

IN THE SUPREME COURT OF OHIO

07-0114

CITY OF CINCINNATI : CASE NO. _____
Defendant-Appellant : APPEAL NO. C050749
APPEAL NO. C050779
v. : APPEAL NO. C050888
(Consolidated)
CLEVELAND CONSTRUCTION, INC. : COURT OF APPEALS
Plaintiff-Appellee : FIRST APPELLATE DISTRICT
CASE NO. A-0402638

MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT CITY OF CINCINNATI

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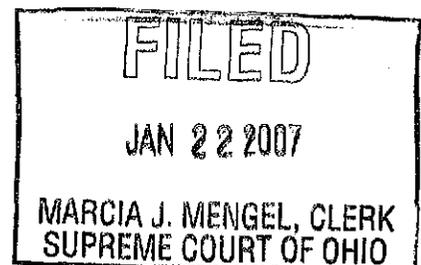


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I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

This “lowest and best” public contracts damages and injunction case involves a decision by the First District Court of Appeals in favor of Cleveland Construction, Inc. (“Cleveland Construction”) and against the City of Cincinnati (“the City”). The decision causes significant financial harm to the City and other public entities and their taxpayers. With its decision in this public contracts case, the First District erred in several major respects in both the damages and injunction parts of the case by: 1) ignoring uncontroverted evidence that the City retained general discretion to reject the bid and that Cleveland Construction failed to comply with the particular bid requirement for a specified participation by small businesses; 2) conflating the required elements of an unsuccessful bidder’s procedural due process claim, erring by concluding that Cleveland Construction had a legitimate claim of entitlement to the public contract, and obviating the need for evidence proving the due process claim; 3) disregarding this Court’s recent decision in *Cementech, Inc. v. City of Fairlawn*¹ by allowing a claim for monetary damages against the City by an unsuccessful bidder; 4) overbroadly construing the law of standing for seeking injunctions by exercising jurisdiction over equal protection claims by a party that only hypothetically might bid for a future City contract; and 5) erroneously concluding that the City’s outreach program was unconstitutionally race-based.

Needless to say, the City and other government entities are under significant financial and budgetary constraints. In recognition of these constraints, existing rules of law strike a fair balance between the needs of government entities contracting for necessary services and the interests of bidders for those contracts. The First District’s decision upsets that fair balance and

¹ 109 Ohio St.3d 475, 849 N.E. 2d 24 (2006).

unlawfully exposes the City and other entities to costly claims for damages, attorneys' fees, and injunctions.

By erroneously increasing the risk to government entities that they will be liable to unsuccessful bidders for alleged constitutional deprivations and forcing them to pay monetary damages, attorneys' fees, and costs to the unsuccessful bidders, the First District's decision presents questions of public and great general interest. Competitive public bidding protects taxpayers, prevents excessive costs and corrupt practices, and provides open and honest competition. The First District's decision does not protect taxpayers and does not prevent excessive costs for public contracts. Instead, the decision threatens taxpayers and exposes them to paying twice for the same public project and to paying attorneys' fees and costs. The decision oversimplifies an unsuccessful bidder's claims for relief and damages. By contrast, *Cementech* held that limiting an unsuccessful bidder to an injunctive relief remedy adequately protects the bidder's interests. The First District overruled the *Cementech* decision and made it easy for an unsuccessful bidder to hold the government liable and obtain monetary damages, attorneys' fees, and costs. The First District erred to the major detriment of blameless taxpayers.

Thus, the First District's decision favored an unsuccessful bidder for a "lowest and best" public contract on both the bidder's damages and prospective injunction claims. The First District overbroadly expanded due process monetary damage claims against public entities that retained lawful discretion in their "lowest and best" public procurement process. The First District also overbroadly expanded the standing of plaintiffs desiring to invoke the power of the judiciary to bring facial claims for injunctive relief against another branch of the government.

If the First District's decision remains intact, it will affect all contract claims against the City and other government entities and will adversely affect the public at large. The decision is flawed in several respects. The decision empowers an overbroad class of unsuccessful bidders to

sue for damages, attorneys' fees, and costs based on a plainly erroneous application of procedural due process principles. Further, the decision empowers an overbroad class of plaintiffs without any imminent or concrete injury in fact to sue to enjoin a public procurement program based on facial, abstract, and unapplied equal protection claims.

As a result, the sensitive and effective balance between the needs of the government and its citizenry, and the interest of bidders for public contracts, has been subverted by the First District. If the First District's decision is permitted to stand, the public will suffer a detriment to the benefit of private contractors. Accordingly, this Court should accept jurisdiction of this matter to rectify the application of due process, damages, standing, and equal protection principles to the public contract bidding process.

II. STATEMENT OF THE CASE AND FACTS

The City began planning for the expansion of the Cincinnati Convention Center in the early 1990s. The project had an estimated budget of \$145 million. Because of the significance of the project, Cincinnati City Council reserved a project-specific percentage of the Convention Center work for small businesses. That project-specific percentage was 30%. Each trade contract had its own percentage reserved for small businesses, but the overall total of the work reserved for small business was 30%. The City had a separate overall City-wide annual goal for small business participation in City projects and another separate subcontracting outreach program. The subcontracting outreach program included provisions for monitoring the use of minority and women owned firms. The uncontroverted testimony was that the subcontracting outreach program was not a factor considered in evaluating the Convention Center drywall

contract bids. Furthermore, the actual language of the Cincinnati Municipal Code established that consideration of the subcontracting outreach program was discretionary.²

The City awarded 35 contracts for the Convention Center project. For the drywall contract, the City required that bidders reserve 35% of the work for small businesses. The City advised the drywall contract bidders that their bids would be rejected if they failed to meet that mandatory 35% small business requirement. The City explained to the drywall contract bidders that the separate subcontracting outreach program was not a factor for determining the award of the drywall contract and, in fact, the subcontracting outreach program was not considered.

The City bid the drywall contract twice pursuant to the City's standard "lowest and best bid" requirements. For the first bid, none of the bidders satisfied the mandatory small business requirement. Therefore, the City conducted a second bid. Valley Interior Systems ("Valley") and Cleveland Construction participated in the second bid process. Valley submitted a bid with a 40% small business participation and Cleveland Construction submitted a bid with a 10% small business participation. Consistent with its previous instructions, the City determined that Cleveland Construction's bid was nonresponsive to the bid requirements. Consequently, on March 3, 2004, the drywall contract was awarded to Valley on a "lowest and best bid" basis even though Cleveland Construction had submitted a lower bid. In other words, Cleveland Construction lost the drywall bid because it failed to reserve at least 35% of the work for small businesses as the bid documents required.

The City had discretionary authority to reject any and all bids for City contracts. Cincinnati Municipal Code Section 321-43 provided: "The City purchasing agent, city manager or any other duly authorized contracting officer may reject any bid for any reason or all bids for

² C.M.C. 321-37(c). The City purchasing agent "may" consider information about the subcontracting outreach program as part of a "lowest and best bid" determination. "May" is defined to mean "permissive." C.M.C. 321-1-M.

no reason if acceptance of the lowest and best bid is not in the best interests of the city.” The drywall bid document itself provided: “The City reserves the right . . . to reject any or all bids.” It also provided: “The City reserves the right to reject any and all bids or parts of any bid . . . Any bid which . . . contains . . . irregularities of any kind, may be cause for rejection of bid.” Cincinnati Municipal Code Section 321-1-A2 emphasized: “The city may cancel an award at any time before the execution of the contract without any liability against the city.” The trial court concluded in its entry denying the parties’ cross motions for summary judgment: “The City has broad discretion to determine what constitutes the lowest and best bid.” The First District Court of Appeals even acknowledged that the Cincinnati Municipal Code “set forth a non-exhaustive list of factors that the city purchasing agent could consider in determining the lowest and best bid [emphasis added].”

On March 30, 2004, Cleveland Construction filed suit for injunctive relief and damages, claiming that the City violated the Cincinnati Municipal Code and Cleveland Construction’s rights to procedural due process of law and equal protection. Cleveland Construction filed a motion for a temporary restraining order that was denied by the trial court. Cleveland Construction waited one year to further pursue its interest in enjoining the drywall work being done at the Convention Center by Valley. The trial court denied that attempt to enjoin the project and Cleveland Construction did not appeal that denial.

The trial commenced in June 2005. The trial court directed a verdict in favor of the City on Cleveland Construction’s claims for damages. The trial court nevertheless found that Cleveland Construction had a constitutionally protected property interest in the Convention Center drywall contract and that the City had deprived it of that interest without providing procedural due process of law. The trial court further found that Cleveland Construction had standing to challenge the prospective application of the City’s subcontracting outreach program

and that the program was facially and impermissibly race-based and gender-based. The trial court awarded attorneys' fees and costs to Cleveland Construction in the amount of \$433,290.00.

In its opinion dated December 8, 2006, the First District reversed the trial court's directed verdict in favor of the City on Cleveland Construction's claims for damages. The First District acknowledged that damages available under federal law claims are "ordinarily determined according to principles derived from the common law of torts," but nevertheless limited this Court's holding in *Cementech* to claims for damages under state law. The First District remanded the case for trial on Cleveland Construction's federal claims for monetary damages.

The First District ignored that Cleveland Construction's bid was rejected solely because it failed to comply with the mandatory 35% small business requirement, ignored the uncontroverted testimony of City officials that the subcontracting outreach program played no role in the bid evaluation, ignored that C.M.C. 321-37 was, in any event, facially discretionary, ignored all the other procurement discretion reserved to City officials, and made a clearly erroneous finding and abused its discretion by concluding that Cleveland Construction had a legitimate claim of entitlement to the Convention Center drywall contract.

Even though the Convention Center drywall contract was the first City contract bid by Cleveland Construction, the First District also concluded, based on a generalized stipulation that Cleveland Construction might possibly bid for another City contract in the future, that Cleveland Construction had standing to seek an injunction of the City's subcontracting outreach program. The First District affirmed the district court's order enjoining prospective application of the City's subcontracting outreach program and affirmed the district court's award of attorneys' fees to Cleveland Construction based on the issuance of that injunction.

It is uncontroverted that: 1) a Convention Center drywall bid had to comply with the project-specific 35% small business quota and Cleveland Construction did not even come close

to satisfying that quota; 2) the City retained “lowest and best bid” discretion to reject drywall bids for other reasons; 3) there was no evidence submitted to the trial court that the City procedures available to unsuccessful bidders interested in challenging a bid selection were inadequate; 4) Cleveland Construction abandoned its attempt to enjoin the Convention Center drywall project; 5) Cleveland Construction did not prove that it suffered an imminent and concrete injury in fact because of the City’s subcontracting outreach program; and 6) all bidders have an equal opportunity to satisfy the subcontracting outreach program.

This case may appear complicated because Cleveland Construction filed claims both for damages as an unsuccessful bidder for the Convention Center drywall contract and for an injunction as a hypothetical prospective bidder for an unspecified and uncertain future City contract. Properly separated, the facts and law relevant to the damages claim and the facts and law relevant to the injunction claim warrant the conclusion that Cleveland Construction did not have any claim upon which relief could be granted.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1

Under Ohio law, a disappointed bidder for a City of Cincinnati public contract does not have a constitutionally protected property interest in that contract.

The First District asserted that, as a general matter, a person only has a constitutionally protected property interest in a public contract if the person has a legitimate claim of entitlement to the contract.³ A person’s unilateral expectation of a benefit is insufficient to constitute a property interest.⁴ The First District even stated that generally “municipalities are vested with

³ *Cleveland Constr. v. Ohio Dept. of Admin. Servs., GSA*, 121 Ohio App.3d 372, 394, 700 N.E.2d 54 (Tenth District 1997).

⁴ *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).

broad discretion in matters related to public contracts” and that for “lowest-and-best-bidder determinations, Ohio courts are reluctant to substitute their judgment for that of city officials.”

Nevertheless, the First District ignored the prerequisite small business quota for the Convention Center drywall bid, also ignored all the discretion reserved to City officials under the Cincinnati Municipal Code when analyzing “lowest and best” bids, and further ascribed the subcontracting outreach program to the Convention Center drywall bid even though the testimony was uncontroverted that the program was inapplicable to the bid. Based on those errors, the First District erroneously concluded that the City did not have discretion when awarding the Convention Center drywall bid and that Cleveland Construction had a legitimate claim of entitlement to the contract.

The Statement of the Case and Facts describes the specific and generic discretion reserved to City officials when reviewing the “lowest and best” drywall bids. Even though Cleveland Construction did not come close to satisfying the 35% quota for small businesses, and even though the Cincinnati Municipal Code and Ohio law reserve discretion to City officials to otherwise reject bids, the First District focused exclusively on its factually erroneous conclusion that Cleveland Construction was rejected because it compared unfavorably to Valley under the inapplicable subcontracting outreach program. The testimony was uncontroverted that the subcontracting outreach program played no part in the Convention Center drywall bid review process. Rather, Cleveland Construction’s bid was rejected because it failed to comply with the 35% small business quota. Even assuming *arguendo* it was true that City officials considered the subcontracting outreach program, that consideration does not nullify all the other discretion available to City officials. The Cincinnati Municipal Code did not mandate that Cleveland Construction be awarded the Convention Center drywall bid. Therefore, Cleveland Construction did not have a legitimate claim of entitlement to the contract, it did not have a constitutionally

protected property interest, and the City of Cincinnati could not have deprived Cleveland Construction of procedural due process.

In support of its erroneous conclusion, the First District cited inapposite cases that, in fact, held that the claimants in those cases did not have a protected property interest.⁵ The First District admitted that the Cincinnati Municipal Code “set forth a non-exhaustive list of factors that the city purchasing agent could consider in determining the lowest and best bid” but then ignored the holding of the United States Court of Appeals for the Sixth Circuit that when “the statutory requirements are not exhaustive . . . by their nature [they] create discretionary authority in the reviewing boards.”⁶

The Sixth Circuit was clear that a statutory violation of procurement law “does not give rise to a property interest that can be vindicated through a due process claim under 42 U.S.C. 1983.”⁷ The Sixth Circuit emphasized that even if there was interference with a property interest, Ohio law afforded a remedy adequate to comport with due process.⁸

By erroneously and overbroadly describing when a bidder for a “lowest and best” public contract has a legitimate claim of entitlement to that contract, the First District has subjected the City and other government entities to unjustified lawsuits. The established law in this area has been refined to protect both taxpayers and bidders. The First District’s overbroad inclusion of Cleveland Construction within the class of disappointed bidders having a protected property interest jeopardizes the balance in the law. Given the significant adverse effect of its decision on the financial condition of government entities, it is of public and great general interest that this Court accept jurisdiction of this case.

⁵ See, e.g., *Enertech Elec. v. Mahoning County Commrs.*, 85 F.3d 257 (1996) (citing *United of Omaha Insurance Co. v. Solomon, et al.*, 960 F.2d 31 (6th Cir. 1992) and *Peterson Enterprises, Inc. v. ODMRDD*, 890 F.2d 416 (6th Cir. 1989)). All three cases held that the complaining party did not have a constitutionally protected property interest.

⁶ *Peterson Enterprises, Inc. v. ODMRDD*, 890 F.2d 416 (6th Cir. 1989)

⁷ *TriHealth, Inc. v. Bd. of Commissioners*, 430 F.3d 783, 793 (6th Cir. 2005).

⁸ *Id.*

Proposition of Law No. 2

To prove a deprivation of its right to procedural due process, a disappointed bidder with a constitutionally protected property interest in a public contract must establish that the government entity did not provide sufficient notice and opportunity to be heard.

Procedural due process law provides: “If the existence of a protected property interest is established, then we must determine whether the procedures accompanying . . . [a government entity’s] interference are constitutionally sufficient.”⁹ The First District, however, did not consider in any way whatsoever the City’s procedures available to a disappointed bidder. Assuming for the sake of argument that Cleveland Construction had a constitutionally protected property interest in the Convention Center drywall bid, it still had to adduce evidence of the allegedly deficient City procedures. It did not. The First District erroneously conflated the determination of protected property interest with the determination of required process. These separate determinations were merged into one. Despite the lack of proof that the City’s procedures were constitutionally inadequate, the First District erroneously held the City liable for depriving Cleveland Construction of procedural due process. The First District’s oversimplification of the elements of an unsuccessful bidder’s claim for damages for deprivation of procedural due process opens the door to unjustified lawsuits against government entities. Given the significance of this risk, it is of public and great general interest for this Court to accept jurisdiction of this case.

Proposition of Law No. 3

A disappointed bidder for a public contract in Ohio cannot recover lost profit damages in a 42 U.S.C. 1983 action alleging a deprivation of procedural due process.

The City agrees with, and incorporates by reference, the Amicus Curiae Brief of the Ohio Municipal League. The First District erred by allowing Cleveland Construction to pursue a

⁹ *Id.*, p. 792.

damages claim for lost profits against the City. The First District unlawfully ignored this Court's holding in *Cementech* that "when a municipality violates competitive bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages."¹⁰ With an eye on balancing competing interests, this Court held:

It is clear that in the context of competitive bidding for public contracts, injunctive relief provides a remedy that prevents excessive costs and corrupt practices, as well as protects the integrity of the bidding process, the public, and the bidders. Moreover, the injunctive process and the resulting delays serve as a sufficient deterrent to a municipality's violation of competitive-bidding laws.¹¹

The First District's decision unlawfully exposes taxpayers to the devastating risk of paying twice for the same project and flies in the face of the *Cementech* case.

Even though the First District conceded that "a person's compensatory damages under Section 1983 is ordinarily determined according to principles derived from the common law of torts," and even though this Court determined in *Cementech* that the common law of Ohio did not justify allowing a disappointed bidder for a public contract to sue for damages, and even though Cleveland Construction abandoned its claim to enjoin the drywall work at the Convention Center, the First District still remanded the case to the trial court to allow Cleveland Construction to pursue its claim for lost profits. This subversion of the *Cementech* holding comes at great cost to the City of Cincinnati and other government entities.

As expressed by the Ohio Municipal League, and previously in this Memorandum, a disappointed bidder for a public contract does not have a constitutionally protected property interest in that contract and cannot recover for an alleged deprivation of procedural due process. There is now a conflict between the Fourth District and the Tenth District (holding that a

¹⁰ 109 Ohio St.3d 475, 478, 849 N.E.2d 24 (2006).

¹¹ *Id.*, p. 477.

disappointed bidder cannot assert a claim)¹² and the First District (holding that the bidder can assert a claim). The pursuit of damage claims by unsuccessful bidders for public contracts will be financially ruinous to government entities and will injure innocent taxpayers. This issue is of public and great general interest and the Court should accept jurisdiction of this case to rectify the First District's error and restore the balance between the needs of the government and its citizenry and the interests of bidders for public contracts.

Proposition of Law No. 4

A plaintiff does not have standing to seek an injunction against the operation of a municipal corporation unless the plaintiff pleads and proves a concrete and imminent injury in fact.

Based solely on a general stipulation that Cleveland Construction intended and was able to bid on future unspecified City construction projects, the First District concluded that Cleveland Construction had standing to seek injunctive relief against prospective application of the City's subcontracting outreach program. The First District merged the standing analysis with the merits analysis by adding to its standing analysis that the City's allegedly "discriminatory policies would have affected Cleveland's ability to compete fairly." As described in the next proposition of law, the City disputes that the subcontracting outreach program unlawfully affected any bidder's ability to compete fairly. Rather, all bidders were similarly situated in terms of their *ex ante* capacity to comply with the subcontractor outreach program.

¹² *Miami Valley Contractors v. Village of Oak Hill*, 108 Ohio App.3d 745, 752, 671 N.E.2d 646, 650 (Fourth District 1996); *Cleveland Construction, Inc. v. State of Ohio, DAS*, 121 Ohio App.3d 372, 396, 700 N.E.2d 54 (Tenth District 1997).

The general stipulation was insufficient to establish Cleveland Construction's standing to sue the City for an injunction. The United States Supreme Court described the elements required, in this context, to have standing to seek an injunction against future application of the City's procurement procedures. Cleveland Construction must have proven that it is very likely to bid in the relatively near future on another City contract and that the City will discriminate against it.¹³ The general stipulation that Cleveland Construction intended and was able to submit future bids does not establish that it was very likely to bid or that the bid would be in the relatively near future. Other than the Convention Center drywall contract, Cleveland Construction had not previously bid for any City contract. By contrast, the plaintiff in *Adarand* had bid on every guardrail project in Colorado, Colorado let an average of 1½ contracts per year of the type that the plaintiff submitted bids for, and the plaintiff had to compete for contracts against firms guaranteed a financial incentive for hiring disadvantaged subcontractors defined with race-based presumptions.

Cleveland Construction's mere intention and ability to bid at some unspecified future time, in the event there is ever another City contract that it desires, is too vague and hypothetical to confer standing on Cleveland Construction to challenge the City's procurement procedures. Furthermore, the City's "lowest and best" procurement system authorizes, but does not require, that the City purchasing agent consider information concerning the subcontracting outreach program. Cleveland Construction did not plead or prove a concrete and imminent injury in fact. The First District erred by overbroadening the class of possible plaintiffs who have standing to seek injunctive relief against the procurement policies of public entities.

¹³ *Adarand Construction, Inc. v. Peña, et al.*, 515 U.S. 200, 210-13 (1995).

Proposition of Law No. 5

A subcontracting outreach program is not impermissibly race-based or gender-based when all bidders have an equal opportunity to comply with the subcontracting outreach program and the program does not create a preference.

Bidder A and Bidder B had an equal opportunity to comply with the City's subcontracting outreach program. Nevertheless, the First District held that the subcontracting outreach program was facially unconstitutional by reference to a case decided by the United States Court of Appeals for the Sixth Circuit. The record in that case indicated that the government required an outcome resulting in the hiring of a minority subcontractor.¹⁴ That case indicated that strict judicial scrutiny applies only where "outreach" "'indisputably pressures' contractors to hire minority subcontractors."¹⁵ The Sixth Circuit discussed "onerous burden[s],"¹⁶ and elements like "[d]ocumentation requirements and the geographic scope of solicitation,"¹⁷ that had to be considered to determine whether there was indisputable pressure. The Sixth Circuit held that "[o]utreach efforts may or may not require strict scrutiny."¹⁸ The City's subcontracting outreach program did not require an outcome resulting in the hiring of minority subcontractors. It did not impose "indisputable pressure." Moreover, under the Cincinnati Municipal Code,¹⁹ application of the program to a particular "lowest and best bid" procurement was facially discretionary.

In *Safeco*, the Sixth Circuit referenced *Lutheran Church-Missouri Synod v. FCC*,²⁰ another case cited by the First District in its opinion. However, in that case the United States Court of Appeals for the District of Columbia Circuit emphasized that the challenged regulations

¹⁴ *Safeco Ins. Co. of America v. White House*, 191 F.3d 675, 691 (6th Cir 1999).

¹⁵ *Id.*, p. 692.

¹⁶ *Id.*, p. 691

¹⁷ *Id.*

¹⁸ *Id.*, p. 692.

¹⁹ C.M.C. 321-37(c). The City purchasing agent "may" consider information about the subcontracting outreach program as part of a "lowest and best bid" determination. "May" is defined to mean "permissive." C.M.C. 321-1-M.

²⁰ 154 F.3d 487 (C.A.D.C. 1998).

“do effectively oblige the Church to implement racial preferences in its hiring decisions.”²¹ The D.C. Circuit relied upon the Supreme Court’s decision in *Adarand*, a case in which the challenged regulations provided a financial incentive to bidding contractors to grant a preference to minority subcontractors. The City’s program, by contrast, did not grant a financial incentive to bidding contractors.

Without careful analysis to determine whether the City’s outreach program indisputably resulted in an outcome requiring the hiring of minority or women subcontractors, the First District jumped to the conclusion that the program was subject to strict judicial scrutiny. The First District’s overbroad invalidation of legitimate outreach efforts subjects public entities to unwarranted equal protection lawsuits and, in the case at bar, erroneously imposed liability on the City, enjoined its program, and affirmed an award of attorneys’ fees against the City for that reason.

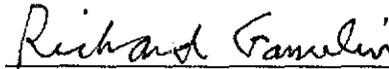
IV. CONCLUSION

For the reasons discussed above, this case involves matters of public or great general interest. Both the damages claims issues and the injunction claims issues were wrongly decided by the First District. The City requests that this Court accept jurisdiction in this case so these important issues presented will be reviewed on the merits.

²¹ *Id.*, p. 491.

Respectfully submitted,

JULIA L. MCNEIL (0043535)
City Solicitor

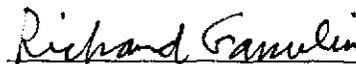


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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum In Support of Jurisdiction of Defendant-Appellant City of Cincinnati has been sent to David L. Barth, Esq. and Kelly A. Armstrong, Esq., Cors & Bassett, LLC, 537 East Pete Rose Way, Suite 400, Cincinnati, Ohio 45202 and to W. Kelly Lundrigan, Esq. and Gary E. Powell, Esq., Manley Burke, 225 West Court Street, Cincinnati, Ohio 45202 this 19th day of January, 2007 by ordinary U.S. Mail.



RICHARD GANULIN
Assistant City Solicitor

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

| | | |
|---|---|----------------------|
| CLEVELAND CONSTRUCTION, INC., | : | APPEAL NOS. C-050749 |
| | : | C-050779 |
| Plaintiff-Appellant/ Cross-Appellee, | : | C-050888 |
| | : | |
| vs. | : | TRIAL NO. A-0402638 |
| | : | |
| CITY OF CINCINNATI, | : | <i>OPINION.</i> |
| | : | |
| Defendant-Appellee/ Cross-Appellant, | : | |
| | : | |
| and | : | |
| | : | |
| TIMOTHY RIORDAN, | : | |
| | : | |
| BERNADINE FRANKLIN, | : | |
| | : | |
| NATE MULLANEY, | : | |
| | : | |
| ALICIA TOWNSEND, | : | |
| | : | |
| KATHI RANFORD, | : | |
| | : | |
| and | : | |
| | : | |
| VALLEY INTERIOR SYSTEMS, INC., | : | |
| | : | |
| Defendants-Appellees. | : | |

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: December 8, 2006

OHIO FIRST DISTRICT COURT OF APPEALS

W. Kelly Lundrigan, Gary E. Powell, Robert E. Manley, and Manley Burke LPA, for Plaintiff-Appellant/Cross-Appellee,

Julia L. McNeil, City Solicitor, and Julie F. Bissinger, Assistant City Solicitor, for Defendant-Appellee/Cross-Appellant City of Cincinnati and Defendants-Appellees Timothy Riordan, Bernardine Franklin, Nate Mullaney, Alicia Townsend, and Kathi Ranford,

David L. Barth, Kelly A. Armstrong, and Cors & Bassett, LLC, for Defendant-Appellee Valley Interior Systems, Inc.

SYLVIA SIEVE HENDON, Judge.

{¶1} This case arose from the city of Cincinnati's rejection of a bid by Cleveland Construction Co. for drywall work on the expansion and renovation of the Cincinnati Convention Center. At the heart of the dispute was the city's implementation of its small business enterprise (SBE) program.

{¶2} Cincinnati Municipal Code (CMC) 321-37 required the city to award a construction contract to the lowest and best bidder. The ordinance set forth a non-exhaustive list of factors that the city purchasing agent could consider in determining the lowest and best bid. One of the factors that could be considered was a contractor's compliance with the rules and regulations of the city's SBE Subcontracting Outreach Program.¹

{¶3} Where a lowest-and-best determination was based primarily on the contractor's subcontracting-outreach compliance, the ordinance had a built-in cap. The contract award could be made, "subject to the following limitation: the bid could not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars (\$50,000.00), whichever is lower."² The cap was apparently intended to strike a balance between the city's efforts to include small businesses in public contracts and the city's interest in protecting its taxpayers from excessive costs.

{¶4} On December 23, 2003, the city issued an invitation to bid on the Cincinnati Convention Center Expansion and Renovation Project, entitled "Bid Package C / TC-09A Drywall." The city required bidders to show that they had

¹ CMC 321-37(c)(4).

² CMC 321-37(c).

made a good-faith effort to obtain the participation of SBEs on the project. For the drywall-contract bids, the city established a mandatory SBE-participation goal of 35%. Bidders were notified that their failure to meet the SBE-participation goal could cause a bid to be rejected as nonresponsive. The city received bids until February 5, 2004.

{¶5} On February 11, 2004, Kathi Ranford, a contract-compliance officer, reported to Bernadine Franklin, the city's purchasing agent, that none of the three bidders for the project's drywall contract had complied with the 35% SBE-participation requirement. According to Ranford, Cleveland had submitted a bid with 3% SBE participation, Valley Interior Systems had submitted a bid with 34% SBE participation, and Kite, Inc., had submitted a bid with no SBE participation. In that round of bidding, Cleveland's bid had been the lowest-dollar bid.

{¶6} Because none of the bidders had achieved the full 35% SBE-participation goal, the city conducted an emergency rebidding for the drywall contract. On February 24, 2004, Ranford notified Franklin that Cleveland had submitted a re-bid for \$8,889,000, with 10% SBE participation, and that Valley had submitted a re-bid for \$10,135,022, with 40% SBE participation.

{¶7} The city's office of contract compliance deemed Cleveland's bid to be unacceptable due to its failure to achieve 35% SBE participation. In all other respects, however, Cleveland's bid had been found acceptable according to the city's purchasing division.

{¶8} Following a review of the acceptability of the bids, Franklin issued a recommendation to Timothy Riordan, an assistant city manager, that the drywall contract be awarded to Valley. Franklin's recommendation stated, "Pursuant to

Section 321-37 of the Municipal Code, the bid submitted by [Valley] has been determined to be the lowest and best bid.”

{¶9} Valley’s new bid exceeded Cleveland’s new bid by \$1,246,022, well over the \$50,000 or 10% cap in CMC 321-37. Nonetheless, on March 3, 2004, the city awarded the drywall contract to Valley and instructed Valley to commence work under the terms of the contract.

Cleveland Files Suit

{¶10} Three weeks later, on March 30, 2004, Cleveland brought an action for injunctive relief and damages against the city, several city employees, and Valley. Cleveland asked the court to restrain the city and Valley from proceeding on the drywall contract and to order the city to award the contract to Cleveland.

{¶11} In addition, Cleveland sought declarations by the court that (1) the city’s award of the contract violated CMC 321-37; (2) the city’s drywall contract with Valley was void; (3) the city’s SBE program was unconstitutional and in violation of Section 1983, Title 42, U.S.Code; (4) the city had deprived Cleveland of a property interest; (5) Cleveland was the lowest and best bidder; and (6) the city’s delegation of discretion to its purchasing agent under the SBE subcontracting-outreach program was void.

{¶12} Finally, Cleveland sought compensatory and punitive damages, as well as attorney fees and costs.

{¶13} The trial court denied Cleveland’s motion for a temporary restraining order. Later, upon motion, the trial court dismissed the city employees from the action.

{¶14} In June 2005, the case proceeded to a jury trial. At the close of Cleveland's case, the trial court directed a verdict in favor of the city and Valley on Cleveland's claims for lost profits. Cleveland's remaining claims for injunctive and declaratory relief and attorney fees were tried to the bench, by agreement of the parties.

{¶15} At the conclusion of the trial, the court found that the city had violated CMC 321-37 by awarding the drywall contract to Valley rather than to Cleveland. As a result, the court held, the city had abused its discretion in a manner that had denied Cleveland the contract in violation of its federally protected due-process rights and in violation of Section 1983.

{¶16} The court held that the city's SBE program rules and guidelines created race- and gender-based classifications that rendered the program facially unconstitutional. The court further found that the city had pressured and encouraged bidders, including Cleveland, to draw upon race- and gender-based classifications, in violation of Cleveland's rights under Section 1983. But the court held that Cleveland had failed to establish that the denial of the drywall contract was the result of the race- and gender-based classifications; rather, it held that the denial had been the result of the city's preference for small businesses.

{¶17} The court rendered a declaratory judgment that precludes the city from awarding future contracts to a bidder that exceeds the cap set forth in CMC 321-37 if the bid selection is based primarily on the bidders' compliance with the SBE subcontracting-outreach program.

{¶18} The court permanently enjoined the city from maintaining or applying race- or gender-based classifications in its SBE rules and guidelines, absent a formal

determination that such race-based provisions were narrowly tailored and necessary to fulfill compelling governmental interests, or that such gender-based provisions were substantially related to genuine and important governmental objectives.

{¶19} Finally, the court entered judgment in favor of Cleveland as the prevailing party, and against the city, for Cleveland's reasonable attorney fees and costs pursuant to Section 1988, Title 42, U.S.Code. The court also entered judgment in favor of Valley.

{¶20} On appeal, Cleveland argues that the trial court erred by (1) directing a verdict in favor of the city on Cleveland's damage claims; (2) refusing to declare Valley's drywall contract to be void or to prohibit performance under the contract; (3) ruling that Cleveland could not elicit testimony from Valley's subcontractors with respect to post-contract events; (4) denying Cleveland's motion for a new trial; (5) granting the motions to dismiss individual city employees; and (6) making findings concerning causation of damages.

{¶21} In its cross-appeal, the city argues that the trial court (1) erred by applying CMC 321-37; (2) lacked jurisdiction over Cleveland's claims for injunctive relief; (3) erred by concluding that the city had deprived Cleveland of its right to procedural due process; (4) erred by ruling that portions of the city's SBE program created constitutionally impermissible race- and gender-based classifications; and (5) erred by awarding attorney fees to Cleveland. We first address the city's assignments of error.

The Application of CMC 321-37

{¶22} In its first assignment of error, the city argues that the trial court erred by applying CMC 321-37 in its analysis of Cleveland's claims. The city contends that Franklin had not applied the provisions of CMC 321-37 in her review of bids for the project because the ordinance had not been in place at the time the project's "procurement process" was planned.

{¶23} The record reflects that CMC 321-37 had been adopted in specific contemplation of the convention center project. By its terms, the ordinance had been enacted as an emergency measure due to the city's "immediate need to proceed with the bidding of the Convention Center and major development projects." The ordinance specifically applied to the award of construction contracts that exceeded \$100,000. And the ordinance had gone into effect before the project's bid solicitation, and well before the award of the drywall contract. So Franklin's selection of the lowest and best bidder was subject to CMC 321-37.

{¶24} The city argues that "[e]ven though Valley's bid was \$1.2 million more than Cleveland's, the project was well within the budget." This argument fails to take into account that "among the purposes of competitive bidding legislation are the protection of the taxpayer [and the] prevention of excessive costs."³ The fact that the project was under budget was of questionable relevance and was certainly not dispositive of the legality of the bid-selection process.

³ *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt Dist.*, 73 Ohio St.3d 590, 602, 1995-Ohio-301, 653 N.E.2d 646.

{¶25} The city argues that even if Franklin had applied CMC 321-37 to the drywall-contract bids, the ordinance’s cap would not have come into play because Cleveland’s bid was not an “otherwise qualified” bid. But the city acknowledges in its brief that “[t]he trial evidence established that Cleveland lost because its drywall bid failed to reserve at least 35% of the work for small business enterprises as the bid documents required.” In other words, but for its SBE noncompliance, Cleveland’s bid was qualified. Where the sole reason that Cleveland’s bid was rejected was its noncompliance with the SBE subcontracting-outreach program, Cleveland was an “otherwise qualified” bidder. Under these circumstances, Valley’s SBE-compliant bid could not have exceeded Cleveland’s bid by the \$50,000 or 10% cap.

{¶26} Accordingly, we hold that the trial court properly considered and applied CMC 321-37. We overrule the city’s first assignment of error.

Cleveland’s Standing

{¶27} In its second assignment of error, the city argues that the trial court lacked jurisdiction over Cleveland’s claims for injunctive relief. The city contends that the possibility that Cleveland might bid on a city contract in the future did not create a risk that it would again be subject to a deprivation of rights.

{¶28} In Ohio, it is well established that standing to challenge the constitutionality of a legislative enactment exists where a litigant “has suffered or is threatened with direct and concrete injury in a manner or degree different from that

suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury.”⁴

{¶29} In the context of a constitutional challenge to a set-aside program, the “injury in fact” is the inability to compete on an equal footing in the bidding process, and not necessarily the loss of a contract. So to establish standing, a party challenging a set-aside program need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.⁵

{¶30} At trial, the city specifically stipulated that Cleveland intended and was able to bid on future city construction projects. And the city’s discriminatory policies would have affected Cleveland’s ability to compete fairly. So Cleveland had sufficient standing to seek injunctive relief against the city. We overrule the city’s second assignment of error.

Deprivation of a Property Interest

{¶31} In its third assignment of error, the city argues that the trial court erred by concluding that the city had deprived Cleveland of a right to procedural due process.

{¶32} One of the proscriptions of the Fourteenth Amendment is the deprivation of a person’s property interests without due process of law.⁶ In a due-

⁴ *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469-470, 1999-Ohio-123, 715 N.E.2d 1062.

⁵ *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville* (1993), 508 U.S. 656, 666, 113 S.Ct. 2297.

⁶ *Bd. of Regents v. Roth* (1972), 408 U.S. 564, 569-570, 92 S.Ct. 2701.

process challenge based upon such a deprivation, we must first determine whether a protected property interest was at stake.

{¶33} Property interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”⁷ A person has a property interest in a benefit, such as a public contract, if the person has a legitimate claim of entitlement to it.⁸ A person’s unilateral expectation of a benefit is not enough.⁹

{¶34} The Sixth Circuit Court of Appeals has held that a disappointed bidder may establish a legitimate claim of entitlement to a public contract in one of two ways. A bidder can either show that it actually was awarded the contract and then deprived of it, or that the government abused its limited discretion in awarding the contract to another bidder.¹⁰

{¶35} Generally, municipalities are vested with broad discretion in matters related to public contracts. But that discretion is not limitless.¹¹ For example, a municipality “may by its actions commit itself to follow rules it has itself established.”¹²

{¶36} In the context of lowest-and-best-bidder determinations, Ohio courts are reluctant to substitute their judgment for that of city officials.¹³ But where city

⁷ Id. at 577, 92 S.Ct. 2701.

⁸ *Cleveland Constr. v. Ohio Dept. of Admin. Servs.*, GSA (1997), 121 Ohio App.3d 372, 394, 700 N.E.2d 54.

⁹ *Roth*, supra, at 577, 92 S.Ct. 2701.

¹⁰ *United of Omaha Life Ins. Co. v. Solomon* (C.A.6, 1992), 960 F.2d 31, 34; *Enertech Elec. v. Mahoning County Commrs.* (C.A.6, 1996), 85 F.3d 257, 260.

¹¹ *Danis*, supra, at 604, 1995-Ohio-301, 653 N.E.2d 646.

¹² Id. at 603, 1995-Ohio-301, 653 N.E.2d 646.

¹³ See *Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 552 N.E.2d 202.

officials abuse the discretion vested in them, courts will intervene.¹⁴ An abuse of discretion “connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary, or unconscionable attitude. * * * ‘Arbitrary’ means ‘without adequate determining principle; * * * *not governed by any fixed rules or standard.*’ * * * ‘Unreasonable’ means ‘irrational.’ ”¹⁵

{¶37} In this case, the city had established a “fixed rule” with respect to the award of a contract based primarily upon the bidder’s subcontracting-outreach program compliance. In that instance, CMC 321-37 required the city to apply the ordinance’s cap.

{¶38} But, here, the evidence demonstrated that the city had arbitrarily ignored the cap in awarding the contract to Valley. Thus, we agree with the trial court that the city’s failure to follow the directive of its own ordinance constituted an abuse of discretion that resulted in a deprivation of Cleveland’s property interest in the contract award. We overrule the city’s third assignment of error.

SBE Program Provisions Were Facially Unconstitutional

{¶39} In its fourth assignment of error, the city argues that the trial court erred by ruling that elements of the rules and guidelines in the city’s SBE program created constitutionally impermissible race- and gender-based classifications. The city contends that the program was a lawful “outreach” program that encouraged

¹⁴ Id. at 21-22, 552 N.E.2d 202.

¹⁵ *Dayton, ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, 423 N.E.2d 1095 (emphasis added).

contractors to use “good faith efforts” to promote opportunities for minorities and females.

{¶40} The Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.¹⁶ Racial classifications must serve a compelling government interest and must be narrowly tailored to further that interest.¹⁷ Gender-based classifications, by contrast, require an “exceedingly persuasive” justification.¹⁸

{¶41} At trial, the city did not put forth any argument or evidence to demonstrate that its SBE program could withstand such heightened scrutiny. Instead, the city relied on its assertion that increased scrutiny should not apply in the first instance because its SBE program created neither race- nor gender-based classifications.

{¶42} On appeal, the city acknowledges that it had predetermined estimates of the availability of minorities and females for each trade represented in the convention center project. But the city argues that its availability estimates were for informational purposes only, and that bidders were required to do nothing in response.

{¶43} Racial or gender classifications may arise from a regulation’s strict requirements, such as mandated quotas or set-asides. But rigid mandates are not a prerequisite to a finding of a racial classification.¹⁹ Where regulations pressure or

¹⁶ *Richmond v. J.A. Croson Co.* (1989), 488 U.S. 469, 109 S.Ct. 706.

¹⁷ *Adarand Constructors v. Peña* (1995), 515 U.S. 200, 235, 115 S.Ct. 2097.

¹⁸ *United States v. Virginia* (1996), 518 U.S. 515, 533, 116 S.Ct. 2264.

¹⁹ *Bras v. Calif. Pub. Utils. Comm.* (C.A.9, 1995), 59 F.3d 869.

encourage contractors to hire minority subcontractors, courts must apply strict scrutiny.²⁰

{¶44} For example, in *Adarand Constructors v. Pena*,²¹ the United States Supreme Court considered federal regulations that provided financial incentives to bidding contractors to hire minority subcontractors. The regulations did not require contractors to use minority subcontractors. But contractors would receive additional compensation if they did so. The court held that, to the extent that the regulations provided incentives to contractors to use race-based classifications, the regulations were subject to strict scrutiny.²²

{¶45} In determining whether strict scrutiny must be applied to the city's SBE program, we must look behind its ostensibly neutral labels such as "outreach program" and "participation goals." The program's rules and guidelines "are not immunized from scrutiny because they purport to establish 'goals' rather than 'quotas.' [Courts] look to the economic realities of the program rather than the label attached to it."²³

{¶46} Under the city's SBE rules and guidelines, all bidders were required to use "good faith efforts" to promote opportunities for minority- and women-owned businesses (MBEs and WBEs) to the extent of their availability as determined by the city. With respect to the drywall portion of the project, the city estimated that the availability of MBEs was 13.09%, and that it was 1.05% for WBEs.

²⁰ See *Lutheran Church-Missouri Synod v. FCC* (C.A.D.C., 1998), 154 F.3d 487; *Monterey Mechanical Co. v. Wilson* (C.A.9, 1997), 125 F.3d 702; *Safeco Ins. Co. of America v. White House* (C.A.6, 1999), 191 F.3d 675.

²¹ (1995), 515 U.S. 200, 115 S.Ct. 2097.

²² *Id.* at 224, 115 S.Ct. 2097.

²³ *Bras*, *supra*, at 874.

{¶47} Bidders were required to provide detailed descriptions of the techniques used to obtain participation of MBEs and WBEs. The city would then evaluate each bidder's documented efforts to achieve participation of MBEs and WBEs. If that review determined that a bid's utilization percentage for MBEs and WBEs was lower than the estimated availability for those groups, the bid would be flagged for a discrimination investigation.

{¶48} Where the city's SBE program required documentation of a bidder's specific efforts to achieve the participation of minority subcontractors to the extent of their availability as predetermined by the city, the program undeniably pressured bidders to implement racial preferences.²⁴ Therefore, the program's rules must be subject to strict scrutiny. To the extent that the rules pressured bidders to hire women-owned subcontractors, the city was required to demonstrate an "exceedingly persuasive" justification for the differential treatment.

{¶49} Given that the city effectively conceded that it could not justify race- or gender-based classifications under either standard of heightened scrutiny, the trial court properly determined that those elements of the program that caused bidders to use racial- or gender-based preferences were unconstitutionally impermissible.

Award of Attorney Fees

{¶50} In its fifth assignment of error, the city argues that the trial court erred by awarding attorney fees to Cleveland. The city contends that Cleveland was not entitled to the award because it was not a prevailing party.

²⁴ *Safeco Inc.*, supra, at 692, citing *Lutheran*, supra, at 491.

{¶51} A “prevailing party” is one who “succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.”²⁵ To be a “prevailing party,” there must have been “a court-ordered ‘change [in] the legal relationship’ ” between the parties.²⁶ In this regard, a declaratory judgment may serve as the basis for an award of attorney fees.²⁷

{¶52} But the entry of a declaratory judgment in a party’s favor does not automatically render that party a prevailing party under Section 1988.²⁸ “In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement – what makes it a proper judicial resolution of a ‘case or controversy’ rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*” (Emphasis in original.)²⁹

{¶53} We hold that the trial court did not abuse its discretion in ordering attorney fees. Cleveland successfully challenged the unconstitutional race- and gender-based provisions of the city’s SBE program. As a result, the city will no longer be permitted to apply those provisions against Cleveland or other bidders on

²⁵ *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433, 103 S.Ct. 1933.

²⁶ *Buckhannon Bd. v. W. Va. Dept. of Health & Human Res.* (2001), 532 U.S. 598, 604, 121 S.Ct. 1835.

²⁷ *Hewitt v. Helms* (1987), 482 U.S. 755, 761, 107 S.Ct. 2672.

²⁸ *Rhodes v. Stewart* (1988), 488 U.S. 1, 109 S.Ct. 202.

²⁹ *Hewitt*, *supra*, at 761, 107 S.Ct. 2672.

city contracts. In that regard, Cleveland was a prevailing party because the judgment had a distinct effect on the city's behavior. Accordingly, we overrule the city's fifth assignment of error.

Directed Verdict

{¶54} In its complaint, Cleveland sought damages for the loss of profits that it would have realized had it been awarded the drywall contract. Cleveland now argues in its first assignment of error that the trial court erred by directing a verdict in favor of the city on its lost-profits claim.

{¶55} In considering a motion for a directed verdict, a trial court must construe the evidence most strongly in favor of the party against whom the motion is made.³⁰ In doing so, if the court "finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."³¹

{¶56} "A motion for directed verdict * * * does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence."³² Because a question of law is presented, we apply a de novo standard of review to a directed verdict.³³

³⁰ Civ.R. 50(A)(4).

³¹ Civ.R. 50(A)(4).

³² *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶4, quoting *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896, paragraph three of the syllabus.

³³ *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 523, 1996-Ohio-298, 668 N.E.2d 889.

{¶57} Cleveland acknowledges that the Ohio Supreme Court's recent decision in *Fairlawn v. Cementech*³⁴ resolves its claim for damages under state law. In *Cementech*, the court held that when a municipality violates competitive-bidding laws in awarding a competitively bid project, a disappointed bidder cannot recover its lost profits as damages.

{¶58} But in addition to its claim for damages under state law, Cleveland sought damages under federal law, Section 1983, Title 42, U.S.Code, for the city's deprivation of its property interest in the drywall contract. Under Section 1983, a party who has been deprived of a federal right under the color of state law may seek relief through "an action at law, suit in equity, or other proper proceeding for redress."

{¶59} The basic purpose of a Section 1983 damage award is to compensate persons for injuries caused by the deprivation of constitutional rights.³⁵ For this reason, no compensatory damages may be awarded in a Section 1983 suit without proof of actual injury.³⁶ The level of a person's compensatory damages under Section 1983 is ordinarily determined according to principles derived from the common law of torts.³⁷

{¶60} In *Adarand Constructors v. Pena*,³⁸ the United States Supreme Court considered whether a rejected bidder had standing to seek injunctive relief against future application of a minority set-aside program. In doing so, the Court presumed that the rejected bidder was entitled to seek damages for the lost contract:

³⁴ 109 Ohio St.3d 475, 2006-Ohio-2991, 849 N.E.2d 24.

³⁵ *Carey v. Phipus* (1978), 435 U.S. 247, 253-254, 98 S.Ct. 1042.

³⁶ *Memphis Community Sch. Dist. v. Stachura* (1986), 477 U.S. 299, 306, 106 S.Ct. 2537.

³⁷ *Id.* at 306-307, 106 S.Ct. 2537.

³⁸ (1995), 515 U.S. 200, 115 S.Ct. 2097.

{¶61} “Adarand, in addition to its general prayer for ‘such other and further relief as to the Court seems just and equitable,’ specifically seeks declaratory and injunctive relief against any *future* use of subcontractor compensation classes. * * * Before reaching the merits of Adarand’s challenge, we must consider whether Adarand has standing to seek forward-looking relief. Adarand’s allegation that it has lost a contract in the past because of a subcontractor compensation clause *of course entitles it to seek damages for the loss of that contract[.]*” (Emphasis added.)

{¶62} Those damages may include a disappointed bidder’s lost profits.³⁹ In *W.H. Scott Constr. Co., Inc. v. Jackson*,⁴⁰ the Fifth Circuit Court of Appeals considered an equal-protection challenge to a policy encouraging minority participation in city construction projects. The court upheld an award of lost profits to a rejected bidder who had sought damages from the city under Section 1983.

{¶63} Similarly, in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade Cty., Fla.*,⁴¹ the court held that a county was liable to the plaintiffs under Section 1983 for any compensatory damages resulting from its unconstitutional affirmative-action programs. The court held that the plaintiffs’ damages could include their lost profits, but that the plaintiffs in that case had failed to prove that any actual losses had resulted from the unconstitutional programs.⁴²

{¶64} In this case, the trial court concluded that Cleveland’s failure to adduce evidence concerning the degree of completion of the drywall contract precluded Cleveland from proceeding on its claim for money damages. The court reasoned that

³⁹ See *Flores v. Pierce* (C.A.9, 1980), 617 F.2d 1386, 1392; *Chalmers v. Los Angeles* (C.A.9, 1985), 762 F.2d 753.

⁴⁰ (C.A.5, 1999), 199 F.3d 206.

⁴¹ (S.D.Fla.2004), 333 F.Supp.2d 1305.

⁴² *Id.* at 1339.

Cleveland's damages were speculative, not due to a failure of proof as to Cleveland's anticipated profits, but due to the court's misapprehension that Cleveland's damage claim was wholly dependent on its claim for injunctive relief.

{¶65} Certainly, the status of the drywall project would have been relevant to a determination of any injunctive relief the court may have awarded, but that evidence was not critical to Cleveland's claim for Section 1983 damages. In effect, the trial court's entry of a directed verdict on the damage claim precluded Cleveland from seeking redress, even though Cleveland could have waited to file suit until the drywall contract had been completed. The issuance of a directed verdict on the issue of Section 1983 damages before the contract's completion had the absurd result of denying redress because of Cleveland's diligence in asserting its claims.

{¶66} We recognize that a plaintiff seeking redress under Section 1983 is required to mitigate its damages.⁴³ But once the plaintiff has presented evidence of damages, the defendant has the burden of establishing the plaintiff's failure to properly mitigate damages.⁴⁴ So once Cleveland presented evidence of damages, the burden of proof on the issue of mitigation was on the city.

{¶67} Because a jury could have concluded that Cleveland had established all the elements of its Section 1983 claim for damages, we hold that a directed verdict in favor of the city was unwarranted. Consequently, we sustain Cleveland's first assignment of error in part, reverse the entry of the directed verdict on the Section 1983 damage claim, and remand the case for a new trial on the issues of liability and damages with respect to Cleveland's lost-profits claim under Section 1983.

⁴³ *Meyers v. Cincinnati* (C.A.6, 1994), 14 F.3d 1115, 1119.

⁴⁴ *Id.*, citing *Rasimas v. Michigan Dept. of Mental Health* (C.A.6, 1983), 714 F.2d 614.

{¶68} Because Cleveland’s fourth and sixth assignments of error relate to the trial court’s dismissal of its damage claims, we address the assignments out of order. Cleveland argues that the trial court erred by denying its motion for a new trial, given the court’s erroneous dismissal of its damage claim under Section 1983. Cleveland also contends that the trial court erred by making “a finding that, essentially, amount[ed] to a directed verdict on the issue of proximate causation of Cleveland’s damages in addition to that given at trial.” For the reasons set forth in our disposition of Cleveland’s first assignment of error, we sustain the fourth and sixth assignments of error.

The Denial of Injunctive Relief

{¶69} In its second assignment of error, Cleveland argues that the trial court erred by refusing to declare the drywall contract unenforceable and by failing to enjoin performance of the contract. Cleveland contends that the trial court should have enjoined performance of the contract despite the fact that substantial work had been completed on the project.

{¶70} An appellate court need not consider an issue where the court becomes aware of an intervening event that has rendered the issue moot.⁴⁵ The duty of an appellate court is to decide actual controversies between parties and to render judgments that may be carried into effect.⁴⁶ “Thus, when circumstances prevent an appellate court from granting relief in a case, the mootness doctrine precludes

⁴⁵ *Cincinnati Gas & Elec. Co. v. PUC of Ohio*, 103 Ohio St.3d 398, 2004-Ohio-5466, 816 N.E.2d 238, at ¶15, citing *Miner v. Witt* (1910), 82 Ohio St. 237, 238, 92 N.E. 21.

⁴⁶ *Miner*, supra, at 238, 92 N.E. 21.

consideration of those issues.”⁴⁷ For example, in the context of appeals involving construction projects, Ohio courts have held that an appeal is rendered moot where the appellant fails to obtain a stay of execution of the trial court’s judgment and construction commences.⁴⁸

{¶71} In this case, there is no dispute that the convention center project, which was substantially completed at the time that the trial court denied the injunction, is now completed in its entirety. At no point in the proceedings did Cleveland obtain a stay of the trial court’s denial of its request for a temporary restraining order. In fact, as the trial court pointed out, Cleveland did not pursue preliminary injunctive relief for an entire year. Instead, Cleveland acceded to several continuances. In denying Cleveland’s motion for a preliminary injunction, the trial court noted the following:

{¶72} “The court at this time will deny Cleveland’s motion for injunctive relief pending trial. The parties’ desires with regard to the scheduling of this case have been solicited on a regular basis. After the action was removed to and returned from federal court, Cleveland opted not to seek a prompt hearing on [a] preliminary injunction, but sought rather to engage in the extended discovery reflected in the voluminous materials relating to the summary judgment motions. Cleveland then waited to the final day of the dispositive motion period – almost one year after the action was filed and roughly three months prior to the scheduled June 20, 2005 trial date – to pursue its preliminary injunction request.”

⁴⁷ *Schwab v. Lattimore*, 166 Ohio App.3d 12, 2006-Ohio-1372, 848 N.E.2d 912, at ¶10.

⁴⁸ *Schuster v. Avon Lake*, 9th Dist. No. 03CA008271, 2003-Ohio-6587, at ¶3; *Pinkney v. Southwick Invs., L.L.C.*, 8th Dist. Nos. 85074 and 85075, 2005-Ohio-4167; *Bd. of Commrs. v. Saunders*, 2nd Dist. No. 18592, 2001-Ohio-1710; *Smola v. Legeza*, 11th Dist. No. 2004-A-0038, 2005-Ohio-7059; *Redmon v. City Council*, 10th Dist. No. 05AP-466, 2006-Ohio-2199.

{¶73} At this point, we can not render a judgment that could be carried into effect with respect to the performance of the drywall contract. Even if we concluded (which we expressly do not) that the trial court had erred in failing to enjoin the contract's performance, our opinion would only be advisory in nature. Consequently, we decline to address the assignment of error on its merits.

Evidentiary Rulings

{¶74} In its third assignment of error, Cleveland argues that the trial court erred by ruling that it could not elicit testimony from Valley's subcontractors about events that had occurred after the city had awarded the contract to Valley. In support of its argument, Cleveland directs us to its examination of one of Valley's subcontractors, Marti Stouffer-Heis, owner of MS Construction Consultants.

{¶75} "Relevant evidence" is defined by Evid.R. 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 402 provides that relevant evidence is admissible, subject to enumerated exceptions, and that evidence that is not relevant is not admissible. Although the terms of Evid.R. 402 are mandatory, a trial court is vested with broad discretion in determining whether evidence is relevant.⁴⁹ A reviewing court is, therefore, limited to a determination of whether the trial court abused its discretion in admitting or excluding the disputed evidence.⁵⁰

⁴⁹ See *Cincinnati v. Banks* (2001), 143 Ohio App.3d 272, 287, 757 N.E.2d 1205; *Siuda v. Howard*, 1st Dist. Nos. C-000656 and C-000687, 2002-Ohio-2292, ¶25.

⁵⁰ See *Banks*, *supra*.

{¶76} Cleveland's attorney attempted to elicit testimony from Stouffer-Heis about the city's post-award enforcement of its SBE program. Counsel asked whether Stouffer-Heis had been able to perform her described "[l]ogistics, project coordination" tasks at the construction site, and whether the city had performed any investigation upon submission of her request to be certified as an SBE supplier.

{¶77} The trial court indicated that it would allow testimony by a subcontractor with respect to the current status of the uncompleted project. And the court expressly permitted counsel to question Stouffer-Heis about whether she had been certified as an SBE supplier prior to the contract award. But the court instructed counsel to otherwise restrict his questioning to matters that had occurred prior to the contract award to Valley, because Cleveland's complaint had been predicated on the rejection of its bid.

{¶78} We find no abuse of discretion by the trial court in ruling that testimony related to post-award program enforcement was irrelevant and inadmissible. We overrule Cleveland's third assignment of error.

Dismissal of City Employees

{¶79} In its fifth assignment of error, Cleveland argues that the trial court erred when it granted the individual defendants' motion to dismiss. The trial court dismissed Cleveland's claims against city employees Riordan, Franklin, Mullaney, Townsend, and Ranford in their "personal and individual capacities," on the basis of qualified immunity. Cleveland had also sued the employees in their "official capacities." Because the trial court did not explicitly dismiss the claims against the

employees in their official capacities, we treat the official-capacity claims as claims against the city.⁵¹

{¶80} The doctrine of qualified immunity generally shields public officials performing discretionary functions from liability for civil damages to the extent that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.⁵²

{¶81} The doctrine recognizes the strong public interest in protecting public officials from the costs of defending against claims. A public official's entitlement to avoid the burdens of litigation "is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."⁵³ To this end, a ruling on the issue of qualified immunity should be made as early as possible in the proceedings, before the commencement of discovery.⁵⁴ "[A] quick resolution of a qualified immunity claim is essential."⁵⁵

{¶82} "Where a defendant official is entitled to qualified immunity, the plaintiff must plead facts which, if true, describe a violation of a clearly established statutory or constitutional right of which a reasonable public official, under an objective standard, would have known. The failure to so plead precludes a plaintiff from proceeding further, even from engaging in discovery, since the plaintiff has failed to allege acts that are outside the scope of the defendant's immunity."⁵⁶

⁵¹ See *Asher Investments, Inc. v. Cincinnati* (1997), 122 Ohio App.3d 126, 137, 701 N.E.2d 400; *Norwell v. Cincinnati* (1999), 133 Ohio App.3d 790, 729 N.E.2d 1223.

⁵² *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818, 102 S.Ct. 2727.

⁵³ *Mitchell v. Forsyth* (1985), 472 U.S. 511, 526, 105 S.Ct. 2806.

⁵⁴ *Id.*

⁵⁵ *Will v. Hallock* (2006), ___ U.S. ___, 126 S.Ct. 952, 960.

⁵⁶ *Salt Lick Bancorp v. FDIC* (May 30, 2006), C.A.6 No. 05-5291, ___ F.3d ___, citing *Kennedy v. Cleveland* (C.A.6, 1986), 797 F.2d 297, 299.

{¶83} In this case, Cleveland alleged that the city employees had violated its rights to due process and equal protection by failing to apply the cap in CMC 321-37 and by rejecting its bid as nonresponsive after applying provisions of a race-conscious program. These allegations were insufficient as a matter of law to describe a violation of a clearly established constitutional right. As demonstrated by the complex nature of the issues already discussed, the individual defendants could not have reasonably known that their actions were unconstitutional. Accordingly, we overrule Cleveland's fifth assignment of error.

Conclusion

In conclusion, we reverse the trial court's entry of a directed verdict on Cleveland's claim for lost profits under Section 1983. We remand the cause for a new trial on the issues of liability and damages under Section 1983. In all other respects, the trial court's judgment is affirmed.

Judgment accordingly.

HILDEBRANDT, P.J., and PAINTER, J., concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.