

IN THE SUPREME COURT OF OHIO

CLEVELAND CONSTRUCTION, INC., : CASE NO. 2007-0114
: :
Plaintiff-Appellee, : :
: : APPEAL NO. C050749
vs. : APPEAL NO. C050779
: APPEAL NO. C050888
: (Consolidated)
CITY OF CINCINNATI, : :
: : COURT OF APPEALS
Defendant-Appellant. : FIRST APPELLATE DISTRICT
: CASE NO. A-0402638

MEMORANDUM OF AMICUS CURIAE
NORTHERN OHIO CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS
IN OPPOSITION TO JURISDICTION

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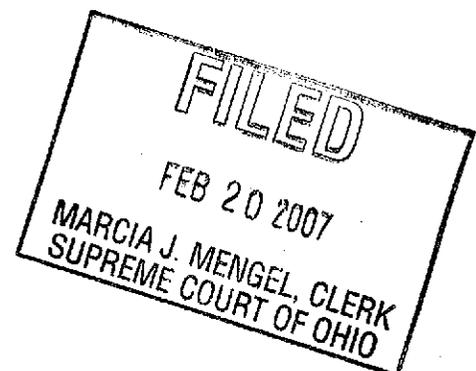


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I. STATEMENT OF AMICUS INTEREST

The Northern Ohio Chapter of Associated Builders and Contractors, Inc., (“the Chapter”) is part of a national association representing more than 24,000 merit shop construction and construction-related firms in 79 local chapters across the United States. ABC and the Chapter adhere to the philosophy that construction projects should be awarded based upon merit to the lowest responsible bidder. ABC’s mission is to encourage open competition in an atmosphere of free enterprise so that contracts are awarded based solely upon merit and to actively protect against governmental law and regulatory or private sector initiatives that undermine or diminish such free enterprise opportunities or principles.

II. THIS CASE DOES NOT INVOLVE ISSUES OF GREAT GENERAL INTEREST OR A SUBSTANTIAL CONSTITUTIONAL QUESTION.

The City of Cincinnati’s, (“the City’s”), characterization of the First District Court of Appeal’s decision as a threat to the competitive bidding process is groundless.¹ The decision not only preserves and promotes the integrity and stability of the competitive bidding process, but also the right to equal protection by deterring government entities from trodding upon bidders’ constitutional rights, and by holding such governmental authorities accountable under federal law to compensate those whose constitutional rights have been violated. The City’s assertion that the decision of the Ohio First District Court of Appeals unfairly forces taxpayers “pay twice” to compensate disappointed bidders, is ludicrous in light of the City’s intentional and blatant violations of both its own ordinances designed to save taxpayer funds, and of federal law which specifically creates a damage remedy for violations of constitutional rights. In this case, the most significant threat to the financial health of the City and its taxpayers was the City’s blind

¹Memorandum in Support of Jurisdiction, p. 2.

adherence to its clearly unconstitutional Small Business Enterprise, (“SBE”), Program, at all costs.

The plain language of CMC §321-37 limited the City’s discretion in awarding competitively bid public contracts to any bidder but the lowest and best when the award is based primarily on the bidder fulfilling the requirements of the subcontracting outreach portion of the City’s SBE Program. Under CMC §321-37, if the City wishes to award a public contract to a bidder other than the lowest and best primarily because of that bidder’s compliance with the Subcontracting Outreach Program, that bid cannot exceed the lowest and best by more than \$50,000, or 10%, whichever is less. CMC §321-37 was intended to balance the goals of inclusion of SBE subcontractors on City projects and acquiring work at the most competitive prices for Cincinnati’s taxpayers.

Despite this explicit limitation, the City blatantly abused its discretion in making the deliberate decision to spend an extra \$1,246,022 taxpayer dollars to award the drywall contract to Valley Interior Systems (“Valley”) because of its compliance with the subcontracting outreach requirements of the City’s SBE Program, despite the fact that its bid exceeded Cleveland’s by 24 times the monetary cap. Further, as the First District noted in its opinion, the City tried to justify the expense by arguing that the Convention Center project was under budget so the extra cost was somehow legitimate² even though “among the purposes of competitive bidding legislation are the protection of the taxpayer [and the] prevention of excessive costs . . .”³ That the City is now arguing that it has the interests of the public purse at heart is disingenuous.

² 2006-Ohio-6452, ¶24

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

III. STATEMENT OF THE CASE AND FACTS

The Chapter hereby adopts, in its entirety, and incorporates by reference, the Statement of the Case and Facts contained within the Memorandum in Opposition to Jurisdiction of Cleveland.

IV. ARGUMENT

**AMICUS CURIAE'S RESPONSE TO THE CITY'S PROPOSITION OF LAW NO. 1:
THE LOWEST AND BEST BIDDER HAS A CONSTITUTIONALLY PROTECTED
PROPERTY INTEREST IN A MUNICIPAL CONTRACT WHERE THE CITY HAD NO
DISCRETION UNDER ITS OWN CODE TO AWARD THE CONTRACT TO A
HIGHER-PRICED BIDDER.**

While both the City and the Municipal League deem it appropriate to ignore its very existence in their Memoranda, there was a clear and absolute limitation in the City's municipal code upon the City's discretion to award to a higher bidder in this case, but one which was ignored in the bid award process just as it is ignored by the City now. The limitation is in the form of a monetary "cap" designed to preserve taxpayer funds."⁴ Also critical for purposes of analyzing whether Cleveland had any property interest of which it could be deprived, the City admits that Cleveland's bid was acceptable in every other way but for the unconstitutional subcontracting requirements of the SBE Program, and that Cleveland would have been awarded the contract but for its failure to meet those unconstitutional requirements. Those two facts are what gave rise to a constitutionally protected property interest in this case.

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."⁵ In the context of competitive bidding, a person has a property interest in a public contract if the person

⁴ Cincinnati Municipal Code 321-37(c)(4).

⁵ *Bd of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701 (1972).

has a legitimate claim of entitlement to it.⁶ To state a claim, a disappointed bidder must either show that it was actually awarded the contract and then deprived of it or that the government abused its limited discretion in awarding the contract to another bidder.⁷ An abuse of discretion “implies an unreasonable, arbitrary, or unconscionable attitude . . . ‘Arbitrary’ means ‘without adequate determining principle; . . . not governed by any fixed rules or standard.’ . . . ‘unreasonable’ means ‘irrational.’”⁸ Application of the cap ordinance, combined with the fact that the City admits that only basis for the award to the higher bidder was that bidder’s attainment of the unconstitutional subcontracting requirements of the SBE program, and that the contract otherwise would have gone to Cleveland, create a legitimate expectation in Cleveland that it would receive the contract under the City law which governed the bidding process. This gives rise to a recognized property interest in Cleveland, to which constitutional due process protection should have attached.

While the City argues that it had discretionary authority to reject any and all bids for City contracts,⁹ *this is true only should the City actually decide to reject all of the bids.* It did not do so here; instead it selected a bidder based upon criteria which violate a clear limitation in its own code designed to save taxpayer money, and did so to achieve unconstitutional racial and gender based quotas. While government entities generally do have great discretion in awarding public contracts, a municipality “may by its actions commit itself to follow rules it has itself

⁶ *Cleveland Construction v. Ohio Dept. of Admin. Servs.*, 121 Ohio App.3d 372, 700 N.E.2d 54 (10th Dist.1997).

⁷ *United of Omaha Life Ins. Co. v. Solomon* (C.A. 6, 1992) 960 F.2d 31; *Enertech Elec. v. Mahoning Cty Commrs* (C.A. 6, 1996), 85 F.3d 257; *Peterson Enterprises, Inc. v. Ohio Dept. of Mental Retardation* (C.A. 6, 1989), 890 F.2d 416, 1989 WL 143563.

⁸ *City of Dayton, ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, 423 N.E.2d 1095.

⁹ Memorandum in Support of Jurisdiction, p. 4-5, 8.

established...¹⁰ Even in the context of throwing out all bids, (which did not occur here), surely even the City does not argue that it could exercise whatever discretion it has in that context to achieve unconstitutional racial quotas.

In the case of the drywall contract, there was a clear monetary limitation imposed on city officials by CMC §321-37 and only by failing to abide by this restriction could the City avoid awarding the drywall contract to Cleveland, the lowest and best bidder. The City concedes that the only reason that Cleveland's bid was rejected was because "it failed to comply with the mandatory 35% small business requirement . . ."¹¹ While the City argues that bidders' adherence to the subcontracting outreach portion of the SBE program played no role in the evaluation of bids, the City erroneously states that "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."¹² That is a blatant misstatement as the City was bound by the monetary cap in the event that the bid was awarded primarily on the basis of a bidder's compliance with the subcontracting outreach program. The City's arbitrary decision to award the contract to Valley, a contractor whose bid was more than 24 times higher than what was permissible under the plain language of CMC §321-37, where no discretion remained in the City to fail to make the award to Cleveland, constituted an abuse of discretion depriving Cleveland of its constitutionally protected property interest without due process of law.

This Court has clearly stated that a contract must be awarded based on announced criteria. The Court has warned against situations wherein there are no standards or guidelines that would both restrain the government from acting arbitrarily and illustrate to a bidder how its

¹⁰ *Danis Clarko Landfill*, 73 Ohio St.3d at 603.

¹¹ Memorandum in Support of Jurisdiction, p. 6.

¹² *Id.* at p. 8.

bid is to be evaluated so the bidder may maximize its odds of being selected. The Court cautioned that, "Absent such standards, the bidding process becomes an uncharted desert, without landmarks or guideposts..."¹³ While municipal governing bodies are necessarily vested with wide discretion, such discretion is neither unlimited nor unbridled. The presence of standards against which such discretion may be tested is essential; otherwise, the term 'abuse of discretion' would be meaningless."¹⁴

In this case, the monetary cap helped the bidder understand how its bid was to be evaluated. Unbeknownst to the bidders, while the City purportedly restrained itself in imposing a "fixed rule,"¹⁵ it blatantly ignored that rule, (the monetary cap), in awarding the contract to Valley. The City's brazen failure to evaluate bids based on its own announced criteria severely undercuts a bidder's ability to tailor its bid so that it has the best chance of winning the contract. It also defeats the bidder's fair expectation that the contract will be awarded based on the application of a fixed set of standards and guidelines.

The City claims that the First District's decision has caused a conflict of law with the Fourth and Tenth Districts.¹⁶ However, upon closer examination of the facts and reasoning of each case, it is clear that this assertion is unwarranted.

In *Miami Valley Contractors v. Village of Oak Hill*, the Fourth District found that a disappointed bidder whose bid was not rejected as a result of an abuse of discretion and whose bid was consequently not the lowest and best failed to establish the existence of a

¹³ *City of Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 360, 423 N.E.2d 1095.

¹⁴ *Scandrick*, 67 Ohio St.2d at 360.

¹⁵ *Cedar Bay Construction, Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 22, 552 N.E.2d 202.

¹⁶ Memorandum in Support of Jurisdiction, p 11-12.

constitutionally protected property right required to assert a §1983 claim.¹⁷ This case confirms that there is a possibility of a constitutionally protected property interest in a competitively bid public contract but not under the facts of that particular case. As is conceded by the City in this case, Cleveland's bid was rejected solely on the basis of its failure to comply with the City's SBE Program, not because it was unable, unwilling, or unqualified to perform the work. An award to a bidder other than the lowest and best based upon its compliance with the subcontracting outreach goals triggers the requirement that the City may only award to another bidder if its bid does not exceed the monetary cap. The City abused its discretion when it arbitrarily ignored that cap.

In *Cleveland Constr. v. Ohio Dept. of Admin Services*, the Tenth District found that while a disappointed bidder could have a constitutionally protected property interest in a public contract, Cleveland failed to demonstrate it in that particular case.¹⁸ Consequently, the court found that there was no abuse of discretion by state or local officials that unlawfully deprived Cleveland of a protected property interest. The case does not stand for the proposition that a disappointed bidder can never assert and prove such a claim. In the case at hand, Cleveland's entitlement to the Drywall Contract as the lowest and best bidder was virtually admitted by the City, but for the City's failure to apply its cap ordinance and the application of its unconstitutional small business subcontracting requirements.

Similarly inapposite to this case, the City cites *Trihealth v. Bd. of County Commissioners*,¹⁹ a case involving a civil rights action against the county stemming from the county's refusal to permit Trihealth, a hospital partnership, to share in levy funds. The court

¹⁷108 Ohio App.3d 745, 671 N.E.2d 646 (4th Dist. 1996).

¹⁸121 Ohio App.3d 372, 700 N.E.2d 54 (10th Dist. 1997).

¹⁹(C.A. 6, 2005), 430 F.3d 783.

found, first and foremost, that the case did not even involve a publicly bid contract. Second, Trihealth's argument that denial of its right to competitively bid on the contract deprived it of a protected property interest was erroneous because Trihealth could not claim a property interest in a competitive bidding procedure which had not even been initiated at that point. Finally, in pure dicta, the court speculated that even if Trihealth had a protected property interest, state law would have afforded it a remedy comporting with due process, specifically declaratory and injunctive relief. However, the court noted that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."²⁰ In Trihealth's particular situation, a declaratory judgment or an injunction would have protected its due process rights, but the court is not suggesting that this is true in every scenario. The City's interpretation of *Trihealth* as a universal statement that Cleveland has no protected property interest is misplaced.

AMICUS CURIAE'S RESPONSE TO THE CITY'S PROPOSITION OF LAW NO. 2:
A BIDDER WHO PROVES VIOLATIONS OF HIS CONSTITUTIONAL EQUAL PROTECTION AND DUE PROCESS RIGHTS IS ENTITLED TO SEEK DAMAGES IN THE FORM OF LOST PROFITS CAUSED BY THOSE VIOLATIONS UNDER 42 U.S.C. SECTION 1983.

Under §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 proceedings for redress." The basic purpose of §1983 is to compensate persons for injuries caused by the deprivation of their constitutional rights.²¹ The United States Supreme Court has specifically stated that, "To the extent that Congress intended that awards under §1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent

²⁰ *Id.* at 794 (quoting *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001)).

²¹ *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042 (1978).

more formidable than that inherent in the award of compensatory damages.”²² Violation of a person’s constitutional rights, “creates ‘a species of tort liability’ in favor of persons who are deprived of ‘rights, privileges, or immunities secured’ to them by the Constitution. . . . [T]he level of damages is ordinarily determined according to principles derived from the common law of torts.”²³ The court in *Stachura* went on to describe the purpose underlying the award of damages under §1983, stating that, “Congress adopted this common-law system of recovery when it established liability for ‘constitutional torts.’ Consequently, ‘the basic purpose’ of §1983 damages is ‘to *compensate persons for injuries* that are caused by the deprivation of constitutional rights.”²⁴

The United States Supreme Court further declared that under §1983, compensatory damages may include “out-of-pocket loss and other monetary harms.”²⁵ The court elaborated that, “[jury] instructions concerning damages for constitutional violations are thus impermissible unless they reasonably could be read as authorizing compensatory damages.”²⁶ Thus, the United States Supreme Court has made it clear that §1983, to accomplish its remedial purpose, allows the recovery of damages.

Any proper application of §1983 permits Cleveland the opportunity to recover its lost profits as compensatory damages. In *Adarand Constructors v. Pena*, the United States Supreme Court held that a subcontractor that was not awarded a federal contract due to the contract’s subcontractor compensation clause that provided financial incentives to the prime contractor for

²² *Id.* at 255.

²³ *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305, 106 S.Ct. 2537 (1986) (internal citations omitted).

²⁴ *Memphis Community School District v. Stachura*, (1986), 477 U.S. 299, 307, 106 S.Ct. 2537 (1986)(quoting *Carey v. Piphus*, 435 U.S. at 254, 98 S.Ct. at 1047).

²⁵ *Id.* at 307.

²⁶ *Id.*

hiring disadvantaged subcontractors could seek damages for the loss of that contract. Specifically, the Court stated that, “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.*”²⁷ (emphasis added) Those damages may include lost profits.²⁸

In *W.H. Scott Constr. Co., Inc. v. Jackson*, a general contractor brought a §1983 equal protection challenge against Jackson’s “small business” program alleging that the city’s policy promoting minority participation in construction contracts was unconstitutional.²⁹ The Fifth Circuit upheld the award of lost profit damages.³⁰

And in *Hershell Gill Consulting Engineers v. Miami Dade Cty, Fla.*, the issue of lost profits as damages under §1983 arose in the competitive bidding context involving a racially preferential small business program.³¹ Although not proven in the case, the court found that the plaintiff could recover lost profits caused by the unconstitutional program under §1983 as an element of compensatory damages.

Despite the City’s assertions to the contrary,³² the First District’s decision in this case did not “overrule” this Court’s decision in *Cementech*. *Cementech* prohibited a disappointed bidder from seeking lost profit damages under state competitive bidding laws when a municipality violates those laws in awarding a competitively bid contract. While Cleveland did initially pursue a claim for damages under state law, it also sought damages under §1983. The First District acknowledged, as did Cleveland, that *Cementech* resolved Cleveland’s claim for damages under

²⁷ 515 U.S. 200, 210, 115 S.Ct. 2097 (1995).

²⁸ *Flores v. Pierce* (C.A. 9, 1980), 617 F.2d 1386; *Chalmers v. Los Angeles* (C.A. 9, 1985), 762 F.2d 753.

²⁹ (C.A. 5, 1999), 199 F.3d 206.

³⁰ *Id.* at 219-20.

³¹ (S.D. Fla. 2004), 333 F.Supp.2d 1305.

³² Memorandum in Support of Jurisdiction, p. 2, 11.

state law but not its claim under federal law.³³ Not every violation of state competitive bidding laws gives rise to constitutional claims. The plaintiff's claims of competitive bidding law violations in *Cementech* did not. In this case, due to its particular facts, constitutional equal protection and due process claims were properly recognized as valid by the courts below. A proper reading of *Cementech* would not prohibit a disappointed bidder like Cleveland from seeking its lost profit damages under §1983, where, as here, a protected property interest was established.

AMICUS CURIAE'S RESPONSE TO THE CITY'S PROPOSITION OF LAW NO. 3:
A "SMALL BUSINESS ENTERPRISE" PROGRAM WHICH CONTAINS RACE AND GENDER BASED SUBCONTRACTING GOALS AND WHICH ENCOURAGES AND PRESSURES BIDDERS TO MEET THOSE GOALS IS SUBJECT TO CONSTITUTIONAL STRICT SCRUTINY.

"Outreach programs" or programs with similarly innocuous names may still contain impermissible race or gender preferences triggering heightened scrutiny. The City's SBE Program is "not immunized from scrutiny because [it] purport[s] to establish 'goals' rather than 'quotas.' We look to the economic realities of the program rather than the label attached to it."³⁴

The City claims that its program contained "legitimate outreach efforts"³⁵ that encouraged good faith attempts to promote opportunities for minorities and females. But regardless of what the City labels its program, at its core are illegal race and gender classifications that promote preferential treatment. That the Program is labeled an SBE program rather than an MBE or WBE program is irrelevant to the determination of what level of scrutiny to apply. In the context of racial classifications, strict scrutiny applies whenever the government "encourages" racial preferences, even if such programs are termed outreach programs or do not appear mandatory on their face.³⁶

³³ 2006-Ohio-6452, ¶57-58

³⁴ *Bras v. California Public Utilities Com'n* (C.A. 9, 1995), 59 F.3d 869, 874.

³⁵ Memorandum in Support of Jurisdiction, p. 15.

³⁶ See, *Safeco Insurance Company of America v. City of White House, Tennessee* (C.A. 6, 1999), 191 F.3d. 675, 691-92, where "outreach" requirements or goals operate as a "*sub rosa* racial preference – that is, where their administration 'indisputably pressures' contractors to hire minority subcontractors – courts must apply strict scrutiny." (quoting *Lutheran Church-Missouri Synod v. Fed. Comm. Comm'n* (D.C. Cir. 1998), 154 F.3d 487, 491.

In its Memorandum, the City argues that its SBE Program did not contain explicit race or gender-based requirements triggering heightened scrutiny. However, courts have rejected the argument that a regulation constitutes a racial classification subject to strict scrutiny only if it requires or obliges someone to exercise a racial preference.³⁷ “[T]he degree to which the regulations require, oblige, pressure, induce, or even encourage the hiring of particular races is not the logical determinant of whether the regulation calls for a racial classification.”³⁸ Rather, the fact of encouragement, even if a regulation does not explicitly require race-based decisions, makes a regulation a racial classification.³⁹

In *Safeco Insurance Company of America v. City of White House, Tennessee*,⁴⁰ the Sixth Circuit opined that even if the regulations did not explicitly impose a numerical quota, but instead only required “good faith efforts,” that alone would not insulate the regulations from strict scrutiny.⁴¹ In that case, the Court found that the EPA’s stated policy of awarding a “fair share” of sub-agreements to MBEs “implies that the outcome must meet an implicit goal—a goal derivable from one’s calculation of ‘fair share,’ but almost certainly non-zero.”⁴² A government cannot avoid “strict scrutiny, by invoking the phrase ‘good-faith effort to solicit.’”⁴³

Similarly, in *Monterey Mechanical*, the Ninth Circuit found that an outreach program requiring “good faith efforts” was impermissibly race-conscious.⁴⁴ In that case, a bid specification required contractors to make “good-faith efforts” to solicit bids from DBE

³⁷ *Id.* at 690.

³⁸ *Lutheran Church-Missouri Synod v. Fed. Comm. Comm’n* (D.C. Cir. 1998), 154 F.3d 487, 491.

³⁹ *Id.*

⁴⁰ (C.A. 6, 1999), 191 F.3d. 675.

⁴¹ *Id.* at 689, 691.

⁴² *Id.* at 690.

⁴³ *Id.* at 691.

⁴⁴ *Monterey Mechanical Co. v. Wilson* (C.A. 9, 1997), 125 F.3d. 702.

contractors (which included MBE and WBE subcontractors). The plan also allowed subcontractors to self-perform and meet the requirements if the contractors themselves qualified as DBE's. This element of the plan was found by the Court to award a preference to MBEs and WBEs in that they did not have to comply with the minority solicitation imposed on non-DBEs.⁴⁵

In its Memorandum, the City claims that its SBE Program did not create constitutionally impermissible race and gender classifications. But as the First District noted in its decision, 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."⁴⁶ The First District rejected this argument, stating that "rigid mandates are not a prerequisite to a finding of a racial classification. Where regulations pressure or encourage contractors to hire minority subcontractors, courts must apply strict scrutiny."⁴⁷

The City's SBE Program encouraged and pressured bidders to hire MBEs and WBEs or they risked losing the contract. For example, all bidders were required to document their good faith efforts to promote opportunities for MBEs and WBEs to the extent of their availability as determined by the City. If the City found those good faith efforts to be unsatisfactory, the bid would be flagged for a discrimination investigation and the bidder would almost certainly not be awarded the contract. This requirement is just one example of the indisputable pressure imposed upon bidders to utilize race and gender-based classifications triggering strict scrutiny.

The Equal Protection Clause of the 14th Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the law." Under this clause,

⁴⁵ *Id.* at 709.

⁴⁶ 2006-Ohio-6452, ¶42

⁴⁷ 2006-Ohio-6452, ¶43

race-based action by state or local governments triggers strict scrutiny.⁴⁸ The United States Supreme Court explicitly admonished that, “all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”⁴⁹ Gender-based classifications require an “exceedingly persuasive” justification.⁵⁰

The City imposed race and gender based classifications through its SBE Program without the requisite determination establishing, in the case of a race-based preference, that the provisions are narrowly tailored to advance a compelling governmental interest or, in the case of gender-based preferences, substantially related to genuine and important governmental objectives. As the First District noted, the City “effectively conceded that it could not justify race- or gender-based classifications under either standard of heightened scrutiny, [and] the trial court properly determined that those elements of the program that caused bidders to use racial or gender-based preferences were unconstitutionally impermissible.”⁵¹ The City’s SBE Program is infused with impermissible race and gender-based preferences that violate Cleveland’s right to equal protection.

V. CONCLUSION

This Appeal should be denied because not only does this case not present a significant constitutional question or an issue of great public concern, none of Appellant’s Propositions of Law are meritorious. The decision of the Ohio First District Court of Appeals comports with

⁴⁸ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989).

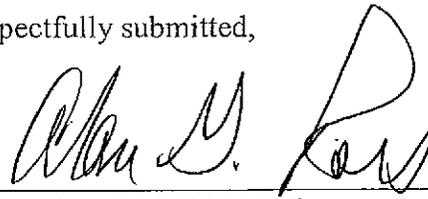
⁴⁹ *Adarand Constructors*, 515 U.S. at 227; *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (C.A. 6, 2000), 214 F.3d 730, 733.

⁵⁰ *United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264 (1996).

⁵¹ 2006-Ohio-6452, ¶49

existing well established precedents of this Court, and with federal law governing constitutional claims under 42 U.S.C. Section 1983. The decision will provide greater clarity and predictability for contractors in the public competitive bidding process by emphasizing that all bidders are to be held to the same announced criteria for the award of public contracts, and that municipalities must follow the "rules of the game" they themselves create in their own ordinances. In so doing, the decision also promotes and protects the viability of the rule of law in the State of Ohio.

Respectfully submitted,



February 19, 2007

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing, Memorandum of Amicus Curiae, Northern Ohio Chapter of Associated Builders & Contractors, Inc., in Opposition of Jurisdiction, was served via ordinary U.S. mail, postage prepaid, upon the following:

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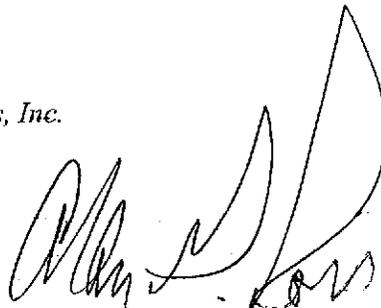
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