

195 A.3d 1078

Commonwealth Court of Pennsylvania.

Richard HIGHLEY and Brian Hurst, Petitioners

v.

Commonwealth of Pennsylvania DEPARTMENT OF TRANSPORTATION, Leslie M. Richards, Individually and in her Capacity as Secretary of Department of Transportation, [Kenneth McClain](#), Individually and in his Capacity as District Executive for PennDOT Engineering District 6-0 and **Contracting** Officer for all District 6-0 Construction **Contracts**, Respondents

No. 36 M.D. 2018

Argued: September 12, 2018

Decided: October 15, 2018

Synopsis

Background: Employees of nonunion highway construction contractor filed petition for review, in nature of complaint in equity, against Commonwealth Department of Transportation (DOT), Secretary of DOT, and others, challenging Commonwealth's award of **contract** for highway improvement project, based on solicitation for **bids** that required bidders to sign project labor agreement (PLA), as condition of **bidding**, which bound contractors to collective bargaining agreements between Building and Construction Council and 11 local unions. Commonwealth respondents filed preliminary objections.

Holdings: The Commonwealth Court, No. 36 M.D. 2018, [Brobson, J.](#), held that:

[1] employees did not have traditional standing under Procurement Code to petition for review of **bidding** process, and

[2] employees did not have taxpayer standing to petition for review.

Preliminary objections sustained; petition dismissed.

[James Gardner Colins](#), Senior Judge, filed dissenting opinion.

Procedural Posture(s): Review of Administrative Decision; Motion to Dismiss for Lack of Standing.

West Headnotes (10)

[1] [Pleading](#)

🔑 [Mode of objecting:preliminary objections](#)

In ruling on preliminary objections, the Commonwealth Court accepts as true all well-pleaded material allegations in the petition for review and any reasonable inferences that it may draw from the averments.

[Cases that cite this headnote](#)

[2] [Pleading](#)

🔑 [Mode of objecting:preliminary objections](#)

In ruling on preliminary objections, the Commonwealth Court is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in a petition for review.

[Cases that cite this headnote](#)

[3] [Pleading](#)

🔑 [Mode of objecting:preliminary objections](#)

The Commonwealth Court may sustain preliminary objections only when the law makes clear that the petitioner cannot succeed on his claim, and the Court must resolve any doubt in favor of the petitioner.

[Cases that cite this headnote](#)

[4] [Action](#)

🔑 [Persons entitled to sue](#)

Prior to judicial resolution of a dispute, an individual must demonstrate that he has standing to bring the action, that is, the

party initiating legal action must show that he has been “aggrieved,” i.e., that he has a substantial, direct, and immediate interest in the outcome of the litigation.

[Cases that cite this headnote](#)

[5] **Action**

🔑 [Persons entitled to sue](#)

An interest in the outcome of the litigation is “substantial,” as necessary for a plaintiff to show that he or she is aggrieved, as a prerequisite to standing, if it surpasses the common interest of all citizens in procuring obedience to the law.

[Cases that cite this headnote](#)

[6] **Action**

🔑 [Persons entitled to sue](#)

An individual's interest in the outcome of the litigation is “direct,” as necessary to show that the individual is “aggrieved,” as a prerequisite to standing, where it shows that the matter complained of caused harm to the individual's interest, and it is “immediate” if the causal connection is not remote or speculative.

[Cases that cite this headnote](#)

[7] **Action**

🔑 [Persons entitled to sue](#)

The keystone to standing on the basis of aggrievement is that the individual must be negatively impacted in some real and direct fashion.

[Cases that cite this headnote](#)

[8] **Public Contracts**

🔑 [Parties;standing](#)

States

🔑 [Standing](#)

Employees of non-union highway construction contractor were not aggrieved by condition of Commonwealth's solicitation for **bids** on highway improvement project that

bidders sign project labor agreement (PLA), which bound contractors to the collective bargaining agreements (CBAs) between Building and Construction Council and 11 local unions, and thus, employees did not have traditional standing under Procurement Code to challenge Commonwealth's **bid** solicitation; employees had no interest that was substantial, direct, or immediate, given that contractor had not submitted **bid** for project, and while there were conceivable scenarios where employees would be hired to work on project, there were just as many scenarios where they would not, i.e., both could be terminated, both could quit and work for another contractor, or both could continue working for contractor but be assigned to different construction projects. [62 Pa. Cons. Stat. Ann. § 1711.1\(a\)](#).

[Cases that cite this headnote](#)

[9] **Municipal Corporations**

🔑 [Nature and scope in general](#)

A taxpayer has standing to challenge a governmental action provided he satisfies the following requirements: (1) the governmental action would otherwise go unchallenged; (2) those directly and immediately affected by the complained of matter are beneficially affected and not inclined to challenge the action; (3) judicial relief is appropriate; (4) redress through other channels is unavailable; and(5) no other persons are better situated to assert the claim.

[Cases that cite this headnote](#)

[10] **Public Contracts**

🔑 [Parties;standing](#)

States

🔑 [Rights and remedies of taxpayers](#)

Employees of non-union highway contractor could not show that Commonwealth's solicitation for **bids** on highway improvement project that required bidders to sign project labor agreement (PLA), which bound contractors to collective bargaining

agreements (CBAs) between Building and Construction Council and 11 local unions, would go unchallenged and that those immediately affected were beneficially affected and not inclined to challenge action, as required for employees to have taxpayer standing to file petition for review challenging Commonwealth's **bid** solicitation, under Procurement Code; contractor, along with other non-union entity, filed **bid** protests for exact same government **contract**, and contractor was represented by same attorney who was representing employees on their instant petition for review. [62 Pa. Cons. Stat. Ann. § 1711.1](#).

[Cases that cite this headnote](#)

*1080 ORIGINAL JURISDICTION

Attorneys and Law Firms

[Bruce W. Ficken](#) and [Raymond DeLuca](#), Philadelphia, for petitioners.

[Jeffrey W. Davis](#), Deputy Chief Counsel, Harrisburg, for respondents.

BEFORE: HONORABLE [P. KEVIN BROBSON](#), Judge, HONORABLE [PATRICIA A. McCULLOUGH](#), Judge, HONORABLE [JAMES GARDNER COLINS](#), Senior Judge

Opinion

OPINION BY JUDGE [BROBSON](#)

Richard Highley and Brian Hurst (collectively Petitioners) are employees of Allen Myers, LP (Myers), a nonunion highway construction contractor. Petitioners filed a petition for review in the nature of a complaint in equity to challenge a construction project in Montgomery County. Currently before this Court for disposition are the preliminary objections of the Commonwealth of Pennsylvania, Department of Transportation (PennDOT), Secretary of Transportation Leslie M. Richards, and PennDOT's District Executive Kenneth McClain (collectively, Commonwealth Respondents). Commonwealth Respondents object on the grounds that

Petitioners lack standing and their claims are barred by sovereign immunity. For the reasons set forth below, we sustain the first preliminary *1081 objection by Commonwealth Respondents and dismiss the petition for review.

I. BACKGROUND

In their petition for review, Petitioners aver that in 2013, PennDOT began making improvements to Markley Street/U.S. 202 South in Norristown, Montgomery County (Markley Street Project). J.D. Eckman won the **bid** for the first part of the Markley Street project, underbidding the closest union contractor by more than \$500,000. J.D. Eckman completed the first part of the Markley Street Project a year ahead of schedule. Petitioners point out that the **bid** solicitation for the first part of the Markley Street Project did not require contractors to sign a project labor agreement (PLA) as a condition of **bidding**.

Petitioners also aver that, in August 2017, PennDOT issued a **bid** solicitation for **Contract** No. 80021, the second part of the Markley Street Project. PennDOT's August **bid** solicitation provided that all contractors were required to sign a PLA with the Building and Construction Council of Philadelphia and Vicinity (Building and Construction Council) as a condition of **bidding** on the project. Under that PLA, contractors were bound to the collective bargaining agreements (CBAs) between various local unions and the Building and Construction Council. Multiple contractors, both union and nonunion, filed taxpayer lawsuits, **bid** protests, and a motion for preliminary injunction to challenge the August **bid** solicitation. By the end of August 2017, PennDOT withdrew its August **bid** solicitation.

Petitioners further aver that, in December 2017, PennDOT issued another **bid** solicitation for **Contract** No. 80021. The December **bid** solicitation also required contractors to sign a revised PLA with the Building and Construction Council. The revised PLA again binds contractors to the CBAs between the Building and Construction Council and 11 local unions. The revised PLA requires craft labor personnel employed to be hired through the 11 local unions. Finally, differing from the original PLA, the revised PLA provides that if the successful bidder already has a CBA with United

Steelworkers, that bidder is not subject to the hiring requirements of the revised PLA and is instead permitted to use its United Steelworkers workforce.¹

Petitioners allege standing as employees of Myers—a company that would have **bid** on this **contract** if the revised PLA was not a condition of **bidding**. Both are highway construction workers with prior experience working on PennDOT roadway projects. Petitioners additionally allege that they have standing as taxpaying residents of Montgomery County.

Petitioners filed the subject petition for review, asking this Court to enjoin PennDOT from requiring contractors to sign the revised PLA as a condition for **bidding** and performing work on the Markley Street Project. Petitioners allege that the revised PLA precludes nonunion contractors from **bidding** on the Markley Street Project and applies different standards to different bidders. As such, Petitioners allege that PennDOT's imposition of the requirement that contractors sign the revised PLA violates the Commonwealth *1082 Procurement Code² and the State Highway Law.³

Commonwealth Respondents filed two preliminary objections. First, Commonwealth Respondents averred that Petitioners lack standing under both the requirements for traditional standing and for the taxpayer exception to traditional standing. Second, Commonwealth Respondents averred that Petitioners' claims are barred by sovereign immunity under our Supreme Court's decision in [Scientific Games International, Inc. v. Department of Revenue](#), 620 Pa. 175, 66 A.3d 740 (2013).⁴

II. DISCUSSION

[1] [2] [3] Setting the stage for our analysis is the standard for preliminary objections. In ruling on preliminary objections, we accept as true all well-pleaded material allegations in the petition for review and any reasonable inferences that we may draw from the averments. [Thomas v. Corbett](#), 90 A.3d 789, 794 (Pa. Cmwlth. 2014). The Court, however, is not bound by legal conclusions, unwarranted inferences from facts, argumentative allegations, or expressions of opinion encompassed in the petition for review. [Id.](#) We may sustain

preliminary objections only when the law makes clear that the petitioner cannot succeed on his claim, and we must resolve any doubt in favor of the petitioner. [Id.](#)

A. Standing

With the enactment of the Procurement Code in 1998 and its subsequent amendments, bidders, offerors, prospective bidders or offerors, and prospective contractors have a statutory right to protest the solicitation or award of a **contract** with the head of a purchasing agency or his designee. 62 Pa. C.S. § 1711.1(a). The Procurement Code both reaffirms the Commonwealth's sovereign immunity and waives sovereign immunity for **bid** protests under Section 1711.1 of the Procurement Code. 62 Pa. C.S. § 1702. While Sections 1711.1 and 1702 of the Procurement Code govern bidders, offerors, prospective bidders or offerors, and prospective contractors, Petitioners do not fall within any of those categories. They are employees of a prospective bidder, Myers, and they bring their suit in equity as taxpayers. The question, then, is whether they have standing under the traditional standing requirements or the taxpayer exception and, if so, whether their claims are nonetheless barred by sovereign immunity.

1. Traditional Standing

[4] [5] [6] [7] Prior to judicial resolution of a dispute, an individual must demonstrate that he has standing to bring the action. [Pittsburgh Palisades Park, LLC v. Cmwlth.](#), 585 Pa. 196, 888 A.2d 655, 659 (2005). That is, the party initiating legal action must show that he has been “aggrieved”—*i.e.*, that he has a “substantial, direct, and immediate interest in the outcome of the litigation.” [Id.](#) at 659-60. An interest is “substantial” if it surpasses the common interest of all citizens in procuring obedience to the law. [Id.](#) at 660. An interest is “direct” where it shows that the matter complained of caused harm to the party's interest and “immediate” if the causal connection is not remote or speculative. *1083 [Id.](#) “The keystone to standing in these terms is that the person must be negatively impacted in some real and direct fashion.” [Id.](#)

[8] Here, Petitioners argue that they meet these traditional standing requirements. They contend that their interest in the project is substantial and surpasses the common interest of all Pennsylvanians, because, as long-time construction workers dependent on government construction **contracts**, their livelihood is affected more than that of the average citizen. They suggest that they may be forced to join a union, that they may not be accepted into union membership, and that they still might not work on this project. Petitioners contend that their interest is direct because there would be no harm to their interest in the absence of the PLA requirement. Finally, Petitioners contend that their interest is immediate because their injury stems directly from the PLA requirement in the **bid** solicitation.

In response, Commonwealth Respondents argue that the alleged harm to Petitioners depends on a “string of contingencies.” (Commonwealth Respondents’ Br. at 10.) Commonwealth Respondents point out that Myers has not even **bid** on the project. Myers would have to not only **bid** on the project, Commonwealth Respondents argue, but Myers would have to win the **contract** and assign Petitioners to work on the **contract**. Commonwealth Respondents argue that any interest of Petitioners is too attenuated to confer standing.

We agree with Commonwealth Respondents that Petitioners do not have an interest that is substantial, direct, and immediate. Neither **bid** on this project, and the only relation they have to the **bidding** process is that their employer *may* have submitted a **bid** if there were no PLA requirement. While there are conceivable scenarios where Petitioners would be employed to work on this project, there are just as many scenarios where they would not. Both could be terminated tomorrow; both could quit and work for another contractor. Both could continue working for Myers but be assigned to different construction projects. Petitioners are not, therefore, sufficiently aggrieved to meet the requirements for traditional standing.

2. Taxpayer Standing

[9] This is not the end of the inquiry, however, as the Pennsylvania Supreme Court articulated an exception to the traditional requirements for standing in [Application of Biester](#), 487 Pa. 438, 409 A.2d 848 (1979). Under

this exception, a taxpayer has standing to challenge a governmental action provided he satisfies the following requirements:

- (1) the governmental action would otherwise go unchallenged;
- (2) *those directly and immediately affected by the complained of matter are beneficially affected and not inclined to challenge the action;*
- (3) judicial relief is appropriate;
- (4) redress through other channels is unavailable; and
- (5) no other persons are better situated to assert the claim.

[Pittsburgh Palisades Park](#), 888 A.2d at 662

(summarizing [Biester](#) taxpayer exception standing requirements) (emphasis added). The Supreme Court stressed that the impetus behind the taxpayer standing exception was the desire to “enable the citizenry to challenge government action which would otherwise go unchallenged in the courts because of the standing requirement.” [Id.](#) at 661.

[10] We need not be too exhaustive in addressing this exception, however, as Petitioners are unable to meet the first two [Biester](#) requirements. Two nonunion contractors, *1084 J.D. Eckman and Myers, the latter being Petitioners’ employer, have filed **bid** protests for this exact government **contract** under Section 1711.1 of the Procurement Code.⁵ See [62 Pa. C.S. § 1711.1](#) (establishing the right to challenge procurements by Commonwealth agencies). The same counsel that represents Myers in that **bid** protest represents Petitioners in this matter. In other words, the **bid** for this project is being challenged in pending litigation, and Petitioners know as much. There is simply no danger that the government action at issue would otherwise go unchallenged. For this same reason, this case fails the second prong of [Biester](#). Based on the allegations in the petition for review, it is clear to this Court that Petitioners’ employer, Myers, as a nonunion contractor, is directly and immediately affected by the PLA requirement in the **bid** solicitation. As evidenced by Myers’ **bid** protest, it neither considers itself beneficially affected by the PLA requirement nor was it inclined to refrain from challenging the inclusion of the PLA

mandate. Accordingly, as Petitioners cannot satisfy the first two prongs of [Biester](#), they do not have taxpayer standing to maintain this action.

3. Cases from this Court

Petitioners argue that there is, in fact, a third type of standing available to them as taxpayers under the precedent of this Court. They argue that they meet the standing requirements in the specific context of a taxpayer in a **bidding** award case, citing *Brayman Construction Corporation v. Department of Transportation* (Pa. Cmwlth., No. 527 M.D. 2008, filed February 17, 2009), *aff'd*, [608 Pa. 584, 13 A.3d 925 \(2011\)](#); [Reich v. Berks County Intermediate Unit No. 14, 861 A.2d 1005 \(Pa. Cmwlth. 2004\)](#), *appeal denied*, [584 Pa. 689, 881 A.2d 821 \(2005\)](#); [Marx v. Lake Lehman School District, 817 A.2d 1242 \(Pa. Cmwlth. 2003\)](#); and [Balsbaugh v. Department of General Services, 815 A.2d 36 \(Pa. Cmwlth.\)](#), *aff'd per curiam*, [572 Pa. 393, 815 A.2d 628 \(2003\)](#). Petitioners argue that, because they are challenging a **bid** award for a **contract** with PennDOT, they do not need to meet the 5-prong test in [Biester](#). We address these cases in turn, but note at the outset that Petitioners are mistaken; these cases do not confer a third option for standing.

In *Brayman*, a construction company and its president brought suit as taxpayers to challenge PennDOT's use of a "Design-Build Best Value" program during the **bidding** process. *Brayman*, slip op. at 1 n.1. Relevant to the instant case, this Court mentioned, in passing, that taxpayers have standing to bring an action aimed at preventing unauthorized or unlawful expenditure of money because taxpayers have an interest in **public** funds and bidders do not have standing to challenge an award.⁶ *Id.* Standing was so undeveloped in *Brayman* that, on appeal, the Pennsylvania Supreme Court determined that PennDOT waived the issue of whether the company and president lacked standing to challenge the **bidding** process. [Brayman Constr. Corp.](#), 13 A.3d at 931.

Brayman is unhelpful to Petitioners for several reasons. First, *Brayman* was an unreported, nonbinding decision by this *1085 Court.⁷ Second, the Court mentioned standing in *Brayman* in passing, but it was not a central

issue of the case. PennDOT did not contest standing in *Brayman*, as evinced by the Supreme Court's holding that PennDOT waived that issue. There was no standing analysis, by this Court or the Supreme Court on appeal, that could aid us in the instant matter. Third, the footnote in our opinion in *Brayman* that mentioned that the construction company and its president had standing *as taxpayers* appears to have done so in part because they could not challenge the award as disappointed bidders. Here, in contrast, that is clearly not the case, so what little standing analysis there was in *Brayman* does not apply. Two prospective bidders, Myers and J.D. Eckman, have already challenged the December **bid** solicitation.

In [Reich](#), we discussed the taxpayer standing exception in the context of a taxpayer challenging the authority of an intermediate unit to enter into a busing **contract** with the taxpayer's local school district. We distinguished the school district taxpayer's case from those of disappointed bidders by the nature of the action brought in [Reich](#). We explained that the school district taxpayer was challenging the intermediate unit's authority not the award of a **bid** with the Commonwealth. As a result, we applied the 5-prong test set forth in [Biester](#) and held that the taxpayer resident of that school district lacked standing.

[Reich](#) is inapplicable because, like *Brayman*, there is no holding or determination regarding taxpayer standing in a **bidding** context.⁸ In fact, Petitioners only cite to [Reich](#) for its reference to other cases that are, again, readily distinguished.

[Reich](#) primarily addressed and distinguished [Marx](#). In [Marx](#), we addressed taxpayer standing in the context of a challenge to a **bid** award for electrical work for a school district. This Court determined that there was a relaxed standard for taxpayers to challenge **bid** awards and held that the taxpayer in [Marx](#) met that standard. Paramount to that determination was our reasoning that "because competitors are not granted standing in **bidding** award cases, the process relies upon taxpayers to bring actions" to challenge the procurement. [Marx, 817 A.2d at 1245](#) (emphasis added). [Marx](#) is distinguishable because there is no

bar in this case that prevents competitors or bidders from challenging the **bidding** process for the Markley Street Project; there is no doubt they have standing. Myers and J.D. Eckman have already demonstrated that as they both mounted challenges against the requirements surrounding the December **bid** solicitation and the revised PLA. The reasoning in [Marx](#) does not apply here because disappointed bidders have standing under the Procurement Code to challenge an award of a **bid** by a Commonwealth agency. [62 Pa. C.S. § 1711.1](#); see also [Reich, 861 A.2d at 1009](#) (noting that challenge to **bidding** award in [Marx](#) was *not* brought under Procurement Code).

In [Balsbaugh](#), two contractors **bid** on a solicitation by the Department of General *1086 Services (DGS) for a new chemistry building at Pennsylvania State University. The losing contractor submitted a **bid** protest with DGS, arguing that the winning contractor's **bid** was defective in that it was unsigned. DGS denied that **bid** protest, and the losing contractor did not appeal from that decision. Subsequently, employees of a subcontractor used by the losing contractor brought a complaint in equity in this Court's original jurisdiction. DGS argued that the subcontractor employees lacked standing because the enactment of the Procurement Code granted a statutory remedy to disappointed bidders challenging an award of a government **contract**. We rejected that argument and held:

Here, there is no dispute that [the subcontractor employees] are taxpayers in the Commonwealth. Because they have filed a complaint in equity with this Court, they have standing to bring this action.

[Balsbaugh, 815 A.2d at 40](#). We explained that while the enactment of the Procurement Code provided standing to disappointed bidders, it did not take away the right of taxpayers to bring an action in equity before this Court.

[Balsbaugh](#) undoubtedly bears similarities with the case *sub judice*: the government party was a Commonwealth agency, rather than a political subdivision, so the **contract** was governed by the Procurement Code; the petitioners were employees of a subcontractor and thus employees

of an entity that did not actually **bid** on the solicitation; and the disappointed bidder, the general contractor, did file a **bid** protest, thus evincing the ability to challenge the government action.

There are crucial differences, however, between this matter and [Balsbaugh](#). In [Balsbaugh](#), DGS argued that the subcontractor employees lacked standing because they were “straw parties” for the general contractor, and because the exclusive remedy was for the general contractor to bring a challenge under the Procurement Code. This Court held that the subcontractor employees did have standing in light of *that* argument, but we did not employ an analysis of the factors set forth in [Biester](#). It appears we did not have cause to do so, and we can only guess why—perhaps [Biester](#) was not thoroughly developed in the parties' briefs. Taxpayer standing under [Biester](#) is briefed in the matter now before this Court, and we are bound as an intermediate court to follow our Supreme Court's precedent.

While the enactment of the Procurement Code did not take away the right of taxpayers to bring an action in equity in our original jurisdiction, taxpayers still must satisfy [Biester](#) to do so. For the reasons set forth above, Petitioners do not satisfy the Supreme Court's test for taxpayer standing.

B. Sovereign Immunity

Commonwealth Respondents also object to the petition for review on the ground that Petitioners' claims are barred by sovereign immunity under our Supreme Court's decision in [Scientific Games](#). Because we have decided that Petitioners lack standing, we need not address this issue.

III. CONCLUSION

For the reasons discussed above, Petitioners lack standing to bring their petition for review under traditional standing requirements or the taxpayer exception. We will, therefore, sustain Commonwealth Respondents' first

preliminary objection and dismiss Petitioners' petition for review.

Judge [Fizzano Cannon](#) did not participate in the decision of this case.

***1087 ORDER**

AND NOW, this 15th day of October, 2018, the preliminary objection by the Commonwealth of Pennsylvania, Department of Transportation (PennDOT), Secretary of Transportation Leslie M. Richards, and PennDOT Executive Director Kenneth McClain to the petition for review based on lack of standing is SUSTAINED, and the petition for review is DISMISSED with prejudice.

DISSENTING OPINION BY SENIOR JUDGE [JAMES GARDNER COLINS](#)

I respectfully dissent from the well-researched, well-written opinion of the majority. However, I cannot agree that we should disregard [Balsbaugh v. Department of General Services](#), 815 A.2d 36 (Pa. Cmwlth.), *aff'd per curiam*, 572 Pa. 393, 815 A.2d 628 (2003), as precedent and, therefore, would find that Petitioners have standing in equity to challenge the award of the **contract** in question.

Therefore, I would overrule the preliminary objections.

All Citations

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Footnotes

- [1](#) Petitioners suggest in their petition for review that the original PLA eliminated the candidacy of several union contractors that had already signed a CBA with United Steelworkers, because if those union contractors signed the original PLA, then they would be in violation of their CBA with United Steelworkers and subject to immediate sanctions. (Pet. at ¶ 5.) The petition for review implies that PennDOT revised the PLA to be more union-contractor-friendly.
- [2](#) [62 Pa. C.S. §§ 101-2311](#).
- [3](#) Act of June 1, 1945, P.L. 1242, *as amended*, [36 P.S. §§ 670-101](#) to -1102.
- [4](#) In their petition for review, Petitioners also seek attorney's fees, and Commonwealth Respondents object to this request on the basis that Petitioners did not allege facts that provide a basis for an award for attorney's fees. In their brief in the instant appeal, Petitioners agree with Commonwealth Respondents that their request should be stricken.
- [5](#) Docketed with this Court at 313 C.D. 2018 and 314 C.D. 2018, respectively.
- [6](#) It is unclear why this Court's opinion in *Brayman* determined that bidders do not have standing to challenge an award. Given the enactment of the Procurement Code in 1998, the company and its president in *Brayman* likely did have standing as prospective bidders under Section 1711.1 of the Procurement Code, [62 Pa. C.S. § 1711.1](#).
- [7](#) Pursuant to Commonwealth Court Internal Operating Procedure § 414(a), [210 Pa. Code § 69.414\(a\)](#), an unreported panel decision issued by this Court after January 15, 2008, may be cited "for its persuasive value, but not as binding precedent."
- [8](#) Petitioners also rely on [On-Point Technology Systems, Incorporated v. Department of Revenue](#), 753 A.2d 911 (Pa. Cmwlth. 2000), which is inapplicable for the same reason that *Brayman* and [Reich](#) are. There was no standing determination in [On-Point Technology](#). Instead, this Court determined that the period for challenging a **bid** award did not apply to taxpayers that brought a suit in equity to challenge a **bid** award; it applied only to disappointed bidders.