

In the
Supreme Court of Ohio

CITY OF CINCINNATI,	:	Case No. 2007-0114
	:	
Defendant-Appellant,	:	
	:	On Appeal from the
v.	:	Hamilton County
	:	Court of Appeals,
CLEVELAND CONSTRUCTION, INC.,	:	First Appellate District
	:	
Plaintiff-Appellee.	:	Court of Appeals Case
	:	No. A-0402638

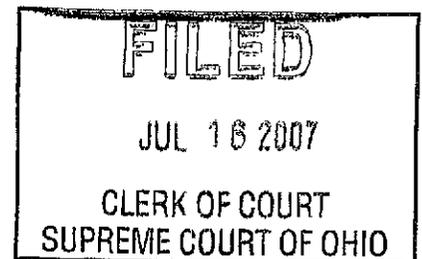
**MERIT BRIEF OF *AMICUS CURIAE* STATE OF OHIO
IN SUPPORT OF DEFENDANT-APPELLANT CINCINNATI**

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INTRODUCTION

The Cincinnati Municipal Code (“CMC”) authorizes the City of Cincinnati (“City”), when entering contracts for services by private contractors on behalf of the City, to exercise its discretion in accepting the bid that advances the City’s best interests. In this case, the City solicited bids on a drywall contract and included in the solicitation the right to reject any and all bids—a right that was granted by the CMC. When all of the initial bids on the project failed to meet the terms of the bid invitation, the City exercised its reserved right to reject all bids. After a new round of bidding, the City accepted the only bid that met all of the City’s conditions.

Cleveland Construction is a disappointed bidder that submitted two bids that failed to meet the specified conditions. It claims—and the lower court held—that it had a vested property interest in the contract on the drywall project and is entitled to lost profits. That is wrong. Where a governmental authority reserves the right to reject any and all bids and exercises that right in rejecting a bid that failed to meet an express condition on the contract, a disappointed bidder has no legitimate claim of entitlement that confers a constitutionally protected property interest in the contract. The City therefore violated no vested interest of Cleveland Construction’s under the Fourteenth Amendment’s Due Process Clause.

STATEMENT OF AMICUS INTEREST

The State of Ohio has a strong interest in ensuring that its laws are properly and uniformly enforced across the State. The State is therefore concerned with any decision that either creates a conflict between the State appellate districts or incorrectly applies State law.

Moreover, many State agencies administer public projects involving large sums of taxpayers’ money. Since 1997, for example, the Ohio School Facilities Commission, in combination with funding from local school districts, has spent nearly \$5 billion through the competitive bidding process for construction of primary and secondary school facilities. And the

Ohio Department of Transportation spent approximately \$1.3 billion through competitive bidding on construction programs for fiscal year 2005 alone. If the lower court's ruling stands, these and other State entities, including the State colleges and universities, might improperly be subjected to constitutional challenges and claims for lost profits to disappointed bidders.

For these reasons and others explained below, the State of Ohio, as *amicus curiae* in support of Appellant, City of Cincinnati, requests that the Court reverse the First District's decision.

STATEMENT OF THE CASE

The Cincinnati Municipal Code sets forth several guidelines for the City of Cincinnati's award of construction contracts, all of which give broad discretion to city officials. The City is to award a construction contract to the "lowest and best" bidder, but the CMC does not limit the criteria that the City may consider in determining which bid is "lowest and best." CMC § 321-37. The nonexhaustive list of factors that the City "may" consider includes the bidder's prior performance, payment of prevailing wages, compliance with City nondiscrimination policies, and compliance with the City's program for encouraging small-business participation. CMC § 321-37(c).

The City administration "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." CMC § 321-43. "Best interest of the City" is defined as "any decision made by the city manager or city purchasing agent or their designee that the officer concerned believes a specific bid may be of benefit to the efficiency or effectiveness of the operation of the city." CMC § 321-1-B. The City officer's decision as to the best interest of the City "is a matter of discretion and the decision of the officer concerned is final." *Id.* The City may also make written corrections to its bid invitations, and may withdraw or cancel a bid invitation entirely at any time if to do so would be

in the best interest of the city. CMC § 321-27. The City retains discretion even after a contract has been awarded: “The city may cancel an award at any time before the execution of the contract without any liability against the city.” CMC § 321-1-A2. Finally, the CMC emphasizes the discretion built into the bidding process by explicitly stating that the term “may” as used in these sections “denotes the permissive.” CMC § 321-1-M.

In December 2003, Cincinnati solicited bids for drywall work as part of its project to renovate the Cincinnati Convention Center. *Cleveland Constr., Inc. v. City of Cincinnati* (1st Dist.), 169 Ohio App. 3d 627, 2006-Ohio-6452, ¶¶ 1, 4. The City chose to set a criterion of at least 35% small-business participation in the drywall project and announced that criterion in its invitation for bids. *Id.* ¶ 4. When the first round of bidding yielded no bids that satisfied the 35% requirement, the City conducted an emergency re-bidding. The City received two re-bids: one from Cleveland Construction, Inc., which included only 10% small business participation, and one from Valley Interior Systems, Inc., which, although higher, included 40% small business participation. *Id.* ¶ 6. The City awarded the bid to Valley Interior Systems. *Id.* ¶ 9.

Cleveland Construction sued the City under 42 U.S.C. § 1983, claiming, among other things, unconstitutional deprivation of property without due process. Cleveland Construction’s due process claim was premised on its assertion that it had a protected property interest in its expectation of winning the drywall project contract. It argued that the City abused its discretion in awarding the contract to Valley Interior Systems because Cleveland Construction’s bid was \$1.2 million lower. It sought lost profits as well as declaratory and injunctive relief.

In a jury trial, the trial court directed a verdict in the City’s favor on Cleveland Construction’s lost profit claims. *Id.* ¶ 14. In a bench trial on the remaining claims, the trial court concluded that the City had violated Cleveland Construction’s due process rights, *id.* ¶ 15,

entered declaratory and injunctive relief against the City, *id.* ¶ 17, and awarded Cleveland Construction costs and attorneys fees, *id.* ¶ 19. On appeal, the First Appellate District affirmed the trial court’s finding of a due process violation and its award of attorneys fees. *Id.* ¶¶ 38, 53. It also reversed the trial court’s determination that Cleveland Construction was not entitled to lost profits as a matter of law, it and remanded for a new trial on the issue of damages. *Id.* ¶ 67.

The Court accepted review of (1) whether a disappointed bidder for a Cincinnati public contract has a protected property interest in that contract, and, (2) if so, whether the disappointed bidder may recover lost profits. See Ohio Supreme Court 05/02/07 Case Announcements.

Amicus Curiae State of Ohio submits this brief in support of the City of Cincinnati on the first question.

ARGUMENT

A. No Protected Property Interest Can Arise Where the Decisionmaker Retains the Discretion to Reject Any and All Bids and Acts Consistently With the Terms of the Bid Invitation.

To receive any form of relief, Cleveland Construction must first establish that the City invaded a property interest recognized and protected by the Fourteenth Amendment’s Due Process Clause. A property interest is protected only where the claimant possesses “a legitimate claim of entitlement to” the benefit at issue. *Bd. of Regents v. Roth* (1972), 408 U.S. 564, 577. “Such entitlements are . . . created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.” *Town of Castle Rock v. Gonzales* (2005), 545 U.S. 748, 756 (internal quotations and citations omitted).

Whether or not an entitlement exists depends on the amount of discretion that is vested in the decisionmaking authority. “[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion.” *Id.* In the context of competitive bidding processes, this means that bidding contractors have no constitutionally protected interest in receiving the

contract unless the state or local authority has no discretion in determining which party shall receive the award. Where the governmental officials may base their decision on a range of both tangible and intangible factors, the Constitution does not confer a protected interest on the bidding contractors.

This rule is well settled in the Ohio courts. As this Court has explained, the statutory preference for the lowest and *best* bid reflects a recognition “that an element other than the mere low dollar bid often enters into the letting of a contract.” *Cedar Bay Constr., Inc. v. City of Fremont* (1990), 50 Ohio St. 3d 19, 21. The phrase “lowest and best” therefore places in “city authorities the discretion of determining who under all the circumstances is the *lowest and best* bidder for the work in question.” *Id.* (quotations and citation omitted). “[T]he courts cannot interfere in the exercise of this discretion unless it clearly appears that the city authorities in whom such discretion has been vested are abusing the discretion so vested in them.” *Id.* (quotations and citation omitted).

A governmental authority does not abuse its discretion when it acts consistently with the terms of the solicitation of bids. In *Cedar Bay*, for instance, the appellee city stated in its legal notice seeking bids that it reserved the right to waive irregularities in the bidding process and to conduct any investigations that were necessary for evaluating the bids. *Id.* at 23. When one party submitted a bid that used manufacturers not named on the city’s preferred list of manufacturers, the city exercised its reserved rights to investigate the nonpreferred manufacturers and to waive the requirement that the bidder use only preferred manufacturers. This Court held that the city had not abused its discretion in accepting a bid in a manner consistent with the solicitation. *Id.*; see also *Miami Valley Contractors, Inc. v. Village of Oak Hill* (4th Dist. 1996), 108 Ohio App.

3d 745, 751 (finding no abuse of discretion where disappointed bidder “failed to follow the bid specifications”).

A decisionmaker’s discretion is at its apex when it expressly reserves the right—by enactment, by the invitation for bids, or both—to reject any and all bids. Indeed, Cleveland Construction itself has previously failed to recover for an unsuccessful bid where the decisionmaker retained the discretion to reject any and all bids. See *Cleveland Constr., Inc. v. State* (10th Dist. 1997), 121 Ohio App. 3d 372, 395 (“[G]iven the fact that OSU and/or DAS retained the right to reject all bids, this court is further persuaded that Cleveland did not have a property interest in the contract for the Fisher Project.”).

Other state supreme courts have followed the rule that no protected property interest exists where the state authority retains discretion in awarding the contract, and particularly where it reserves the right to reject any and all bids. In *Carroll F. Look Construction Co. v. Town of Beals* (2002), 2002 ME 128, the Supreme Judicial Court of Maine considered a claim by a disappointed bidder after the Town of Beals awarded a contract on a road reconstruction project to a higher bidder. The plaintiff bidder argued that it was entitled to the contract because an applicable regulation of the Federal Emergency Management Agency (“FEMA”), which provided the funds for the contract, provided in part that an “award will be made in writing to the lowest responsive and responsible bidder.” *Id.* at ¶ 9 n.2 (quoting 44 C.F.R. § 13.36(d)(2)(ii)(D) (2001)). But as the Maine court noted, the FEMA regulation further stated that “[a]ny or all bids may be rejected if there is a sound documented reason.” *Id.* at ¶ 13 (quoting 44 C.F.R. § 13.36(d)(2)(ii)(E)). Moreover, the Town of Beals’s invitation to bid expressly “reserve[d] the right to accept or reject any and all bids.” *Id.* at ¶¶ 9 n.2, 12. Based on these facts and its survey of case law from other jurisdictions, the court concluded that “disappointed

bidders do not have a property interest unless the applicable law or regulation mandated that the contracting body accept the bid and gave it *no discretion whatsoever* to reject the bid.” *Id.* at ¶ 16 (emphasis added). The Supreme Court of Illinois has adopted the same rule: Having found in a bid-contract dispute that “both the advertisement for bids and the instructions to bidders . . . contained explicit language providing that the State reserved the right to reject any or all bids,” the court concluded that the bidder did not have a recognizable property interest. *Polyvend, Inc. v. Puckorius* (1979), 77 Ill. 2d 287, 295.

This rule is equally well settled in the federal courts. In *Enertech Electrical, Inc. v. Mahoning County Commissioners* (6th Cir. 1996), 85 F.3d 257, 261, the Sixth Circuit, citing this Court’s decision in *Cedar Bay*, held that the appellant county acted within its discretion where it enforced a condition—the ratification of a labor agreement—that it had made clear at the outset of the bidding process. And in other cases the Sixth Circuit has found that the governmental authority’s reservation of the right to reject any and all bids meant that the bidding contractors had no protected property interest in the contract. See *Charlie’s Towing & Recovery v. Jefferson County* (6th Cir. 1999), 183 F.3d 524, 527 (no protected property interest where both county code and bid invitations reserved right “to reject any or all bids”); *United of Omaha Life Ins. Co. v. Solomon* (6th Cir. 1992), 960 F.2d 31, 34-35 (no protected property interest where state official “retained discretionary authority to reject any and all bids”). Other federal courts of appeals have taken the same approach. See *Kim Constr. Co. v. Bd. of Trs.* (7th Cir. 1994), 14 F.3d 1243, 1247-48 (no property interest where “the Board . . . was expressly authorized to reserve the right to reject all bids”); *Buckley Constr., Inc. v. Shawnee Civic & Cultural Dev. Auth.* (10th Cir. 1991), 933 F.2d 853, 858 (no protected property interest where “the Authority retains broad discretion to determine which contractor is the lowest *responsible* bidder”); *Curtis*

Ambulance of Fla., Inc., v. Bd. of County Comm'rs (10th Cir. 1987), 811 F.2d 1371, 1384 (plaintiff was “unable to demonstrate the existence of applicable local or state rules which sufficiently circumscribe the Board’s authority to award the contract in dispute such that [plaintiff] had anything other than a mere ‘unilateral expectation’ of receiving the ambulance contract”); *Sowell’s Meats & Servs., Inc. v. McSwain* (4th Cir. 1986), 788 F.2d 226, 228 (“[T]he discretion allowed the contracting officer demonstrates a lack of a property interest or of any protected right in federal procurement procedures and indicates that judicial review of the award of a contract at the behest of a disappointed bidder is inappropriate.”).

This wealth of case law makes three things clear: First, a disappointed bidder suffers no invasion of a constitutionally protected property interest where the governmental authority acts within its discretion in awarding the disputed contract. Second, the governmental authority’s discretion is especially broad when it expressly reserves the right to reject any and all bids. And third, the governmental authority does not abuse its discretion when it enforces a condition that was made clear from the outset of the bidding process.

This approach makes considerable sense as a policy matter. “The 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.” *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St. 3d 475, 2006-Ohio-2991, ¶ 9. The openness and integrity of the bidding process are preserved when a municipality adheres to the plain terms of its bid solicitation or specification. Thus, when a disappointed bidder files suit after a municipality exercises rights it expressly reserved, the losers are the taxpayers, who are burdened when the municipality is forced to defend against the disappointed bidder’s lawsuit.

B. The City Retained the Discretion to Select a Particular Bid or No Bid At All and to Insist that the Winning Bid Met the Terms of the Bid Invitation.

In awarding the contract at issue in this case, the City acted well within the discretion it retained under both its municipal code and its invitation for bids. As explained above, the Cincinnati Municipal Code provides that the City “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.” CMC § 321-43. The Code in turn makes clear that the “best interests” determination “is a matter of discretion,” and it allows the City to “cancel an award at any time before the execution of the contract without any liability against the city.” *Id.* § 321-1-A2. Moreover, the bid invitation expressly “reserve[d] the right . . . to reject any or all bids or parts of any bid” and provided that “irregularities of any kind . . . may be cause for rejection of bid.” See General Conditions, Instructions, and Information for Bidder. The City also “reserve[d] the right to consider all elements entering into the question of determining the responsibility of the bidder.” *Id.*

In the initial round of bidding, no bid met the condition concerning small businesses. The City rejected all of the bids. It need not have had a specific reason for the blanket rejection, since both the CMC and the bid invitation expressly reserved the right to reject all bids. But in doing so on the basis of nonconformance with the terms of the bid invitation, the City plainly acted consistently with its ordinance and its solicitation of bids. A second round of bidding then occurred, and the City accepted the only bid that met the terms of the bid invitation. Again, in doing so, it acted within its expressly reserved rights under the CMC and the bid document. Cleveland Construction cannot argue that it had a legitimate expectation of any sort—let alone one protected by the Fourteenth Amendment—in a contract for which it never submitted a conforming bid, particularly given that the City reserved the right to reject its bids.

The double rounds of bidding underscore the discretion that rested in the City's hands and that precluded the existence of any constitutionally protected property interest. In *C&E Services, Inc. v. District of Columbia Water & Sewer Authority* (D.C. Cir. 2002), 310 F.3d 197, 199, a similar situation arose: The municipal authority, citing the city's best interests, canceled the first round of bidding—as it had the discretion to do. It then awarded the contract on a second round of bidding. When a disappointed bidder filed suit, the D.C. Circuit held that the bidder had no protected property interest because the city retained the authority to cancel the bidding, meaning that “submitting the lowest bid d[id] not necessarily translate into winning the contract.” *Id.* at 200. So, too, here: Because the City of Cincinnati retained the authority to reject Cleveland Construction's bid, the bidder had no protected interest in the contract.

Nor did the City act arbitrarily in selecting Valley Interior Systems' responsive bid even though Cleveland Construction's nonresponsive bid was lower. The court of appeals held that CMC § 321-37(c) imposed a mandatory “cap” that constrained the City's choice of drywall contractors. *Cleveland Constr.*, 2006-Ohio-6425 at ¶ 37. On the contrary, the plain language of CMC § 321-37(c) makes clear that the ordinance neither removed the City's discretion nor limited it in any way. The provision states: “In the event that the selection of the lowest and best bidder is based primarily upon factors [including small business enterprise outreach], the contract award *may* be made subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars (\$50,000.00), whichever is lower.” CMC § 321-37(c) (emphasis added). The ordinance's definition section explains that “[m]ay” denotes the permissive.” CMC § 321-1-M. Thus, CMC 321-37(c) is part and parcel of the discretionary scheme that allows the City to take into account a number of variables but does not dictate that a contract *must* be awarded to any particular bidder.

Finally, even if the City erred in awarding the contract to Valley Interior Systems, it does not necessarily follow that the City had an obligation to accept Cleveland Construction's bid. Having expressly reserved the right to reject any and all bids, the City retained the option of rejecting Cleveland Construction's bid regardless of any other bids on the table. Cleveland Construction therefore cannot say that it had a "legitimate claim of entitlement" to the contract when the City had every right to reject Cleveland Construction's bid.

CONCLUSION

The City of Cincinnati had the discretion to reject any and all bids, including those that did not comport with the terms of the bid specification. The City therefore invaded no vested property interest held by Cleveland Construction. Accordingly, this Court should reverse the decision below the Court and need not reach the question of remedy.

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CERTIFICATE OF SERVICE

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