IN THE SUPREME COURT OF OHIO

CLEVELAND CONSTRUCTION, INC.	:	CASE NO. 07-0114
Plaintiff - Appellee	:	
	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
v.	:	
CITY OF CINCINNATI, OHIO	:	Court of Appeals Case Nos. C-050749 C-050779 C-050888
Defendant-Appellant	:	

MEMORANDUM OF AMICUS CURIAE THE OHIO MUNICIPAL LEAGUE IN SUPPORT OF JURISDICTION ON BEHALF OF APPELLANT THE CITY OF CINCINNATI, OHIO

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INTRODUCTION: THIS CASE INVOLVES BOTH A SUBSTANTIAL CONSTITUTIONAL QUESTION AND A MATTER OF GREAT GENERAL INTEREST

The Ohio Municipal League (the "League"), as amicus curiae on behalf of the City of Cincinnati, Ohio, urges this court to accept jurisdiction over this case in order to reverse the decision in *Cleveland Construction, Inc. v. City of Cincinnati*, 2006 Ohio 6452, ("Appendix i"). While the League supports all of the arguments of the City of Cincinnati ("City"), it wishes to emphasize the importance of certain aspects of this case which establish that this case is worthy of this court's time and attention.

Constitutional Question

This case presents a substantial constitutional question involving the right of a disappointed bidder to make a due process claim, under the Fourteenth Amendment to the United States Constitution, and collect lost-profit damages on a public contract which was not awarded to the disappointed bidder.

The First District Court of Appeals ("First District") wrongfully permitted an award of lost profit damages to a disappointed bidder based upon an erroneous determination that the disappointed bidder has a property interest in a contract which it was not awarded. This holding by the lower court is not consistent with well established Ohio law, and conflicts with decisions from other Ohio District Courts of Appeals.

In *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006 Ohio 2991, 849 N.E.2d 24, this court recently held, at the syllabus: "When a municipality violates

competitive-bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages." In reaching this conclusion, this court concluded that the sole remedy available in such cases is injunctive relief. *Id.*, at ¶¶10-11.

If a putative low bidder had a property interest in a public contract, under Ohio law, money damages would presumably be available and injunctive relief would not be available, as an adequate remedy would exist at law. The League believes *Cementech* stands for the proposition that the <u>only</u> relief available to a disappointed bidder, under Ohio law, is injunctive relief to prevent the award and performance of an allegedly unlawful contact; no claim for a due process violation will lie, pursuant to 42 U.S.C. § 1983, because a disappointed bidder has no property interest in a contract which is not awarded to it.

Great General Interest

In addition to the substantial constitutional question presented, this case is also has tremendous statewide importance. The lower court's decision conflicts with the decisions of two other courts of appeals, and the due process issue presented in this case is ripe for consideration by this court.

The decision of the First District Court of Appeals in this case conflicts with Fourth District Court of Appeals decision in *Miami Valley Contractors v. Village of Oak Hill* (1996), 108 Ohio App.3d 745, 752, 671 N.E.2d 646, 650 ("We can find no support for the proposition that a second or third place finisher in a lowest and best bidder

determination acquires a constitutionally protected property right. Therefore appellant cannot assert a Section 1983, Title 42, U.S. Code claim and summary judgment is appropriate.") See, also, *Cleveland Construction, Inc. v. State of Ohio, DAS* (1997), 121 Ohio App.3d 372, at 396, 700 N.E.2d 54, at 69 (citing *Miami Valley Contractors*).

This court is urged to accept the case in order to eliminate the confusion which will be created by the First District's decision. Such confusion, if allowed to fester, will have an adverse impact on municipalities throughout the state.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio Corporation composed of a membership of more than 750 Ohio cities and villages. All municipalities in this state have an interest in the continued validity of the public policy of the state which directs that the only remedy in the case of an improperly awarded public contract is injunctive relief. The taxpayers of Ohio should not be punished by having to pay for a contractor's lost profit when a public contract has been improperly awarded to someone other than the lowest and best bidder.

The League, by this brief, respectfully seeks to advise the court of the urgency of the instant case, and bring to this court's attention a decision of the First District Court of Appeals which warrants review by this court.

STATEMENT OF THE CASE AND FACTS

The League hereby adopts, in its entirety, and incorporates by reference, the statement of the case and facts contained within the Memorandum in Support of Jurisdiction of the City of Cincinnati.

The League notes, however, that the proper analysis of this case depends upon an understanding that, under the Municipal Code of the City of Cincinnati ("CMC"),[1] a "Small Business Enterprise" ("SBE," defined at CMC §323-1-S) is **not synonymous** with a "Minority Business Enterprise" ("MBE," CMC §323-1-M) or a "Women's Business Enterprise" ("WBE," CMC §323-1-W). (See "Appendix ii.")

The requirement that a contractor comply with the SBE participation goal, under CMC §323-7(a), exists independently from the monitoring of MBE and WBE participation. (See, "Appendix iii:" "The City of Cincinnati's Annual Goal fo SBE participation shall be 30% of the city's total dollars spent for construction, supplies, services and professional services. The city of Cincinnati MBE/WBE annual participation goals of 30% construction, 15% supplies/services, and 10% professional services will be monitored, tracked internally, and reported annually to city council along with annual SBE participation rates." CMC §323-7(a))

Also, as a factual matter, it should be noted that the Cincinnati ordinances provide tremendous discretion to the city's administration "reject any bid for any reason or all bids

[1] Available on the internet at www.municode.com in the "Online Library."

for no reason if acceptance of the lowest and best bid is not in the best interests of the city." CMC §321-43. ("Appendix iv.") Thus, in no meaningful sense can any bidder claim an "entitlement" to a city contract, even if that person is the lowest and best bidder.

The First District failed to acknowledge that the City could reject Cleveland's bid because it did not adhere to the SBE requirements of the contract, which are race and gender neutral. In no event does the applicable public bidding law ever compel the City to grant a contract to any party.

It is the League's position that, while the First District erred in analyzing the municipal ordinances in this case, the case remains of critical state-wide importance and contains a substantial constitutional question; consequently, this case rises above the parochial nature of an error in interpreting the Cincinnati Municipal Code

ARGUMENT

Proposition of Law No. 1: A disappointed bidder for a public contract cannot recover lost-profit damages in a 42 U.S.C. §1983 action, alleging a violation of the Fourteenth Amendment's Due Process Clause, because the disappointed bidder does not have a "protected property interest" in a public contract under Ohio law. (*Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006 Ohio 2991, 849 N.E.2d 24, construed and extended.)

Public Contracts in Ohio

It has been the well-settled law of Ohio for nearly one hundred (100) years that no person has a right to the benefits of a government contract until it has been duly executed. *State, ex rel. Cleveland Trinidad Paving v. Bd. of Public Service* (1909), 81 Ohio St. 218;

MacKinnon-Parker, Inc. v. Lucas Metropolitan Housing Auth. (1992), 84 Ohio App.3d 453, 616 N.E.2d 1204. It is equally well established, in Ohio, that if a person fails to properly enter into a public contract, no remedy may be had in law or in equity, either by quantum meruit or promissory estoppel. *Shampton v. City of Springboro*, 98 Ohio St.3d 457, 786 N.E.2d 883, 2003-Ohio-1913; *Lathrop Co. v. Toledo* (1966), 5 Ohio St.2d 165, 173, 34 O.O.2d 278, 214 N.E.2d 408; *McCloud & Geigle v. Columbus* (1896), 54 Ohio St. 439, 44 N.E. 95. The next logical determination to be made, in the evolution of public contract law in Ohio, is that there is no property interest in a public contract, unless and until it is duly awarded and executed pursuant to law.

Only Injunctive Relief

Pursuant to this court's recent decision in *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006 Ohio 2991, 849 N.E.2d 24, the remedy for a disappointed bidder, who alleges that a political subdivision has violated the laws controlling the award of public contract, begins and ends with injunctive relief. A disappointed bidder has no "property interest" in a public contract, under clearly established Ohio law, and therefore cannot recover for a "due process" violation, under federal law, when the bidder is not awarded the contract.

Even assuming, arguendo, that the City violated its own competitive bidding laws in awarding the Convention Center drywall contract to Valley Interior Systems instead of to Cleveland Construction, *Cementech* stands for the proposition that Cleveland's sole

remedy was to obtain injunctive relief to stop the award and performance of the allegedly unlawful contract. When Cleveland failed to pursue injunctive relief, it slept on its rights and ought not be heard to assert a constitutional violation resulting in money damages.

In *Cementech*, this court reiterated the principles underlying competitive bidding:

> "[t]he intent of competitive bidding is to protect the taxpayer, prevent excessive costs and corrupt practices, and provide open and honest competition in bidding for public contracts. While allowing lost-profit damages in municipal-contract cases would protect bidders from corrupt practices, it also would harm the taxpayers by forcing them to bear the extra cost of lost profits to rejected bidders. Thus, the purposes of competitive bidding clearly militate against allowing lost-profit damages to rejected bidders. Rather, a rejected bidder is limited to injunctive relief."

Id., at 477 (citations omitted).

The holding of *Cementech* should be extended to this case: there is no property interest in a public contract, under Ohio law, which would support in a Due Process claim by a disappointed bidder.

Due Process Claim

The First District did not properly analyze Cleveland's claim of entitlement to lost profits under a traditional "due process" analysis. Pursuant to federal law, it is important to identify the property interest which is alleged to have been taken without due process, and this determination requires a review of state property law:

"The procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit': 'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.' *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972). Such entitlements are '"of course, . . . not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."' *Paul v. Davis,* 424 U.S. 693, 709, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976) (quoting *Roth, supra,* at 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701); see also *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 164, 141 L. Ed. 2d 174, 118 S. Ct. 1925 (1998).

Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion. See, e.g., *Kentucky Dep't of Correction v. Thompson,* 490 U.S. 454, 462-463, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989)"

Castle Rock v. Gonzalez (2005), 545 U.S. 748, 125 S. Ct. 2796, 2803, 162 L. Ed. 2d 658, 668-669 (Emphasis added.)

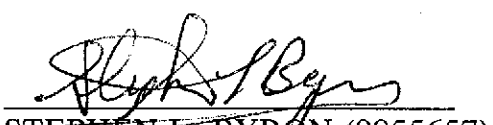
The emphasized language is crucial to this case. Cleveland failed to submit a bid which complied with the race and gender neutral SBE participation requirements. Because

Cleveland's bid did not conform with the required specifications, the City had discretion, under Ohio law, to reject Cleveland's bid. CMC § 321-43; see, also, *Cedar Bay Construction, Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 552 N.E.2d 202 . Consequently, Cleveland had no property interest in the contract which was awarded to another party, and should not be permitted to collect the lost profits on a contract it did not perform.

CONCLUSION

The Ohio Municipal League respectfully requests this court to accept jurisdiction over this case in order to reverse the decision of the Court of Appeals. The substantial constitutional question and conflict between district courts makes this case worthy of htis court's time and attention.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the within Memorandum of Amicus Curiae the Ohio Municipal League in Support of Jurisdiction on Behalf of the Appellant City of Cincinnati, Ohio has been mailed, via regular U.S. mail, on the 16th day of January 2007 to:

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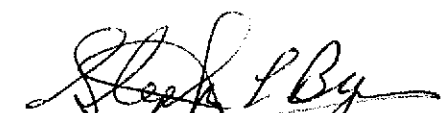

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CLEVELAND CONSTRUCTION, INC., Plaintiff-Appellant/ Cross-Appellee, vs. CITY OF CINCINNATI, Defendant-Appellee/ Cross-Appellant, and TIMOTHY RIORDAN, BERNADINE FRANKLIN, NATE MULLANEY, ALICIA TOWNSEND, KATHI RANFORD, and VALLEY INTERIOR SYSTEMS, INC., Defendants-Appellees.

APPEAL NOS. C-050749, C-050779, C-050888

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

2006 Ohio 6452; 2006 Ohio App. LEXIS 6410

December 8, 2006, Date of Judgment Entry on Appeal

NOTICE: [**1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: Civil Appeals From: Hamilton County Court of Common Pleas. TRIAL NO. A-0402638.

DISPOSITION: Affirmed in Part, Reversed in Part, and Cause Remanded.

HEADNOTES: CONSTITUTIONAL LAW/CIVIL - MUNICIPAL - CIVIL MISCELLANEOUS

SYLLABUS: A municipality's failure to follow the mandate of its own ordinance governing selection of a lowest and best bidder for a construction contract constituted an abuse of discretion that resulted in the deprivation of an unsuccessful bidder's property interest in the contract award.

A municipality's small-business-enterprise program was subject to strict scrutiny where the 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 municipality, and where the program thereby undeniably pressured bidders to implement racial preferences; and to the extent that the program's rules pressured bidders to hire women-owned subcontractors, the municipality was required to demonstrate an "exceedingly persuasive" justification for the gender-based preference.

Where a disappointed bidder for a municipal [**2] construction contract successfully challenged the unconstitutional race- and gender-based provisions of the municipality's small-business-enterprise program, and where, as a result, the municipality would no longer be able to apply those provisions, the bidder was a prevailing party for purposes of Section 1988, Title 42, U.S.Code.

The trial court erred by entering a directed verdict in favor of a municipality on a disappointed bidder's lost-profits claim brought pursuant to Section 1983, Title 42, U.S.Code, where a jury could have concluded that that bidder had established all the elements of its claim.

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JUDGES: SYLVIA SIEVE HENDON, Judge. HILDEBRANDT, P. [**3] J., and PAINTER, J., concur.

OPINION BY: SYLVIA SIEVE HENDON

OPINION: SYLVIA SIEVE HENDON, Judge.

[*P1] 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.

[*P2] 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. n1

n1 CMC 321-37(c)(4).

[*P3] 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 [**4] 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." n2 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.

n2 CMC 321-37(c).

[*P4] 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 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.

[*P5] On February 11, 2004, Kathi [**5] 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.

[*P6] 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.

[*P7] 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.

[*P8] Following a review of the acceptability [**6] 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."

[*P9] 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

[*P10] 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.

[*P11] 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; [**7] (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.

[*P12] Finally, Cleveland sought compensatory and punitive damages, as well as attorney fees and costs.

[*P13] 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.

[*P14] 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.

[*P15] 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 [**8] in violation of Section 1983.

[*P16] 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.

[*P17] 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.

[*P18] 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 [**9] to fulfill compelling governmental interests, or that such gender-based provisions were substantially related to genuine and important governmental objectives.

[*P19] 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.

[*P20] 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.

[*P21] 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 [**10] 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

[*P22] 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.

[*P23] 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 [**11] 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.

[*P24] 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." n3 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.

n3 *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.

[*P25] 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 [**12] 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.

[*P26] 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

[*P27] 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.

[*P28] In Ohio, it is well established that standing to challenge the constitutionality of a legislative enactment exists [**13] 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." n4

n4 *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.

[*P29] 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. n5

n5 *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville* (1993), 508 U.S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586.

[**14]

[*P30] 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

[*P31] 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.

[*P32] One of the proscriptions of the Fourteenth Amendment is the deprivation of a person's property interests without due process of law. n6 In a due-process challenge based upon such a deprivation, we must first determine whether a protected property interest was at stake.

n6 *Bd. of Regents v. Roth* (1972), 408 U.S. 564, 569-570, 92 S. Ct. 2701, 33 L. Ed. 2d 548.

[*P33] Property interests "are [**15] 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." n7 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. n8 A person's unilateral expectation of a benefit is not enough. n9

n7 Id. at 577, 92 S. Ct. 2701.

n8 *Cleveland Constr. v. Ohio Dept. of Admin. Servs., GSA* (1997), 121 Ohio App.3d 372, 394, 700 N.E.2d 54.

n9 *Roth*, supra, at 577, 92 S. Ct. 2701.

[*P34] 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. n10

n10 *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.

[**16]

[*P35] Generally, municipalities are vested with broad discretion in matters related to public contracts. But that discretion is not limitless. n11 For example, a municipality "may by its actions commit itself to follow rules it has itself established." n12

n11 *Danis*, supra, at 604, 1995 Ohio 301, 653 N.E.2d 646.

n12 Id. at 603, 1995 Ohio 301, 653 N.E.2d

646.

[*P36] In the context of lowest-and-best-bidder determinations, Ohio courts are reluctant to substitute their judgment for that of city officials. n13 But where city officials abuse the discretion vested in them, courts will intervene. n14 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.'" n15

n13 See *Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 552 N.E.2d 202.

[**17]

n14 Id. at 21-22, 552 N.E.2d 202.

n15 *Dayton, ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, 423 N.E.2d 1095 (emphasis added).

[*P37] 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.

[*P38] 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

[*P39] 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 [**18] race- and gender-based classifications. The city contends that the program was a lawful "outreach" program that encouraged contractors to use "good faith efforts" to promote opportunities for minorities and females.

[*P40] The Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. n16 Racial classifications must serve a compelling government interest and must be narrowly tailored to further that interest. n17 Gender-based classifications, by contrast, require an "exceedingly persuasive" justification. n18

n16 *Richmond v. J.A. Croson Co.* (1989), 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854.

n17 *Adarand Constructors v. Pena* (1995), 515 U.S. 200, 235, 115 S. Ct. 2097, 132 L. Ed. 2d 158.

n18 *United States v. Virginia* (1996), 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735.

[*P41] At trial, the city did not put forth any argument or evidence to demonstrate that its SBE program could withstand [**19] 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.

[*P42] 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.

[*P43] 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. n19 Where regulations pressure or encourage contractors to hire minority subcontractors, courts must apply strict scrutiny. n20

n19 *Bras v. Calif. Pub. Utils. Comm.* (C.A.9, 1995), 59 F.3d 869.

n20 See *Lutheran Church-Missouri Synod v. FCC* (C.A.D.C., 1998), 332 U.S. App. D.C. 165, 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.

[**20]

[*P44] For example, in *Adarand Constructors v. Pena*, n21 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. n22

n21 (1995), 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158.

n22 Id. at 224, 115 S. Ct. 2097.

[*P45] 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 [**21] economic realities of the program rather than the label attached to it." n23

n23 *Bras*, supra, at 874.

[*P46] 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.

[*P47] 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.

[*P48] Where the city's SBE program required documentation [**22] 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. n24 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.

n24 *Safeco Inc.*, supra, at 692, citing *Lutheran*, supra, at 491.

[*P49] 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

[*P50] In its fifth assignment of error, the city argues that the trial [**23] 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.

[*P51] 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." n25 To be a "prevailing party," there must have been "a court-ordered 'change [in] the legal relationship' " between the parties. n26 In this regard, a declaratory judgment may serve as the basis for an award of attorney fees. n27

n25 *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40.

n26 *Buckhannon Bd. v. W. Va. Dept. of Health & Human Res.* (2001), 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855.

n27 *Hewitt v. Helms* (1987), 482 U.S. 755, 761, 107 S. Ct. 2672, 96 L. Ed. 2d 654.

[*P52] But the entry of a declaratory judgment in a party's favor does not automatically render that party [**24] a prevailing party under Section 1988. n28 "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.) n29

n28 *Rhodes v. Stewart* (1988), 488 U.S. 1,

109 S. Ct. 202, 102 L. Ed. 2d 1.

n29 *Hewitt*, supra, at 761, 107 S. Ct. 2672.

[*P53] We hold that the trial court did not abuse its discretion in ordering attorney [**25] 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 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

[*P54] 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.

[*P55] 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. n30 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 [**26] as to that issue." n31

n30 Civ.R. 50(A)(4).

n31 Civ.R. 50(A)(4).

[*P56] "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." n32 Because a question of law is presented, we apply a de novo standard of review to a directed verdict. n33

n32 *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002 Ohio 2842, 769 N.E.2d 835, P4, quoting *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896, paragraph three of the syllabus.

n33 *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 523, 1996 Ohio 298, 668 N.E.2d 889.

[*P57] Cleveland acknowledges that the Ohio [**27] Supreme Court's recent decision in *Fairlawn v. Cementech* n34 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.

n34 109 Ohio St.3d 475, 2006 Ohio 2991, 849 N.E.2d 24.

[*P58] 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."

[*P59] The basic purpose of a Section 1983 damage award is to compensate persons for injuries caused by the deprivation of constitutional rights. n35 For this reason, no compensatory damages [**28] may be awarded in a Section 1983 suit without proof of actual injury. n36 The level of a person's compensatory damages under Section 1983 is ordinarily determined according to principles derived from the common law of torts. n37

n35 *Carey v. Piphus* (1978), 435 U.S. 247, 253-254, 98 S. Ct. 1042, 55 L. Ed. 2d 252.

n36 *Memphis Community Sch. Dist. v. Stachura* (1986), 477 U.S. 299, 306, 106 S. Ct. 2537, 91 L. Ed. 2d 249.

n37 Id. at 306-307, 106 S. Ct. 2537.

[*P60] In *Adarand Constructors v. Pena*, n38 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:

n38 (1995), 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158.

[**29]

[*P61] "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.)

[*P62] Those damages may include a disappointed bidder's lost profits. n39 In *W.H. Scott Constr. Co., Inc. v. Jackson,* n40 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.

n39 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.

[**30]

n40 (C.A.5, 1999), 199 F.3d 206.

[*P63] Similarly, in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade Cty., Fla.*, n41 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. n42

n41 (S.D.Fla.2004), 333 F. Supp. 2d 1305.

n42 Id. at 1339.

[*P64] 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 Cleveland's damages were speculative, not due to a failure of proof [**31] 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.

[*P65] 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.

[*P66] We recognize that a plaintiff seeking redress under Section 1983 is required to mitigate its damages. n43 But once the plaintiff has presented evidence of damages, the defendant has the burden of establishing the plaintiff's failure to properly mitigate damages. n44 So once Cleveland presented evidence of damages, the burden of proof on the issue of mitigation [**32] was on the city.

n43 *Meyers v. Cincinnati* (C.A.6, 1994), 14 F.3d 1115, 1119.

n44 Id., citing *Rasimas v. Michigan Dept. of Mental Health* (C.A.6, 1983), 714 F.2d 614.

[*P67] 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.

[*P68] 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 [**33] 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

[*P69] 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.

[*P70] An appellate court need not consider an issue where the court becomes aware of an intervening event that has rendered the issue moot. n45 The duty of an appellate court is to decide actual controversies between parties and to render judgments that may be carried into effect. n46 "Thus, when circumstances prevent an appellate court from granting relief in a case, the mootness doctrine precludes consideration [**34] of those issues." n47 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. n48

n45 *Cincinnati Gas & Elec. Co. v. PUC of Ohio*, 103 Ohio St.3d 398, 2004 Ohio 5466, 816 N.E.2d 238, at P15, citing *Miner v. Witt* (1910), 82 Ohio St. 237, 238, 92 N.E. 21, 8 Ohio L. Rep. 71.

n46 *Miner*, supra, at 238, 92 N.E. 21.

n47 *Schwab v. Lattimore*, 166 Ohio App.3d 12, 2006 Ohio 1372, 848 N.E.2d 912, at P10.

n48 *Schuster v. Avon Lake*, 9th Dist. No. 03CA008271, 2003 Ohio 6587, at P3; *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.

[**35]

[*P71] 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:

[*P72] "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 [**36] was filed and roughly three months prior to the scheduled June 20, 2005 trial date - to pursue its preliminary injunction request."

[*P73] 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

[*P74] 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.

[*P75] "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 [**37] 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. n49 A reviewing court is, therefore, limited to a determination of whether the trial court abused its discretion in admitting or excluding the disputed evidence. n50

n49 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, P25.

n50 See *Banks*, supra.

[*P76] 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, [**38] 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.

[*P77] 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.

[*P78] 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

[*P79] 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, [**39] 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. n51

n51 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.

[*P80] 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. n52

n52 *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396.

[**40]

[*P81] 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." n53 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. n54 "[A] quick resolution of a qualified immunity claim is essential." n55

n53 *Mitchell v. Forsyth* (1985), 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411.

n54 Id.

n55 *Will v. Hallock* (2006), U.S. , 126 S. Ct. 952, 960, 163 L. Ed. 2d 836.

[*P82] "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 [**41] 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." n56

n56 *Salt Lick Bancorp v. FDIC* (May 30, 2006), C.A.6 No. 05-5291, F.3d , 187 Fed. Appx. 428, citing *Kennedy v. Cleveland* (C.A.6, 1986), 797 F.2d 297, 299.

[*P83] 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 [**42] 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.

independently owned and controlled by SBEs and in determining whether such SBEs have at least 51% independent ownership and control, the Contract Compliance Officer may use discretion in weighing the foregoing factors, as well as any other factor, which in the City's opinion affects independent ownership and control.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999)

Sec. 323-1-J. Joint Venture.

"Joint Venture" shall mean a combination of two or more persons, firms or corporations who, without any partnership or corporate designation, join to carry out a single business project or undertaking which is limited in scope and duration. Under this chapter, SBEs shall be allowed to joint venture only with another SBE or shall be allowed to joint venture with a non-SBE for contracts in excess of one million dollars. The certification of a joint venture will terminate upon completion of the City contract for which the joint venture was formed.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999)

Sec. 323-1-M. Minority Business Enterprise.

"Minority Business Enterprise" or "MBE" shall mean:

(a) a sole proprietorship that is totally independently owned and controlled by an individual who is a minority group member; or

(b) a joint venture which is totally independently owned and controlled by minority group members; or

(c) a partnership or corporation that is at least 51% independently owned and controlled by minority group members; or

(d) a nonprofit organization if at least 51% of the board of directors are minority group members as defined in their articles of incorporation, whose mission is to serve minority business enterprises; and

(e) such business shall have been in existence at least one year prior to application for participation in the MBE program; and

(f) such business shall have maintained fixed offices located within the geographical boundaries of Hamilton County at least one year prior to application for participation in the MBE program; and

(g) such business must perform a commercially useful function; and

(h) such business has been certified by the City.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999)

Sec. 323-1-M1. Minority Group Members.

"Minority Group Members" shall mean persons who are citizens of the United States who are African American, Hispanic, Asian or Native American as follows:

(a) African American - a person having origin in the Black racial group of Africa.

(b) Hispanic - persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture origin.

(c) Asian American - persons having origin in the original people of the Far East or the Pacific Islands.

(d) Native American - an individual having origin in any of the original people of North America and who maintain cultural identification through tribal affiliation.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999)

Sec. 323-1-P. Professional Services.

"Professional Services" shall mean professional services as defined in Section 321-1-P, Professional Services.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999)

Sec. 323-1-W. Women's Business Enterprise.

"Women's Business Enterprise" or "WBE" shall mean:

(a) a sole proprietorship that is totally independently owned and controlled by an individual who is a woman; or

(b) a partnership, corporation or joint venture which is totally independently owned and controlled by women; or

(c) a partnership or corporation that is at least 51% independently owned and controlled by women; or

(d) a nonprofit organization if at least 51% of the board of directors are women as defined in their articles of incorporation, whose mission is to serve women business enterprises; and

(e) such business shall have been in existence at least one year prior to application for participation in the WBE program; and

(f) such business shall have maintained fixed offices located within the geographical boundaries of Hamilton County at least one year prior to application for participation in the WBE program; and

(g) such business must perform a commercially useful function; and

(h) such business has been certified by the City.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999)

Sec. 323-1-S. Small Business Enterprise.

A Small Business Enterprise or ASBE shall mean a firm for which the gross revenue or number of employees averaged over the past three years, inclusive of any affiliates as defined by 13 C.F.R. Sec. 121.201 does not exceed the size standards as defined pursuant to Section 3 of the SBE Act and for which the net worth of each owner does not exceed $750,000.

(a) Such business shall have been in existence at least one year prior to application for participation in the SBE program; and

(b) Such business shall have maintained fixed offices located within the geographical boundaries of Hamilton County at least one year prior to application for participation in

the SBE program; and

(c) Such business must perform a commercially useful function; and

(d) Such business has been certified by the city.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999; a. Ord. No. 435-2002, eff. Jan. 17, 2003; a. Ord. No. 107-2003, eff. May 15, 2003)

Sec. 323-1-S1. Services.

"Services" shall mean services as defined in Section 321-1-S1. Services.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999)

Sec. 323-1-S2. Supplies.

"Supplies" shall mean supplies as defined in Section 321-1-S2. Supplies.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999)

Sec. 323-1-W. Women's Business Enterprise.

"Women's Business Enterprise" or "WBE" shall mean:

(a) a sole proprietorship that is totally independently owned and controlled by an individual who is a woman; or

(b) a partnership, corporation or joint venture which is totally independently owned and controlled by women; or

(c) a partnership or corporation that is at least 51% independently owned and controlled by women; or

(d) a nonprofit organization if at least 51% of the board of directors are women as defined in their articles of incorporation, whose mission is to serve women business enterprises; and

(e) such business shall have been in existence at least one year prior to application for participation in the WBE program; and

(f) such business shall have maintained fixed offices located within the geographical boundaries of Hamilton County at least one year prior to application for participation in the WBE program; and

(g) such business must perform a commercially useful function; and

(h) such business has been certified by the City.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999)

Sec. 323-3. Purpose.

The purpose of the SBE program of the city is to promote the economic welfare of the people of the City of Cincinnati, to mitigate the effects of discrimination against SBEs and to promote full and equal business opportunity for all persons doing business with the City of Cincinnati by assisting SBEs to actively participate in the city's procurement process, and by working to eliminate SBE discrimination

in public markets.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999)

Sec. 323-5. Rules and Regulations.

The city manager shall issue and enforce rules and regulations to carry out the meaning and purpose of the small business enterprise program authorized by this chapter.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999)

Sec. 323-7. Program Goals.

(a) The City of Cincinnati's Annual Goal for SBE participation shall be 30% of the city's total dollars spent for construction supplies, services, and professional services. The city of Cincinnati MBE/WBE annual participation goals of 30% construction, 15% supplies/services, and 10% professional services will be monitored, tracked internally, and reported annually to city council along with annual SBE participation rates.

(b) SBE participation is counted as follows:

(1) Once a firm is determined to be an eligible SBE, in accordance with this policy, the total dollar value of the contract awarded to the SBE is counted toward the SBE participation rate.

(2) The City of Cincinnati or a contractor may count toward its SBE rate a portion of the total dollar value of a contract with an eligible joint venture equal to the percentage of the ownership and contract of the SBE partner in the joint venture.

(3) The City of Cincinnati or a contractor may count toward its SBE rate only expenditures to SBEs that perform a "commercially useful function" in the work of a contract. An SBE is considered to perform a "commercially useful function" when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and supervising the work involved. To determine whether an SBE is performing a commercially useful function, the City of Cincinnati or a contractor shall evaluate the amount of work subcontracted, industry practices, and other relevant factors.

(4) Consistent with normal industry practices, an SBE may enter into subcontracts. If an SBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the SBE shall be presumed not to be performing a commercially useful function. The SBE may present evidence to rebut this presumption to the City of Cincinnati.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999)

Sec. 323-9. Eligible Firms.

(a) *Requirements.* To be eligible for certification as an SBE, each applicant must meet the definition of an SBE as defined in § 323-1-S.

(b) *Certification Process.* A business seeking certification as an SBE must:

(1) Submit an application to the City of Cincinnati on the prescribed form, affirming under penalty of perjury that the business qualifies as a City of Cincinnati SBE.

(2) If requested by the City of Cincinnati, the applicant must provide any and all

APPENDIX iii

Whenever bids shall be received for supplies, services or construction and two or more bids shall, in the opinion of the city purchasing agent, be equally entitled to be considered the lowest and best bids, the city purchasing agent shall be authorized to award such contract by lot to any one of such lowest or best bidders, or, if the number of such lowest and best bidders is not in excess of three, to divide the award and contract as the city purchasing agent deems best among them or among such of them asshall consent to such apportionment.

(Ordained by Ord. No. 426-1992, eff. 10-23-92)

Sec. 321-41. Bid; Waiver of Bidding and Contracting Requirements Where No Acceptable Bid is Made.

The city purchasing agent is authorized to waive all legal bidding and/or contracting requirements in order to provide for the acquisition of supplies when a situation exists because of various supply allotment programs, volatile market conditions, shortages and similar situations which causes vendors to refuse to submit acceptable bids based on all the city's legal bidding and contracting requirements; provided, however, before waiving such requirements the city purchasing agent shall have first endeavoredto secure competitive bids based on all applicable city holding and contracting requirements, but when no acceptable bid is subsequently received due to one or more of the above causes, the city purchasing agent is then authorized to make award of a contract to the determined lowest and best bid of all non-acceptable bids submitted, or to negotiate a contract where no bids are received.

The city purchasing agent shall report to city council semiannually on all applications of this authorization during the interim period.

(Ordained by Ord. No. 426-1992, eff. 10-23-92)

Sec. 321-43. Bid; Rejection of Bids.

The city purchasing agent, city manager or any other duly authorized contracting officer may reject any bid for any reason or all bids for no reason if acceptance of the lowest and best bid is not in the best interests of the city. Where there is reason to believe there is collusion or combination among bidders, the bids of those involved shall be rejected.

(Ordained by Ord. No. 426-1992, eff. 10-23-92)

Sec. 321-45. Bid; Waiver of Bid Surety.

When the city manager or city purchasing agent has been granted the authority by this chapter or ordinance to waive requirements for bid surety on any city bid, such waiver may be exercised only upon a finding by the city purchasing agent that the waiver will encourage competition in bidding and will not impair the city's ability to secure execution or performance of the contract.

Surety may be required in an amount deemed necessary by the city purchasing agent or designee. The purchasing agent will have discretion on bonding for both bid and surety. The purchasing agent also, there should be a commodity, as well as a threshold, exemption, as determined by the Purchasing Agent.

(Ordained by Ord. No. 426-1992, eff. 10-23-92; a. Ord. No. 440-2002, eff. Jan. 17, 2003)

Sec. 321-47. Bid; Default.