STATE OF MICHIGAN

COURT OF CLAIMS

ASSOCIATED BUILDERS AND CONTRACTORS OF MICHIGAN (also known as ABC OF MICHIGAN),

Plaintiff,

v

DEPARTMENT OF TECHNOLOGY, MANAGEMENT & BUDGET, a State Government Agency,

Defendant,

and

MICHIGAN BUILDING AND CONSTRUCTION TRADES COUNCIL,

Intervening Defendant.
_____/

OPINION AND ORDER

Case No. 22-000111-MZ

Hon. Douglas B. Shapiro

At a session of said Court held in the City of Lansing, County of Ingham, State of Michigan.

Pending before the Court is plaintiff's motion for a preliminary injunction and defendant's MCR 2.116(C)(4) and (C)(8) motion for summary disposition. Having reviewed the briefing and hearing arguments on September 20, 2022, the Court GRANTS defendant's motion for summary disposition and DISMISSES plaintiff's motion for a preliminary injunction as moot.

I. BACKGROUND

At issue in this matter is whether defendant, Department of Technology, Management & Budget (DTMB), lawfully established a prevailing-wage policy for contractors working on state

projects several years after the repeal of the Prevailing Wage Act, MCL 408.551 *et seq.*, repealed by 2018 PA 171.

Before it was repealed in 2018, the Prevailing Wage Act provided, in relevant part, that

> [e]very contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics . . . and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed. [MCL 408.552, repealed by 2018 PA 171.]

The Prevailing Wage Act further required the contracting agent (the state entity) to have the commissioner (of the Department of Labor) determine the prevailing-wage rates and fringe-benefit rates for all classes of construction mechanics outlined in the proposed contract and to include a schedule of the rates within the specifications for the work. MCL 408.553, repealed by 2018 PA 171. The Prevailing Wage Act also made it a misdemeanor to violate the provisions of the statute. MCL 408.557, repealed by 2018 PA 171.

In June 2018, the Legislature approved a voter-initiated petition, under Const 1963, art 2, § 9, that repealed the Prevailing Wage Act. See 2018 PA 171. The repealer, which appears in 2018 PA 171, simply stated "408.551-408.588 Repealed. 2018, Act 171, Imd. Eff. June 6, 2018." "Enacting section 2" of the repealer appropriated certain funds toward communicating the repeal of the Prevailing Wage Act to the public, and "[e]nacting section 3" contained a severability clause. The corresponding Compiler's Note stated, "Public Act 171 of 2018 was proposed by initiative petition pursuant to Const 1963, art 2, § 9. On June 6, 2018, the initiative petition was approved by an affirmative vote of the majority of the Senate and the House of Representatives, and filed with the Secretary of State." The repealer did *not* restrict defendant from establishing its own

prevailing-wage policy based on its authority to develop the terms of state contracts, as outlined in the Management and Budget Act, MCL 18.1101 *et seq*.

On October 7, 2021, Governor Gretchen Whitmer issued a press statement announcing that defendant would require contractors and subcontractors bidding on DTMB projects greater than $50,000 to pay their employees the prevailing wage in the region. At the time, the Governor's Office explained, "Michigan's repeal eliminated the state's prevailing-wage requirement, but left the door open for DTMB to require prevailing wage under its authority to develop the terms of state contracts." Thus, "[t]he move reinstates the prevailing wage requirement, which was repealed in June 2018, and ensures that any construction worker working on a state construction project receives a fair wage." Unlike a violation of the Prevailing Wage Act, violation of defendant's prevailing-wage policy does *not* constitute a crime.

Beginning with contracts initially posted for bidding after March 1, 2022, defendant required state contractors and subcontractors to pay the applicable prevailing wage. Defendant posted certain requirements and frequently asked questions for the prevailing-wage policy on its website, providing the following administrative guide citation:

> **1.3.13 Prevailing Wage**
>
> With the exception of lease build-outs, if a project greater than $50,000 involves employing construction mechanics (e.g., asbestos, hazardous material handling, boilermaker, carpenter, cement mason, electrician, office reconstruction and installation, laborer including cleaning debris, scraping floors, or sweeping floors in construction areas, etc.) and is sponsored or financed in whole or in part by State funds, state contractors must pay prevailing wage. [*Prevailing Wage for DTMB Construction Contracts—Administrative Guide Citation, Effective March 1, 2022*, available at https://www.michigan.gov/dtmb/procurement/design-and-construction/prevailing-wage-information (last accessed October 7, 2022).]

On July 21, 2022, plaintiff, a trade association representing approximately 900 construction and construction-related firms, sued in this Court for declaratory and injunctive relief, claiming that (1) defendant's prevailing-wage policy violated the separation-of-powers doctrine; (2) the prevailing-wage policy was not enacted in compliance with the Administrative Procedures Act of 1969 (APA), MCL 24.201 *et seq*.; and (3) defendant's conduct was an *ultra vires* exercise of legislative power. Plaintiff also moves for a preliminary injunction to enjoin enforcement of defendant's prevailing-wage policy, arguing that it is likely to prevail on the merits, and that its members will sustain irreparable financial harm without an injunction and if forced to pay a prevailing wage. Finally, plaintiff argues, an injunction would not harm defendant or the public because the injunction would return the contract-bidding process to the status quo between 2018 and 2022.

Defendant responded to the motion for a preliminary injunction and moved for summary disposition as its first response to the complaint. Defendant first argues, in its motion for summary disposition, that plaintiff lacks standing to sue and its claims are unripe. Next, defendant argues it did not violate separation of powers or commit an *ultra vires* act by establishing a prevailing-wage policy for DTMB contracts. The APA did not bind defendant because it was exercising a legislative grant of power when enacting the prevailing-wage policy. In its response to plaintiff's motion for a preliminary injunction, defendant adds that plaintiff failed to sue for nine months after Governor Whitmer's announcement, and nearly five months after defendant's prevailing-wage policy went into effect. Also, according to defendant, plaintiff's claim for irreparable harm

remains speculative and is outweighed by the harm to local economies if defendant were prohibited from enforcing the prevailing-wage policy.[1]

The Court heard arguments on both motions on September 20, 2022, and the parties agreed that the Court may decide both motions simultaneously.

II. ANALYSIS

A. JUSTICIABILITY CHALLENGE

Defendant challenges plaintiff's standing to sue on behalf of its membership and the ripeness of its claims.[2] The Court disagrees with defendant's arguments and concludes that plaintiff's claims are justiciable.

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[1] The Court permitted Michigan Building and Construction Trades Council to intervene as a defendant. Michigan Building and Construction Trades Council has concurred in defendant's response to plaintiff's motion for a preliminary injunction and in defendant's motion for summary disposition.

[2] Defendant requests summary disposition under MCR 2.116(C)(4) on the basis that plaintiff's claims are not justiciable. Summary disposition is appropriate under MCR 2.116(C)(4) when the Court lacks subject-matter jurisdiction over the case. *Ind Mich Power Co v Community Mills, Inc*, 336 Mich App 50, 54; 969 NW2d 354 (2020). " 'When viewing a motion under MCR 2.116(C)(4), [the] Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact.' " *Id*. (citation omitted).

Defendant further argues that plaintiff has failed to state a claim for relief under MCR 2.116(C)(8). This motion tests the legal sufficiency of the complaint. *Bailey v Antrim Co*, ___ Mich App ___; ___ NW2d ___ (2022) (Docket No. 357838); slip op at 5. "A motion under MCR 2.116(C)(8) may . . . be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery." *Id*. The court will consider the factual allegations in the complaint as true, but may also consider documentary evidence attached to the complaint. *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 206; 920 NW2d 148 (2018).

To the extent the Court is required to interpret the Management and Budget Act, the Court will examine the language of the statutes to determine the Legislature's intent. *D'Agostini Land Co LLC v Dep't of Treasury*, 322 Mich App 545, 554; 912 NW2d 593 (2018). "The Legislature is

> [A] litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant. [*Groves v Dep't of Corrections*, 295 Mich App 1, 5; 811 NW2d 563 (2011) (alteration in original), citing *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010) (*LSEA*).]

The Court of Appeals has explained that the doctrine of ripeness is like the doctrine of standing in that both doctrines focus on the timing of the lawsuit. *Van Buren Charter Twp v Visteon Corp*, 319 Mich App 538, 553; 904 NW2d 192 (2017). For a matter to be ripe, the plaintiff must have an actual injury to bring a claim, and cannot premise their lawsuit on a hypothetical injury. *Id*. at 554.

Defendants argue that plaintiff lacks standing to sue under the "disappointed bidder doctrine." As the Court of Appeals acknowledged in *Groves*, "Michigan jurisprudence has never recognized that a disappointed bidder . . . has the right to challenge the bidding process." *Groves*, 295 Mich App at 5. This is because a contract bidder lacks an expectancy interest in the public contract to be awarded. *Id*. at 5-6. The rationale behind the rule is that competitive bidding for public contracts is designed to benefit taxpayers and not the parties seeking the contracts. *Id*. at 7.

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presumed to intend the meaning clearly expressed, and this Court must give effect to the plain, ordinary, or generally accepted meaning of the Legislature's terms." *Id*. As for the Prevailing Wage Act's repealer, 2018 PA 171, to the extent the Court is required to interpret its provisions, the court will do so in line with the intent of the electors who initiated the law. *DeRuiter v Byron Twp*, 505 Mich 130, 139; 949 NW2d 91 (2020).

The problem with defendant's theory is that plaintiff is not a disappointed bidder to a specific state contract. As plaintiff notes, each case defendant cites addressed a losing bidder's challenge to a state contract after it was made. See *Cedroni Assoc, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 43-44; 821 NW2d 1 (2012) (the plaintiff, the lowest bidder, sued the defendant for tortious interference after a public body awarded a contract to the defendant, the second-lowest bidder); *Detroit v Wayne Circuit Judges*, 128 Mich 438, 438-439; 87 NW 376 (1901) (the city of Detroit accepted a bid to repave a street and the plaintiff, the lowest bidder, challenged the decision); *MCNA Ins Co v Dep't of Tech, Mgt & Budget*, 326 Mich App 740, 741-742; 929 NW2d 817 (2019) (the petitioner submitted a proposal in response to a state request for submissions and challenged the respondent's decision to accept another proposal); *Groves*, 295 Mich App at 4 (the plaintiff sued after another entity won a state-contract bid); and *Rayford v Detroit*, 132 Mich App 248; 347 NW2d 210 (1984) (laid-off police officers sued to get their jobs back after a change to the city budget). In this case, plaintiff is challenging defendant's authority to enforce the prevailing-wage policy—not its decision to enter into a specific contract. Thus, the disappointed bidder doctrine does not preclude plaintiff's lawsuit.

The Court looks, instead, to whether plaintiff has met the criteria to request declaratory relief under MCR 2.605. MCR 2.605(A)(1) provides, "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." Defendant challenges whether there is an "actual controversy" in this matter, arguing that plaintiff's injury is purely hypothetical. It argues that plaintiff and its members have no special injury or right distinct from the public at large, which renders its claims unripe.

The most relevant case on this topic is *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486; 815 NW2d 132 (2012) (*UAW*). In *UAW*, the plaintiff sued on behalf of its members to enjoin enforcement of a policy relating to the political candidacy of the defendant's employees. *Id*. at 489-492. The defendant argued there was no actual controversy, for standing purposes, because it had not yet applied the policy to any employees. *Id*. at 492. The Court of Appeals held that courts may not decide hypothetical (or unripe) issues, but clarified that a court may grant declaratory relief to guide or direct future conduct. *Id*. at 495. "The essential requirement of an 'actual controversy' under the rule is that the plaintiff pleads and proves facts that demonstrate an adverse interest necessitating the sharpening of the issues raised." *Id*. (quotation marks and citation omitted). Thus, the Court concluded that even though the defendant had not yet acted on the policy, the plaintiff had standing to settle the issue before it ripened into a violation of the law. *Id*. at 496-497.

Likewise, although plaintiff does not allege that defendant has denied its members a contract based on the prevailing-wage requirements, the Court concludes that, as a representative for bidders on state contracts, plaintiff has demonstrated an adverse interest that is distinct from the public at large and that necessitates a sharpening of the issues at this juncture. Plaintiff's injury is not purely hypothetical because its members must alter their business practices to obtain a state-government contract. Plaintiff has standing to sue for declaratory relief, and its claim is ripe for this Court's review.

B. SEPARATION OF POWERS

Next, defendant argues that the prevailing-wage policy was a proper exercise of its discretionary authority under the Management and Budget Act. On this point, the Court agrees.

Plaintiff's first challenge to defendant's authority to enact a prevailing-wage policy is on the basis of separation of powers. Article 3, § 2 of the Michigan Constitution provides for separation of powers among the three branches of government as follows: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

The Michigan Supreme Court has explained that " 'the separation of powers doctrine does not require so strict a separation as to provide no overlap of responsibilities and powers.' " *Taxpayers of Mich against Casinos v Michigan*, 478 Mich 99, 105; 732 NW2d 487 (2007) (citation omitted). Rather, an overlap is permissible if " 'the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other . . . .' " *Id*. (citation omitted). Thus, the branches of government are not "wholly separate." *Id*. at 105-106 (quotation marks and citation omitted).

The separation-of-powers principle has led to the development of a standard known as the nondelegation doctrine. *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003). The nondelegation doctrine essentially prohibits the Legislature from delegating its power to either the executive branch or judicial branch, but permits the Legislature to obtain assistance from the other branches of government under certain circumstances. *Id*. By way of example, the Legislature may delegate a task to an executive-branch agency if the Legislature provides "sufficient standards" for the executive agency to follow, at which point the task becomes a proper exercise of executive power. *Id*. at 10 n 9.

The Legislature has delegated certain powers to defendant in the Management and Budget Act. Among other powers, MCL 18.1261(2) grants defendant broad discretionary authority over the award, solicitation, and amendment of state contracts. The statute provides, "The department shall *make all discretionary decisions* concerning the solicitation, award, amendment, cancellation, and appeal of state contracts." MCL 18.1261(2) (emphasis added).

With that said, the Legislature also gave defendant ample guidance to support its discretionary decision making, as required under the nondelegation doctrine. By way of example, the Legislature requires defendant to award a construction contract to the "responsive and responsible best value bidder." MCL 18.1241(4). The Legislature defined the term "responsive and responsible best value bidder" to mean the bidder who meets the following criteria:

> (a) A bidder who complies with all bid specifications and requirements.
>
> (b) A bidder who has been determined by the department to be responsible by the following criteria:
>
> (*i*) The bidder's financial resources.
>
> (*ii*) The bidder's technical capabilities.
>
> (*iii*) The bidder's professional experience.
>
> (*iv*) The bidder's past performance.
>
> (*v*) The bidder's insurance and bonding capacity.
>
> (*vi*) The bidder's business integrity.
>
> (c) A bidder who has been selected by the department through a selection process that evaluates the bid on both price and qualitative components to determine what is the best value for this state. Qualitative components may include, but are not limited to, all of the following:
>
> (*i*) Technical design.
>
> (*ii*) Technical approach.

(*iii*) Quality of proposed personnel.

(*iv*) Management plans. [MCL 18.1241(4)(a)-(4)(c).]

By providing the above criteria, the Legislature provides defendant with "sufficient standards" to follow, making the Management and Budget Act a proper delegation of legislative power. But beyond providing the above standards, the Legislature does not regulate defendant's discretionary powers at the granular level. For example, when deciding the quality of proposed personnel, defendant has the discretion to determine what metrics it uses to measure the quality of the personnel, such as experiential background. Nor does the Legislature, provide detailed guidance on how to measure the bidder's business integrity, leaving the specifics of that decision to defendant as well. The Legislature also does not direct defendant on what materials to require as part of the "technical design" or the "technical approach."

The only case plaintiff cites to limit defendant's discretionary authority to award a state contract is *Leavy v City of Jackson*, 247 Mich 447, 450; 226 NW 214 (1929), in which the Michigan Supreme Court held that a public body's exercise of discretion to accept or reject contract bids is only curtailed when necessary to prevent fraud, violation of trust, or an injustice. But plaintiff does not allege that defendant has acted with fraud or has committed a violation of trust. 2018 PA 171 simply repealed the Prevailing Wage Act without substituting any language in its place or providing any rationale for the repeal. See 2018 PA 171. The Court declines to read any prohibitions into the Prevailing Wage Act repealer that do not appear in, and cannot be implied from, the language of the statute. See *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 564; 741 NW2d 549 (2007) ("A court cannot read into a clear statute that which is not within the manifest intention of the Legislature as derived from the language of the statute itself.").

The Court finds *Associated Builders & Contractors v Lansing*, 499 Mich 177; 880 NW2d 765 (2016), instructive in this context. In *Associated Builders*, the plaintiff alleged that the defendant (a municipality) lacked authority to adopt an ordinance regulating wages paid by third parties, even when the work was done on municipal contracts and through the use of municipal funds. *Id*. at 181. The Michigan Supreme Court, however, held that municipalities had broad constitutional powers over local concerns, which included the power to set terms for municipal contracts with third parties. *Id*. at 187-188. Thus, because the Michigan Constitution granted municipalities broad control over local concerns, and because there was no other source of law prohibiting the city of Lansing from setting a wage policy, Lansing's ordinance withstood the plaintiff's challenge. *Id*. at 189-190. Similarly, in this case, the Prevailing Wage Act repealer did not limit defendant's broad authority under the Management and Budget Act to enact policies relating to state contracts, including a prevailing-wage policy.

Had the Legislature wished to limit defendant's ability to set a prevailing wage, it could have done so through statute. The Local Government Labor Regulatory Limitation Act, MCL 123.1381 *et seq.*, expressly prohibits local governments from requiring employers to pay an employee a wage or benefit based on the prevailing wage in the locality. MCL 123.1386 provides, in relevant part, "A local governmental body shall not adopt, enforce, or administer an ordinance, local policy, or local resolution requiring an employer to pay to an employee a wage or fringe benefit based on wage and fringe benefit rates prevailing in the locality." The statute did not apply to state projects subject to the Prevailing Wage Act (which was still in effect at the time the Local Government Labor Regulatory Limitation Act was enacted). *Id.* The rationale for the Local Government Labor Regulatory Limitation Act was the Legislature's conclusion that "regulation of the employment relationship between a nonpublic employer and its employees is a matter of

state concern and is outside the express or implied authority of local governmental bodies to regulate, absent express delegation of that authority to the local governmental body." MCL 123.1382. This statute demonstrates that the Legislature knew how to limit another governmental body's ability to set a prevailing wage. The Legislature declined to do so here. And while plaintiff notes that the repeal of the Prevailing Wage Law was initiated by voter petition (not by proposed legislation), the Legislature could have proposed an alternative law for voter consideration that expressly prohibited prevailing wage. Or, now that the 2018 legislative session has expired, the Legislature could pass a new law at any time prohibiting defendant from establishing a prevailing-wage policy.

Finally, plaintiff argues that defendant's interpretation of its powers under the Management and Budget Act conflicts with certain prohibitions outlined in the Fair and Open Competition in Governmental Construction Act, MCL 408.871 *et seq*. The implication is that by violating the Fair and Open Competition in Governmental Construction Act, defendant has violated the separation-of-powers doctrine as well.

The purpose of Fair and Open Competition in Governmental Construction Act is to "provide for more economical, nondiscriminatory, neutral, and efficient procurement of construction-related goods and services by this state and political subdivisions of this state as market participants, and providing for fair and open competition best effectuates this intent." MCL 408.872.[3] Plaintiff cites MCL 408.875, which provides:

[3] As intervening-defendant notes, the Sixth Circuit has concluded that the Fair and Open Competition in Governmental Construction Act is proprietary—as opposed to regulatory—in nature. *Mich Bldg and Constr Trades Council v Snyder*, 729 F3d 572, 577 (CA 6, 2013).

> Subject to section [MCL 408.878], a governmental unit awarding a contract on or after the effective date of the amendatory act that added [MCL 408.872] for the construction, repair, remodeling, or demolition of a facility and any construction manager acting on its behalf shall not, in any bid specifications, project agreements, or other controlling documents:
>
> (a) Require or prohibit a bidder, offeror, contractor, or subcontractor from entering into or adhering to an agreement with 1 or more labor organizations in regard to that project or a related construction project.
>
> (b) Otherwise discriminate against a bidder, offeror, contractor, or subcontractor for becoming or remaining or refusing to become or remain a signatory to, or for adhering or refusing to adhere to, an agreement with 1 or more labor organizations in regard to that project or a related construction project.

Plaintiff argues that the prevailing-wage policy discriminates in favor of bidders who enter into collective bargaining agreements with unionized employees, in violation of MCL 408.875(b). It points to language in a Michigan Department of Labor and Economic Opportunity (LEO) document titled "DTMB Prevailing Wage Commercial Survey," which defendant used to set the prevailing-wage rates. Plaintiff argues that the survey violated the Fair and Open Competition in Governmental Construction Act because the survey directs prospective bidders, "It is critical that you provide a copy of the pertinent collective bargaining agreement and the applicable understanding or understandings, if any, for each listed rate, and that you indicate the page numbers where all information is found as requested on the form." But plaintiff does not cite the entirety of the provision.

The complete text of relevant provision in the commercial survey provides:

> Please provide prevailing wages and fringe benefits currently in effect under the applicable collective bargaining agreement, and under any applicable understandings associated with the agreement. List rates separately for each geographic area and, if applicable, for each size of project for which there are different rates in effect.
>
> On each rate sheet you complete, if there is only one pay rate in effect for a job classification, list that rate as the prevailing wage. If there is more than one pay

> rate in effect, list as the prevailing wage the one that has been the most frequently or commonly paid during the 60 days prior to completing this Survey. In determining the most common or frequent wage, include the pay rates in effect in the area even if a collective bargaining agreement or understanding excludes those rates from prevailing wage projects.
>
> It is critical that you provide a copy of the pertinent collective bargaining agreement and the applicable understanding or understandings, if any, for each listed rate, and that you indicate the page numbers where all information is found as requested on the form.
>
> **Rates cannot be included in the state prevailing wage schedules if they are not submitted with a current collective bargaining agreement or understanding.**

Considering the survey as a whole, the language of the survey does not constitute a "bid specification," a "project agreement" or another "controlling document" as outlined in MCL 480.875. Rather, the survey is intended to assist defendant in establishing the prevailing wage in a given locality. There is no indication, from this document alone, that defendant has discriminated against (or intends to discriminate against) any specific bidder for refusing to enter into a collective-bargaining agreement. In fact, in another document titled *Informational Sheet: Prevailing Wages on DTMB Projects*, attached to plaintiff's complaint, defendant has explained, "Prevailing rates are compiled from the rates contained in collectively bargained agreements which cover the locations of the state projects. While the DTMB prevailing wage rates are compiled though surveys of collectively bargained agreements, a collective bargaining agreement is *not required* for contractors to be on or be awarded state projects." (Emphasis added.) The survey, in and of itself, does not violate the Fair and Open Competition in Governmental Construction Act or establish a separation-of-powers violation.

The bottom line is that plaintiff attempts to read language into the initiative petition repealing the Prevailing Wage Act that does not appear in the repealer. The voter-initiated law simply repealed the Prevailing Wage Act, without otherwise limiting defendant's authority under

the Management and Budget Act. When the Prevailing Wage Act was repealed, the Management and Budget Act became the status quo. At present, the Management and Budget Act provides defendant with broad discretionary authority, which encompasses the ability to establish a prevailing-wage policy. Plaintiff has not pointed to a single source that denies defendant that discretion or prohibits defendant from setting a prevailing wage for construction contracts. For these reasons, defendant's implementation of a prevailing-wage policy does not violate separation of powers.

C. APA COMPLIANCE

Plaintiff next argues that defendant failed to follow the appropriate procedures to enact the prevailing-wage policy as a "rule" under the APA. Plaintiff further contends that when the Legislature repealed the Prevailing Wage Act, there was no longer an "executive agency actor" who had the power to make or enforce a prevailing-wage requirement. But the Management and Budget Act grants defendant broad discretionary authority relating to solicitation and award of state contracts. See MCL 18.1261(2). So defendant continued to serve as the executive agency actor with the power to set or enforce a prevailing-wage requirement.

Moreover, defendant does not claim that its prevailing-wage policy was a "rule" within the meaning of the APA. Rather, defendant's position is that the policy falls within an exception to the APA's rulemaking requirements, as outlined in MCL 24.207(j). MCL 24.207 defines the term "rule" to mean, in relevant part:

> an agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.

In general, an administrative agency cannot rely on a guideline or policy in lieu of a rule promulgated under the APA. *Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 82; 678 NW2d 444 (2003). The APA requires agencies to follow certain procedures, including providing notice and holding a hearing. *Id*., citing MCL 24.241 (outlining the notice and hearing requirements for a proposed rule). The failure to do so will render the rule invalid. *Id*.

But there are several exceptions. Defendant relies on the exception for "[a] decision by an agency to exercise or not to exercise a permissive statutory power, although private rights or interests are affected." MCL 24.207(j). As the Court of Appeals has explained, "If an agency policy follows from its statutory authority, the policy is an exercise of permissive statutory power and not a rule requiring formal adoption." *Pyke v Dep't of Social Servs*, 182 Mich App 619, 630; 453 NW2d 274 (1990). MCL 24.207(p) also excludes from the definition of rule "[t]he provisions of an agency's contract with a public or private entity including, but not limited to, the provisions of an agency's standard form contract."

The Court of Appeals explored a similar situation in *Village of Wolverine Lake v Mich State Boundary Comm*, 79 Mich App 56; 261 NW2d 206 (1977). In *Wolverine Lake*, both Commerce Township and the Village of Wolverine Lake submitted separate petitions to the State Boundary Commission (SBC) to incorporate their existing township and village. *Id*. at 57. The SBC granted Commerce Township's petition, denied Wolverine Lake's petition, and adjusted the boundaries for Commerce Township to include the Village of Wolverine Lake. *Id*. at 57-58.

Wolverine Lake challenged the decision, arguing that the SBC had adopted a "rule," without engaging in proper rulemaking procedures, that disfavored small cities in the metropolitan Detroit area. *Id*. at 58. The Court concluded, however, that the SBC exercised a permissive

statutory power under MCL 123.1009, which provided the SBC with criteria when considering a petition for proposed incorporation. Like the Management and Budget Act, the statute at issue in *Wolverine Lake* did *not* expressly permit favoring larger communities, but allowed the SBC to consider certain factors, including "past and probable future urban growth," "probable future needs for services," "practicability of supplying such services," "the probable effect on the cost and adequacy of services in the area to be incorporated and on the remaining portion of the unit from which the area will be detached," and "the financial ability of the incorporating municipality to maintain urban type services in the area." *Id*. at 59.

The Court concluded that, because the statutory criteria favored "future growth and ability to provide services," the SBC was bound to favor larger communities with an industrial-tax base. *Id*. Thus, the statute—not the SBC's internal policies--created the perceived bias against small communities. *Id*. at 59-60. See also *Hinderer v Dir, Mich Dep't of Social Servs*, 95 Mich App 716, 727; 291 NW2d 672 (1980) (citing *Wolverine Lake* for the proposition that "if an agency policy . . . follows from its statutory authority, the policy is an exercise of a permissive statutory power and not a rule requiring formal adoption").

Here, as discussed earlier, the Management and Budget Act grants defendant broad discretionary powers when awarding state contracts, but provides certain criteria for defendant to consider when awarding a contract to the responsive and responsible best-value bidder. Defendant's prevailing-wage policy follows from its permissive statutory authority to make *all* discretionary decisions about the solicitation and award of state contracts. See MCL 18.1261(2). Thus, the prevailing-wage policy falls within the exception to rulemaking outlined in MCL 24.207(j). Additionally, the prevailing-wage policy applies to, and forms a term of, defendant's contracts with private entities. So the rulemaking exception outlined in MCL 24.207(p) applies in

this circumstance as well.[4] Accordingly, defendant was not required to follow the APA's formal rulemaking process when enacting the prevailing-wage policy.

D. *ULTRA VIRES* ACTIVITY

Plaintiff also argues that the prevailing-wage policy was an *ultra vires* exercise of governmental power. An *ultra vires* activity is one that is "*not* expressly or impliedly mandated or authorized by law." *Richardson v Jackson Co*, 432 Mich 377, 381; 443 NW2d 105 (1989). For the reasons discussed earlier, defendant did not engage in an *ultra vires* activity because its decision to implement a prevailing-wage policy was within its discretionary powers outlined in the Management and Budget Act.[5]

III. CONCLUSION

For these reasons, the Court GRANTS defendant's motion for summary disposition. Because the Court concludes that defendant is entitled to summary disposition, the Court need not

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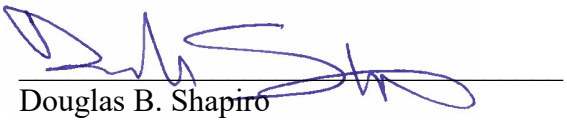
[4] Even if the prevailing-wage policy were a "rule," MCL 24.264 provides that the validity of a rule may be determined in a declaratory-judgment action only if it impairs the legal rights or privileges of the plaintiff. Plaintiff's members have no legal right or privilege to obtain a state contract or to prohibit the state from considering their wages when granting a government contract. The outcome for plaintiff's members, if they fail to abide by the prevailing-wage policy, is the denial of a state contract; they are still eligible for local or private jobs.

[5] Plaintiff also cites the Michigan Supreme Court's recent decision in *People v Peeler*, ___ Mich ___; ___ NW2d ___ (2022) (Docket Nos. 163667, 163672, and 164191), for the position that "an administrative official [cannot] revive the content and meaning of a statute that has been specifically amended to remove that content." *Peeler* explored the exercise of a "one-man grand jury," as outlined in MCL 767.3 and MCL 767.4. *Id*. at ___; slip op at 2. The Court concluded that although the Legislature had initially permitted judges to issue indictments, it later amended the relevant statute to remove that authority. *Id*. at ___; slip op at 12. The Court held, therefore, that the statute did not permit a judicial indictment initiating a criminal prosecution. *Id*. at ___; slip op at 12-13, 15. Where this case differs from *Peeler* is the fact that the Legislature *has* provided defendant with broad discretionary powers in relation to the solicitation, award, amendment, cancellation, and appeal of state contracts. See MCL 18.1261(2). *Peeler* is inapplicable in this context.

address the merits of plaintiff's motion for a preliminary injunction, which is DISMISSED AS MOOT.

This is a final order that dismisses the final claim and closes the case.

Date: October 10, 2022



Douglas B. Shapiro
Judge, Court of Claims