

IN THE SUPREME COURT OF OHIO

CLEVELAND CONSTRUCTION, INC.,	:	CASE NO. 2007-0114
	:	
Plaintiff-Appellee,	:	
	:	On Appeal from the
vs.	:	Hamilton County Court Of Appeals
	:	First Appellate District
	:	
CITY OF CINCINNATI,	:	Appeal No. C050749
	:	Appeal No. C050779
Defendant-Appellant.	:	Appeal No. C050888
	:	(Consolidated)

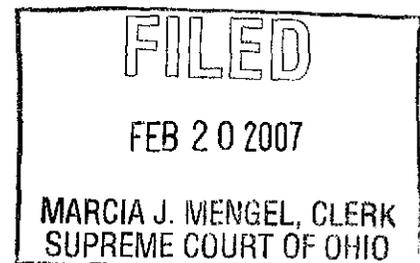
**MEMORANDUM OF APPELLEE CLEVELAND CONSTRUCTION, INC.
IN OPPOSITION TO JURISDICTION**

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II. EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

Contrary to the City's argument, this case is fact specific and reliant upon the unique City of Cincinnati public bidding ordinances, including its Small Business Enterprise (SBE) Program. Therefore, the outcome of this case will not have a direct impact outside of Cincinnati and the First District's decision did not establish any new law.

Prior to publicly bidding the City's major convention center renovation and expansion project, the City Council amended its public bidding requirements and established as part of its SBE Program, a "Subcontracting Outreach Program" ("SOP")¹ to ensure that small businesses were included in the project, at least as subcontractors. The City Council recognized that the inclusion of a requirement that small businesses be included as subcontractors in the large trade contracts for the project would likely cost the City more money than if such a requirement was not present. Therefore, in order to protect the City's taxpayers from paying considerably more for the project than required under the normal public-bidding process that did not have a subcontracting requirement, the City Council put a "cap" on the City Purchasing Agent's discretion in awarding a contract utilizing the SBE Program's subcontracting requirement.

While neither the City nor its amicus even mentioned the "cap" provision of the Cincinnati Municipal Code ("CMC"), the City Council decided that if the selection of the lowest and best bid is based primarily on compliance with the SOP, the higher bidder may be awarded the contract subject to the express limitation that "the bid may not exceed an otherwise qualified bid by ten percent (10%) or Fifty Thousand Dollars, whichever is lower."² There is no dispute that Cleveland Construction's bid was otherwise qualified except for the fact that Cleveland did

¹ The Subcontracting Outreach Program was adopted and implemented as part of the SBE Program in anticipation of the Convention Center project and specifically applied to all City-funded construction contracts over \$100,000.

² CMC §321-37(c)(4).

not attain the 35% SBE Program's subcontracting requirement.³ However, the bidder that was awarded the contract was \$1,246,022 higher than Cleveland's bid or more than 24 times higher than the "cap" allowed.

As the trial court pointed out, the City Administration advised Council immediately prior to Council's adoption of the 10%/\$50,000 "cap"

What this ordinance allows us to do is be clear about when it is appropriate to award a bid to a SBE compliant (bidder) if they are not the lowest. This ordinance would allow us to award a bid if the bid is \$50,000 or less difference away from the lowest bid. We had an example where the SBE-compliant bidder was some nine hundred thousand dollars in excess of the lowest bid and, it doesn't make a lot of sense to spend nine hundred thousand dollars more to comply with the regulations of SBE.

Following this explanation, Council adopted the ordinance establishing the "cap" one month before the project bid offering. Council clearly limited the otherwise broad discretion possessed by the City's Purchasing Agent in awarding public contracts where the award is based primarily on compliance with the SBE Program's subcontracting requirement.

Because Cleveland's was the lowest and best bid under the City's public bidding ordinances including the "cap" provision, the City did not have the discretion to ignore the clear requirement of CMC §321-37 and award the contract to the next lowest bidder whose bid was more than \$50,000 higher than Cleveland's bid. In this very rare situation, that is likely unique to the City of Cincinnati, Cleveland had a legitimate claim of entitlement to the contract, and therefore, a property interest that was protected from unlawful deprivation by the Fourteenth

³ As the trial court noted, "Defendants have maintained throughout this litigation that Plaintiff Cleveland was excluded from contract consideration because it failed to meet the City's SBE requirement, the evidence provides no indication of other infirmities in Cleveland's bid or capacity to perform the work, and the City previously conceded that Cleveland was otherwise qualified to perform the work, see SJ Entry at 10." Entry, July 13, 2005, p. 2. The City's Memorandum (at p. 4) acknowledged, "Cleveland lost the drywall bid because it failed to reserve at least 35% of the work to small business enterprises as the bid documents required."

Amendment to the U.S. Constitution. As explained herein, the City deprived Cleveland of its property interest without providing any process at all, either before or after the deprivation.

Contrary to what the City argues, the First District did not disregard *Cementech, Inc. v. City of Fairlawn*.⁴ The Court even stated that Cleveland acknowledged that *Cementech* resolved its claim for damages under state law.⁵ However, *Cementech* did not eliminate, nor could it, Cleveland's right to compensatory damages for violation of its constitutional rights. Even the City's amicus, the Ohio Municipal League, recognized that *Cementech* only addressed Ohio contract law, not federal civil rights law. While the state may immunize certain governmental actions from liability for damages under state law, those immunities do not apply to municipal violations of rights protected by the federal constitution and laws.⁶

Finally, as determined by both courts below, the City's unique SBE Program impermissibly pressured and encouraged bidders to draw upon race- and gender-based classifications in violation of Cleveland's rights under the equal protection clause of the 14th Amendment. Prior to trial, the City conceded that, despite its best efforts, it could not justify a race- or gender-based preference program. The trial court pointed to eight different parts of the SBE Program Rules and Guidelines that "indisputably pressures" contractors to recruit and utilize subcontractors based on race and/or gender.⁷ The First District noted that bidders "were required to provide detailed descriptions of the techniques used to obtain participation of MBEs and WBEs" and if a bidder did not achieve the designated level of participation of minority- or women-owned businesses, the bidder would be subject to a discrimination investigation.⁸

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

⁵ 2006-Ohio-6452, ¶57.

⁶ See, R.C. §2744.09(E).

⁷ Entry, July 13, 2005, pp. 13-14.

⁸ 2006-Ohio-6452, ¶47.

Therefore, because the City's SBE program was not race- or gender neutral, the SBE Program could not withstand the required heightened scrutiny under equal protection clause analysis. The First District was correct in declaring parts of the SBE Program unconstitutional.

III. STATEMENT OF THE CASE AND FACTS

In 1999, the City adopted the SBE Program to replace its Equal Business Opportunity Program, a race conscious program that included a minority set-aside that was challenged as unconstitutional. As the City prepared to renovate and expand its convention center, Council hired a consultant to conduct a disparity study and to revise the SBE Program. The consultant determined the City lacked the factual predicate for any type of race or gender conscious program. As a result, and as the City conceded, if the SBE Program contained any racial or gender preferences, the Program would be unconstitutional. When the disparity study and proposed revisions to the SBE Program were presented to Council near the end of 2002, the Vice-Mayor told the consultant the proposed revisions "didn't have enough teeth" and to review "economic revenue sharing rewarding those who increase minority business participation."

The consultant then helped the City craft a "Non-Discrimination Program" and a "Subcontracting Outreach Program" ("SOP") as integral parts of the overall SBE Program. The SBE Program's Rules and Guidelines containing the two new programs became effective on April 1, 2003. The SOP applied to all City construction contracts over \$100,000 and required all prime contractors to subcontract a certain, pre-determined percentage of the overall contract to registered SBEs.

On November 26, 2003, Council amended CMC §321-37 by emergency ordinance. CMC §321-37 is titled, "Selection of Lowest and Best in Award of City Contracts" and sets forth the factors the City Purchasing Agent should consider when awarding City contracts. The

amendment allowed, among other things, the City Purchasing Agent to consider a bidder's compliance with the SOP.⁹ However, the Code was clear that, if the selection of the lowest and best bid was based primarily on compliance with the SOP, a higher bid may be awarded the contract subject to the express limitation that "the bid may not exceed an otherwise qualified bid by ten percent (10%) or Fifty Thousand Dollars, whichever is lower."¹⁰

Pursuant to the City's procurement ordinances and the SBE Program requirements, the City advertised for, and accepted bids, on a variety of "trade" contracts for the convention center project. The bid documents included a "Subcontracting Outreach Program Summary" (the "SOP Summary"), which set forth, among other things, the percent goal for the various trade contracts that should be subcontracted to SBEs. For the drywall trade contract at issue herein, the subcontracting goal was 35%. The SOP Summary also stated:

You will also find on the cover of this bid document an Availability Determination. These figures are percentages based on a review of the City's vendors list (of certified minority and women-owned businesses. ... **Bidders should be able to include minority and female firms at the level of availability indicated.** (Emphasis added)

As excerpted from the "Availability Determination" sheet referred to above, bidders for the drywall contract were expected "to include minority and female firms at the level of availability indicated" below as part of the Subcontracting Outreach Program:

AVAILABILITY ESTIMATION SHEET

AVAILABILITY ESTIMATION - Subcontractor Outreach Program (CMC 323-31)

The preliminary availability estimate for this project is:

Commodity Code 099-01-01 Description TC-09A Drywall 13.09 % Minority 1.05 % Female

⁹ Council's stated reason for the emergency was "the immediate need to proceed with the bidding of the Convention Center and major development projects, which may be impacted by Section 321-37 of the Cincinnati Municipal Code." A month later, invitations to bid were issued for a variety of large convention center trade contracts, including the drywall contract.

¹⁰ CMC §321-37(c)(4).

The bid documents also contained a number of other forms, including one that required bidders to certify that they used “good faith efforts” to “obtain the maximum practicable participation by small, minority and women-owned business enterprises on this project.” The Program Rules provided that if the bidder did not reach the “availability” levels for minority or women-owned firms, the bidder may be subject to a discrimination investigation.

When the initial bids were submitted, and although Cleveland was the lowest bidder, all of the initial bids were rejected pursuant to the City’s broad discretion to reject “any and all bids.” Cleveland did not challenge the City’s decision to reject all bids. Upon re-bid, however, the City decided to award the drywall contract to Valley Interiors, although its bid was \$1,246,022 higher than the lowest bid, submitted by Cleveland. Valley met the 35% SOP’s goal. As the City stated, “Cleveland lost the drywall bid because it failed to reserve at least 35% of the work to small business enterprises as the bid documents required.” Clearly, Valley was awarded the contract based primarily on compliance with the Subcontracting Outreach Program.

Without any pre-award notice to the bidders who were not selected, the City awarded the drywall contract to Valley Interiors. Despite Cleveland’s efforts to get information about the bid award, the City did not inform Cleveland that the contract had been awarded to Valley until two weeks after the contract with Valley was signed and Valley was told to proceed. Shortly thereafter, Cleveland filed suit and sought a temporary restraining order. The trial court denied the TRO and set the matter for a preliminary injunction hearing.

Before the scheduled hearing and instead of proceeding quickly to resolve Cleveland’s claim that it was wrongfully denied the contract, the City decided to move forward with Valley on the drywall contract and improperly removed the case to federal court. The case was returned to state court in May, 2004. The City initially maintained that the disparity study supported a

race and gender preference in its SBE Program forcing Cleveland to engage in extended discovery. The City retreated from this position during the October 2004 deposition of the City's consultant. Although the SBE Program Rules and Guidelines that contained much of the race and gender references that were eventually struck by the lower courts were produced in discovery, the City denied they were ever officially adopted. The City continued to disavow the SBE Rules until the eve of trial in June 2005. The City's refusal to acknowledge the Rules led the trial court to deny Cleveland's motion for preliminary injunction and partial summary judgment in April 2005. Throughout this time and through the trial of the matter, the City proceeded with the convention center project knowing that Cleveland claimed entitlement to the drywall contract with the City arguing that any delay in the construction schedule would cost the City millions of dollars and would require a bond in the tens of millions of dollars if a preliminary injunction was issued.

IV. ARGUMENT

Cleveland Construction's Response To The City's Proposition of Law No. 1:

Where the City has no discretion to award to a higher-priced bidder based upon criteria which are subject to a clear limitation in the competitive bidding provisions of its municipal code but does so anyway, and where the City admits that but for awarding based upon those criteria the contract award would have been to the lowest bidder whose bid was acceptable in every respect other than the wrongfully used criteria, the lowest bidder has a constitutionally protected property interest in the contract under 42 U.S.C. §1983.

The City's argument in this regard is based on the ridiculous, contrived premise that the SOP did not apply to the convention center project and that some other, unidentified 35% subcontracting goal applied. However, the bid documents continuously referred to the SOP, and the only document in the bid package that mentioned a 35% SBE utilization goal for the drywall contract was the SOP Summary. In addition, shortly before the convention center project was put out to bid, Council adopted the SOP and made it applicable to all City construction contracts

over \$100,000. It also adopted the ordinance that established the “cap” provision. As mentioned previously, that ordinance was adopted as an emergency ordinance so that it would be effective for the convention center project bidding. Both lower courts considered and rejected the City’s argument. Cleveland’s bid was rejected solely because of noncompliance with the SOP.

The Sixth Circuit has held that a disappointed bidder may establish a legitimate claim of entitlement to a public contract, and therefore a protected property interest, in one of two ways. A bidder can show either that it actually was awarded the contract and was then deprived of it, or that the government abused its limited discretion in awarding the contract to another bidder.¹¹

Cleveland acknowledges that a City usually has a great deal of discretion in awarding publicly bid contracts. However, it must follow the laws it has in place for that process.¹² The City Council expressly limited the Purchasing Agent’s discretion if a bid award was based primarily on compliance with the SOP. Cleveland had a protected property interest in the drywall contract because the City limited its usually broad discretion by enacting the “cap.” In this case, the City abused its discretion in failing to apply its “fixed rule,” the “cap,” and in awarding the drywall contract to Valley instead of Cleveland.¹³ The First District correctly found 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.”

Cleveland Construction’s Response To The City’s Proposition of Law No. 2:

A bidder who proves it received neither notice nor opportunity to be heard prior to deprivation of a property interest in a competitively bid contract establishes that element of a federal constitutional procedural due process violation actionable through 42 U.S.C. §1983.

¹¹ *United of Omaha Life Ins. Co. v. Solomon* (C.A.6, 1992), 960 F.2d 31, 34; *Enertech Elec. v. Mahoning Cty. Commrs.* (C.A.6, 1996), 85 F.3d 257, 260.

¹² *Danis Clarkeo Landfill Co. v. Clark Cty Solid Waste Mgmt Dist.* (1995), 73 Ohio St.3d 590, 602, 1995-Ohio-301, 653 N.E.2d 646.

¹³ *Dayton, ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, 423 N.E.2d 1095. See also, *Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 552 N.E.2d 202.

The testimony in this case was clear that the City did not provide either a pre- or post-deprivation notice or hearing to Cleveland. The City does not argue to the contrary. The City argues that the First District “did not consider in any way whatsoever the City’s procedures available to a disappointed bidder.” However, the City did not indicate that there are any procedures that should have been considered by the Court. The trial court record is clear that there were no such procedures available to a disappointed bidder such as Cleveland.

The CMC provides an opportunity for an appeal where a determination of noncompliance with the SBE is found by the City’s staff. The procedure requires the City to immediately notify a bidder of the City’s finding and allows an appeal to the Contract Compliance Advisory Board and an opportunity for a hearing and decision by the Board “before the contract is awarded or penalties are imposed, except in emergency situations as determined by the city purchasing agent.”¹⁴ However, it was clear that those provisions did not apply in this case because the City conducted the second drywall bid under an “emergency basis” so as to not delay the convention center project’s tight timeline. For the City to now assert that this procedure was in place and could have provided Cleveland with a meaningful opportunity to be heard at a meaningful time is disingenuous at best, especially where the City deliberately delayed informing Cleveland of the bid award to Valley until two weeks *after* the contract was awarded, thereby depriving Cleveland of its opportunity to resolve this matter prior to the award of the drywall contract.

Cleveland Construction’s Response To The City’s Proposition of Law No. 3:

A bidder who establishes a violation of its constitutional due process and equal protection rights is entitled to recover damages in the form of lost profits caused by those violations in an action under 42 U.S.C. §1983.

The Ohio Municipal League, unlike the City, understands that this Court’s *Cementech* decision does not address the issue in this case. Instead, the OML requests the Court to take this

¹⁴ CMC §323.13.

case in order to extend *Cementech* to say that, under no circumstances does the lowest, qualified bidder have a protected property interest in a publicly bid contract award and the disappointed bidder has no protection under the federal constitution even if the bid is awarded to a higher bidder contrary to public policy or federal constitutional requirements.¹⁵

First, it is important to note that, in general, Cleveland acknowledges that, in a typical case,¹⁶ where a city has not otherwise limited its own discretion to award bids to the “lowest and best bidder,” an unsuccessful bidder does not have a protected property interest in that award. For example, the City chose to reject all bids the first time the drywall contract was put out for bid. Cleveland has not challenged that decision. However, when the City chose to award the contract based on the second round of bidding, the award had to be made according to the City’s public bidding laws, including the “cap” provision. Both the City and the OML acknowledge that the only reason Cleveland’s bid was rejected was that Cleveland’s bid did not meet the SBE subcontracting requirements.¹⁷ Again, neither memorandum mentions the “cap,” much less argues why the “cap” provision did not apply to the facts of this case. The lower courts correctly found that the City arbitrarily ignored the “cap” in awarding the drywall contract.

Instead, both argue that the City code provisions provided unfettered discretion to reject any bid for any reason; apparently, even if that reason was contrary to law and the announced criteria or “fixed rules” governing the bid award. Such argument is contrary to clear Ohio Supreme Court precedent.¹⁸ The argument also flies in the face of the reason the “cap” was

¹⁵ This case does not involve a claim that the second or third lowest bidder has a protected property interest as was involved in *Miami Valley Contractors v. Village of Oak Hill* (1996), 108 Ohio App.3d 745, 671 N.E.2d 646. Here, it is undisputed that Cleveland was the lowest bidder and was otherwise qualified but for its noncompliance with the SBE subcontracting requirement.

¹⁶ That is, where the award does not violate public policy or applicable state or federal law.

¹⁷ OML Memorandum, p. 8. See City’s Memorandum, p. 4, discussed, *infra*.

¹⁸ *Dayton, ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, 423 N.E.2d 1095. See

adopted in the first place. As the First District noted, "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." The presentation from the City administration to Council before the "cap" was adopted confirms this finding. Yet, the City ignored the "cap" and now complains that an unfavorable decision threatens the very taxpayers the "cap" would have protected if it had been applied in this case.

By making the spurious arguments discussed herein relating to the disparity study and the SBE Program Rules and Guidelines, and now the argument the City is advancing that the SOP did not apply to the convention center project despite clear evidence to the contrary, the City has attempted to insulate itself from any liability to Cleveland by avoiding injunctive relief to halt the project and now is trying to avoid liability for damages. Just as a City is required to compensate individuals subject to an illegal detention, an unreasonable use of force, or whose property has been taken wrongly by governmental regulation, the City should not be protected from paying damages for an unconstitutional deprivation of a property right in a situation where a bidder has clearly established a deprivation of its federal civil rights.

42 U.S.C. §1983 provides Cleveland the remedy of monetary damages, including lost profits, directly flowing from a violation of its constitutional rights. In *Carey v. Piphus*,¹⁹ the U.S. Supreme Court explained that, "[t]he basic purpose of a §1983 damages award is to compensate persons for injuries caused by the deprivation of constitutional rights." In a later case,²⁰ the Supreme Court declared that under §1983, compensatory damages include "out-of-pocket loss and other monetary harms." The court further stated that, "[j]ury] instructions

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

¹⁹ (1978), 435 U.S. 247, 98 S.Ct. 1042.

²⁰ *Memphis Community School District v. Stachura* (1986), 477 U.S. 299, 307, 106 S.Ct. 2537 (internal citations omitted).

concerning damages for constitutional violations are thus impermissible unless they reasonably could be read as authorizing compensatory damages.”²¹ Thus, the U.S. Supreme Court has made it clear that §1983, to accomplish its remedial purpose, allows the recovery of damages.

The court in *Stachura* went on to describe the purpose underlying the statutory intent to allow damages under §1983:

Punitive damages aside, damages in tort cases are designed to provide “compensation for the injury caused to plaintiff by defendant's breach of duty.” [internal citations omitted] Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are compensatory-damages grounded in determinations of plaintiffs' actual losses. . . . 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.” *Carey v. Piphus*, 435 U.S., at 254, 98 S.Ct., at 1047 (emphasis added). See also *id.*, at 257, 98 S.Ct., at 1049 (“damages awards under §1983 should be governed by the principle of compensation”).²²

Compensatory damages are an essential part of the remedial purpose behind §1983.

Cleveland Construction's Response To The City's Proposition of Law No. 4:

Where a plaintiff has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, the law or action in question has caused the injury, and the relief requested will address the injury, that plaintiff has standing.

In this case, Cleveland alleged that it had been denied the drywall contract award, in part, because the City illegally applied its race-conscious SBE Program to the public bidding process in violation of Cleveland's rights under the 14th Amendment's equal protection clause. Cleveland sought prospective injunctive relief to keep the City from utilizing the unconstitutional provisions of the SBE Program in the future and a declaratory judgment. As both the trial court and the First District noted, the City stipulated prior to trial that Cleveland Construction intended and was able to bid on future Cincinnati construction projects. Now, notwithstanding the

²¹ *Id.*

²² *Id.* at 306-307, 106 S.Ct. at 2542-43. (citations omitted.)

stipulation, the City argues that Cleveland did not have standing to seek prospective injunctive relief to keep the City from utilizing the unconstitutional provisions of its SBE Program.

First, Cleveland received a declaratory judgment finding parts of the SBE Program in violation of the 14th Amendment's equal protection clause. That judgment was upheld on appeal. Even if, assuming arguendo, Cleveland did not have standing to seek prospective injunctive relief, the City would not be able to utilize those provisions of the SBE Program that were declared facially unconstitutional because they provided racial and gender preferences. From a practical standpoint, the City's standing argument is much ado about nothing.

Second, as the First District held, "standing to challenge the constitutionality of a legislative enactment exists when 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 address the injury.'"²³ Under this standard, Cleveland has standing.

While the City would like to insulate itself from such challenges to its ordinances, this Court made clear that a standing analysis in state court is not as rigorous as in federal court. "State courts need not become enmeshed in the federal complexities and technicalities involving standing and are free to reject procedural frustrations in favor of just and expeditious determination on the ultimate merits."²⁴ Decisions from cases involving "public rights," or where the Plaintiff seeks to force a public official to comply with legal duties have relaxed the standing requirements from those of federal courts.²⁵

²³ 2006-Ohio-2991, ¶128, quoting *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, (1999), 86 Ohio St.3d 451, 469-470, 1999-Ohio-123, 715 N.E.2d 1062.

²⁴ *State ex rel. Ohio Acad. of Trial Lawyers*, 86 Ohio St.3d at 470.

²⁵ *State ex rel. Newell v. Brown* (1954), 162 Ohio St. 147, 122 N.E.2d 105; *State ex rel. Cater v. N. Olmsted* (1994), 69 Ohio St.3d 315, 631 N.E.2d 1048.

Even under the federal standard, Cleveland has standing. Cleveland alleged and proved that it was subject to an unconstitutional minority and gender preference program in seeking a publicly bid contract from the City. The Sixth Circuit held in a similar context:

Further, even if the assumed-unconstitutional regulations do not place one contractor at a competitive disadvantage with other contractors, the regulations place white *subcontractors* at a disadvantage. "A person required by the government to discriminate by ethnicity or sex against others has standing to challenge the validity of the requirement, even though the government does not discriminate against him." *Monterey Mechanical*, 125 F. 3d at 707, see also *Lutheran Church Missouri Synod v. FCC*, 141 F. 3d 344, 350-51 (D.C. Circuit, 1998) (echoing this proposition, casting it as a matter of third party standing), reh'g denied, 154 F. 3d 487 (D.C. Circuit, 1998); cf. *Lutheran Church*, 141 F. 3d at 349-50 (finding injury-in-fact where compliance with governmental racial hiring preferences caused "economic harm by increasing the expense" of running the business.)²⁶

The First District correctly determined that Cleveland has standing to pursue prospective injunctive relief from the operation of the unconstitutional parts of the SBE Program.

Cleveland Construction's Response To The City's Proposition of Law No. 5:

A City's small business enterprise program that encourages and pressures bidders to utilize race and gender-based preferences when subcontracting is subject to strict scrutiny, and is unconstitutional where such scrutiny admittedly cannot be met.

As the City conceded prior to trial, if the SBE Program contained elements that provided a preference to minority- or women-owned businesses, those Program elements could not withstand heightened equal protection scrutiny. The City states the SBE Program did not indisputably pressure bidders to contract with minority or women subcontractors, and the inclusion of the "Availability Determination" discussed previously was for informational purposes only. Nowhere in its memorandum does the City even mention the part of its SBE Program the First District found most offensive to the equal protection clause.

²⁶ *Safeco Insurance Co. of America v. City of White House, Tennessee* (6th Cir. 1999), 191 F. 3d 675, 689 (emphasis in original). See also, *Monterey Mechanical Co. v. Wilson* (9th Cir. 1997), 125 F.3d. 702, 707; *Engineering Contractors Ass'n of South Florida Inc. v. Metropolitan Dade County* (11th Cir. 1997), 122 F.3d 895.

As stated previously, the SBE Program required all bidders “to provide detailed descriptions of the techniques used to obtain participation of MBEs and WBEs” and if a bidder did not achieve the designated level of participation of such businesses, the bidder would be subject to a discrimination investigation.²⁷ The actual words from the SBE Program state:

If the evaluation (of good faith efforts) determines that a bidder has failed to achieve levels of minority and women business enterprise participation as might be reasonable on the basis of objective data regarding availability and capacity of such businesses, the bidder shall be subject to an inquiry by the (City).

In addition, the SOP Summary contained in the bid packet said, “Bidders should be able to include minority and female firms at the level of availability indicated” in the “Availability Determination.” The trial court found other parts of the SBE Program, none of which were addressed in the City’s Memorandum, which violated the equal protection clause.

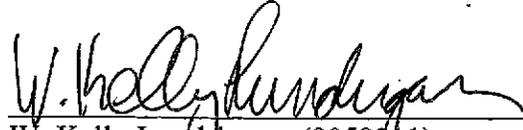
Amazingly, the City argues that it did not base any of its decisions on the bidder’s compliance with obtaining a certain percentage of minority- or women-owned businesses for subcontracts and, therefore, the Program cannot be declared unconstitutional. However, the lower courts found that the language used rendered elements of the Program unconstitutional on its face. By inserting the elements that pressured bidders to include a certain percentage of their required subcontracting to minority- and women-owned businesses, and which threatened bidders with a discrimination investigation if they did not comply, the City irretrievably tainted the entire bidding process and led to Cleveland not being awarded the drywall contract.

V. CONCLUSION

For the forgoing reasons, Cleveland Construction, Inc., respectfully requests that this Court deny Appellant’s request to review the First Appellate District’s decision in this matter.

²⁷ 2006-Ohio-6452, ¶47.

Respectfully submitted,



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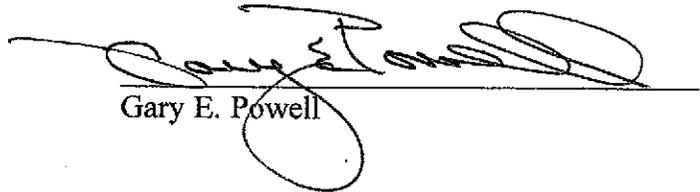
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served via hand-delivery this 20th of February 2007 to the individuals listed below.



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