliminary injunction.

Moreover, this case was decided before the line of cases cited above, beginning with Mascaro, and was decided by a federal district court, whose decisions are not binding on Pennsylvania courts. And finally, in Regional Scaffolding the bidder paid Philadelphia business and mercantile taxes, which could constitute a significant distinction.

In short, Acropolis has no standing to challenge the South Williamsport School District's award. Therefore, it must be dismissed as a plaintiff in the action.

**B. Standing of Mr. Rundio**

Mr. Rundio does not get a free ride into court simply because he is a South Williamsport School District resident and taxpayer. Pennsylvania has adopted the longstanding constitutional law principle that to have standing, the taxpayer must have an interest in the outcome of the suit which surpasses the common interest of all citizens. Boady v. Philadelphia Mun. Authority, 699 A.2d 1358 (Pa. Cmwlth. 1997). Specifically, the taxpayer must show that he or she has a substantial and direct interest in the subject matter of the litigation. The interest must be immediate and not a remote consequence. Id. at 1360-1361. A taxpayer's interest in preventing wasteful spending of tax revenue generally is not sufficient, because that interest is shared by all citizens. Application of Biester, 487 Pa. 438, 409 A.2d 848 (1979).

The purpose of this rule is to prevent taxpayers from flooding the courts with

suits and tying up government entities every time someone feels tax money is being wasted. If this rule were applied strictly, however, many governmental actions would go unchallenged. That would not sit well in a democracy, where government officials are held responsible to the public. Therefore, the Pennsylvania Supreme Court has carved out an exception. Taxpayer standing is permissible where:

> (1) governmental action would otherwise go unchallenged,
> (2) those directly affected are beneficially affected,
> (3) judicial relief is appropriate,
> (4) redress through other channels is not available, and
> (5) no one else is better positioned to assert the claim.

Biester, supra.

We need not go through a lengthy analysis of whether or not this case meets these standards, for the Commonwealth Court has already decided that it does. In Rainey v. Borough of Derry, 163 Pa. Cmwlth. 606, 641 A.2d 698 (1994), taxpayers brought suit to challenge the award of a public bidding contract. The trial court found they lacked standing because they appeared to be bringing the suit solely on behalf of the disappointed bidder, who was not a taxpayer. The Commonwealth Court, however, reversed after applying the Biester factors and concluding that the taxpayers had standing. The court stated:

> In this case, all five requirements are present. As noted above, disappointed bidders generally do not have standing to challenge the bidding process. Therefore, the governmental action in this case would otherwise go unchallenged. The only entity that is directly and immediately affected by the award of the bid, other than the taxpayers, is the successful bidder, who is not likely to challenge the borough's action. Judicial relief is appropriate if the taxpayers are successful on the merits. There is no other means of challenging the award. Finally, because disappointed bidders who are not taxpayers cannot challenge government action that improperly awards a contract to a particular bidder, taxpayers are in the best position to challenge bid award improprieties.

Rainey, supra at 701.

Unfortunately, the Rainey court neglected to discuss a basic prerequisite to taxpayer standing: the taxpayer must be challenging obligations placed on the general public or emoluments given through the exercise of governmental power imposed or given by general ordinances or statutes. Boady, supra at 1361; Drummond v. University of Pennsylvania, 651 A.2d 572, 577-8 (Pa. Cmwlth. 1994). Obviously, an award of a public contract does not meet that requirement. It would have been nice if the Rainey court had acknowledged the requirement and then held it inapplicable to challenges of public bidding contracts, or provided some other explanation why the rule did not prevent standing in that case. Unfortunately, the court gave no indication why the requirement was ignored. Perhaps the court was simply relying on the general principle explicitly stated in numerous disappointed bidder cases which held that only taxpayers can challenge an award of a contract. In any case, we must follow Rainey and assume that the requirement does not thwart Mr. Rundio's status as a plaintiff.

## C. Sua Sponte Action

The plaintiffs have complained because the court raised the issue of Mr. Rundio's standing, rather than counsel for the School District. This is not the first time this court has been accused of improper sua sponte action. Each time, our accuser faced an opponent who had overlooked an important issue favorable to his or her client, and the complainer was peeved when the court caught the oversight.

Apparently, the plaintiffs would like this court to be a judge of counsel, rather than a judge of the law. Under this scheme judges would consider only the

arguments of counsel, ignoring and suppressing their own legal knowledge and experience. That is not how our system is designed to work. Judges are not to be passive puppets, acting only when counsel pulls their strings. Judges are to be ever alert to legal issues, to ensure that each case is fully and fairly litigated. The winner of a lawsuit should not depend merely on which party hired the better attorney.

The plaintiffs point to the Rainey case, where the trial court was held to have erred by raising the issue of standing at the beginning of the injunction hearing. At that point in the case, any objection to standing had already been waived, and indeed the opposing party agreed to stipulate to the standing of one of the plaintiffs. Furthermore, the trial court apparently decided the issue on its own, without the benefit of counsel's thoughts on the matter.

The case of Nader v. Hughes, 164 Pa. Cmwlth. 434, 643 A.2d 747 (1994) is more directly on point. In that case, the trial court raised the issue of standing during a pre-trial conference. The court requested briefs from both counsel before deciding the issue. The Commonwealth Court found nothing improper in the sua sponte action, even though a jury had already been chosen to hear the case.

This court raised the issue of Mr. Rundio's standing at a conference with counsel prior to the hearing scheduled on the preliminary injunction to prevent further work on the contract. During that conference, the plaintiffs agreed to drop their request for an injunction and to proceed with their suit on damages. It was only then that argument was held on the issue of Acropolis' standing, which had already been briefed by the parties. No one was more surprised than this court to learn that neither attorney involved in the case had an inkling that there might be a problem with Mr. Rundio's standing. Taxpayer standing is a basic principle of constitutional

law that all attorneys should be aware of. After raising the question, this court provided counsel with case citations based on our own research, and requested that counsel research and brief the issue. This opinion was issued only after carefully considering counsel's arguments. Therefore, there was nothing improper about our sua sponte raising of the issue.

**O R D E R**

AND NOW, this _____ day of September, 1999, for the reasons stated in the foregoing opinion, the defendant's preliminary objection based on the standing of Acropolis Construction, Inc. is granted, and Acropolis Construction, Inc. is hereby dismissed as a party plaintiff.

BY THE COURT,

Clinton W. Smith, P.J.

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