

IN THE SUPREME COURT OF OHIO

STATE EX REL.
AMERICAN SUBCONTRACTORS
ASSOCIATION, INC., et al.,

Relators,

v.

THE OHIO STATE UNIVERSITY,
c/o Office of Legal Affairs
ATTN: Lisa J. Conomy,
Construction Counsel
1590 N. High Street
Suite 500
Columbus, Ohio 43201

Respondent.

Case No.

**COMPLAINT OF RELATORS
FOR WRIT OF MANDAMUS**

(ORAL ARGUMENT REQUESTED)

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The Surety & Fidelity Association
of America,
American Subcontractors Association,
and
American Subcontractors Association of
Ohio, Inc.

IN THE SUPREME COURT OF OHIO

STATE EX REL. AMERICAN
SUBCONTRACTORS ASSOCIATION, INC.
1004 Duke Street
Alexandria, VA 22314-3588

and

STATE EX REL. AMERICAN
SUBCONTRACTORS ASSOCIATION
OF OHIO, INC.
P.O. Box 2026
Dublin, OH 43017

Case No.

and

STATE EX REL. THE SURETY & FIDELITY
ASSOCIATION OF AMERICA
1101 Connecticut Avenue, NW, Suite 800
Washington, DC 20039

**COMPLAINT FOR WRIT
OF MANDAMUS**

(ORAL ARGUMENT REQUESTED)

Relators,

v.

THE OHIO STATE UNIVERSITY,
c/o Office of Legal Affairs
ATTN: Lisa J. Conomy,
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1590 N. High Street
Suite 500
Columbus, Ohio 43201

Respondent.

Now come Relators American Subcontractors Association (ASA), American Subcontractors Association of Ohio, Inc. (ASA-Ohio), and The Surety & Fidelity Association of America (SFAA), by and through their respective counsel, pursuant to Supreme Court Rule of Practice 10.1(A), Ohio Revised Code Chapter 2731, and Ohio Constitution Article IV, Section 2(B)(1)(b) and state:

1. Relator SFAA is a national trade association of companies licensed to write fidelity and surety bonds. (Affidavit of Edward G. Gallagher, paragraph 3).
2. Relator SFAA has approximately four hundred fifty one (451) members, including 33 with their principal place of business in the State of Ohio. (Gallagher Affidavit, paragraph 4).
3. Relator SFAA's purpose is, *inter alia*, to protect and advance the interests of sureties in the United States and in Ohio. (Gallagher Affidavit, paragraph 5).
4. Relator SFAA's members are sureties on the overwhelming majority of contract performance and payment bonds furnished in the United States and in Ohio and include the sureties that provide bonds for Turner Construction Company (also referred to herein as "Turner") on projects in Ohio. (Gallagher Affidavit, paragraph 6).
5. Relator ASA is a trade association of suppliers and of specialty and trade contractors who work primarily as subcontractors on construction projects. (Affidavit of Richard N. Cevalco, paragraph 4).
6. Relator ASA has approximately five thousand (5,000) members nationwide, including in the State of Ohio. (Cevalco Affidavit, paragraph 6).
7. Relator ASA's purpose is, *inter alia*, to protect and advance the interests of subcontractors and suppliers, including but not limited to subcontractors and suppliers in Ohio. (Cevalco Affidavit, paragraph 8).
8. Relator ASA's Ohio members provide labor and/or materials in construction, including but not limited to the construction of public improvements and public works projects in Ohio. (Cevalco Affidavit, paragraph 10).

9. Relator ASA-Ohio is the Ohio Chapter of ASA. (Cevasco Affidavit, paragraph 5).
10. Relator ASA-Ohio has approximately seventy-five (75) members, all of which perform significant work in and/or have their principal places of business in the State of Ohio. (Cevasco Affidavit, paragraph 7).
11. Relator ASA-Ohio's purpose is, *inter alia*, to protect and advance the interests of Ohio subcontractors and suppliers. (Cevasco Affidavit, paragraph 9).
12. Relator ASA-Ohio's members provide labor and/or materials in construction, including but not limited to the construction of public improvements and public works projects in Ohio. (Cevasco Affidavit, paragraph 10).
13. This Court has original jurisdiction over this Complaint for a Writ of Mandamus to compel Respondent The Ohio State University to comply with the clear requirement of Ohio law, for the failure of which Relators and their respective members have no adequate remedy at law.
14. Ohio Revised Code Chapter 153 governs the construction of public improvements in Ohio. Chapter 153 requires, *inter alia*, that any public body contracting for an improvement require the use of steel products made in the United States (R.C. §153.011); give public notice by advertising the project (R.C. §§153.06 and 153.07); award the contract within 60 days of bid opening (R.C. §153.12); resolve claims within 120 days (R.C. §153.16); include in the contract a time of completion and liquidated damages (R.C. §153.19); obtain separate bids for specified categories of work (R.C. §153.50); obtain a bond for performance of the work and payment of laborers, suppliers and subcontractors (R.C. §153.54); and promptly pay monies due under the contract (R.C. §153.63).

15. On or about December 22, 2009, the Governor signed Sub. H.B. 318 empowering the Chancellor of the Ohio Board of Regents to designate one construction project at each of three different state institutions of higher education as a Construction Reform Demonstration Project that may utilize alternative methods of construction delivery as described in Sub. H.B. 318, Section 8.
16. Subject to Section 8(C)(2), Section 8(C)(1) of Sub. H.B. 318 required the state institutions of higher education undertaking a Construction Reform Demonstration Project to utilize one or more of four (4) specifically identified alternative methods of construction delivery, including Construction Management at Risk. Sub. H.B. 318 defined construction manager at risk as “a person with substantial discretion and authority to plan, coordinate, manage, direct, and construct all phases of a project . . . and who provides the state institution of higher education a guaranteed maximum price utilizing an open book pricing method”
17. Sub. H.B. 318, Section 8(C)(2) provides:
 - In developing their Construction Demonstration Reform Projects, the state institutions of higher education are not exempt from the applicable provisions of law concerning any of the following:
 - (a) Prevailing wage;
 - (b) *Bonding*;
 - (c) EDGE;
 - (d) Retainage;
 - (e) Prompt pay;
 - (f) Equal employment opportunity and affirmative action construction compliance;
 - (g) Domestic steel;
 - (h) Public notice and advertising.

OH LEGIS 11 (2009). (Emphasis added).

18. Pursuant to Sub. H.B. 318, Section 8, a \$700 million construction project at The Ohio State University, was designated a Construction Reform Demonstration Project (hereinafter "ProjectONE").
19. Upon information and belief, The Ohio State University elected to use a Construction Manager at Risk as an alternative method of construction delivery and entered into a contract with Turner Construction Company to construct ProjectONE as the construction manager at risk. The contract requires Turner to furnish a completed project for a cost not to exceed a guaranteed maximum price, and all payments for work performed will be made by The Ohio State University to Turner. The contract requires Turner to comply with some requirements of R.C. Chapter 153 and Sub. H.B. 318 (8)(C)(2) including use of domestic steel, prevailing wage and EDGE requirements. The contract does not require Turner to furnish a bond to guaranty performance of the contract and payment of laborers, materialmen and subcontractors who work on the project.
20. Upon information and belief, The Ohio State University and Turner Construction Company intend to commence and complete ProjectONE without a bond as required by R.C. 153.54 and Sub. H.B. 318 (8)(C)(2).
21. Upon information and belief, Turner Construction Company has contracted with one or more subcontractors for the provision of labor and/or materials in the construction of ProjectONE.
22. Upon information and belief, the subcontracts Turner Construction Company has entered into for the provision of labor and/or materials in the construction of

ProjectONE include a waiver of the subcontractor's lien rights in the event the subcontractor is not timely paid for its labor and/or materials.

23. Relator SFAA's members have suffered and will continue to suffer immediate and irreparable injury from The Ohio State University's failure to comply with its clear legal obligation pursuant to Sub. H.B. 318, Section 8, to require a bond to protect against Turner's default and to protect laborers, suppliers and subcontractors working on the ProjectONE contract.
24. The Ohio State University's failure to obtain such a bond for ProjectONE denies Relator SFAA's members the opportunity to conduct their business in accordance with Ohio Revised Code Chapter 153.
25. One or more members of Relator SFAA is prepared to issue to Turner, as Construction Manager at Risk for ProjectONE, a bond guaranteeing performance of the contract and payment to those who furnish labor and material.
26. The commencement of ProjectONE without such a bond from Turner denies SFAA's members the income and profit arising from or related to the issuance of such a bond.
27. Relators ASA and ASA-Ohio's members have suffered and will continue to suffer immediate and irreparable injury from The Ohio State University's misapplication of Sub.H.B. 318, Section 8 and failure to require the mandatory bond from Turner.
28. The Ohio State University's failure to require such a bond for ProjectONE denies Relators ASA and ASA-Ohio's members the opportunity to conduct their business in accordance with Ohio Revised Code Chapter 153.

29. In the absence of such a bond, Relators ASA and ASA-Ohio's members that furnish materials to or subcontract with Turner Construction Company or Turner's subcontractors or sub-subcontractors on ProjectONE are denied the protection mandated by R.C. §153.54 for payment of money owed for their work and for dispute resolution.
30. Relators ASA and ASA-Ohio's members that decline to furnish labor and material for use on ProjectONE in the absence of such statutory guarantees and protections are denied the work, income, and profit they could earn by furnishing labor or material on the project.
31. The Ohio State University's interpretation of Sub. H.B. 318, Section 8 and its application to ProjectONE reads out of the statutory language the clear condition that Construction Reform Demonstration Projects are "[s]ubject to division (C)(2) of this section." Sub. H.B. 318, Section 8(C)(1).
32. The Ohio State University's interpretation of Sub. H.B. 318, Section 8 and its application to ProjectONE reads out of the statutory language the clear condition that "[i]n developing their Construction Demonstration Reform Projects, the state institutions of higher education are not exempt from the applicable provisions of law concerning . . . (b) Bonding" H.B. 318, Section 8(C)(2).
33. The Ohio State University's interpretation of Sub. H.B. 318, Section 8 and its application to ProjectONE violates standard rules of statutory construction.
34. The Ohio State University's interpretation of Sub. H.B. 318, Section 8 and its application to ProjectONE violates the clear and plain terms and conditions of the statute.

35. Representatives of Relators SFAA, ASA, and ASA-Ohio have met and conferred with representatives of The Ohio State University in an effort to address Relators' concerns without the need for litigation.
36. The Ohio State University has declined to modify its interpretation of Sub. H.B. 318, Section 8 and/or to require Turner Construction Company to provide a bond for its contract on ProjectONE.
37. The Ohio State University has declined to comply with R.C. Chapter 153 regarding bonds for public improvements and public works projects.
38. The Ohio State University has declined to pursue its Construction Demonstration Reform Project, ProjectONE, in accordance with the Sub. H.B. 318, Section 8 language conditioning the Demonstration Projects on compliance with R.C. §153.54, the applicable law regarding bonding.
39. Absent an order mandating that The Ohio State University require a bond for Turner's performance of its Construction Manager at Risk contract for ProjectONE, The Ohio State University will continue to act in violation of R.C. §153.54, and H.B. 318, Section 8.
40. The Ohio State University's failure to comply with Sub. H.B. 318, Section 8 and R.C. §153.54 on ProjectONE places a significant public interest at risk.
41. The Ohio State University is not protected from the financial risk of a default, defect, and/or deficiency in construction attributable to its Construction Manager at Risk on ProjectONE.

42. The public funds that support the operations of The Ohio State University are not protected from the financial risk of a default, defect, and/or deficiency in construction on ProjectONE.
43. No laborer, subcontractor or supplier to Turner Construction Company is protected from the financial risk of a default, delay in, or dispute over payment for its labor and/or materials.
44. No second-, third-, or lower-tier laborer, subcontractor or supplier on ProjectONE is protected from the financial risk of a default, delay in, or dispute over payment for its labor and/or materials.
45. Given the size of ProjectONE, the number of first and lower tier laborers, subcontractors, and suppliers it is likely to involve, and the number of years over which construction is already scheduled to occur, the absence of the vital protection and security that the bond would provide places at risk the financial stability of hundreds of thousands of Ohio workers and the viability of thousands of small business employers in dozens of communities throughout the State of Ohio. The public interest, as well as the law, is best served by mandating Respondent's compliance with Sub.H.B. 318, Section 8, which will require Turner Construction Company to provide a bond guaranteeing performance of the contract and the payment of those who perform labor on and/or furnish material for ProjectONE.
46. Absent an order mandating that The Ohio State University apply Sub. H.B. 318, Section 8 to require a bond from Turner guaranteeing performance of the contract and the payment of those who perform labor and furnish material for

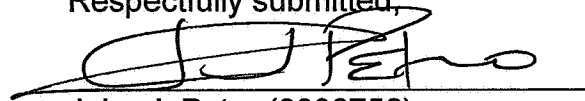
ProjectONE, The Ohio State University will continue to act in violation of Sub. H.B. 318, Section 8 and will continue to be in default of R.C. Chapter 153.

47. Relators and their members involved or potentially involved with ProjectONE have no adequate remedy at law to compel The Ohio State University to comply with its legal duties set out above or to seek damages should it fail to do so.

WHEREFORE, Relators respectfully request that preemptory Mandamus in the first instance pursuant to R.C. 2731.06 and/or a writ of Mandamus and/or an alternative writ be issued ordering The Ohio State University:

- 1) to comply with R.C. Chapter 153 as made applicable by Sub. H.B. 318, Section 8, and thereby
- 2) to require that a bond be furnished by Turner Construction Company as Construction Manager at Risk for its ProjectONE contract.

Respectfully submitted,



John J. Petro (0006758)

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and

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*The Surety & Fidelity Association
of America,*

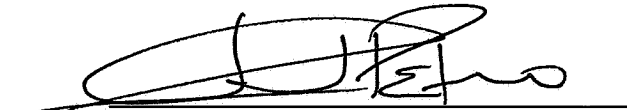
*American Subcontractors Association,
and*

*American Subcontractors Association of
Ohio, Inc.*

REQUEST FOR ORAL ARGUMENT

Now come Relators, pursuant to Supreme Court Rule of Practice IX, Section 2, and request that their Complaint for Writ of Mandamus be scheduled for Oral Argument before this Honorable Court.

Respectfully submitted,



John J. Petro (0006758)

IN THE SUPREME COURT OF OHIO

STATE EX REL. :
AMERICAN SUBCONTRACTORS :
ASSOCIATION, INC., et al, :

Case No.

Relators, :

v. :
THE OHIO STATE UNIVERSITY, :

Respondent. :

AFFIDAVIT OF *Richard N. Cevasco, CPC*
Ceco Concrete Construction, LLC

STATE OF OHIO
COUNTY OF Hamilton; SS

Richard N. Cevasco, after being first duly cautioned and sworn, deposes

and says:

1. I am a member of the American Subcontractors Association (ASA).
2. I am a member of the American Subcontractors Association of Ohio, Inc. (ASA-Ohio).
3. I have personal knowledge of all matters set forth herein and all documents attached hereto.
4. ASA is a trade association of suppliers and of specialty and trade contractors who work primarily as subcontractors on construction projects.
5. ASA-Ohio is the Ohio Chapter of the American Subcontractors Association.
6. ASA has approximately five thousand (5,000) members nationwide, including in the State of Ohio.

7. ASA-Ohio has seventy-five (75) members, all of whom perform significant work in and/or have their principal places of business in the State of Ohio.
8. ASA's purpose is, among other things, to protect and advance the interests of subcontractors and suppliers, including but not limited to subcontractors and suppliers in Ohio.
9. ASA-Ohio's purpose is, among other things, to protect and advance the interests of Ohio subcontractors and suppliers.
10. ASA and ASA-Ohio members provide labor and/or materials in construction, including but not limited to the construction of public improvements and public works projects in Ohio.

Further, affiant sayeth naught.



KATHY J. MCINTOSH
 NOTARY PUBLIC
 STATE OF OHIO
 Comm. Expires
 April 03, 2011

Richard N. Cerasco

Richard N. Cerasco
Ceco Concrete Construction

SWORN to before me and subscribed in my presence this 23rd day of November 2010.

Kathy J. McIntosh

 NOTARY PUBLIC

IN THE SUPREME COURT OF OHIO

STATE EX REL.
AMERICAN SUBCONTRACTORS
ASSOCIATION, INC., et al,

Relators,

v.

THE OHIO STATE UNIVERSITY,

Respondent.

Case No.

AFFIDAVIT OF EDWARD G. GALLAGHER

District of Columbia; SS

Edward G. Gallagher, after being first duly cautioned and sworn, deposes and says:

1. I am an employee and authorized representative of The Surety & Fidelity Association of America (SFAA).
2. I have personal knowledge of all matters set forth herein and all documents attached hereto.
3. SFAA is a national trade association of companies licensed to write fidelity and surety bonds.
4. SFAA has approximately four hundred fifty one (451) members, including 33 with their principal place of business in the State of Ohio.
5. SFAA's purpose is, among other things, to protect and advance the interests of sureties in the United States and in Ohio.

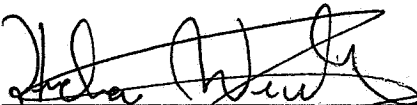
6. SFAA's members are sureties on the overwhelming majority of contract performance and payment bonds furnished in the United States and in Ohio and include the sureties that provide bonds for Turner Construction Company on projects in Ohio.

Further, affiant sayeth not.



Edward G. Gallagher

SWORN to before me and subscribed in my presence this 17 day of November 2010.



NOTARY PUBLIC

HELEN T. WENDIM
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires August 12, 2012