

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI : CASE NO. 07-0114  
Appellant :  
v. :  
CLEVELAND CONSTRUCTION, INC. :  
Appellee :

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MERIT BRIEF OF APPELLANT  
CITY OF CINCINNATI

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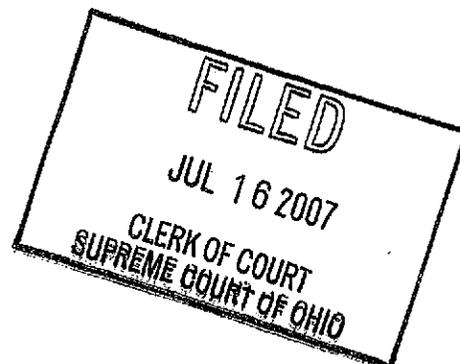
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## STATEMENT OF FACTS

This case is the attempt by Cleveland Construction, Inc., an unsuccessful bidder for a City of Cincinnati “lowest and best bid” construction contract, to secure monetary damages for the alleged deprivation of its right to procedural due process.<sup>1</sup>

The City began planning for the expansion of the Cincinnati Convention Center in the early 1990s.<sup>2</sup> The Convention Center project had an estimated budget of \$145 million.<sup>3</sup> The City had a Small Business Enterprise (SBE) program to achieve an overall City-wide annual goal for small business participation in City projects based on the average of all contracts awarded by the City.<sup>4</sup> Because of the significance of the Convention Center project, Cincinnati City Council specifically reserved a project-specific percentage of the Convention Center work for small businesses.<sup>5</sup> That project-specific percentage was 30%.<sup>6</sup> Each trade contract had its own percentage reserved for small businesses, but the overall total of the work reserved for small businesses for the Convention Center project was 30%.<sup>7</sup>

Another component of the SBE program was subcontracting outreach to compare the availability of minority-owned and women-owned businesses with their use by bidders. The Cincinnati Municipal Code established that consideration of the SBE subcontracting outreach program was discretionary and part of a nonexhaustive list of

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<sup>1</sup> This Court accepted the appeal on the following propositions of law 1) whether an unsuccessful bidder for a “lowest and best bid” public contract has a constitutionally protected property interest subject to the protections of procedural due process and, if so, 2) whether the bidder is entitled to monetary damages for an alleged deprivation of due process.

<sup>2</sup> Transcript, p. 478. Supp. p. 20.

<sup>3</sup> *Id.* at pp. 396, 506. Supp. pp. 15, 24.

<sup>4</sup> *Id.* at pp. 477-78, 488, Joint Ex. 9. Supp. pp. 19-21, 35.

<sup>5</sup> *Id.* at pp. 226, 452-54. Supp. pp. 2, 16-18.

<sup>6</sup> *Id.* at p. 489. Supp. p. 22.

<sup>7</sup> *Id.* at pp. 237-38, 240-41, 316, 490. Supp. pp. 3-6, 9, 23.

factors that could be considered to determine the “lowest and best bid.”<sup>8</sup> This minority and women-owned subcontracting outreach comparison played no part in the procurement decision for the Convention Center drywall work.<sup>9</sup> The subcontracting outreach program referenced in Cincinnati Municipal Code Section 321-37(c) is defined in Section 323-31 by reference to a legislative report prepared for the City in 2002.

The City awarded 35 contracts for the Convention Center project.<sup>10</sup> For the drywall contract, the City required that bidders reserve 35% of the work for small businesses.<sup>11</sup> This 35% small business requirement was stated in a supplement to the bid documents that contained the formal invitation to bid.<sup>12</sup> The City advised the drywall contract bidders that their bids would be nonresponsive and would be rejected if they failed to meet that mandatory 35% small business requirement.<sup>13</sup>

The City bid the drywall contract twice pursuant to the City’s standard “lowest and best bid” requirements.<sup>14</sup> On February 5, 2004, the City received the first set of bids for the drywall contract.<sup>15</sup> For the first bid, none of the bidders satisfied the small business requirement.<sup>16</sup> Therefore, on February 17, 2004, the City conducted a second bid process.<sup>17</sup> Valley Interior Systems (“Valley”) and Cleveland Construction participated in the second bid process. Valley satisfied the small business requirement by

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<sup>8</sup> Cincinnati Municipal Code Section 321-37(c). App. p. 91. The City purchasing agent “may” consider information about the subcontracting outreach program as part of a “lowest and best bid” determination. “May” is defined to mean “permissive.” Cincinnati Municipal Code Section 321-1-M. App. p. 90.

<sup>9</sup> However, on equal protection grounds, the lower courts enjoined prospective consideration of bidders’ use of minority-owned and women-owned firms in future City contracts. That issue is not before this Court.

<sup>10</sup> Transcript p. 490. Supp. p. 23.

<sup>11</sup> *Id.* at p. 215. Supp. p. 1.

<sup>12</sup> Cleveland Construction Ex. 29A; 32. Supp. pp. 90, 115.

<sup>13</sup> Transcript at pp. 367-69; Cleveland Construction Ex. 32. Supp. pp. 12-14, 115..

<sup>14</sup> Transcript at pp. 247-48, 358-59, 512-13; Joint Ex. 11. Supp. pp. 7-8, 10-11, 25-26, 50.

<sup>15</sup> Joint Ex. 11. Supp. p. 49.

<sup>16</sup> *Id.*

<sup>17</sup> Joint Ex. 12. Supp. p. 52.

submitting a bid with a 40% small business participation but Cleveland Construction failed to satisfy that requirement since it submitted a bid with a 10% small business participation.<sup>18</sup> Consistent with its previous instructions, the City determined that Cleveland Construction's bid was nonresponsive to the bid requirements and the bid was rejected.<sup>19</sup> Consequently, on March 2, 2004, the drywall contract was awarded to Valley on a "lowest and best bid" basis.<sup>20</sup> Cleveland Construction lost the drywall bid because it failed to satisfy the prerequisites for the contract by reserving at least 35% of the work for small businesses as the bid documents required. The Court of Common Pleas held: "The court finds that the City's 35% SBE requirement was the only reason that the City awarded the contract to Valley rather than to Cleveland . . ." <sup>21</sup> The drywall work on the Convention Center project commenced on May 3, 2004.<sup>22</sup>

On March 30, 2004, Cleveland Construction filed suit for injunctive relief and damages, claiming that the City violated the Cincinnati Municipal Code and Cleveland Construction's rights to procedural due process of law and equal protection, and seeking a temporary restraining order.<sup>23</sup> Cleveland Construction's motion for a temporary restraining order was denied by the Court of Common Pleas.<sup>24</sup> Cleveland Construction then waited until February 28, 2005, nearly a year after the drywall contract had been awarded to Valley, to file a motion for partial summary judgment and permanent injunction against Valley's performance of the drywall work.<sup>25</sup> On May 13, 2005, the

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<sup>18</sup> Joint Ex. 13. Supp. p. 53.

<sup>19</sup> Joint Ex. 15; Cleveland Construction Ex. 32. Supp. pp. 57, 115.

<sup>20</sup> Joint Ex. 16. Supp. p. 58.

<sup>21</sup> Entry, July 13, 2005; App. p. 38.

<sup>22</sup> Transcript p. 1132. Supp. p. 34.

<sup>23</sup> Verified Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and Damages, Mar. 30, 2004.

<sup>24</sup> Entry Denying Plaintiff's Motion for Temporary Restraining Order, June 16, 2004; App. 98.

<sup>25</sup> Motion of Plaintiff Cleveland Construction, Inc. for Partial Summary Judgment, Feb. 28, 2005.

Court of Common Pleas denied that attempt to enjoin the project.<sup>26</sup> Cleveland Construction did not appeal that denial.

The trial commenced in June 2005. The Court of Common Pleas directed a verdict in favor of the City on Cleveland Construction's claim for damages.<sup>27</sup> The Court of Common Pleas nevertheless found that Cleveland Construction had a constitutionally protected property interest in the Convention Center drywall contract and that the City had deprived it of that interest without providing procedural due process of law.<sup>28</sup> The Court of Common Pleas awarded attorneys' fees and costs to Cleveland Construction in the amount of \$433,290.00.<sup>29</sup>

In its opinion dated December 8, 2006, the First District reversed the Court of Common Pleas' directed verdict in favor of the City on Cleveland Construction's claims for damages.<sup>30</sup> The First District acknowledged that damages available under federal law claims are "ordinarily determined according to principles derived from the common law of torts,"<sup>31</sup> but nevertheless limited this Court's holding in *Cementech, Inc. v. City of Fairlawn*<sup>32</sup> to claims for damages under state law.<sup>33</sup> The First District remanded the case for trial on liability and damages issues for Cleveland Construction's due process claim.<sup>34</sup>

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

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<sup>26</sup> Entry, May 13, 2005; App. p. 83.

<sup>27</sup> Entry Granting Defendant City of Cincinnati's Motion for Partial Directed Verdict, June 28, 2005; App. p. 63.

<sup>28</sup> Entry, July 13, 2005; App. pp. 45-46.

<sup>29</sup> Final Judgment Entry, August 29, 2005; App. p. 35.

<sup>30</sup> Opinion, Dec. 8, 2006; App. p. 27.

<sup>31</sup> *Id.*, App. p. 25.

<sup>32</sup> 109 Ohio St.3d 475, 849 N.E.2d 24 (2006).

<sup>33</sup> Opinion, Dec. 8, 2006, App. pp. 25-27.

<sup>34</sup> *Id.*, App. p. 33.

quota; 2) the City retained “lowest and best bid” discretion to reject drywall bids for any reason; 3) there was no evidence that the City procedures available to unsuccessful bidders interested in challenging a bid selection were inadequate; and 4) Cleveland Construction abandoned its attempt to enjoin the Convention Center drywall project.

## ARGUMENT

### PROPOSITION OF LAW NO. I:

**UNDER OHIO LAW, A DISAPPOINTED BIDDER FOR A CITY OF CINCINNATI PUBLIC CONTRACT DOES NOT HAVE A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST IN THAT CONTRACT.**

#### **E. Introduction**

By Entry dated July 13, 2005, the Court of Common Pleas held that the City violated the Cincinnati Municipal Code in awarding the Convention Center drywall contract to Valley as the “lowest and best bidder” over Cleveland Construction.<sup>35</sup> The Court of Common Pleas cited numerous cases finding that a disappointed bidder to a public contract had *not* established a legitimate claim of entitlement giving rise to a property interest in that contract.<sup>36</sup> The Court of Common Pleas also acknowledged that “[w]here the City publicly determines that a lowest and best bid is not ‘in the best interest of the city,’ it may reject such a bid for that reason . . . .”<sup>37</sup> Nonetheless, disregarding the distinction between municipal liability and employee liability and overbroadly construing due process law, the Court of Common Pleas summarily concluded that *the City* had

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<sup>35</sup> Entry, July 13, 2005; App. p. 37, et. seq.

<sup>36</sup> *Id.*, App. pp. 43-45.

<sup>37</sup> *Id.*, App. p. 43.

abused its discretion and, for that reason, Cleveland Construction had a legitimate claim of entitlement to the Convention Center drywall contract.<sup>38</sup>

The First District upheld the ruling of the Court of Common Pleas that Cleveland Construction had a property interest in the drywall contract. Like the Court of Common Pleas, the First District acknowledged that “municipalities are vested with broad discretion in matters related to public contracts” and that for “lowest-and-best-bidder determinations, Ohio courts are reluctant to substitute their judgment for that of city officials.”<sup>39</sup> Even Cleveland Construction acknowledged that “a city usually has a great deal of discretion in awarding publicly bid contracts”<sup>40</sup> and that “in a typical case, an unsuccessful bidder does not have a protected property interest in that award.”<sup>41</sup> Despite this recognition of the applicable case law, the First District agreed with the Court of Common Pleas that “the [C]ity’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.”<sup>42</sup>

**B. A Bidder for a Public Contract Only Has a Legitimate Claim of Entitlement to the Contract if the Award is Mandatory and All Prerequisites Are Satisfied.**

In order for a disappointed bidder to establish a constitutionally protected property interest in a public contract, that bidder must establish a legitimate claim of entitlement to the contract.<sup>43</sup> Cleveland Construction only had a constitutionally protected property interest in the City of Cincinnati Convention Center drywall contract if

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<sup>38</sup> *Id.*, App. p. 45.

<sup>39</sup> Opinion, Dec. 8, 2006, p. 11; App. p. 18.

<sup>40</sup> Memorandum of Appellee Cleveland Construction, Inc. in Opposition to Jurisdiction, p. 8. Supp. p. 117.

<sup>41</sup> *Id.* at p. 10; Supp. p. 118..

<sup>42</sup> Opinion, Dec. 8, 2006; App. p. 19.

<sup>43</sup> *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).

it had a legitimate claim of entitlement to that contract. As described below, an entitlement only existed if the award of the City contract was mandatory and if Cleveland Construction satisfied all prerequisites for the award.

“To have a property interest in a benefit, a person must have more than an abstract need or desire for it. He [or she] must have more than a universal expectation of it.”<sup>44</sup> Property interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.”<sup>45</sup> The United States Supreme Court has repeatedly held that an interest cannot qualify as “property” within the meaning of the Due Process Clause unless it amounts to a legitimate claim of entitlement.<sup>46</sup> To be an entitlement, issuance of the benefit by the government must be *mandatory*.<sup>47</sup> Entitlement means that the person *satisfies the prerequisites* attached to the right.<sup>48</sup> For instance, a claimant for food stamp benefits satisfying the prerequisites of the food stamp program has an entitlement to those food stamp benefits.<sup>49</sup> The government does not reserve the discretion to reject an application for food stamps if the eligibility prerequisites for the program have been satisfied.

“Legitimate claim of entitlement” is an *ex ante* concept. Entitlement to a benefit has to exist before the fact based on objective criteria, *i.e.*, before the government official has made a determination about eligibility. If the person has satisfied all the existing prerequisites, and issuance of the benefit is mandatory, the person has a legitimate claim of entitlement to the benefit. Otherwise, the person does not.

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<sup>44</sup> *Id.* at pp. 569-70.

<sup>45</sup> *Id.* at p. 577; *Paul v. Davis*, 424 U.S. 693, 709 (1976).

<sup>46</sup> *See, e.g., Hudson v. Palmer*, 468 U.S. 517, 531, n.11 (and cases cited).

<sup>47</sup> *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005).

<sup>48</sup> *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992) (emphasis added).

<sup>49</sup> *Atkins v. Parker*, 472 U.S. 115, 128 (1985) (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

In contrast to these well-established legal principles, the First District relied upon a cryptic and erroneous assertion by the United States Court of Appeals for the Sixth Circuit that a legitimate claim of entitlement may retrospectively be established by virtue of the subsequent government conduct that allegedly deprived a person of procedural due process.<sup>50</sup> This *ex post* hypothesis has not been ratified by the United States Supreme Court. Moreover, it conflates whether there is a constitutionally protected property interest with the subsequent determination whether the procedures provided were sufficient to satisfy procedural due process. It is illogical to use subsequent conduct as the barometer for what should be an *ex ante* determination about prior entitlement to a benefit.<sup>51</sup>

The First District hastily cited Sixth Circuit decisions without carefully analyzing the essential rationale for those decisions.<sup>52</sup> In fact, the original analysis of the Sixth Circuit in this area supports the conclusion that Cleveland Construction does not have a constitutionally protected property interest under Ohio law. *Peterson Enterprises, Inc. v. Ohio Department of Mental Retardation and Developmental Disabilities*<sup>53</sup> considered due process and equal protection claims when a plaintiff challenging the award of a government building contract sought injunctive relief and damages. The Sixth Circuit affirmed the district court's grant of the defendants' motion to dismiss for failure to state

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<sup>50</sup> Opinion, Dec. 8, 2006, App. p. 18.

<sup>51</sup> Note that the only defendant remaining in this case is the City of Cincinnati. The First District erred by conflating the City of Cincinnati with its employees, *e.g.*, "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." *Id.*, App. p. 19 (emphasis added). Any alleged failure to follow an ordinance has to be attributable to a specific employee, not the municipal corporation. There is no corporate *respondeat superior* liability for a claim under 42 U.S.C. §1983. See *Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 694-95 (1978). The City of Cincinnati cannot be liable for an alleged deprivation of procedural due process caused by one of its employees.

<sup>52</sup> App. p. 18.

<sup>53</sup> 890 F.2d 416, 1989 WL 143563 (6th Cir. 1989). *Peterson* was relied upon by the Sixth Circuit in *United of Omaha Life Ins. Co. v. Solomon*, 960 F.2d 31 (6th Cir. 1992), the case cited by the First District Court of Appeals. App. p. 18, n. 10.

a claim upon which relief could be granted. Like the Cincinnati Municipal Code in the case at bar, the Ohio law at issue in *Peterson* “establishe[d] a list of selection criteria, but the list is not exhaustive.”<sup>54</sup>

The Sixth Circuit panel in *Peterson* stated: “Several courts have addressed the issue of whether a bidder for a government contract has a legitimate claim of entitlement in being awarded the contract.”<sup>55</sup> The Court distinguished a different case containing a mandatory requirement to award a contract from the case before it: “Ohio state law does not require the contract to be awarded to the lowest bidder . . . . Second . . . [i]n this case, not only is there no ‘lowest responsible bidder’ requirement, the statutory requirements are not exhaustive and, therefore, by their nature create discretionary authority in the reviewing boards.”<sup>56</sup> The Sixth Circuit concluded that the disappointed bidder did not have a constitutionally protected property interest.<sup>57</sup> The Court indicated that if state law had mandated the award of government contracts to the *lowest* bidder, the disappointed bidder might have a protected property interest. However, since the state law guidelines were nonexhaustive (like the Cincinnati Municipal Code), government officials retained discretion in the award of the contract to the lowest and best bidder. Therefore, in *Peterson*, like in the case at bar, the disappointed bidder only had a “mere unilateral expectation” of receiving the contract, not a legitimate claim of entitlement.<sup>58</sup>

Ohio appellate courts that have examined the issues surrounding a bidder’s property interest in a public contract have afforded great deference to a municipality’s discretion in awarding a public contract to the “lowest and best bidder.” As the Court of

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<sup>54</sup> 890 F.2d 416, at \*1.

<sup>55</sup> *Id.* at \*2.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Common Pleas in this case noted in its denial of the parties' cross-motions for summary judgment, none of the disappointed bidders alleging entitlement to a public contract in the relevant Ohio appellate cases succeeded in establishing a protected property interest in those contracts.<sup>59</sup>

In a case ignored by the First District Court of Appeals, the United States Court of Appeals for the Sixth Circuit recently held that a statutory violation of procurement law "does not give rise to a property interest that can be vindicated through a due process claim under 42 U.S.C. §1983."<sup>60</sup> The Sixth Circuit further emphasized that even if there was interference with a property interest, Ohio law afforded a remedy adequate to comport with due process.<sup>61</sup> In support of its erroneous conclusion, the First District cited inapposite cases that, in fact, held that the claimants in those cases did *not* have a protected property interest.<sup>62</sup> The First District admitted that the Cincinnati Municipal Code "set forth a *non-exhaustive* list of factors that the city purchasing agent could consider in determining the lowest and best bid"<sup>63</sup> but then ignored another holding of the Sixth Circuit that when "the statutory requirements are *not exhaustive* . . . by their nature [they] create discretionary authority in the reviewing boards."<sup>64</sup>

By erroneously and overbroadly describing when a bidder for a "lowest and best" public contract has a legitimate claim of entitlement to that contract, the First District has

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<sup>59</sup> Entry, May 13, 2005, pp. 11-13, App. pp. 74-76 (citing, *inter alia*, *Cleveland Constr. v. Ohio Dep't of Admin. Servs.*, 121 Ohio App.3d 372 (10th Dist. 1997); *Miami Valley Contractors, Inc. v. Montgomery County*, 1996 WL 303591 (2d Dist. 1996); *Miami Valley Contractors, Inc. v. Oak Hill*, 108 Ohio App.3d 745 (4th Dist. 1996); *Greater Cincinnati Plumbing Contractors' Ass'n v. City of Blue Ash*, 106 Ohio App.3d 608 (1st Dist. 1995)).

<sup>60</sup> *TriHealth, Inc. v. Board of Comm'rs*, 430 F.3d 783, 793 (6th Cir. 2005).

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., *Enertech Elec. v. Mahoning County Comm'rs*, 85 F.3d 257 (1996) (citing *United of Omaha*, 960 F.2d 31, and *Peterson*, 890 F.2d 416). All three cases held that the complaining party did not have a constitutionally protected property interest.

<sup>63</sup> Opinion, Dec. 8, 2006, App. p. 10 (emphasis added).

<sup>64</sup> *Peterson*, 890 F.2d at \*2 (emphasis added).

subjected the City and other government entities to unjustified lawsuits. The established law in this area has been refined to protect both taxpayers and bidders. The First District's overbroad inclusion of Cleveland Construction within the class of disappointed bidders having a protected property interest subverts the present balance in the law.

**C. The State Law of Ohio, Cincinnati Municipal Code, and Bid Documents Reserved Discretion To City Officials When Analyzing Bids For Public Contracts.**

Pursuant to Ohio state law, the City has adopted a "lowest and best bidder" policy within the Cincinnati Municipal Code. The concept of "lowest and best bidder" in public contract situations is not expressly defined in state or local statute, but it has been analyzed by the courts. The general principle of a "lowest and best" standard is that:

[A] public body, such as a municipal corporation, is not automatically required to award a contract to the lowest bidder. Statutory provisions directing that the contract be let to the lowest and best bidder vest discretion in the board or officer as to which bid should be accepted and require that a determination be made by looking at more than simply which bid is the lowest in dollar amount. Thus, the contract agency or authority is allowed to engage in a qualitative analysis as to which bid is better.<sup>65</sup>

At one point in time, state statutes provided that political subdivisions were only able to accept the lowest bids for public contracts, but these laws were later amended to permit an award to the lowest and best bidder.<sup>66</sup>

[The] amendment [in the state law to permit acceptance of "lowest *and best*" bids], therefore, places in the hands of city authorities the discretion of determining who under all the circumstances is the *lowest and best* bidder for the work in question. This discretion is not vested in the courts and the courts cannot interfere in the exercise of this discretion unless it clearly appears that the city authorities in whom such discretion has been invested are abusing the discretion so vested in them.<sup>67</sup>

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<sup>65</sup> 78 Ohio Jur.3d Public Works and Contracts § 82 (2007) (cites omitted).

<sup>66</sup> *Cedar Bay Constr. v. City of Fremont*, 50 Ohio St.3d 19, 21, 552 N.E.2d 202 (1990) (quoting *Altschul v. Springfield*, 48 Ohio App. 356, 362 (2d Dist. 1933)).

<sup>67</sup> *Id.*

Ohio case law therefore reserves broad discretion to City officials in the awarding of a “lowest and best bid” public contract. Cincinnati Municipal Code Section 321-37(a) stipulates further that, except where otherwise provided, the city purchasing agent shall award a contract to the lowest and best bidder.<sup>68</sup> This Cincinnati Municipal Code provision reserves in the city purchasing agent broad discretion to make a decision regarding a specific bid that the agent feels is in the best interest of the City.<sup>69</sup>

Additional discretion is reserved to the City by the language of Cincinnati Municipal Code Section 321-37(c), which identifies a *non-exhaustive* list of factors that the city purchasing agent *may* consider when making a determination of the lowest and best bidder. These include, but are not limited to:

- (1) Information concerning the bidder’s performance on prior and current contracts with the city; or
- (2) Information concerning the bidder’s current, past and proposed payment of prevailing wages; or
- (3) Information concerning compliance with the “Non-Discrimination in Purchasing and Contracting” rules and regulations issued by the city manager pursuant to Cincinnati Municipal Code Section 321-159; or
- (4) Information concerning compliance with the “SBE Subcontracting Outreach Program” rules and regulations issued by the city manager pursuant to Cincinnati Municipal Code Section 323-31.<sup>70</sup>

Cincinnati Municipal Code Section 321-37(c) provides: “*In the event* that the selection of the lowest and best bidder is based primarily upon factors (3) or (4) above, the contract award *may* be made subject to the following limitation: the bid may not exceed an

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<sup>68</sup> Cincinnati Municipal Code Section 321-37(a).

<sup>69</sup> Cincinnati Municipal Code Section 321-1-B.

<sup>70</sup> Cincinnati Municipal Code Section 321-37(c).

*otherwise qualified bid* by ten (10%) percent or Fifty Thousand Dollars (\$50,000.00), whichever is lower.”<sup>71</sup>

The language used in Section 321-37(c) is significant for several reasons. First, the use of the term “in the event” clearly indicates the retention of the city purchasing agent’s discretion. In addition, the use of the word “may” denotes a permissive, rather than a requisite, limit on the city purchasing agent’s discretion. Cincinnati Municipal Code Section 321-1-M specifically defines “may” to mean “permissive.”<sup>72</sup> Furthermore, the section may only be considered by the purchasing agent for *otherwise qualified* bids, *i.e.* those bids which are responsive to the bid requirements and have not been rejected. Since Cleveland Construction’s bid was nonresponsive to the 35% small business requirement contained in the bid documents, the bid could not have been subject to Cincinnati Municipal Code Section 321-37(c). The section on its face only applies to *otherwise qualified* bids.

Essentially, the Cincinnati Municipal Code authorizes the purchasing agent’s discretionary consideration of *compliance* with the subcontracting outreach program. The ordinance does not authorize the purchasing agent to excuse Cleveland Construction’s *noncompliance*. It is uncontroverted that Cleveland Construction did not comply with the 35% small business requirement for the Convention Center project. It is also uncontroverted that any review of the availability and use of minority-owned and women-owned subcontractors played no role whatsoever in the selection of the “lowest and best” bidder for the drywall work.<sup>73</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> Cincinnati Municipal Code Section 321-1-M states, “‘May’ denotes the permissive.”

<sup>73</sup> It is immaterial whether, as Cleveland Construction argues, Section 321-37(c) refers to the 35% small business subcontractor requirement for the project or, as the City argues, the Section refers to

City officials retain general discretionary authority to reject any and all bids for City contracts. Cincinnati Municipal Code Section 321-43 provides: “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.”<sup>74</sup> Cincinnati Municipal Code Section 321-1-B defines “best interest of the city” 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. This is a matter of discretion and the decision of the officer concerned is final.*”<sup>75</sup> Cincinnati Municipal Code Section 321-1-A2 emphasizes: “The city may cancel an award at any time before the execution of the contract without any liability against the city.”<sup>76</sup> The Court of Common Pleas, citing Cincinnati Municipal Code Section 321-67, concluded in its entry denying the parties’ cross motions for summary judgment: “*The city has broad discretion to determine what constitutes the lowest and best bid.*”<sup>77</sup> The First District even acknowledged that the Cincinnati Municipal Code “set forth a *non-exhaustive* list of factors that the city purchasing agent *could consider* in determining the lowest and best

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compliance with the outreach component for minority-owned or women-owned businesses. Either way, the Code did not empower the purchasing agent to excuse a bidder’s *noncompliance* with the bid requirements.

<sup>74</sup> Cincinnati Municipal Code Section 321-43.

<sup>75</sup> Cincinnati Municipal Code Section 321-1-B (emphasis added).

<sup>76</sup> Cincinnati Municipal Code Section 321-1-A2.

<sup>77</sup> Entry Denying Defendants’ Motions for Summary Judgment and Denying Plaintiff’s Motion for Partial Summary Judgment and Injunctive Relief, May 13, 2005; App. p. 85 (emphasis added). Cincinnati Municipal Code Section 321-67, which applies to proposals submitted in response to a request for proposals, states, “The city may reject any or all proposals or any item within a proposal for any reason, or reject all proposals for no reason as deemed by the city purchasing agent or designee to be in the best interest of the city.”

bid.”<sup>78</sup> The City therefore retains discretion to reject any and all bids for a public contract.

The City included its project requirements within the Convention Center drywall contract bid documents themselves. Thus, even though as a general matter the City already had discretionary authority to reject any and all bids for City contracts,<sup>79</sup> the bid documents themselves explicitly provided that the City would award the Convention Center contracts to the lowest and best bidder.<sup>80</sup> The bid documents further provided: “The City reserves the right . . . to reject any or all bids.”<sup>81</sup> Additionally, in the bid documents, “Any bid which . . . contains . . . irregularities of any kind . . . may be cause for rejection of bid.”<sup>82</sup> As was the case in *Cedar Bay Construction, Inc., v. City of Fremont*,<sup>83</sup> the City reserved the right in its bid documents to “waive informalities not consistent with the law or to reject any or all bids.”<sup>84</sup>

Therefore, in awarding the Convention Center drywall contract, City officials complied with state, local and project-specific “lowest and best bidder” requirements. The officials lawfully exercised their discretion to reject Cleveland Construction’s bid and award the project to Valley.

#### **D. The First District Erred By Concluding That The City Abused Its Discretion In Awarding The Drywall Contract.**

Cleveland Construction argued that the city purchasing agent in this case committed an abuse of discretion by awarding the drywall contract to Valley in violation of Cincinnati Municipal Code Section 321-37(c). The First District erroneously held that

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<sup>78</sup> Opinion, Dec. 8, 2006, p. 3; App. p. 10 (emphasis added).

<sup>79</sup> Cincinnati Municipal Code Section 321-43.

<sup>80</sup> Cleveland Construction Ex. 29A. Supp. p. 91.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> 50 Ohio St.3d 19, 552 N.E.2d 202 (1990).

<sup>84</sup> Cleveland Construction Ex. 29A. Supp. p. 91.

the subsequent alleged abuse of discretion itself created a prior property interest in the contract award.<sup>85</sup> However, as previously discussed *infra*, subsequent conduct does not transform a prior expectation of a benefit into a legal entitlement to that benefit. The argument is temporally illogical since a legitimate claim of entitlement to a benefit must necessarily preexist the alleged abuse of discretion that, according to the argument, retrospectively establishes a property interest in that benefit.

In any event, the City's purchasing agent did not abuse her broad discretion. Abuse of discretion is defined as meaning more than an error of law or of judgment; it implies an unreasonable, arbitrary or unconscionable attitude.<sup>86</sup> Arbitrary means without adequate determining principle; not governed by and fixed rules or standard.<sup>87</sup> Unreasonable means irrational.<sup>88</sup> Further, the exercise of an honest judgment, however erroneous it may seem to be, is not *an abuse of discretion*.<sup>89</sup> Abuse of discretion, and especially gross and palpable abuse of discretion, which are the terms ordinarily employed to justify an interference with the exercise of discretionary power, implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.<sup>90</sup> There is no evidence to indicate that the purchasing agent's decision rose to the level of an abuse of discretion.<sup>91</sup>

The Court of Common Pleas cited *City of Dayton, ex. rel. Scandrick v. McGee*<sup>92</sup> to support its assertion that the law required that if the City rejected a lowest and best bid

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<sup>85</sup> Opinion, Dec. 8, 2006, p. 12; App. p. 19.

<sup>86</sup> *City of Dayton, ex rel. Scandrick v. McGee*, 67 Ohio St.2d 356, 359, 423 N.E.2d 1095 (1981).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *State ex rel. Shafer v. Ohio Turnpike Comm'n*, 159 Ohio St. 581, 590 113 N.E.2d 14 (1953).

<sup>90</sup> *Id.*

<sup>91</sup> Even assuming *arguendo* the decision did constitute an abuse of discretion, this action by a City employce does not constitute an abuse of discretion by *the City* itself (the only remaining defendant in the case).

<sup>92</sup> *Scandrick*, 67 Ohio St.2d 356.

that was not “in the best interest of the [C]ity,” it must do so “plainly and openly.”<sup>93</sup> In the *Scandrick* case, the Dayton Revised Code provided that a contract be awarded to a lowest and best bidder; the city retained discretion to “make a qualitative determination as to which bid was both lowest and ‘best’” based on certain criteria enumerated in the applicable code provision.<sup>94</sup> Dayton city officials awarded the contract to one bidder based on its residence within the city in furtherance of a city policy to encourage business to locate within the city.<sup>95</sup> However, the city did not inform the bidders of this city policy until after the opening of the bids. On that basis, this Court held that Dayton city officials had “made a conscious decision to withhold this pertinent information until after they had actual knowledge of the amounts of the bids. In effect, . . . [Dayton city officials] modified their requirements without notice . . . [undermining] the integrity of the competitive bidding process.”<sup>96</sup>

In *Scandrick*, this Court recognized that the issue was not the fact that resident bidders were afforded preference under city policy, but rather that the policy was not made a part of the guidelines or standards for awarding a contract to the lowest and best bidder.<sup>97</sup> The Court therefore held that “*due to the lack of announced standards, . . . [Dayton’s] action in this case [in awarding the contract to a resident bidder over a non-resident bidder] was arbitrary.*”<sup>98</sup>

In the case at bar, the City put all bidders on notice before opening the bids that they would be required to meet the 35% small business requirement in order to qualify

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<sup>93</sup> Entry, July 13, 2005, p. 7; App. p. 43.

<sup>94</sup> *Scandrick*, 67 Ohio St.2d at pp. 357-58.

<sup>95</sup> *Id.* at p. 358.

<sup>96</sup> *Id.* at p. 359.

<sup>97</sup> *Id.* at p. 360.

<sup>98</sup> *Id.* at p. 361 (emphasis added).

for the drywall contract. The bidders were not only aware that they had to meet the 35% small business requirement but also knew that the City retained discretion within the bid documents to reject any and all bids. In fact, the City initially rejected all the drywall bids for failure of any bidders to meet the 35% small business requirement, and Cleveland Construction admitted that it “has not challenged that decision.”<sup>99</sup>

In this case, there was no mystery or subterfuge about either the bid requirements or the decision to award the contract to Valley. In *Scandrlick*, by contrast, it was only after the bids had been awarded that the city of Dayton revealed that it had chosen the “lowest and best” bidder based on an unannounced policy of favoring resident contractors. There is a material and dispositive distinction between awarding a public contract on the basis of published criteria and awarding a public contract on the basis of a policy that had not been provided in advance to the bidders. Moreover, the published criteria at issue in this case, *i.e.*, the 35% small business requirement, was contained in the actual bid documents, which also contained the official invitation to bid.<sup>100</sup> As this Court has previously established, “When an award decision is based upon criteria expressly set forth in a bidding proposal, no abuse of discretion occurs.”<sup>101</sup> On its face, then, the fact that the City included the 35% small business requirement in its invitation to bid precludes a finding that the City abused its discretion in awarding the drywall contract on the basis of that same requirement.

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<sup>99</sup> Memorandum of Appellee Cleveland Construction, Inc. in Opposition to Jurisdiction, p. 10. Supp. p. 118.

<sup>100</sup> Cleveland Construction Ex. 29A; Cleveland Construction Ex. 32. Supp. pp. 90, 115.

<sup>101</sup> *Danis Clarkco Landfill Co. v. Clark County Solid Waste Management Dist.*, 73 Ohio St.3d 590, 604-05, 653 N.E.2d 646 (1995) (citing *Kokosing Constr. Co. v. Dixon*, 72 Ohio App.3d 320, 325, 594 N.E.2d 675 (1991)).

Cleveland Construction did not have a legitimate claim of entitlement to the contract, it did not have a constitutionally protected property interest, and the City of Cincinnati could not have deprived Cleveland Construction of procedural due process.<sup>102</sup>

**PROPOSITION OF LAW NO. II:**

**A DISAPPOINTED BIDDER FOR A PUBLIC CONTRACT IN OHIO CANNOT RECOVER LOST-PROFIT DAMAGES IN A 42 U.S.C. §1983 ACTION ALLEGING A DEPRIVATION OF PROCEDURAL DUE PROCESS**

**A. Introduction**

By Entry dated June 28, 2005, the Court of Common Pleas granted the City's Motion for a Directed Verdict on Cleveland Construction's claim for damages.<sup>103</sup> The Court expressed its reasoning on the record:

. . . . Ohio law seems uniformly, or almost uniformly, to establish that at the very least money damages are not available to disappointed bidders in cases where injunctive relief would make the disappointed bidder whole.

In fact, many courts have held that under Ohio law, money damages are not available for---lost profits are not available to disappointed bidders at all.

Now, federal law under Section 1983 does, it seems to me, clearly establish that money damages shall be available, if necessary, to compensate an injured plaintiff where injunctive relief does not do the trick.

To that extent, I think that Ohio law doesn't trump Section 1983 with regard to damages, but I think the two bodies of law reasonably can co-exist with a federal law when mandating damages for injunctive relief is shown not to be possible and Ohio law requiring that injunctive relief be applied to the extent possible in a disappointed bidder case after a weighing of all the relevant elements.

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<sup>102</sup> There is no evidence in the record that Cleveland Construction even inquired about the City's own protest practice after the drywall contract was awarded to Valley. Nor did Cleveland Construction attempt to invoke procedures in Ohio law. *See, e.g.*, Ohio Revised Code Section 9.312(B), which describes the protest procedure available to low bidders where a political subdivision has adopted a policy of awarding competitively bid contracts to the lowest responsive and responsible bidder.

<sup>103</sup> Entry, June 28, 2005; App. p. 63.

That, it seems to me, is, again, federal authority for the proposition that Section 1983 does not require money damages in cases where injunctive relief would suffice.

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I think the plaintiffs are frank to concede that any damages as to lost profit at this stage in the litigation is speculative . . . . But I think plaintiffs had an obligation to make out its case; and as I read the law, I don't think it has established a non-speculative claim with regard to any particular amount of lost profits at this point . . . .

And so I am going to grant the defendant's motion for directed verdict on that score.<sup>104</sup>

The First District reversed the ruling of the Court of Common Pleas. The First District and Cleveland Construction both admitted that *Cementech, Inc. v. City of Fairlawn*<sup>105</sup> precluded Cleveland Construction from trying to recover its lost profits as damages under state law claims.<sup>106</sup> However, even though the First District acknowledged that “[w]e recognize that a plaintiff seeking redress under Section 1983 is required to mitigate its damages,” the First District reversed the Court of Common Pleas’ directed verdict in favor of the City and remanded the case for a new trial with respect to Cleveland Construction’s lost-profits claim under 42 U.S.C. §1983.<sup>107</sup> Disregarding the subtleties and nuances of damage claims under 42 U.S.C. §1983 and instead citing dicta from an equal protection standing case challenging federal race-based contracting requirements, and without even identifying any speculative deficiencies in the City’s procedures available to unsuccessful bidders, the First District stated that the United States Supreme Court “presumed that the rejected bidder was entitled to seek damages for the lost contract . . . .”<sup>108</sup>

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<sup>104</sup> Transcript, pp. 954-60. Supp. pp. 27-33.

<sup>105</sup> 109 Ohio St.3d 475, 2006 Ohio 2991, 849 N.E.2d 24 (2006).

<sup>106</sup> App. p. 25.

<sup>107</sup> *Id.*, p. 27.

<sup>108</sup> *Id.*, p. 25.

**B. The Common Law of Torts Controls The Prerequisites And Elements Of Damages Available For Claims Brought Pursuant to 42 U.S.C. §1983.**

The First District cited a student suspension case, *Carey v. Phipus*,<sup>109</sup> for the proposition that the “basic purpose of a Section 1983 damage award is to compensate persons for injuries *caused by* the deprivation of constitutional rights.”<sup>110</sup> The First District cited an employment suspension case, *Memphis Community School District v. Stachura*,<sup>111</sup> for the proposition that the “level of a person’s compensatory damages under Section 1983 is ordinarily determined according to principles derived from the common law of torts.”<sup>112</sup> In each of those suspension cases, the suspended party did not have the opportunity to prevent the deprivation by enjoining the start of the suspension.

The First District did not carefully analyze the principles announced by the United States Supreme Court in these two suspension cases. In *Carey*, the student suspension case, the Supreme Court held that in order to recover substantial damages a plaintiff must prove that he was actually injured by the constitutional deprivation.<sup>113</sup> The Supreme Court was clear that “the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries *caused by* the violation of his legal rights. These rules, defining the elements of damages *and the prerequisites for their recovery*, provide the appropriate starting point for the inquiry under §1983 as well.”<sup>114</sup>

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<sup>109</sup> 435 U.S. 247 (1978).

<sup>110</sup> App. p. 25 (emphasis added).

<sup>111</sup> 477 U.S. 299 (1986).

<sup>112</sup> App. p. 25.

<sup>113</sup> There is no evidence in the case at bar that the City’s procedures available to unsuccessful bidders for public contracts did not provide all the process that was due under the circumstances. There is also no evidence that the alleged deprivation of procedural due process proximately caused Cleveland Construction to lose the Convention Center drywall contract.

<sup>114</sup> 435 U.S. at 257-58 (emphasis added).

The Supreme Court emphasized: “In order to further the purpose of §1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law.”<sup>115</sup> For instance, the Court held that where the failure to accord procedural due process was not the cause of the alleged injury, a plaintiff could only recover nominal damages, not to exceed one dollar in that case.<sup>116</sup> Cleveland Construction seeks compensatory damages in the case at bar.

In *Stachura*, the employment suspension case, the Supreme Court held that “*Carey* thus makes clear that the abstract value of a constitutional right may not form the basis for §1983 damages.”<sup>117</sup> The Supreme Court reiterated that “when §1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.”<sup>118</sup> The Court emphasized: “Congress adopted this common-law system of recovery when it established liability for ‘constitutional torts.’”<sup>119</sup> In other words, damages under §1983 are grounded on principles of tort damages.<sup>120</sup> The Court repeated its holding in *Carey* that “the elements and prerequisites for recovery of damages’ might vary depending on the interests protected by the constitutional right at issue” and that “the elements and prerequisites appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the

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<sup>115</sup> *Id.* at pp. 258-59.

<sup>116</sup> *Id.* at pp. 266-67.

<sup>117</sup> 477 U.S. at 308.

<sup>118</sup> *Id.* at p. 306.

<sup>119</sup> *Id.* at p. 307.

<sup>120</sup> *Id.* at p. 308.

deprivation of another.”<sup>121</sup> Requiring taxpayers to unnecessarily pay twice for the same project is not mandated by Supreme Court decisions.

The Supreme Court explained in *Robertson v. Wegmann* that 42 U.S.C. §1988 recognized that “federal law simply does not cover every issue that may arise in the context of a federal civil rights action” and, when that occurs, “§1988 instructs us to turn to ‘the common law, as modified and changed by the constitution and statutes of the [forum] State,’ as long as these are ‘not inconsistent with the Constitution and laws of the United States.’”<sup>122</sup> The Court stated: “Of particular importance is whether application of state law ‘would be inconsistent with the federal policy underlying the cause of action under consideration.’”<sup>123</sup> In other words, §1988 effectuates the principle of assimilation of state laws compatible with the policy of the federal law. There is nothing in federal law that undermines the duty of an allegedly injured party to mitigate damages.<sup>124</sup> The Court held that a state law causing abatement of a particular §1983 action did not necessarily violate the policies underlying §1983 including compensation for injured persons.<sup>125</sup> Even when a state statute causes a plaintiff to lose litigation it is not necessarily “inconsistent” with federal law.<sup>126</sup> Furthermore: “That a federal remedy should be available, however, does not mean that a §1983 plaintiff . . . must be allowed to continue an action in disregard of the state law to which §1988 refers us.”<sup>127</sup>

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<sup>121</sup> *Id.* at p. 309 and n. 13.

<sup>122</sup> *Robertson v. Wegmann*, 436 U.S. 584, 588 (1978).

<sup>123</sup> *Id.* at p. 590.

<sup>124</sup> *See Meyers v. City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir.1994) (stating that a plaintiff has a duty under §1983 to mitigate damages).

<sup>125</sup> *Robertson*, 436 U.S. pp. 590-91.

<sup>126</sup> *Id.* at p. 593.

<sup>127</sup> *Id.*

Therefore, the First District Court of Appeals erred by disregarding the applicability of “principles derived from the common law of torts” and allowing Cleveland Construction to pursue its claim for compensatory damages.

**C. The Common Law of Torts Requires That Cleveland Construction Mitigate Its Alleged Damages.**

A tort arises from the violation of a duty imposed by law. Generally, the character of an alleged wrong as a tort excludes its concurrent characterization as a breach of contract.<sup>128</sup> Ohio law requires that one injured by the tort of another mitigate damages by the use of reasonable efforts after the commission of the tort. It is a general principle of law that a plaintiff who is injured by the tort of another has a duty to mitigate and may not recover damages for harm that could have been avoided with reasonable effort or expenditure thereafter.<sup>129</sup> The Restatement (Second) of Torts provides:

§ 918. Avoidable Consequences

(1) Except as stated in Subsection (2), one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort.

(2) One is not prevented from recovering damages for a particular harm resulting from a tort if the tortfeasor intended the harm or was aware of it and was recklessly disregarding of it, unless the injured person with knowledge of the danger of the harm intentionally or heedlessly failed to protect his own interests.<sup>130</sup>

Moreover, under Ohio’s mitigation doctrine of avoidable consequences, a party who makes a claim on a contract also cannot receive damages that it could have prevented by “reasonable affirmative action.”<sup>131</sup> Cleveland Construction had the

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<sup>128</sup> *Resource Title Agency, Inc. v. Morreale Real Estate Serv., Inc.*, 314 F. Supp.2d 763 (N.D. Ohio 2004).

<sup>129</sup> *Johnson v. University Hosp. of Cleveland*, 44 Ohio St.3d 49, 57, 540 N.E.2d 1370 (1987).

<sup>130</sup> Restatement (Second) of Torts §918 (1979).

<sup>131</sup> *F. Enter. v. Kentucky Fried Chicken Corp.*, 47 Ohio St.2d 154, 351 N.E.2d 121, paragraph three of the syllabus (1976).

opportunity to pursue its claim to enjoin the Convention Center drywall work but it declined to do so. Cleveland Construction failed to mitigate its damages and should not be permitted to pursue that remedy to the detriment of the City and its taxpayers.

***D. Cementech, Inc. v. City of Fairlawn Limits Cleveland Construction To Injunctive Remedies.***

The First District erred by narrowing this Court's holding in *Cementech, Inc. v. City of Fairlawn* that "when a municipality violates competitive bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages."<sup>132</sup> With an eye on balancing competing interests, this Court held:

It is clear that in the context of competitive bidding for public contracts, injunctive relief provides a remedy that prevents excessive costs and corrupt practices, as well as protects the integrity of the bidding process, the public, and the bidders. Moreover, the injunctive process and the resulting delays serve as a sufficient deterrent to a municipality's violation of competitive-bidding laws.<sup>133</sup>

There is no principled distinction between an allegation that a municipal employee violated the procedures required by the municipality's own procurement ordinance or state law, and an allegation that the municipal employee violated procedures required by the Constitution. Either way, taxpayers are exposed to paying twice for the same project.

The First District remanded the case to the Court of Common Pleas to allow Cleveland Construction to pursue its claim for lost profits even though the First District conceded that 1) "a person's compensatory damages under Section 1983 is ordinarily determined according to principles derived from the common law of torts;" 2) this Court determined in *Cementech* that the common law of Ohio did not justify allowing a disappointed bidder for a public contract to sue for damages; and 3) Cleveland

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<sup>132</sup> 109 Ohio St.3d 475, 478, 849 N.E.2d 24 (2006).

<sup>133</sup> *Id.* at p. 477.

Construction abandoned its claim to enjoin the drywall work at the Convention Center. This limitation of the *Cementech* holding is not required by federal law and comes at great cost to the City of Cincinnati and other government entities.

The United States Court of Appeals for the Fifth Circuit recently concluded that even assuming a disappointed bidder on a public contract had a constitutionally protected property interest, the availability of judicial injunction procedures in state court satisfied the requirements of due process.<sup>134</sup> Citing the United States Supreme Court, the Fifth Circuit concluded that “a state court injunction available before the deprivation ‘of any significant property interest’ constitutes an adequate pre-deprivation remedy.”<sup>135</sup> In *Cementech*, this Court acknowledged that Ohio law makes the remedy of injunctive relief available to a disappointed bidder for public contracts. That premise justified the Court’s conclusion that “it would be unfair to hold the taxpayers liable for the [disappointed bidder’s] loss” and, therefore, “the rejected bidder cannot recover its lost profits as damages.”<sup>136</sup> Under either the Fifth Circuit’s reasoning that the availability of state court injunctive relief means that there is no deprivation of due process, or this Court’s reasoning that the availability of injunctive relief suffices to protect the interest of a disappointed bidder since paying twice is punitive to innocent taxpayers, Cleveland Construction is not entitled to sue the City of Cincinnati for damages.

**E. The Dicta In *Adarand Constructors v. Pena* Does Not Entitle Cleveland Construction To Sue The City of Cincinnati For Damages.**

The First District cited dicta from *Adarand Constructors v. Pena* (an equal protection standing case challenging federal race-based contracting requirements) in

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<sup>134</sup> *Marco Outdoor Advertising, Inc. v. Regional Transit Auth.*, 2007 WL 1723107 (5th Cir. 2007).

<sup>135</sup> *Id.* at \*2 (citing *McKesson Corp. v. Div. Of Alcoholic Beverages and Tobacco, Dep’t of Bus. Regulation of Fla.*, 496 U.S. 18, 36-37 (1990)).

<sup>136</sup> 109 Ohio St.3d at 478.

support of its conclusion that Cleveland Construction was entitled to sue the City of Cincinnati for damages allegedly attributable to the City's deprivation of its alleged right to procedural due process.<sup>137</sup> The First District overextended the dicta stated in *Adarand Constructors* that an unsuccessful bidder may seek damages for a federal contract lost by application of an unconstitutional race-based subcontractor compensation clause.

The issues before this Court do not involve unconstitutional race-based requirements that proximately caused injury to Cleveland Construction. It does not necessarily follow from the dicta in *Adarand Constructors* that an unsuccessful bidder for a state contract allegedly lost due to a deprivation of due process has a claim for damages. The Supreme Court held that “the elements and prerequisites for recovery of damages’ might vary depending on the interests protected by the constitutional right at issue.”<sup>138</sup> As previously discussed, “the abstract value of a constitutional right may not form the basis for §1983 damages.”<sup>139</sup> Cleveland did not adduce any evidence of the City's protest practices, did not prove that they were legally insufficient, and did not establish that its alleged injury was proximately caused by those hypothetically insufficient practices.

Furthermore, the First District deleted from its Opinion the Supreme Court's concluding language from the dicta in *Adarand*: “. . . (we express no view, however, as to whether sovereign immunity would bar such relief on these facts).”<sup>140</sup> Even under the dicta, a claim for damages is not absolute. The Supreme Court also requires that a plaintiff prove proximate cause to sustain a claim for compensatory damages. In any

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<sup>137</sup> App. pp. 25-26 (citing *Adarand Constructors v. Pena*, 515 U.S. 200 (1995)).

<sup>138</sup> *Stachura*, 477 U.S. at 309 (quoting *Carey*).

<sup>139</sup> *Supra* at p. 22.

<sup>140</sup> *Adarand*, 515 U.S. at 210.

event, a claim for damages based on application of an unconstitutional race-based subcontractor compensation clause protects different interests than a claim based on alleged due process violations that are negated by the availability of an injunction.<sup>141</sup>

### CONCLUSION

A disappointed bidder for a public contract does not have a constitutionally protected property interest in that contract and cannot state a claim for an alleged deprivation of procedural due process.<sup>142</sup> Assuming *arguendo* that Cleveland Construction stated a procedural due process claim against the City of Cincinnati upon which relief can be granted, its remedy was to enjoin the alleged unlawfully awarded contract and thereby mitigate its alleged damages.<sup>143</sup>

Respectfully submitted,

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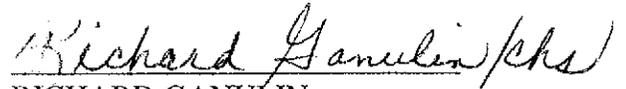
<sup>141</sup> The First District supported its reference to the language in *Adarand* by citing other equal protection decisions. App. p. 26.

<sup>142</sup> Proposition of Law No. 1.

<sup>143</sup> Proposition of Law No. 2.

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing Merit Brief of Appellant City of Cincinnati's has been sent to David L. Barth, Esq. and Kelly A. Armstrong, Esq., Cors & Bassett, LLC, 537 East Pete Rose Way, Suite 400, Cincinnati, Ohio 45202 and to W. Kelly Lundrigan, Esq. and Gary E. Powell, Esq., Manley Burke, 225 West Court Street, Cincinnati, Ohio 45202 this 14<sup>th</sup> day of July, 2007, by ordinary U.S. Mail.

  
RICHARD GANULIN  
Assistant City Solicitor

JLM/RG/MFC/(chs)  
(DOTE) Cleveland Const. Merit Brief 0707-RG

## **APPENDIX**

## APPENDIX

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IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI : CASE NO. **07-0114**  
Defendant-Appellant : APPEAL NO. C050749  
v. : APPEAL NO. C050779  
: APPEAL NO. C050888  
(Consolidated)  
CLEVELAND CONSTRUCTION, INC. : COURT OF APPEALS  
Plaintiff-Appellee : FIRST APPELLATE DISTRICT  
CASE NO. A-0402638

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NOTICE OF APPEAL OF  
DEFENDANT-APPELLANT CITY OF CINCINNATI

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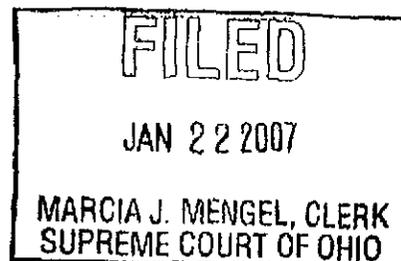
JULIA L. MCNEIL (0043535)  
City Solicitor

RICHARD GANULIN (0025642C)  
MARY FRANCES CLARK (0077497)  
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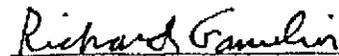
**NOTICE OF APPEAL**

Defendant-Appellant City of Cincinnati gives notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Appellate District, entered in Court of Appeals Case Nos. C050749, C050779 and C050888 on December 8, 2006.

This case raises questions of due process, damages, standing, and equal protection. The case is one of public and great general interest.

Respectfully submitted,

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City Solicitor

  
RICHARD GANULIN (0025642C)  
MARY FRANCES CLARK (0077497)  
Assistant City Solicitors  
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richard.ganulin@cincinnati-oh.gov  
mary.clark@cincinnati-oh.gov

*Attorneys for Defendant-Appellant  
City of Cincinnati*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Notice of Appeal was hand-delivered to Appellee Counsel W. Kelly Lundrigan and Gary E. Powell at Manley Burke, 225 West Court Street, Cincinnati, Ohio 45202 and to Counsel for Valley Interior Systems, Inc., David Barth and Kelly A. Armstrong at Cors & Bassett, LLC, 537 East Pete Rose Way, Suite 400, Cincinnati, Ohio 45202-3502 this 19<sup>th</sup> day of January, 2007.

  
\_\_\_\_\_  
RICHARD GANULIN  
Assistant City Solicitor

JLM/RG/(chs)  
(DOTE) Cleveland Constr NofAppeal 0107-RG

# The Supreme Court of Ohio

**FILED**

MAY 02 2007

MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

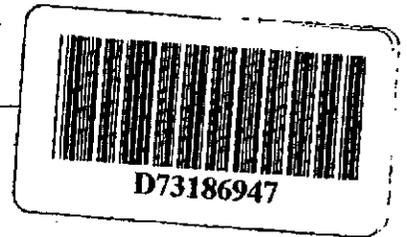
Cleveland Construction, Inc.

Case No. 2007-0114

v.

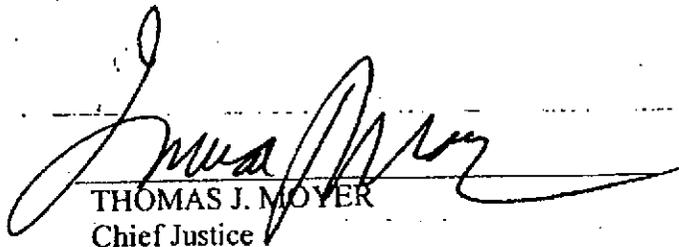
ENTRY

City of Cincinnati, and Timothy Riordan,  
Bernadine Franklin, Nate Mullaney, Alicia  
Townsend, Kathi Ranford, and Valley  
Interior Systems, Inc.



Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal on Propositions of Law Nos. I and III. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Hamilton County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Hamilton County Court of Appeals; Nos. C050749, C050779, and C050888)

  
THOMAS J. MOYER  
Chief Justice

FILED

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GREGORY HARTMANN  
CLERK OF COURTS  
-HAM. CNTY. OH

**FILED**  
COURT OF APPEALS

MAY -7 2007

GREGORY HARTMANN  
CLERK OF COURTS  
HAMILTON COUNTY

FILED

MAY 02 2007

# The Supreme Court of Ohio

To the Clerk of Court of Appeals for

MARCIA J. MENGEL, CLERK  
SUPREME COURT OF OHIO

Hamilton County,

ORDER TO CERTIFY RECORD

Cincinnati, Ohio

S.C. Case No. 07-0114

C.A. Case Nos. C050749, C050779,  
and C050888

Cleveland Construction, Inc.

v.

City of Cincinnati, and Timothy Riordan,

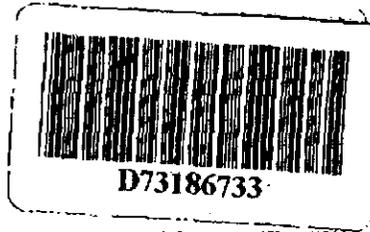
Bernadine Franklin, Nate Mullaney,

Alicia Townsend, Kathi Ranford, and Valley

Interior Systems, Inc.

FILED  
COURT OF APPEALS

MAY - 7 2007



GREGORY HARTMANN  
CLERK OF COURTS  
HAMILTON COUNTY

Pursuant to Rule V, Sections 3 and 5, of the Rules of the Supreme Court of Ohio, you are hereby ordered to prepare and forward to the Clerk's Office the record in the above-captioned case as follows:

FILED

FILED  
MAY 10 2007  
GREGORY HARTMANN  
CLERK OF COURTS  
HAMILTON COUNTY

- The record shall consist of the original papers and exhibits to those papers; the transcript of proceedings and exhibits, along with a computer diskette of the transcript, if available; and certified copies of the journal entry and the docket prepared by the clerk of the court or other custodian of the original papers.
- The record shall be transmitted along with an index that lists all items included in the record. All exhibits listed in the index shall be briefly described, and a copy of the index must be sent to all counsel of record in the case.
- The following items shall not be transmitted at this time:
  - any physical exhibits, other than videotapes and documents such as papers, maps, or photographs;
  - documents of unusual size, bulk, or weight.

Any exhibits or documents that are not transmitted shall be designated in the index. The custodian of those exhibits or documents must also be identified in the index.

- The record shall be transmitted to the Clerk's Office within 20 days of the date of this order.

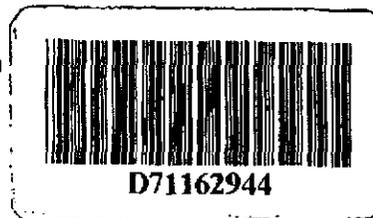
CLERK OF COURTS

THOMAS J. MOYER  
Chief Justice

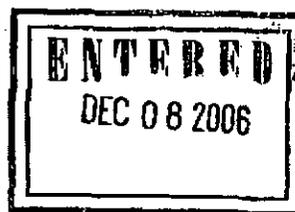
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**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**



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



This cause was heard upon the appeal, the record, the briefs, and arguments. The judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Opinion filed this date. Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

**To The Clerk:**

**Enter upon the Journal of the Court on December 8, 2006 per Order of the Court.**

By:   
\_\_\_\_\_  
Presiding Judge

DEC - 8 2006



D71183224

**IN THE COURT OF APPEALS**

**GREGORY HARTMANN**  
**CLERK OF COURTS**  
**HAMILTON COUNTY**

**FIRST APPELLATE DISTRICT OF OHIO**

**HAMILTON COUNTY, OHIO**

CLEVELAND CONSTRUCTION, INC., : APPEAL NOS. C-050749  
 : C-050779  
 Plaintiff-Appellant/ : C-050888  
 Cross-Appellee, :

TRIAL NO. A-0402638

vs.

*OPINION.*

CITY OF CINCINNATI,

Defendant-Appellee/  
Cross-Appellant,

PRESENTED TO THE CLERK  
OF COURTS FOR FILING

and

DEC 08 2006

TIMOTHY RIORDAN,

COURT OF APPEALS

BERNADINE FRANKLIN,

NATE MULLANEY,

ALICIA TOWNSEND,

KATHI RANFORD,

and

VALLEY INTERIOR SYSTEMS, INC.,

Defendants-Appellees.

Civil Appeals From: Hamilton County Court of Common Pleas

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

Date of Judgment Entry on Appeal: December 8, 2006

GREGORY HARTMANN  
CLERK OF COURTS  
HAMILTON COUNTY, OH

2006 DEC-8 A 11:52

FILED

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

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

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

**SYLVIA SIEVE HENDON, Judge.**

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

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

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

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

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<sup>1</sup> CMC 321-37(c)(4).

<sup>2</sup> CMC 321-37(c).

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

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

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

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

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

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

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

***Cleveland Files Suit***

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

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

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

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

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

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

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

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

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

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

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

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

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

*The Application of CMC 321-37*

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

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

{¶24} The city argues that "[e]ven though Valley's bid was \$1.2 million more than Cleveland's, the project was well within the budget." This argument fails to take into account that "among the purposes of competitive bidding legislation are the protection of the taxpayer [and the] prevention of excessive costs."<sup>3</sup> 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.

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

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

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

#### *Cleveland's Standing*

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

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

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

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

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

#### *Deprivation of a Property Interest*

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

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

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<sup>4</sup> *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.

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

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

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

{¶33} Property interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”<sup>7</sup> 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.<sup>8</sup> A person’s unilateral expectation of a benefit is not enough.<sup>9</sup>

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

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

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

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<sup>7</sup> *Id.* at 577, 92 S.Ct. 2701.

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

<sup>9</sup> *Roth, supra*, at 577, 92 S.Ct. 2701.

<sup>10</sup> *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.

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

<sup>12</sup> *Id.* at 603, 1995-Ohio-301, 653 N.E.2d 646.

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

officials abuse the discretion vested in them, courts will intervene.<sup>14</sup> 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.’”<sup>15</sup>

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

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

***SBE Program Provisions Were Facially Unconstitutional***

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

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<sup>14</sup> *Id.* at 21-22, 552 N.E.2d 202.

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

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

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

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

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

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

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

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

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

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

encourage contractors to hire minority subcontractors, courts must apply strict scrutiny.<sup>20</sup>

{¶44} For example, in *Adarand Constructors v. Pena*,<sup>21</sup> 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.<sup>22</sup>

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

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

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

<sup>21</sup> (1995), 515 U.S. 200, 115 S.Ct. 2097.

<sup>22</sup> *Id.* at 224, 115 S.Ct. 2097.

<sup>23</sup> *Bras*, supra, at 874.

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

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

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

#### ***Award of Attorney Fees***

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

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<sup>24</sup> *Safeco Inc.*, supra, at 692, citing *Lutheran*, supra, at 491.

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

{¶52} But the entry of a declaratory judgment in a party’s favor does not automatically render that party a prevailing party under Section 1988.<sup>28</sup> “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.)<sup>29</sup>

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

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

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

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

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

<sup>29</sup> *Hewitt*, supra, at 761, 107 S.Ct. 2672.

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

***Directed Verdict***

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

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

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

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<sup>30</sup> Civ.R. 50(A)(4).

<sup>31</sup> Civ.R. 50(A)(4).

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

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

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

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

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

{¶60} In *Adarand Constructors v. Pena*,<sup>38</sup> 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:

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

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

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

<sup>37</sup> *Id.* at 306-307, 106 S.Ct. 2537.

<sup>38</sup> (1995), 515 U.S. 200, 115 S.Ct. 2097.

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

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

{¶63} Similarly, in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade Cty., Fla.*,<sup>41</sup> 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.<sup>42</sup>

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

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<sup>39</sup> 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.

<sup>40</sup> (C.A.5, 1999), 199 F.3d 206.

<sup>41</sup> (S.D.Fla.2004), 333 F.Supp.2d 1305.

<sup>42</sup> *Id.* at 1339.

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

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

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

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

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

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

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

#### *The Denial of Injunctive Relief*

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

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

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

<sup>46</sup> *Miner*, supra, at 238, 92 N.E. 21.

consideration of those issues.”<sup>47</sup> 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.<sup>48</sup>

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

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

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

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

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

***Evidentiary Rulings***

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

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

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

<sup>50</sup> See *Banks*, *supra*.

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

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

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

#### ***Dismissal of City Employees***

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

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

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

{¶81} The doctrine recognizes the strong public interest in protecting public officials from the costs of defending against claims. A public official's entitlement to avoid the burdens of litigation "is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."<sup>53</sup> 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.<sup>54</sup> "[A] quick resolution of a qualified immunity claim is essential."<sup>55</sup>

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

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<sup>51</sup> 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.

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

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

<sup>54</sup> *Id.*

<sup>55</sup> *Will v. Hallock* (2006), \_\_\_ U.S. \_\_\_, 126 S.Ct. 952, 960.

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

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

*Conclusion*

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

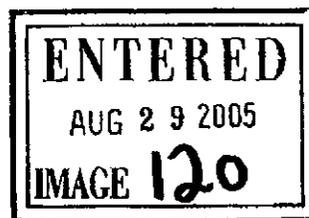
Judgment accordingly.

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

*Please Note:*

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

COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO



Cleveland Construction,

Plaintiff,

v.

City of Cincinnati, et al.,

Defendants.

Case No. A0402638

Judge Nelson

Final Judgment Entry



D65063916

This final judgment entry is based on and incorporates in full the court's post-trial entry of July 13, 2005.

As set forth in that prior entry, the court finds and adjudges that:

- 1) Defendant the City of Cincinnati ("the City") violated the requirements of Cincinnati Municipal Code Section 321-37 ("Bid; Award to Lowest and Best") in awarding the Convention Center drywall contract at issue to Defendant Valley Interior Systems, Inc. ("Valley") rather than to Plaintiff Cleveland Construction, Inc. ("Cleveland Construction") when the award was "based primarily upon" compliance with the City's Subcontracting Outreach Program and Valley's bid exceeded Cleveland Construction's by \$1,246,022.00. That additional cost exceeded the \$50,000 cap established by Code Section 321-37, and the City acknowledged that Cleveland Construction was otherwise qualified to perform the work. In making its award, the City abused its discretion in a manner that harmed the public and denied Cleveland Construction the contract in violation of Cleveland Construction's federally protected due process rights and in violation of 42 U.S.C. Section 1983.
- 2) The City's Small Business Enterprise program Rules and Guidelines as in effect at the time of contract award and trial create race and gender based classifications for which the City claims no compelling governmental interest and offers no basis to satisfy any appropriate intermediate scrutiny review. The program is to that extent unconstitutional on its face. Further, in the process of soliciting bids in this matter, the City did pressure and encourage bidders, including Plaintiff, to draw upon race and sex-based classifications that the City concedes could not withstand the heightened level of review that the court finds mandated by governing law. The City in that regard violated Cleveland Construction's rights under 42 U.S.C. Section 1983. However, Cleveland Construction failed to establish that the City's race and sex

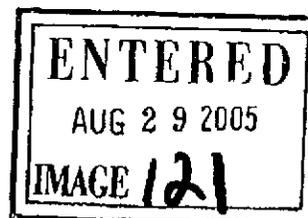
based classifications (as opposed to the City's small business preference) resulted in the loss of the contract at issue.

Further, the court enters a declaratory judgment, in favor of Cleveland Construction and against the City, that City Code Section 321-37(c) in its current form provides, among other things, that where the City elects to enter into a construction contract on the basis of the "lowest and best" bid, and where that selection is based primarily upon the City's determination of the bidders' relative compliance with the City's SBE Subcontracting Outreach Program rules and regulations, the City may not award the contract to a bidder whose bid amount exceeds an otherwise qualified bid by ten percent or fifty thousand dollars.

The court also enters a declaratory judgment, in favor of Cleveland Construction and against the City, that the City's SBE Rules and Guidelines as of the date of trial, and as promulgated by the City as official policy pursuant to City ordinance, contain race and sex based classifications that violate the equal protection clause of the United States Constitution.

The court also enters judgment against the City by permanent injunction prohibiting the City from maintaining or applying any iteration of the SBE Rules and Guidelines provisions specified at pages 13-14 of the court's July 13, 2005 post-trial entry, or any substantially comparable provisions making race or gender based classifications through similar formulations, absent a formal, public determination by the City establishing that such provisions are, in the case of racial classifications, narrowly tailored to advance a compelling governmental interest, or, in the case of gender classifications, substantially related to genuine and important governmental objectives. The court notes that the City acknowledged during this litigation that it was not in a position to make such showings. For the reasons set forth in its July 13, 2005 entry, the court does not enjoin drywall work (well under progress at this stage) with regard to the Convention Center project.

The court also enters judgment in favor of Cleveland Construction, as the prevailing party and against the City, for its reasonable attorney fees and costs pursuant to 42 U.S.C. Section 1988, in the amount of \$433,290.00. In arriving at that figure, the court has declined to award fees for certain preliminary and post-trial activities and for certain matters relating to potential expert witness testimony on matters not directly relevant to the issues presented to the court. The court has reviewed Cleveland Construction's fee application in light of prevailing standards (see, e.g., *Grycza v. Steger* [6<sup>th</sup> Dist. App. 1994], 97 Ohio App. 3d 82, 84 ["ordinarily a prevailing plaintiff should recover its attorneys fees"]; *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept Health and Human Resources* [2001], 532 U.S. 598; *Morscott, Inc. v. City of Cleveland* [6<sup>th</sup> Cir. 1991], 936 F.2d 271 [absent special circumstances, trial court "must" award fees to the prevailing plaintiff]), and with regard for the degree of success obtained through judicially enforceable remedies that alter the contemplated future legal relationship of the parties. The court does not find the City's memorandum in opposition to any fee award persuasive (including the City's less than full account of its shifting positions on whether its own Rules and Guidelines even had been formally promulgated, cf. City's May 11, 2005 brief at 13 arguing that the Rules and Guidelines as attached to Cleveland Construction's amended complaint "do not have the force of law" and are not "official policy" – a matter of significance to both prongs of Plaintiff's action).



Court costs as recorded by the Clerk of Courts are assessed to the Defendants to be shared equally between them. Although Valley's legal arguments did not prevail to the (very considerable) extent that they mirrored the arguments of the City on those issues as to which the court awards judgment to Plaintiff Cleveland Construction against the City, the court awards no separate relief against Valley and enters judgment for Valley to that effect for the reasons stated in the July 13, 2005 post-trial entry.

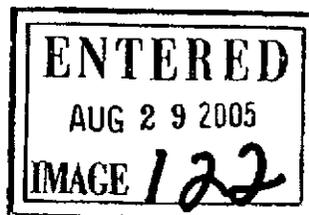
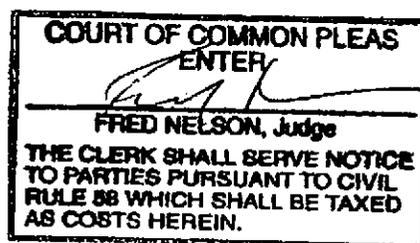
This is a final order and there is no just cause for delay. The Clerk of Courts is directed to serve notice of this final judgment upon the parties in accordance with the civil rules.

**ENTERED**  
SO ORDERED

AUG 29 2005

  
Fred Nelson, Judge  
Judge

- cc: Kelly Lundrigan, 225 West Court Street, Cincinnati, OH 45202 (fax: 721-4268)
- Leonard Weakley, Jr., One West Fourth Street, Suite 900, Cincinnati, OH 45202 (fax: 381-9206)
- David Barth, 537 East Pete Rose Way, Suite 400, Cincinnati, OH 45202 (fax: 852-8222)



COMMON PLEAS COURT  
HAMILTON COUNTY, OHIO

Cleveland Construction, Inc.,

CASE NO: A0402638

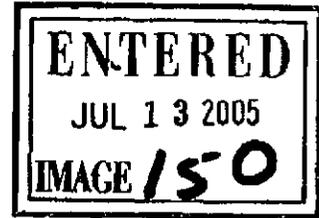
Plaintiff,

Judge Nelson

v.

Entry

City of Cincinnati, et al.,  
Defendants



This matter proceeded to a trial on the merits of Plaintiff's case combined with an evidentiary hearing on Plaintiff's Motion for Preliminary Injunction pursuant to Civil Rule 65(B)(2) and under a schedule referenced in the court's May 13, 2005 Entry Denying Defendants' Motions for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment and [preliminary] Injunctive Relief [SJ Entry] That prior entry sets forth in some detail the legal context of this action, which arises from a dispute relating to drywall work for the expansion and renovation of Cincinnati's Convention Center A jury was impaneled to address certain issues in the case, after the court granted the motion of Defendant the City of Cincinnati for a directed verdict with regard to Plaintiff Cleveland Construction, Inc.'s claim for lost profits, as referenced below, the parties agreed that the litigation should proceed as a trial to the court and the jury was discharged by the consent of all sides (a matter as to which Plaintiff subsequently took some issue) The trial now has concluded, and the court has heard the evidence and counsels' closing arguments and also has reviewed the final materials presented in writing



*I The City violated its Code requirement that a determination to award a City contract primarily on the basis of compliance with the City's Subcontractor Outreach Program (designed to favor subcontracting to small businesses) not cost taxpayers more than \$50,000 beyond the amount submitted in a lower and otherwise qualified bid*

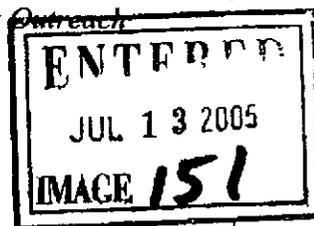
The evidence is clear and the parties agree that in the determinative second round of bidding to perform the drywall work, the bid submitted by Plaintiff Cleveland Construction, Inc ("Cleveland," or "Plaintiff") was lower by \$1,246,022.00 than the bid submitted by Defendant Valley Interior Systems, Inc ("Valley"). Nonetheless, Defendant City of Cincinnati ("the City") awarded the drywall contract to Valley as the "lowest and best" bidder because Valley agreed to subcontract at least 35% of the work to small business enterprises ("SBEs") while Cleveland did not. 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 had conceded that Cleveland was otherwise qualified to perform the work, *see* SJ Entry at 10. The court finds that the City's 35% SBE requirement was the only reason that the City awarded the contract to Valley rather than to Cleveland despite the one and a quarter million dollar difference between the bids.

The City's Code section 321-37, "Bid, Award to Lowest and Best," provides in part

"(a) Selection of Lowest and Best in Award of City Contracts. Except where otherwise provided by ordinance, the city purchasing agent shall award a contract to the lowest and best bidder ...

(c) Factors to be Considered. Other factors that the city purchasing agent may consider in determining the lowest and best bid include, but are not limited to [prior performance, prevailing wage history, compliance with nondiscrimination rules, and]

(4) Information concerning compliance with the 'SBE Subcontracting Outreach

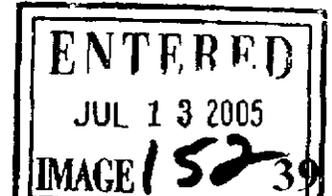


*Program' rules and regulations issued by the city manager pursuant to section 323-31*

*In the event that the selection of the lowest and best bidder is based primarily upon factors 3 or 4 above, 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 ” (emphasis added)*

As the court noted in its SJ Entry, the language of 321-37 establishes that “information concerning compliance” with the City’s SBE Subcontracting Outreach Program rules and regulations is a “[f]actor” that “may” be considered as the City determines the lowest and best bid. If the lowest and best bid is indeed selected “based primarily” on that factor, the City may proceed to award the contract “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 ” 321-37(c)(4)

In that context, the phrase “otherwise qualified bid” can reasonably be read only to mean a bid that is qualified except that it is not in “compliance” with the SBE Subcontracting Outreach Program “factor ” The bid not selected “primarily” because of the SBE Subcontracting Outreach Program factor must “otherwise” be qualified in order to trigger the required calculation with regard to whether the contract award may be made as selected on that basis. As the court also observed in its SJ Entry at 15, the City Administration through then Assistant City Manager Rashid Young advised Cincinnati City Council’s Law and Public Safety Committee prior to enactment of this 10% / \$50,000 cap that, “[w]hat 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

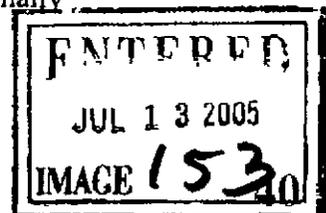


hundred thousand dollars more to comply with the regulations of SBE ” This explanation of a taxpayer protection rationale for the cap is fully consistent with the Code language that Cincinnati Council promptly adopted

The 321-37(c) cap protecting Cincinnati taxpayers from having to pay more than \$50,000 extra (extra, that is, beyond the amount established by a lower and otherwise qualified bid) for the benefit of SBE Subcontracting Outreach Program compliance was adopted in specific contemplation of the Convention Center project; it took effect only months before the contract at issue was awarded See Plaintiff’s trial exhibit 13-A (noting that “this ordinance is an emergency measure The reason for the emergency is 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”)

The court parsed the language of 321-37 at some length in its SJ Entry (pages 10-23), and incorporates here that statutory construction As earlier observed, the cap applies specifically (and exclusively) to instances where a higher bid is accepted because of “information concerning compliance with ‘SBE Subcontractor Outreach Program rules’ . . . issued . . . pursuant to 323-31 [‘Subcontracting Outreach Program’] ” Code 321-37(c) (The Code’s reference to program “rules” rather than to the program itself reflects a rather unusual drafting approach through which City Council adopted its Subcontracting Outreach Program simply by reference to a consultant’s recommendations and through authorization of administratively promulgated rules in the absence of any further legislative definition of the Program Code 323-31 )

Until the eve of trial, the City had maintained that, despite the clear instruction of Code Section 323-31 requiring that the “City Manager shall issue rules and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program,” the City had not formally



promulgated its Small Business Enterprise Program Rules and Guidelines containing Subcontracting Outreach Program rules. *See, e.g.*, City's March 11, 2005 Memo Opposing Plaintiff's MSJ at 13. At trial, however, the City stipulated that the Small Business Enterprise Program Rules and Guidelines introduced as Plaintiff's exhibit 17 are what they purport to be and were in fact adopted as of April 1, 2003. Those Rules and Guidelines set forth at pages 4-22 the "Components of the [City's] SBE Program," including (at 9-14) the "Subcontracting Outreach Program."

As established by the City, the "Subcontracting Outreach Program applies to City-funded construction contracts of \$100,000.00 or more." *Id.* at 9. Further, the "Subcontracting Outreach Program requires bidders to make subcontracting opportunities available to a broad base of qualified subcontractors and achieve a minimum of 20% (which may be higher for construction of buildings) SBE subcontractor participation. *To be eligible for award of this project, the SBE bidder must subcontract a minimum percentage of its bid to qualified available SBE subcontractors.*" *Id.* (emphasis added). *See also* Plaintiff's trial ex. 5, the "legislative recommendation" that City Council adopted by reference in establishing the SBE Subcontractor Outreach Program and in authorizing promulgation of rules and regulations therefore ("Failure to comply with the City's Subcontracting Outreach Program will cause a bid to be rejected. Terms and conditions of this Subcontracting Outreach Program apply to City-funded construction projects of \$100,000 or more"). Thus, the Subcontracting Outreach Program is a subset of the City's broader Small Business Enterprise Program, it applies to all City construction projects costing \$100,000 or more, and it incorporates requirements that a certain "minimum percentage" of a bid go to qualified SBEs. With regard to covered projects, the Subcontracting Outreach Program establishes mechanisms for assuring a more firm



particularized, and project-specific SBE requirement than the aspirational city-wide annual "goal" of 30% SBE participation set forth at Section 323-7 of the Code *See also, e.g.*, trial testimony of City consultant Rodney Strong (mandatory aspect of Subcontracting Outreach Program minimum percentage requirements)

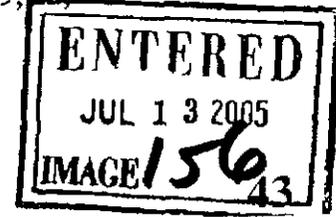
Having considered all of the evidence adduced, the court finds by clear and convincing evidence that the award of the contract at issue here was "based primarily" upon "information concerning compliance with the 'SBE Subcontracting Outreach Program' rules and regulations issued pursuant to section 323-31." Valley won the contract on re-bid because it exceeded the 35% SBE participation figure that the City established for this project under the SBE Subcontracting Outreach Program, while Cleveland did not. Plaintiff's trial exhibit 32, for example, is a City bid document issued to the bidders on this project and setting forth the applicable "SUBCONTRACTING OUTREACH PROGRAM SUMMARY." That program summary prominently featured the "SBE Goals Per Trade Contract Cincinnati Convention Center," establishing that "All bidders are required to meet the goal stated for the individual trade contract Drywall 35%." The Subcontracting Outreach Program, to the extent of its legislative formulation, was in place at the time of bid solicitation and the contract award (and was to be applied to construction contracts of \$100,000 or more) *See also, e.g.*, Riordan trial testimony and Plaintiff's trial ex 56 (1/21/03 memo contemplating application to Convention Center project of legislation containing Subcontracting Outreach Program authority). In place later, but also in effect by the time of bid solicitation and award, was the \$50,000 taxpayer protection cap on the amount that the program could cost the City on any one contract -- and that limitation was part of a package enacted specifically in contemplation of the Convention Center



project That the cap was not in place during initial planning stages of the project does not obviate its mandate once enacted

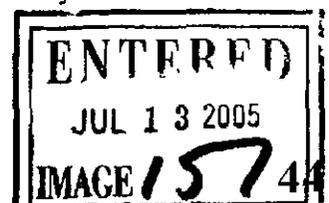
Thus, the court finds that the City did violate a specific prohibition of its own municipal Code in awarding the drywall contract to Valley as the "lowest and best bidder" over Cleveland in order to favor small business enterprise subcontracting despite the additional cost to taxpayers of some \$1,246,022 00 (an excess expenditure of \$1,196,022 00 beyond what the 321-37 cap permits) Cincinnati's local rules limit the discretion of contracting officials in awarding such contracts where the officials purport to be determining the "lowest and best" bid. Where the City publicly determines that a lowest and best bid is not "in the best interest of the city," it may reject such a bid for that reason, *see e.g.* Code 321-67, but the law requires that it do so plainly and openly (and for some legitimate, non-arbitrary reason, *see City of Dayton, ex rel Scandrick v McGee* [1981], 67 Ohio St 2d 356) Where no such other rationale exists and the City purports to award a contract on the basis of the "lowest and best" bid, it is constrained by the standards it has established at 321-37, including the cost cap for awards where the lowest and best determination is based primarily on Subcontracting Outreach Program rules

In determining whether the City abused its discretion under Ohio law and deprived Plaintiff Cleveland of a constitutionally protected property interest without due process of law by awarding the contract in a manner contrary to governing Code, the court refers to its discussion of the applicable legal standards from its SJ Entry "The meaning of the term 'abuse of discretion' . . . connotes more than an error of law or 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' " *Cedar Bay Construction, Inc v City of Fremont et al* , 50 Ohio St 3d 19, 22,



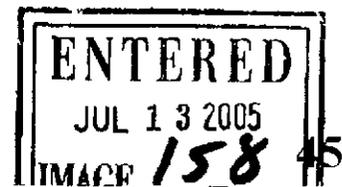
citations omitted. Moreover, "courts in this state should be reluctant to substitute their judgment for that of city officials in determining which party is the 'lowest and best bidder.' [I]n the absence of evidence to the contrary, public officers [and] administrative officers, within the limits of the jurisdiction conferred by law, will be presumed not to have acted illegally." *Id.* at 21. Discretion for determining the lowest and best bid "is not vested in the courts and the 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." *Id.* at 21 (citation omitted). See also, e.g., *Greater Cincinnati Plumbing Contractors' Association v City of Blue Ash* (1<sup>st</sup> Dist. 1995), 106 Ohio App.3d 608, 613-14 (a charter city's discretion in accepting lowest and best bid "is similar to the discretion provided under general state law [citing R.C. 735.05], "Competitive bidding provides for 'open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms'").

For a property interest in the award of a public contract to inhere, "one must have more than a unilateral expectation, rather, one must instead have a legitimate claim of entitlement to such a contract." *Cleveland Construction, Inc. v Ohio Department of Administrative Services* (10<sup>th</sup> Dist. 1997), 121 Ohio App.3d 372, 394. Thus, "a disappointed bidder to a government contract may establish a legitimate claim of entitlement protected by due process by showing that local rules limited the discretion of officials as to whom the contract should be awarded" and that discretion was abused in depriving the bidder of the award. *Id.* at 394-95 (no abuse of discretion found), see also, e.g., *Enertech Electrical, Inc. v Mahoning Co. Commissioners* (6<sup>th</sup> Cir. 1996), 85 F.3d 257, 260 ("A constitutionally protected property interest in a publicly bid contract can be demonstrated [if a bidder can show] that, under state law, the County had



limited discretion, which it abused, in awarding the contract', no abuse of discretion found), *Peterson Enterprises, Inc v Ohio Department of Mental Retardation* (6<sup>th</sup> Cir 1989), 890 F 2d 416 ("if the board had limited discretion under local rules as to whom should be awarded the contract , then Plaintiff might have a protected property interest in the award if he were the beneficiary of the state law mandate," no property interest where state guidelines were nonexhaustive), cf *United of Omaha Life Ins Co v Solomon* (6<sup>th</sup> Cir 1992), 960 F 2d 31, 34 ("Michigan law neither requires that the lowest bidder be awarded a state contract nor creates a property interest in disappointed bidders on state contracts"), *Cementech, Inc v City of Fairlawn* (Ohio 9<sup>th</sup> Dist App ), 2005 WL 844948 (disappointed bidder whom jury found had submitted lowest and best bid may qualify for money damages when project is already complete), but see, *Miami Valley Contractors, Inc v Montgomery Co* (2<sup>nd</sup> Dist App ), 1996 WL 303591 ("as best we can determine, this jurisdiction has never recognized a constitutionally protected property interest of a disappointed bidder on a public works project"), *Miami Valley Contractors, Inc v Oak Hill* (4<sup>th</sup> Dist App 1996), 108 Ohio App 3d 745, 752 (no abuse of discretion found, "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")

Having heard the evidence at trial, the court finds that the City did abuse its discretion in a manner that harmed the public and denied Cleveland the contract award, and that Cleveland did have a "legitimate claim of entitlement" sufficiently clear under the Code (with its 321-37 cost cap) to establish a due process violation. The City established a "fixed rule," in the language of *Cedar Bay*, that it then ignored when it awarded the contract to Valley based primarily on SBE attainment despite the City Code's instruction that such SBE requirements should not cost the

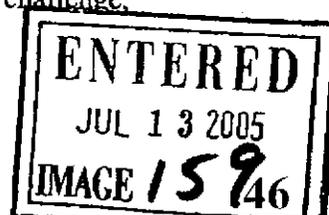


taxpayers more than \$50,000 per contract *Cf Greater Cincinnati Plumbing Contractors' Ass'n v City of Blue Ash* (1<sup>st</sup> Dist App 1995), 106 Ohio App 3d 608, 614 ("Competitive bidding provides for 'open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its various forms'," quoting *Cedar Bay*), *Scandrick*, 67 Ohio St 2d at 360 ("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"), *Mechanical Contractors Ass'n of Cincinnati v University of Cincinnati* (10<sup>th</sup> Dist. App 2001), 141 Ohio App 3d 333, 343 (public entities should not be at liberty "to violate laws intended to benefit the public" in contracting), *Cementech*, 2005 WL 844948

*II The City's Small Business Enterprise Program, as reviewed in light of its SBE Rules and Guidelines, contains elements that create race and gender based classifications for which the City claims no compelling governmental interest. The program is to that extent unconstitutional. As applied in this case, however, those unconstitutional elements did not cause Cleveland to lose the contract award, rather, Valley was awarded the contract because of its higher SBE subcontracting percentage as calculated without regard to race or gender.*

Plaintiff asserts and the City concedes that Plaintiff intends and is positioned to bid on future City contracts and that it has standing to mount an equal protection clause challenge to the City's SBE program as that program currently is constituted.

Very significantly to this assessment, the City has stipulated that it lacks the necessary factual basis to withstand any "strict scrutiny" review of its SBE program. If any part of the SBE program must comply with strict scrutiny standards in order to survive constitutional challenge,



the City agrees that such elements must be invalidated as unconstitutional at this time. That is, the City concedes that it is not in a position to prove any "compelling governmental interests" that could sustain a racial classification program no matter how "narrowly tailored." The City also has failed to present or argue any significant evidence showing that its program could satisfy any "intermediate scrutiny" review.

Justice O'Connor has set forth the determination by the United States Supreme Court that "the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments." *Adarand Constructors, Inc v Pena* (1995), 515 U S 200, 222, citing *Richmond v JA Croson Co* (1989), 488 U S 469. "A free people whose institutions are founded upon the doctrine of equality" should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly,

all racial classifications, imposed by whatever federal, state, or local government 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." *Id.* at 227, *see also, e.g., Grutter v Bollinger* (2003), 539 U S 306, 326 (strict scrutiny required for all governmentally imposed racial classifications), *Monterey Mech Co v Wilson*, 125 F 3d 702, 713 (9<sup>th</sup> Cir 1997) ("burden of justifying different treatment by ethnicity or sex is always on the government"). Given the City's stipulations on standing and strict scrutiny, the court is required to examine whether the City's SBE program imposes classifications subject to such heightened review.

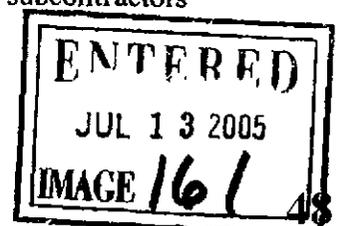
Plaintiff points to nothing in the Constitution or laws of the United States or of the State of Ohio that creates a heightened standard of judicial review for a governmental program that



simply favors small business enterprises at the expense of larger competitors. The issue here is not classification by size, but rather by race or gender.

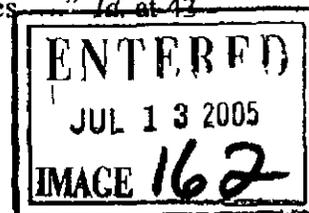
Further, the law does not prohibit governmental entities from recording statistics relating to race or gender, or from tracking the progress of groups as identified by such categories, or from seeking to ascertain whether any impermissible, discriminatory barriers are hampering the advancement of individuals within groups as defined by race or gender. Thus, for example, the fact that the City reviews statistics relating to contract awards to Minority Business Enterprises ("MBEs," as defined at 323-1-M) or Women's Business Enterprises ("WBEs," as defined at 323-1-W) pursuant to 323-17 ("City Maintained Records and Reports") itself does not establish a requirement of heightened scrutiny. *See, e.g., Croson*, 488 U.S. at 492 (plurality opinion of O'Connor, J.) ("a state or local subdivision has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction . . . and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment") Even the identification of specified "MBE/WBE annual participation goals," to be used in conjunction with "monitor[ing], track[ing] . . . and report[ing]" purposes alone, as set forth in 323-7(a), without further mechanism to promote or effectuate or encourage others to meet such goals in any particular context, may not threaten cognizable injury to this Plaintiff. *Cf. Safeco Ins. Co. v. City of White House, Tenn.* (6<sup>th</sup> Cir. 1999), 191 F.3d 675, 690, 692 (cited in filings made by both parties and in City's proposed jury instructions) ("Outreach efforts may or may not require strict scrutiny," citing authority for proposition that such scrutiny generally does not apply to outreach efforts targeting particular race).

However, "where 'outreach' requirements operate as a *sub rosa* racial preference – that is, where their administration 'indisputably pressures' contractors to hire minority subcontractors



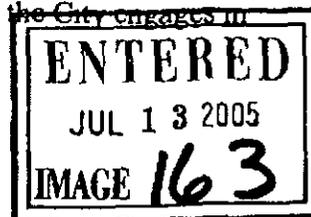
- courts must apply strict scrutiny " *Safeco*, 191 F 3d at 692 The City's Small Business Enterprise Program Rules and Guidelines, disavowed by the City as unofficial until the eve of trial and then acknowledged as formally promulgated as of April 1, 2003, *see* Plaintiff's trial exhibit 17, contain a number of such elements when reviewed as a complete program. The City's Rules and Guidelines state, for example, that

- 1) "all bidders are required to use good faith efforts to promote opportunities for Women and Business Enterprises to participate in *to the extent of their [governmentally specified] availability*, contracting Prior to the award of any contract related to construction services or professional services, the City shall evaluate each bidder's documented efforts to achieve the participation of minority and women business enterprise firms " Rules and Guidelines, Plaintiff's trial exhibit 17, at 5 (emphasis added), *cf Viridi v Dekalb Co School Dist* (11<sup>th</sup> Cir 2005), 2005 WL 1389942 (nonbinding "goals" for "minority vendor involvement" linked to specific notice and advertising outreach programs are racial classifications subject to strict scrutiny)
- 2) "Upon its successful completion, the Non-Discrimination Program [component of the SBE program] will result in utilization of minority and women owned firms *to the extent of their [governmentally specified] availability* ." Rules and Guidelines at 6 (emphasis added).
- 3) "The City will evaluate efforts made by bidders to promote opportunities for minority and women owned firms to compete for business as subcontractors and/or material or equipment suppliers at the time of bidding If the evaluation 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 business, the bidder shall be subject to an inquiry by the Office of Contract Compliance " *Id* at 6 (emphasis added), *cf MD/DC/DE Broadcasters Assn v Fed Communications Com* (D C Cir 2001), 236 F 3d 13 (potential investigation of recruitment efforts based on applicant pool numbers is a "powerful threat" giving rise to strict scrutiny review)
- 4) "Bidders [operating under the Subcontracting Outreach Program] should be able to include the participation of minority and female firms at the levels of availability determined in the City of Cincinnati Disparity Study . " Rules and Guidelines at 9 (referencing a study that the City concedes does not reflect a compelling governmental interest in pursuing a program of racial classification)
- 5) "[Using form 2007,] [o]fferor will provide a detailed description of the techniques used to obtain participation of minority and women owned business enterprises " *Id* at 13



- 6) "Utilizing the bidder's utilization form (Form 2003) and total bid amount, the actual utilization percentage is calculated. This is accomplished by taking the amount of the subcontracts awarded to minority and women-owned businesses and dividing by the total bid amount. If this amount is equal to the estimated availability, then no further inquiry is needed. If the actual utilization is less than the estimate, then further inquiry is warranted. The contract administrator must look at the bidder's solicitation form and contact the minority and women-owned businesses listed on the form to verify that they were contacted by the bidder and what their response was. The administrator must also review the good faith efforts taken by the bidder. The burden is on the bidder to explain the low utilization percentage. If the contract administrator determines that the contractor under-utilized minority and/or women-owned businesses based on the actual [government specified] availability percentage, and that the bidder's good faith efforts were inadequate and there is no legitimate explanation for the under-utilization, then the matter is turned over to the investigative unit for a discrimination investigation." *Id* at 46; cf. *MD/DC/DE Broadcasters, supra*
  
- 7) [From the "Pre-bid/Outreach Session Script for Contract Administrator"] "Bidders are required to show that they've made a good faith effort to get the *maximum practical participation* of minority and women-owned businesses on this project. [I]f it is feasible that the work can be broken into two or more smaller units, then it should be done so as to permit maximum participation, based on the availability estimate." Rules and Guidelines at 49 (emphasis added).
  
- 8) Every bidder is to submit a "Statement of Good Faith Efforts" certifying that "we have utilized the following methods to obtain the *maximum practicable participation* by small, minority and women-owned business enterprises on this project." *Id* at Form 2007 (emphasis added)

As constituted, therefore, to include the officially promulgated Rules and Guidelines authorized and required by Code 323-5, the City's Small Business Enterprise Program contains a variety of elements through which the City makes classifications by race and sex and "indisputably pressures" contractors to recruit and use subcontractors on those terms. This case is different from many other cases involving government race and sex classifications in that the City advances no evidence to suggest that these elements of its program could withstand the heightened scrutiny applied under U.S. Supreme Court precedents. The constitutional inquiry is foreshortened because the City concedes that it cannot satisfy any strict scrutiny review of its program. Thus, the program is unconstitutional on its face to the extent that the City engages in

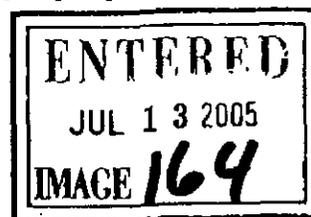


classification by race or sex with regard to City contracting in construction projects To that extent, as identified above, Plaintiff prevails on its facial challenge under 42 U S C Section 1983

With regard to the application of those unconstitutional program elements to the facts of this case, the court notes that there is no evidence that any bidder on the contract at issue was privy to the Rules and Guidelines document itself. The court further notes, however, that both Cleveland and Valley did in fact (and without protest by Cleveland until after the contract was awarded to Valley) submit form 2007 ("Statement of Good Faith Efforts") certifying their efforts "to obtain the maximum practicable participation by small, minority and women-owned business enterprises on this project " See, e g , Plaintiff's trial ex 28 Those certifications were made after all bidders were provided the "Subcontracting Outreach Program Summary" sheet for the project that included this directive from the City "You will also find on the cover of this bid document an Availability Determination [of "13 09% Minority / 1 05% Female" for the drywall work, see Availability Estimation Sheet at Plaintiff's trial ex 28] These figures are percentages based on a review of the City's vendor list and certified minority and women-owned businesses

*Bidders should be able to include minority and female firms at the level of availability indicated* " Plaintiff's trial exhibit 32 (emphasis added) The City also informed bidders through Addendum 3 to the bid documents that "If the availability estimates are not met, it does not mean that the bid will be deemed non-responsive However, we expect the utilization of SBEs to be reflective of the availability estimates." See Plaintiff's trial exhibit 70

Thus, in the process of soliciting bids, the City did in those respects pressure and encourage bidders to draw upon race and sex-based classifications that the City concedes could not withstand any appropriate heightened review on the facts to which the City is privy The trial



elicited no testimony, however, that the City in fact gave weight to bidders' compliance with MBE or WBE availability estimates in making the contract award with regard to subcontracting percentages, Plaintiff failed to establish that City officials looked beyond whether drywall bidders met the City's 35% SBE requirement. Indeed, Plaintiff's own chief estimator on the project did testify that in seeking to gain the contract award, his focus in this area was on boosting his company's small business enterprise inclusion rate, and not on attaining any particular MBE or WBE percentages. Valley did not meet the specified WBE percentage, and no evidence was presented at trial that the City rejected any Convention Center bid on the basis of MBE or WBE availability estimates. The evidence indicates that the City awarded the contract to Valley, and not to Cleveland, because Valley's bid complied with the City's requirement that 35 percent of the work go to small business enterprises and Cleveland's bid did not.

With regard to the unlawful discrimination component of the case, therefore, Plaintiff here is much in the posture of the plaintiff in the case that it cites of *Viridi v Dekalb County School District* (11<sup>th</sup> Cir 2005), 2005 WL 1389942. There, the federal court of appeals determined that a school district's aspirational "goals" for minority involvement in contracting, coupled with specific mechanisms for public outreach, created racial classifications that were not narrowly tailored to meet strict scrutiny review, "the program is facially unconstitutional." The court held that, "[n]evertheless, the District is still entitled to judgment on Viridi's intentional discrimination claim. While the [program's] goals themselves are unconstitutional, they do not constitute evidence that Viridi himself was discriminated against. Viridi has failed to establish a causal connection between the unconstitutional aspect of the [program] and his alleged injury.

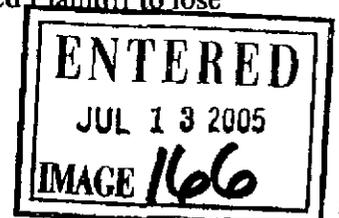
Moreover, there is insufficient other evidence to impose liability upon the District for



damages to Virdi for intentional discrimination” Similarly here, Cleveland has not established that the City’s race and sex based classifications (as opposed to the City’s small business preference) resulted in the loss of the contract award. *Cf Florida General Contractors v Jacksonville* (1993), 508 U S 656 (traceability requirement)

Nor has Plaintiff met its burden of proof to establish that the City’s stated policy to favor small businesses (to the extent that the practice does not cost taxpayers more than \$50,000 per major construction contract) is in reality a sham to mask invidious discrimination. The court notes as an aside that the City’s policy of encouraging small business participation well predates the Subcontracting Outreach Program components of which Plaintiff complains. Further, the court observes that Cincinnati’s City Council, at the urging of the Administration, has indeed opted to limit application of Subcontracting Outreach Program small business preferences to circumstances in which such preferences would not add more than \$50,000 to the cost of a contract. While that newly enacted taxpayer protection cap was not observed in this instance, the evidence does not establish that the provision was ignored as part of a scheme to further race or sex based distinctions, and the fact that the cap was adopted by Code certainly does not further the intentional discrimination theory. Moreover, for example, the City’s rejection of all the initial drywall bids, including Valley’s, does not bolster the theory that the City’s stated preference for SBEs was used here as a “sham” to mask improper considerations of race or sex. Further still, evidence was adduced that the City did award other contracts on the Convention Center project to bidders who did not include any MBE or WBE participation.

In short, Plaintiff has demonstrated that the City’s SBE program contains certain race and sex based classifications that cannot pass constitutional muster as constituted at this time, Plaintiff has not established, however, that those aspects of the program caused Plaintiff to lose

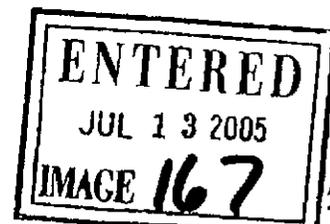


award of the drywall contract at issue in this case *Cf Texas v Lesage*, 528 U S 18 (1999) (“where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under [Section] 1983” on an ‘as applied’ challenge)

*III Having prevailed on its abuse of discretion/due process Section 1983 claims and on its claim that specific portions of the City's SBE Rules and Guidelines are unconstitutional on their face, Cleveland is entitled to certain declaratory and injunctive relief Cleveland also is entitled to its reasonable attorney's fees under 42 U S C Section 1988 Cleveland did not establish, however, that the court should use its equitable powers to enjoin ongoing work with regard to the Convention Center project itself*

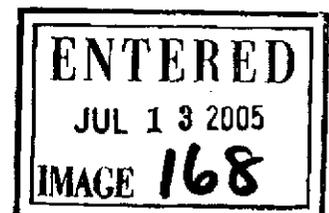
The injunctive and declaratory relief sought by Cleveland involve both the administration of future City construction contracts and the disposition of the current Convention Center drywall project

Plaintiff is entitled to a declaration that City Code Section 321-37(c) in its current form provides, among other things, that where the City elects to enter into a construction contract on the basis of the “lowest and best” bid, and where that selection is based primarily upon the City’s determination of bidders’ relative compliance with the City’s SBE Subcontracting Outreach Program rules and regulations, the City may not award the contract to a bidder whose bid amount exceeds an otherwise qualified bid by ten percent or Fifty Thousand Dollars The City Administration professed to know the meaning of that Code subsection at the time it was considered by Council the court trusts that now that further attention has been drawn to the existence of the subsection (and to the high cost to taxpayers of ignoring it), and now that the



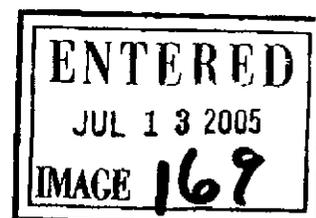
City has acknowledged the status of its Subcontracting Outreach Program rules and regulations, no injunctive mandate with regard to future contracts is necessary with regard to that provision of law Plaintiff Cleveland further is entitled to a declaration that the conduct of the City in ignoring the cost cap deprived Cleveland of a property interest without due process of law

Plaintiff also is entitled to a declaration that the City's SBE Rules and Guidelines in their current form contain certain race and sex based classifications as enumerated above that, in light of the City's admission that it cannot now offer a compelling governmental interest to satisfy "strict scrutiny" review as required by governing United States Supreme Court precedent, violate the equal protection clause of the U S Constitution The court will enjoin the City from applying those specified Rules and Guidelines provisions to any City construction project absent a formal determination and public showing by the City that such provisions are narrowly tailored to advance a compelling governmental interest of the sort that the City concedes it cannot now establish Now that the City has acknowledged the status of its Rules and Guidelines, and now that these particular classifications have been identified and the City has conceded that it is unable to meet any strict scrutiny review, the City is expected to take prompt steps to remove all unconstitutional provisions from its Rules and Guidelines In this regard, the court is heartened by the City's stated commitment in the Rules and Guidelines (at page 8) to ensure that "Businesses awarded City contracts shall prohibit discrimination against any person or business on the basis of race, color, sex, religion, disability or national origin Such businesses shall develop a policy statement to be communicated regularly to all persons and entities involved in the performance of their contracts, and shall conduct their contracting and purchasing programs so as to discourage any discrimination and to resolve all allegations of discrimination "



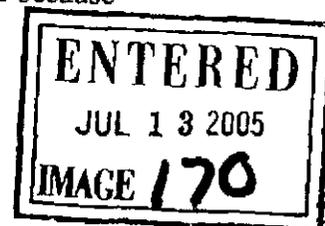
In considering Cleveland's request for injunctive relief with regard to the Convention Center drywall contract at issue, the court is mindful that "A party seeking a permanent injunction must show [that it has 'a right to relief under the applicable substantive law,'] that the injunction is necessary to prevent irreparable harm and that the party does not have an adequate remedy at law [Such] party must ordinarily prove the required elements by clear and convincing evidence" *Procter & Gamble Co v Stoneham* (1<sup>st</sup> Dist App 2000), 140 Ohio App 3d 260, 267 The merits of Cleveland's claims, including its showing that the City abused its discretion in disregarding the \$50,000 cost cap under Code Section 321-37, have been discussed above

Regarding the question of an adequate remedy at law, the court observes that the Defendants' consistent position up to and into trial was that Plaintiff is limited in this action solely to its requests for injunctive and declaratory relief, and that money damages are not an appropriate remedy for Plaintiff's claims *See, e.g.*, City's May 27, 2005 pretrial statement at 2 ("The City also challenges Cleveland's ability to recover its alleged 'lost profits' "), City's Motion in Limine to Preclude Plaintiff from Presenting Evidence of Lost Profits; City's June 13, 2005 Reply to Response to the Motion in Limine Regarding Lost Profits ("Because Cleveland's only claim is for injunctive relief, Cleveland also is not entitled to a jury trial Cleveland's constitutional rights, and any claim for redress, can be handled through an action in equity by filing and seeking injunctive relief Not only does an action for injunctive relief protect Cleveland, but it also protects the taxpayers from having to pay twice for a public project"), City's June 20, 2005 Memorandum Citing Additional Authority on the Recovery of Lost Profits ("in Ohio lost profits are not available and only injunctive relief is available to the plaintiff")



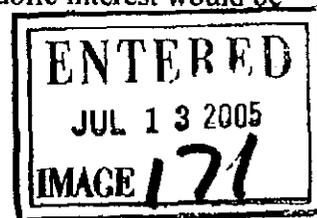
The court agreed with the City that lost profits are not a remedy available under Ohio law to a disappointed bidder on a public contract. See, e.g., *O'Rourke Construction Co v Cincinnati Metropolitan Housing Authority* (1<sup>st</sup> Dist App 1982), 1982 WL 8613 at n 5 (“we can find no award of damages from public funds even though the contract was given to another bidder as the result of abuse of discretion”); *Hardrives Paving & Constr, Inc v Niles* (1994), 99 Ohio App 3d 243, 247-48 (“the fact that injunctive relief is available generally indicates that a monetary award is not available for lost profits. [I]f we were to allow appellant to receive monetary damages, only the bidders would be protected because the public would have to pay the contract price of the successful bidder plus the lost profits of an aggrieved bidder. However, if injunction is the sole remedy, both the public and the bidders themselves are protected”), *Cavanaugh Bldg Corp v Cuyahoga Cty Bd Of Commrs* (8<sup>th</sup> Dist App 2000), 2000 WL 86554. The court disagreed with the City’s proposition, however, that it “must apply state law for purposes of defining the scope of damages under [federal Section] 1983,” cf. City’s June 16, 2005 Motion to Clarify at 2, and concluded that violations of federal law under Section 1983 can give rise to money damages including lost profits where injunctive relief alone would not make a plaintiff whole. See, e.g., *Carey v Piphus* (1978), 435 U.S. 247, 257-58 (“damages awards under Section 1983 should be governed by the principle of compensation” as developed by the common law of torts, where common law does not provide full compensation, “the task will be the more difficult one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right”).

The City’s newly adopted assertion at closing that project-specific injunctive relief is precluded because Plaintiff had a complete damages remedy available at law thus rings a bit hollow. The court granted a directed verdict for the City on the lost profits issue because



Plaintiff – which consistently had sought a combination of money damages and injunctive relief, including project-specific injunctive relief, *see, e g*, Amended Complaint and Plaintiff's May 27, 2005 pretrial statement at 2 (seeking remedies including damages, declaratory relief, and “injunctive relief against the City and Valley with regard to the application of the SBE Program to the award of the drywall contract at issue”) – failed in its case in chief to provide any evidence whatsoever with regard to the drywall project status or the potential availability of injunctive relief on any balance of the contract, at the close of Plaintiff's case, therefore, there was no factual basis on which assess available damage remedies or on which to instruct the jury to calculate any lost profits for drywall work already completed. *See, e g*, Ohio cases *supra* establishing precedence of injunctive relief as opposed to money damages in public bid contracts, *see also, e g*, *Milwaukee Co Pavers Assn v Fiedler* (W D Wisc 1989), 707 F Supp 1016, 1032 (lawsuit challenging “disadvantaged business” preference in construction contracts “Plaintiffs would be entitled to money damages [for the alleged federal constitutional violations] *only if* their motion for a preliminary injunction were denied, they were to succeed ultimately on the merits of their claim, *and the state construction projects were to have proceeded so far that they could not reasonably be re-let under non-discriminatory bidding conditions*” [emphasis added]) The court did not rule and does not find that Plaintiff had available a fully adequate remedy at law. It is true that no evidence as to the current status of the drywall work (and as to whether there remains any significant portion of that drywall project left for potential injunction) was presented until the City and Valley put forward proof on that subject as part of their defense cases; such evidence now is before the court, however, for any appropriate consideration.

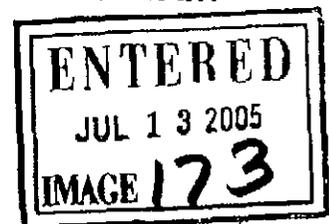
In light of the equitable nature of the remedy sought, and especially given the public nature of the project at issue, the court also should consider whether the public interest would be



which delays could significantly affect other parts of the project Defendants argue, in effect, that the savings that the City might obtain if it were ordered to shift the remaining drywall work from Valley to Cleveland at Cleveland's bid price are likely to be surpassed by additional costs arising from delay claims and lost Convention Center business See, e g , McKillip testimony that potential delay claims could reach into the millions of dollars) Although Defendants couple this argument with the contention that Cleveland delayed unduly in seeking to press its preliminary injunction claim, thereby allowing the project to reach a more delicate juncture, the court is constrained to note that the City seems to have contributed to any perceived need for extensive and lengthy discovery by taking positions such as its longstanding denial, only now abandoned, that it had not officially promulgated SBE Rules and Guidelines at all

Valley is prepared to perform the balance of the drywall work and, with its subcontractors, would lose any expected remaining profits if the project is enjoined Valley also presented testimony that a premature end to its contract would mean a loss of work for certain employees in light of the additional worker contingent recently added to the endeavor Against that very real concern, the court notes that Valley would not have won the contract or been paid for *any* of the work had the contract been awarded in keeping with the \$50,000 cost cap, and that Valley and its subcontractors appear to have been well compensated for the work they have performed relative to the significantly lower (and "otherwise qualified") bid submitted by Cleveland

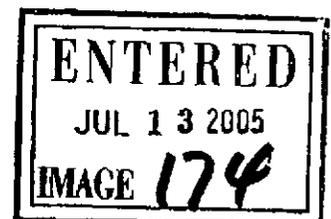
The court finds that equity would not be served by Cleveland's proposal that Valley be made to disgorge money it already has earned for work already done Testimony at trial indicates that Valley followed the rules set forth by the City in bidding on the contract, and that it has borne substantial contractual risks associated with its undertaking The court does not



deem Valley's contract with the City void *ab initio*, and it would be inequitable to strip Valley of the compensation it has been given for the work it has undertaken pursuant to contract.

Further, Cleveland provided no testimony whatsoever during its case in chief either with regard to the current status of the Convention Center project or with regard to Cleveland's own current ability to complete the work without delay and disruption to a major City undertaking. On rebuttal, Cleveland offered no testimony to dispute Defendants' position that the Convention Center drywall work is on a "critical path" that is extremely time-sensitive and as to which disruptions would impede other contractors and interfere with planned Convention Center events and broader City interests surrounding the City's economic development program. Cleveland did not offer credible assurances by a witness conversant with the scope of work and the project's current status that Cleveland could take over the job at this stage without undue and costly disruption. The court continues to believe that a Plaintiff in an action of this nature is not entitled to manufacture heightened claims to lost profits by eschewing serious efforts toward injunctive relief at any stage in the process.

Considering the testimony that was given, including the rebuttal testimony, the court finds that an injunction interfering with the ongoing Convention Center construction work has not been shown to be appropriate upon examination of all appropriate equitable considerations. The court reaches this conclusion reluctantly in light of the course that this litigation took, but it finds that the public interest is a weighty factor in this case involving a major public undertaking, *see, e.g. White*, 12 Ohio App.2d 136, and that the public interest at this juncture is best served by the combination of declaratory and non-project specific relief outlined above. The court further finds that Cleveland is the prevailing party on its Section 1983 due process claim and on its



reasonable attorney's fee under 42 U S C Section 1988 Costs will be assessed against  
Defendants jointly

The court will ask the parties to confer, if they wish, on a judgment entry to propose to  
the court in very short order reflecting these determinations The court also asks the parties to  
confer on a date for a hearing on the amount of Cleveland's attorney's fee

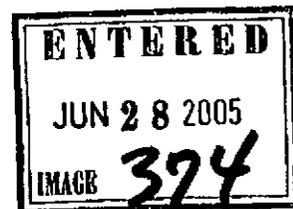
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Judge Nelson

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IMAGE 175

COMMON PLEAS COURT  
HAMILTON COUNTY, OHIO



Cleveland Construction, Inc.,

CASE NO: A0402638

Plaintiff,

Judge Nelson

v.

City of Cincinnati, et al.,

Entry Granting Defendant City Of  
Cincinnati's Motion For Partial  
Directed Verdict, Denying Dismissal Of  
Equal Protection Claim, Withholding  
Judgment On Defendant Valley's  
41(B)(2) Motion, and Noting Stipulation  
That Remaining Issues Are To Be  
Determined By The Court Without A  
Jury

Defendants.

For the reasons expressed on the record of today's date, the Court grants Defendant City's Motion For A Directed Verdict solely on the issues of lost profit and bid preparation cost.

The Court denies Defendant City's Motion for dismissal of Plaintiff's equal protection claim relating to the administration of the contract at issue in this case.

The Court defers a ruling on Defendant Valley's motion to dismiss under Rule 41(B)(2) and will withhold judgment on such issues until the close of all evidence.

All parties having stated that the remaining issues in this action are appropriate for determination by the Court alone without jury verdict, the jury is discharged with the consent of all parties with regard to all issues remaining in this action. The case will proceed as a trial to the bench with regard to Plaintiff's claims for declaratory and injunctive relief and attorney fees.

SO ORDERED.

ENTERED



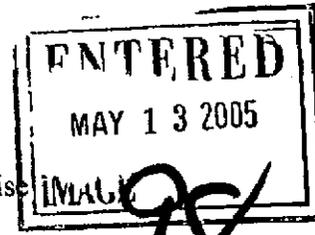
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Judge Nelson

JUN 28 2005

Fred Nelson, Judge





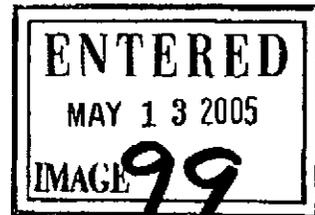
contract to Valley as the lowest bidder that met the City's Small Business Enterprise program ("SBE") criteria. The City states that Valley got the contract because it was prepared to make greater use of small business subcontractors than could Cleveland.

Cleveland subsequently filed this lawsuit, alleging among other matters that the City's SBE program "is a sham to allow the City to use racial and gender-based quotas illegally," and asserting that in awarding the contract to Valley, the City violated Cleveland's equal protection rights and ignored its own municipal code in violation of due process. After a hearing at which this court denied Cleveland's motion for a temporary restraining order, Defendants removed the case to federal court; in due course, the action was remanded here, the court dismissed certain individual defendants, and the parties engaged in extended discovery. Cleveland elected not to pursue application for a preliminary injunction until the filing of the instant motions, which include the summary judgment issues to which the court now turns.

#### *Summary Judgment Standard*

Summary judgment is appropriate when it is clear from the facts established in the pleadings and evidentiary materials of record, as viewed in the light most favorable to the party or parties opposing the motion, that: "(1) no genuine issue of fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion." *See, e.g., Sauter v. One Lytle Place* (1<sup>st</sup> Dist. App. 2005), 2005-Ohio-1183, citing Civil Rule 56(C). If a party seeking summary judgment meets its initial burden of identifying a basis for the motion together

with those parts of the record that “demonstrate the absence of a genuine issue of material fact on the essential element(s) of the ... nonmoving party’s claims .... , the nonmoving party then has a reciprocal burden ... to set forth specific facts showing that there is a genuine issue for trial ....” *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293.



*Equal Protection Issues*

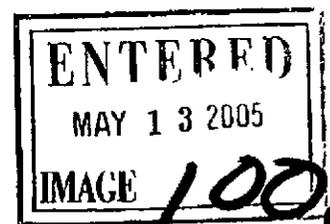
At this stage in the litigation, Cleveland argues that the City’s SBE program as designed (to include certain “Rules and Guidelines”) and as applied here amounts to a race-conscious awards scheme that the City cannot justify under prevailing constitutional norms. (Plaintiff at this point does not argue that the City has required improper considerations of gender, perhaps because Valley’s successful bid did not reflect subcontracting percentages for women-owned firms that approached the City’s availability estimates.) The City is frank to respond that it lacks a factual predicate that could satisfy “strict scrutiny” review of a race-conscious program, but argues that its SBE approach as designed and as undertaken here is race-neutral, rationally based, and constitutionally unexceptionable. The record as presented to date reflects genuine issues of material fact that preclude summary judgment for any side on this part of the dispute.

The City’s municipal code provides that “Cincinnati’s Annual Goal for SBE participation shall be 30% of the city’s total dollars spent for construction ... services....” Cincinnati Municipal Code (“Code”) at 323-7(a). The Code defines a Small Business Enterprise with regard to gross revenues and number of employees; the SBE definition itself does not include factors of race or gender. Code 323-1-S. The record here may suggest that the City pursues the 30% SBE goal on a project by project basis, establishing

different percentages for different project components in order to arrive at the overall 30% figure. The parties agree that with regard to the drywall element of the Convention Center project, the goal was that 35% of subcontracting dollars go to SBEs. *See also*, e.g., Small depo. at Ex. 5 (City's "Subcontracting Outreach Program Summary" sets Drywall "Goal[ ] For Bid Package C" at 35%).

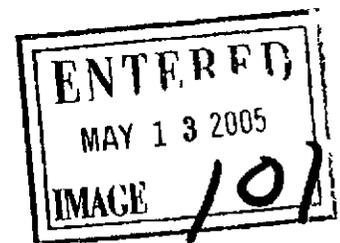
Standing alone, that SBE goal does not on its face implicate any considerations of race or gender, and the court does not understand Plaintiff to argue that a program undertaken to ensure participation of small businesses is subject to heightened scrutiny simply because it may have the ancillary effect of broadening participation for people in groups as defined by race or gender. Plaintiff argues, however, that the program must be assessed in light of 'Minority Business Enterprise/Women's Business Enterprise' "participation goals of 30% [for] construction ... services [,to be] monitored, tracked internally, and reported annually to city council along with annual SBE participation rates," as also established in Code 323-7(a), and in light both of "availability estimates" provided by the City to reflect percentages of minority and female controlled subcontractors available for hire in the region, and of SBE "Rules and Guidelines" that imply or direct a race-conscious focus for the program. The City responds that this project, by its terms, involved only SBE goals; that availability estimates, in and of themselves, do not establish any particular hiring requirements; and that the Rules and Guidelines never were officially promulgated and have not been applied, at least in full, to this project.

It is undisputed that in the course of the bidding process, the City was asked why it had provided prospective bidders with an "Availability Estimation Sheet ...



Subcontractor Outreach Program (CMC 323-31)" noting availability estimates for drywall subcontractors of "13.09% Minority" and "1.05% Female." See Amended Complaint at Ex. B and City's MSJ at page 8. The inquiry, disseminated along with the answer to all prospective bidders, continued: "I thought this project only deals with SBEs. Please clarify." The City responded: "This project does deal with SBEs. However, the City of Cincinnati's Disparity Study found that Minorities and Females were underutilized in city contracting projects. .... The minority and female business owner would also have to be certified with the City as a Small Business Enterprise. If the availability estimates are not met, it does not mean that the bid will be deemed non-responsive. However, we expect the utilization of SBEs to be reflective of the availability estimates." Amended Complaint at Ex. H; City's MSJ at 8.

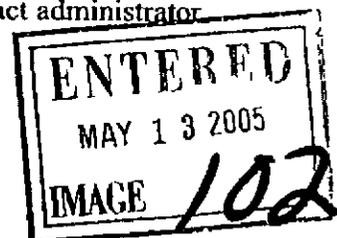
The City submits that this arguably rather opaque answer demonstrates that the drywall bids were governed exclusively by SBE considerations without regard to MBE/WBE concerns. The City points, also, to evidence indicating that a first round of bidding resulted in no contract award because Valley, while exceeding the MBE availability estimate, did not satisfy the 35% SBE goal. The City further notes testimony of its representatives to the effect that availability estimates did not factor into its bid evaluation, and argues that a stated desire to calculate and track project participation by race does not itself trigger strict scrutiny under such precedent as *Reed v. Agilent Technologies*, 174 F. Supp. 176 (D. Del. 2001). The City, in short, cites to testimony of its representatives that Cleveland was disqualified because it did not meet the 35% SBE goal, and that considerations of race simply did not enter into the determination. See, e.g., purchasing agent Franklin depo. at 46; Ranford at 68 ("when I looked at a bid I did



not look at the availability estimation, all I was concerned about was Small Business Enterprise”).

Cleveland contends that the City’s answer on the relevance of availability estimates should not be construed as advising bidders that the City will not consider race or gender in evaluating bids. Moreover, Cleveland points to Valley’s certification of MBE percentages in its winning Subcontractor Utilization Plan, to language in the required Statement of Good Faith Efforts (form 2007, certifying use of any “methods to obtain the maximum practicable participation by small, minority and women-owned business enterprises”), and to language in the Subcontracting Program Outreach Summary stating that “[b]idders should be able to include minority and female firms at the level of availability indicated.” See, e.g., Strawser depo. ex. 3; Small depo. ex. 5.

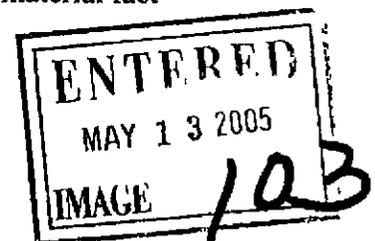
Moreover, Cleveland emphasizes a document titled: “City of Cincinnati / Small Business Division / Office of Contract Compliance / Small Business Enterprise Program / Rules and Guidelines.” See Townsend depo. ex. 19. That document recites, among other things, that “[i]f ... evaluation determines that 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 Office of Contract Compliance.” Furthermore, the document states, that Office is to examine bid forms to determine “the amount of the subcontracts awarded to minority and women-owned businesses .... If the bidder’s utilization is the same as or greater than the actual availability percentage, then the city can accept the bidder’s utilization as being in compliance with the program. The burden is on the bidder to explain the low utilization percentage. If the contract administrator



determines that the contractor under-utilized minority and/or women-owned businesses based on the actual availability percentage, and that the bidder's good faith efforts were inadequate and there is no legitimate explanation for the under-utilization, then the matter is turned over to the investigative unit for a discrimination investigation." Townsend depo. ex. 19 at 6, 45-46.

For the purposes of these motions, the City does not really argue that such provisions in the "Rules and Guidelines" document are permissible as mechanisms to prevent intentional discrimination by contractors. Rather, the City contends that "[t]he Rules and Guidelines ... were never signed by the City Manager and do not have the force of law," and that "certain portions of the 'Rules and Guidelines' have not been used" in the bid solicitation and evaluation process. See City's memo opposing Plaintiff's MSJ at 13; see also Lemmie depo; Ranford depo. at 68, 70-73(City engaged in no evaluation of MBE participation).

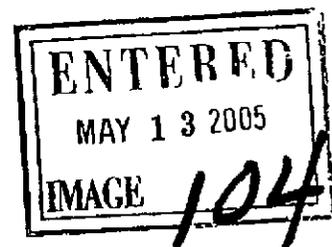
Code section 323-31 instructs the City Manager to promulgate rules and regulations for the SBE Subcontracting Outreach Program; the City Manager, however, has testified that, "I have not promulgated rules and regulations under this section." Lemmie depo. at 10. The City also notes that there is no evidence in the record that the Rules and Guidelines document was made available or known to any bidder prior to the award of the contract at issue; that is, the current record does not reflect that the document directly could have caused any bidder to take race into account in submitting a proposal. The City in effect disavows any problematic portions of the document by arguing that those sections never have controlled the policy of the City or its contractors. On the state of the record to date, that appears to be a genuine issue of material fact



(although the court does observe that the City has admitted that the Rules and Guidelines “are ... part of the Small Business Enterprise Program,” *see* City’s Response to Interrogatory 17(D) at 6).

Viewing the evidence in the light most favorable to the non-moving party, and given that the Rules and Guidelines document was prepared for and available to City staff, and served to some extent as “working documents used by staff,” Lemmie depo. at 11 and Stark depo. ex. 6, (and considering, too, presumptions of regularity that generally inform review of governmental actions), the court cannot conclude for summary judgment purposes that the principles embodied in the Rules and Guideline document played no part in the determinations at issue here. By the same standard, with all reasonable inferences drawn in favor of the Defendants in evaluating Cleveland’s summary judgment motion, the court cannot find as a matter of undisputed fact that certain sections of the Rules and Guidelines cited above entered into the City’s decision. The status of the “Rules and Guidelines,” and the issue of to what extent and effect, if any, they were used here or may support other reasonable inferences regarding Cleveland’s claim that the SBE program is run as a “sham” to mask a race-conscious awards program, remain questions of arguably material fact.

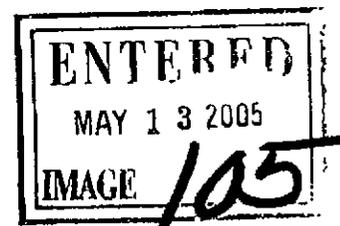
In light of the City’s response to the bidder inquiry about the relevance of availability estimates, viewed in conjunction with the bid documents and Code mandates and the Rules and Guidelines document, and the testimony of City officials, the court similarly concludes under the summary judgment standard that a question of fact remains as to whether the City did intelligibly and accurately communicate to the bidders that this drywall project was to be administered under SBE principles without regard to



considerations of race (as Defendants maintain was the case and which Plaintiff strongly disputes). Moreover, the court notes as an aside that the record indicates arguably conflicting testimony regarding the subjective impressions of the bidders on this score.

In short, whether or not the City has engaged here in a race-conscious contracting program of the sort that would require "strict scrutiny" review depends on a determination of facts that remain at issue when reasonable inferences are drawn in favor of the non-moving parties on each of the summary judgment motions. *Cf. Safeco Ins. Co. v. City of White House, Tenn.* (6<sup>th</sup> Cir. 1999), 191 F.3d 675, 692 ("Outreach efforts may or may not require strict scrutiny" [citing authority that such heightened review "'is generally inapplicable' to outreach efforts that target one race]. "But ... where their administration 'indisputably pressures' contractors to hire minority subcontractors [,] courts must apply strict scrutiny").

The City argues, however, that Cleveland lacks standing to pursue its equal protection claims in any event because it did not meet the 35% SBE standard and therefore could not have been awarded the contract regardless of any other considerations. *Cf. Florida General Contractors v Jacksonville* (1993), 508 U.S. 656 (traceability requirement). The court finds below however, that the City's Code in some instances precludes award of a contract based primarily on SBE Subcontractor Outreach Program considerations where the winning bid is more than \$50,000 higher than the bid of an otherwise qualified contractor rejected for not meeting the SBE goal. Under these circumstances, where the City agreed to pay well more than one million dollars extra in order to achieve 35% participation by small businesses in the drywall project, the undisputed facts do not establish for summary judgment purposes that Cleveland would



have been out of the running for the award had the City applied its SBE rules in the context of the Code as written. Thus, Defendants' standing argument fails at this point in the process for reasons even beyond Cleveland's contention that the SBE program itself is wholly a sham to mask impermissible race-conscious awards.

The court therefore denies the motions for summary judgment of all three parties with regard to Cleveland's equal protection claims.

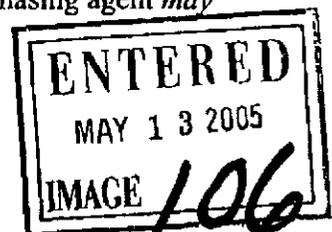
*Due Process Issues*

Defendants concede that Cleveland's bid to perform the drywall work on the City's Convention Center project was \$1,246,022.00 lower than Valley's. City's MSJ Memo at 7 ("Valley's bid was for \$10,135,022.00 while Cleveland's bid totaled \$8,889,000.00"); Valley's MSJ (adopting "all the same grounds" as City). Defendants also affirm that "Cleveland's bid was excluded from consideration because it failed to meet the SBE requirements," City's MSJ Memo at 7, and they point to no other infirmities in Cleveland's bid or capacity to perform the work. Cf. Franklin depo. at 21-22, 29, 62, 88 (City purchasing agent believes that all three bidders met non-SBE bid specifications and that those bids were acceptable to the purchasing department; no issues with Cleveland's prior performance).

Code section 321-37, "Bid; Award to Lowest and Best" provides in part:

"(a) Selection of Lowest and Best in Award of City Contracts: Except where otherwise provided by ordinance, the city purchasing agent shall award a contract to the lowest and best bidder. ....

(c) Factors to be Considered: Other factors that the city purchasing agent may



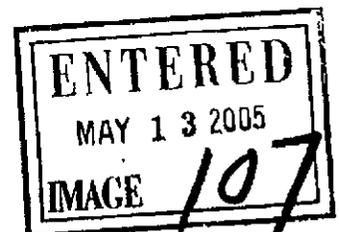
consider in determining the lowest and best bid include, but are not limited to:  
[prior performance; prevailing wage history; compliance with nondiscrimination  
rules; and]

*(4) Information concerning compliance with the 'SBE Subcontracting Outreach  
Program' rules and regulations issued by the city manager pursuant to ... section  
323-31.*

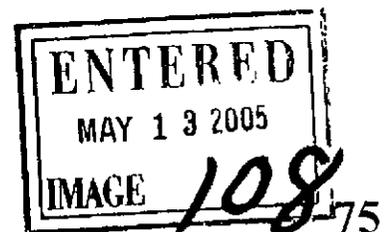
*In the event that the selection of the lowest and best bidder is based primarily  
upon factors 3 or 4 above, the contract award may be made subject to the  
following limitation: the bid may not exceed an otherwise qualified bid by ten  
(10%) percent or Fifty Thousand Dollars (\$50,000.00), whichever is lower.”  
(emphasis added)*

Cleveland contends that in awarding the contract to Valley despite the fact that  
Valley's bid was more than \$50,000 higher than Cleveland's (by more than 1.2 million  
dollars), the City abused its discretion and thereby deprived Cleveland of a  
constitutionally protected property interest without due process of law. Defendants argue  
that Cleveland was not the lowest and best bidder because it failed to reach the SBE goal  
without regard to Subcontracting Outreach Program rules. See City's memo in op. at 22;  
Valley's memo in op. at 10 (“Code section 321-37 does not apply ... because Cleveland  
was not an otherwise qualified bidder eligible for consideration under 321-37”).

For a property interest in the award of a public contract to inhere, “one must have  
more than a unilateral expectation; rather, one must instead have a legitimate claim of  
entitlement to such a contract.” *Cleveland Construction, Inc. v. Ohio Department of  
Administrative Services* (10<sup>th</sup> Dist. 1997), 121 Ohio App.3d 372, 394. Thus, “a



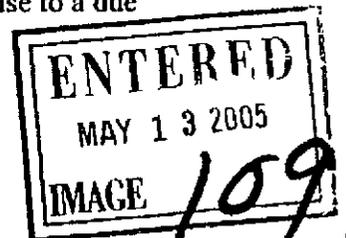
disappointed bidder to a government contract may establish a legitimate claim of entitlement protected by due process by showing that local rules limited the discretion of ... officials as to whom the contract should be awarded” and that discretion was abused in depriving the bidder of the award. *Id.* at 394-95 (no abuse of discretion found); *see also, e.g., Enertech Electrical, Inc. v. Mahoning Co. Commissioners* (6<sup>th</sup> Cir. 1996), 85 F.3d 257, 260 (“A constitutionally protected property interest in a publicly bid contract can be demonstrated .... [if a bidder can show] that, under state law, the County had limited discretion, which it abused, in awarding the contract”; no abuse of discretion found); *Peterson Enterprises, Inc. v. Ohio Department of Mental Retardation* (6<sup>th</sup> Cir. 1989), 890 F.2d 416 (“if the board had limited discretion under local rules as to whom should be awarded the contract ..., then Plaintiff might have a protected property interest in the award if he were the beneficiary of the state law mandate;” no property interest where state guidelines were nonexhaustive); *cf. United of Omaha Life Ins. Co. v. Solomon* (6<sup>th</sup> Cir. 1992), 960 F.2d 31, 34 (“Michigan ... law neither requires that the lowest bidder be awarded a state contract nor creates a property interest in disappointed bidders on state contracts”); *Cementech, Inc. v. City of Fairlawn* (Ohio 9<sup>th</sup> Dist. App.), 2005 WL 844948 (disappointed bidder whom jury found had submitted lowest and best bid may qualify for money damages when project is already complete); *but see, Miami Valley Contractors, Inc. v. Montgomery Co.* (2<sup>nd</sup> Dist. App.), 1996 WL 303591 (“as best we can determine, this jurisdiction has never recognized a constitutionally protected property interest of a disappointed bidder on a public works project”); *Miami Valley Contractors, Inc. v. Oak Hill* (4<sup>th</sup> Dist. App. 1996), 108 Ohio App.3d 745, 752 (no abuse of discretion found; “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”).

“‘The meaning of the term ‘abuse of discretion’ ... connotes more than an error of law or 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’.” *Cedar Bay Construction, Inc. v. City of Fremont et al.*, 50 Ohio St.3d 19, 22, citations omitted. Moreover, “courts in this state should be reluctant to substitute their judgment for that of city officials in determining which party is the ‘lowest and best bidder.’ .... [I]n the absence of evidence to the contrary, public officers [and] administrative officers .... within the limits of the jurisdiction conferred by law, will be presumed ... not to have acted illegally.” *Id.* at 21. Discretion for determining the lowest and best bid “is not vested in the courts and the 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’.” *Id.* at 21 (citation omitted). *See also, e.g., Greater Cincinnati Plumbing Contractors’ Association v. City of Blue Ash* (1<sup>st</sup> Dist. 1995), 106 Ohio App.3d 608, 613-14 (a Charter city’s discretion in accepting lowest and best bid “is similar to the discretion provided under general state law [citing R.C. 735.05]; “Competitive bidding provides for ‘open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms”).

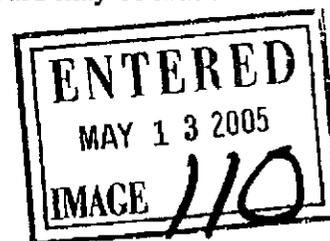
If the bid in the instant case was awarded in violation of the explicit \$50,000/10% cap established by 321-37(c)(4), the award would be an abuse of discretion and Cleveland would have a “legitimate claim of entitlement” sufficiently clear to give rise to a due



process claim. Violation of that precise standard as established by ordinance would move Cleveland's interest in the contract beyond the "mere 'unilateral expectation'" of receiving the award under a regime in which the relevant ordinance provides non-exhaustive guidelines limiting discretion, *cf. Peterson Enterprises*, 890 F.2d 416; *Cleveland Construction*, 121 Ohio App.3d at 394, and into that rare context in which a disappointed bidder may assert a constitutionally protected property interest. This is the basis on which Cleveland advances the second part of its motion for partial summary judgment. See Motion at 2 (seeking judgment based on an asserted "property interest in the contract"). Under the summary judgment standard, the court thus turns to the question of whether any genuine issue of material fact exists as to whether the City breached its 321-37(c)(4) cap.

The language of 321-37 establishes that "information concerning compliance" with the City's SBE Subcontracting Outreach Program rules and regulations is a "[f]actor" that "may" be considered as the City determines the lowest and best bid. If the lowest and best bid is selected "based primarily" on that factor, the City may proceed to award the contract "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." 321-37(c)(4).

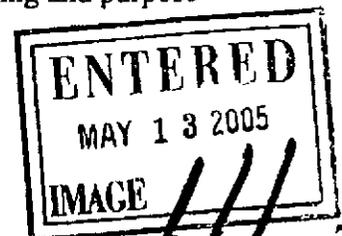
In that context, the phrase "otherwise qualified bid" can reasonably be read only to mean a bid that is qualified except that it is not in "compliance" with the SBE Subcontracting Outreach Program "factor." The bid not selected "primarily" because of the SBE Subcontracting Outreach Program factor must "otherwise" be qualified in order to trigger the required calculation with regard to whether the contract award may be made



as selected on that basis.

Cleveland points to legislative history for 321-37 indicating that the City Administration took the position and advised Cincinnati's City Council that the ten-percent/\$50,000.00 cap would apply to any purchasing contract affected by SBE compliance issues. Assistant City Manager Rashid Young advised Council's Law and Public Safety Committee on November 25, 2003 that "[w]hat 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 didn't make a lot of sense to spend nine hundred thousand dollars more to comply with the regulations of SBE." Young depo. and ex. 1.

By its terms, however, the cap applies specifically (and exclusively) to instances where a higher bid is accepted because of "information concerning compliance with 'SBE Subcontractor Outreach Program rules' ... issued ... pursuant to 323-31." Code 321-37(c)(4) (emphasis added). As used in the legislative text, the reference to an "SBE Subcontractor Outreach program" does not appear coextensive with the broader "Small Business Enterprise Program" itself. Thus, for example: Chapter 323 as a whole is titled "Small Business Enterprise Program," while section 323-31 specifically is titled "Subcontracting Outreach Program;" and Section 323-5 directs the City Manager to "issue and enforce regulations to carry out the meaning and purpose of the small business enterprise program authorized by this chapter," while Section 323-31 directs the City Manager to "issue and enforce rules and regulations to carry out the meaning and purpose



of the Subcontracting Outreach Program, substantially in conformance with the content of Part II, Section 1, the 'Legislative Recommendation Report To The City of Cincinnati' dated December 17, 2002, prepared by Griffin & Strong, P.C.."

As Cleveland observes: "A basic rule of statutory construction requires that 'words in statutes should not be construed to be redundant, nor should any words be ignored.' ... No part [of a statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *D.A.B.E., Inc. v. Toledo-Lucas County Board of Health* (2002), 96 Ohio St.3d 250-256 (citations omitted); *see also* Cleveland's MSJ Motion/Memo at 39. Council enacted 323-31 directing enforcement of regulations for the "SBE Subcontracting Outreach Program" in 2003, while leaving in place the separate 323-5 directive as enacted in 1999 to enforce regulations for the SBE program itself. If the Subcontracting Outreach Program and the overall SBE program were identical, a double instruction on enforcement would be unnecessary and redundant. The specific reference in 321-37(c)(4) to the SBE Subcontracting Outreach Program thus appears to comprehend something less than the SBE program as a whole (a conclusion strengthened by the structure of Chapter 323).

The distinction between the "SBE Subcontractor Outreach Program" and the overall SBE program may not be terribly complex. The Griffin & Strong Report referenced and to some extent incorporated by Code section 323-31 ("Subcontracting Outreach Program") itself makes clear that "[t]he Subcontracting Outreach Program applies to City-funded construction contracts of \$100,000 or more," except where the City "in advance" specifically waives such requirements. Lemmie Depo. Ex. 2



(December 17, 2002 Griffin & Strong Report at 3, 5). That is also the deposition testimony offered by City representatives. *See, e.g.,* Ranford depo. at 78 (“Those are for contracts that are in excess of \$100,000”). That distinction, applying the Subcontracting Outreach Program to contracts in excess of \$100,000, both would explain the implication in the Code that the SBE Subcontracting Outreach Program is only a subset of the SBE program overall, and could vindicate the City Administration’s representation to Council through Mr. Young that 323-31 would preclude the City from paying, for example, “nine hundred thousand dollars more to comply with the regulations of SBE”: it gives a widely applicable meaning to the \$50,000/10% cap, while also making clear that the cap applies only to relatively large contracts.

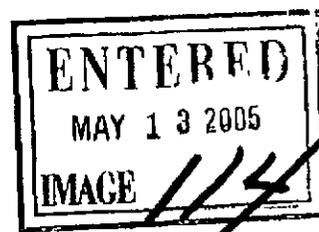
The record before the court further reflects that at least some elements of the SBE Subcontractor Outreach Program were applied to the bids at issue. As City contract compliance officer Ranford has testified: “The Subcontracting Outreach Program was applied to convention center bids. If you have any of those bid documents, you will see the Subcontracting Outreach Program. Those are for contracts that are in excess of \$100,000.” Ranford depo. at 78; *see also id.* at 60 (“we had the Subcontracting Outreach Program on all convention center projects and they were in excess of \$100,000. So we followed how that worked, the goals. The goals were set.”), 83 (“The Subcontracting Outreach Program was used for convention center”), 100 (“Q: “There’s a listing of the forms that you reviewed ... for the bidders in this case? A: These were the same documents that were the Subcontracting Outreach Program, yes.”).

The record now before the court also reflects that the very bid requirement document that specified the 35% SBE participation figure was headed in all capital



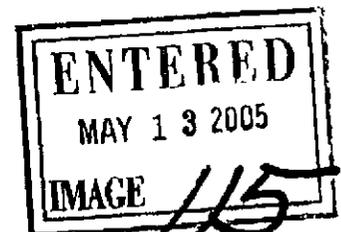
letters: "SUBCONTRACTING OUTREACH PROGRAM SUMMARY / CONVENTION CENTER PROJECT." *See, e.g.*, Small depo. ex. 5; Butler depo. ex. 1, tab 4, p.7. That document continued, in part: "SBE GOALS PER TRADE CONTRACT ..., BID PACKAGE C: All bidders are required to meet the goal stated .... Drywall.... 35%." The Outreach Program Summary also stated that the "SBE bidder must clearly indicate on Form 2003 the percentage of work that represents their SBE participation percentage as a Prime related to the completion of the scope of work."

Substantial evidence in the record suggests, too, that the City treated that 35% figure as a mandatory requirement. *See, e.g.*, Townsend depo. at 83 ("You're determined not to be in compliance if you did not meet the goal, yes"), 106. Indeed, the City bases its Motion with respect to Cleveland's equal protection claims on the assertion that the SBE goal was mandatory, although Cleveland takes somewhat of a contrary position, *cf.* Cleveland's Reply Memo in support of MSJ at 2, citing prior Townsend testimony. Whereas the rest of the Code relating to SBE matters speaks in terms of "goals" not expressed as inflexible threshold requirements, the Subcontracting Outreach Program as referenced in 321-37 and 323-31 "requires bidders to ... achieve a minimum of 20% (which may [be] higher for construction of buildings) SBE subcontractor participation." December 17, 2002 Griffin & Strong Report 7 (noting elsewhere that City can waive requirement in advance under the program). Significantly, at the same time that the Code was amended to include the Subcontracting Outreach Program language (including the cost cap), Council also deleted Code language otherwise requiring bidders to submit (less rigorous) "written assurance of commercially useful SBE participation in their bids" and to make "good faith" efforts to meet SBE participation levels. *See* former Code sections



323-27 and 323-29, as repealed by the same ordinance that established 232-31 incorporating the more mandatory regime of the Griffin & Strong report.

That mandatory approach also is largely consistent with the "Subcontracting Outreach Program" section of the Small Business Enterprise Program Rules and Guidelines that, although not signed by the City Manager, nonetheless provided guidance to City employees in certain respects. *See, e.g.,* Townsend depo. ex. 19 ("Rules and Guidelines") at 9 ("Subcontracting Outreach Program, CMC 323-31: The Subcontracting Outreach Program applies to City-funded construction contracts of \$100,000 or more. At the City's sole discretion, these requirements may be waived in advance ....The Subcontracting Outreach Program requires bidders to ... achieve a minimum of 20% [which may be higher for construction of buildings] SBE subcontractor participation. To be eligible for award of this project, the SBE bidder must subcontract a minimum percentage of its bid to ... SBE subcontractors"); *see also* Lemmie depo. at 11 ("Rules and Guidelines" were "working documents used by staff in the office"); Ranford depo. at 78, 80 and ex. 34 and G ("Rules and Guidelines" page 10, Subcontracting Outreach Program with regard to coverage of projects over \$100,000 and mandatory nature of SBE figures was used for contract compliance review in convention center program, whereas Nondiscrimination MBE sections of Rules and Guidelines were not). The court observes, however, that Cleveland's position that "the City has ... decided that good faith efforts [to achieve SBE compliance] do not matter and does not look at them," Cleveland's MSJ Memo at 33, argues that certain elements of the Subcontracting Outreach section of the Rules and Guidelines were disregarded in pursuit of higher SBE figures, *see* Ranford depo. ex. G at 11 (good faith exceptions).



The City Manager's failure formally to promulgate rules and regulations for the Subcontracting Outreach Program under 323-37, of course, can provide no justification for any failure to abide by the \$50,000/10% cost cap established by 321-37. Code 323-31 requires the issuance of such rules: "The City Manager shall issue rules and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program...." Failure to provide required regulations may compound an abuse of discretion; it does not mitigate such an abuse. See, e.g., *City of Dayton, ex rel. Scandrick v. McGee*, 67 Ohio St.2d 356, 360 (1981) ("The presence of standards against which such discretion may be tested is essential; otherwise, the term 'abuse of discretion' would be meaningless"); cf. Lemmie depo. at 11 ("[a]t this time we have no plans" to issue any SBE rules and regulations other than those cited above as "working documents used by staff.").

Similarly, the City's perhaps unusual approach to legislative drafting – codifying the Subcontractor Outreach Program through statutory references to a consultant's report, rather than by direct recitation of standards and requirements – cannot permit the City to ignore the cost cap that Council did specifically enact in 321-37. Had the legislative recommendations concerning the Subcontractor Outreach Program as set forth in Part II, Section I of the Griffin & Strong report referenced in 323-31 been adopted in a more straightforward fashion, the connection between the Subcontractor Outreach Program and a generally required SBE figure of 20% or higher would be more publicly visible. That connection is not nullified simply because it may be obscured by the indirect approach of the Code.

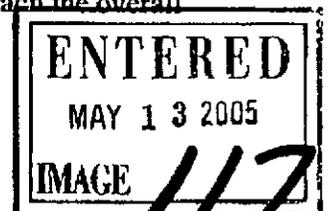
Code section 321-37(c)(4) envisions that "[i]nformation concerning compliance" with the SBE Subcontracting Outreach Program may be the primary basis for the



selection of the lowest and best bidder (in which event, the cost cap applies). Defendants do not dispute that award of the contract to Valley was "based primarily" on "compliance" with the 35% SBE figure set forth in the SUBCONTRACTING OUTREACH PROGRAM SUMMARY. *See, e.g.,* Franklin depo. at 28-29 ("Q: ... do you remember any factor other than SBE compliance that was a primary factor in deciding who got the bid award in this situation? A: No. .... Q: ... do you recall there being any factor that made a difference primarily one way or the other other than the SBE number? A: No."). Although the title of that bid requirements document may not be dispositive, it does not appear to weigh in Defendants' favor.

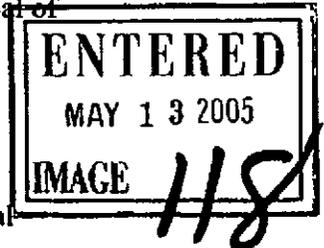
Defendants plainly have not established that they are entitled to summary judgment on Cleveland's due process claim or on the remaining elements of Cleveland's Amended Complaint.

The closer issue is whether Cleveland is entitled to judgment on the due process portion of its motion. When the evidence is reviewed in the light most favorable to Defendants, as the summary judgment standard requires for this evaluation, the court cannot find that reasonable minds could come only to the conclusion that Cleveland had been divested of a property right in violation of due process of law. A question remains for the finder of fact as to whether the City legitimately designated Valley as the lowest and best bidder based on factors other than information concerning compliance with the Subcontracting Outreach Program. That is, an arguable question of fact remains as to whether the 35% SBE figure invoked by the City derived from the Subcontracting Outreach Program itself (with its generally mandatory 20% SBE threshold) or from efforts by the City on top of the Subcontractor Outreach Program to approach the overall



30% SBE goal contained elsewhere in the Code.

The City's 30% SBE goal was created prior to the Subcontractor Outreach Program and continues in effect today in a Code section separate from that containing the Subcontractor Outreach Program. Code 323-7 ("The city of Cincinnati's Annual Goal for SBE participation shall be 30% of the city's total dollars spent for construction ..."). The parties have not specifically identified in their briefing the particular genesis of the 35% drywall SBE figure that was used for Convention Center bids, and the court does not find the facts on that matter established beyond peradventure. That the Subcontracting Outreach Program applies to contracts over \$100,000 and generally requires at least 20% SBE participation need not necessarily mean to a finder of fact that the higher goal of 30% SBE participation stated elsewhere in the Code could not have provided a sufficiently distinct basis for the City's evaluation.



The facts do make clear that the City insisted upon a re-bid after the initial bidding round in which Valley came very close to but did not meet the 35% figure (while very considerably exceeding the 20% level designated by the Subcontracting Outreach Program); in the end, Valley achieved 40% SBE participation to Cleveland's 10% -- a difference of 400%. The record also includes testimony that the Convention Center project is the only recent City project for which SBE goals were set at higher than the 20% Subcontractor Outreach figure. See Ranford depo. at 84.

The City has broad discretion to determine what constitutes the lowest and best bid. See 321-37; 321-65 (award to the "most advantageous" offeror, "taking into consideration price and evaluation factors set forth in the request for proposals"; here the contract was awarded on "lowest and best" basis); cf. *Cedar Bay Construction*, 50 Ohio

St.3d at 21. Construing all the facts in the light most favorable to the Defendants for summary judgment purposes, the court determines that a reasonable finder of fact could decide that the cost cap provision is not triggered because the City arrived at its award for reasons substantially enough beyond the Subcontracting Outreach Program as to make "information concerning compliance" with that program something less than the primary basis for the award. That is an issue for trial next month.

The court therefore denies all motions for summary judgment in this matter.



*Cleveland's Motion for Injunctive Relief*

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 preliminary injunction, but sought rather to engage in the extended discovery reflected in the voluminous materials relating to the summary judgment motions. Cleveland then waited to the final day of the dispositive motion period -- almost one year after the action was filed and roughly three months prior to the scheduled June 20, 2005 trial date -- to pursue its preliminary injunction request.

Moreover, Cleveland has provided no evidence whatsoever to meet its burden of proving (by clear and convincing evidence) various elements required to win injunctive relief. For example, the court has been presented with no evidence, apart from the McKillip affidavit provided by the City, as to the current status of the Convention Center drywall project, the equitable balance of harms among the parties, and important factors affecting the public interest. The trial date now is not much more than one month away;

the evidence adduced there surely will help inform any decisions with regard to injunctive relief. The court in the exercise of its equitable powers will await that necessary information as presented by the parties in an orderly manner at trial.

SO ORDERED **ENTERED**

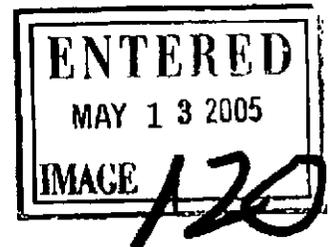
*[Signature]*  
MAY 12 2005

Fred Nelson,  
Judge **Fred Nelson, Judge**

cc: Kelly Lundrigan, 225 West Court Street, Cincinnati, OH 45202 (fax: 721-4268)

Leonard Weakley, Jr., One West Fourth Street, Suite 900, Cincinnati, OH 45202  
(fax: 381-9206)

David Barth, 537 East Pete Rose Way, Suite 400, Cincinnati, OH 45202 (fax:  
852-8222)





D62678742

COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO

ENTERED

FEB 25 2005

Cleveland Construction

Plaintiff

Judge Paul Nelson Judge

Vs.

Case No. AO-12638

City of Cincinnati

Defendant

ENTRY on City's Motion for  
a Protective Order

After a hearing conducted in chambers, Defendant City's Motion for a protective order is denied, in that the City through counsel and Plaintiff's counsel will craft an agreed order proposing the terms & conditions under which the Duress/Breach database will be provided to Plaintiff's counsel solely for use in this action. Re City's motion regarding SBE files not related to the convention center project is moot, as Plaintiff withdraws its request for such documents.

W. Kelly Rindgen 0059211  
Attorney Atty for Plaintiff

Christy J. Clitt 0059556  
Attorney ATTY for City of Cincinnati

Dave Z. Burt 0025169  
Atty for Valley Interior Systems, Inc.

ENTERED  
FEB 25 2005  
IMAGE 126

**Sec. 321-1-A. Advertisement.**

"Advertisement" shall mean the notification of an invitation to bid or request for proposal by publication in a newspaper of general circulation in the city or a newspaper regularly published under the authority of the council.

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

**Sec. 321-1-A1. Announcement.**

"Announcement" shall mean the notification of an invitation for bids or request for proposal by public posting, mail, phone, telefacsimilie, telectronic or any other means of communication approved by the city purchasing agent.

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

**Sec. 321-1-A2. Award.**

"Award" shall mean the written notice of a bid or proposal by the city purchasing agent, board or commission or their designee. The written notice may be a separate document or the contract itself prepared by the city purchasing agent or designee. The city may cancel an award at any time before the execution of the contract without any liability against the city.

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

**Sec. 321-1-B. Best Interest of the City.**

"Best interest of the city" shall mean 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. This is a matter of discretion and the decision of the officer concerned is final.

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

**Sec. 321-1-B1. Bid.**

"Bid" shall mean an offer in response to an "Invitation For Bid" to provide or dispose of supplies, service or construction.

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

**Sec. 321-1-B2. Bidder.**

"Bidder" shall mean the individual, partnership, corporation or other entity responding to the city's "Invitation for Bid."

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

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

**Sec. 321-1-C5. Contract Alteration, Modification, Change Order.**

"Contract alteration," "modification" or "change order" shall mean any written alteration in specifications, delivery point, rate of delivery, period of performance, service, quantity or other provisions of any contract.

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

**Sec. 321-1-C6. Contractor.**

"Contractor" shall mean any person having a contract with the city.

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

**Sec. 321-1-D. Debar.**

"Debar" shall mean the removal of a specific contractor from awards for a specific commodity or all awards.

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

**Sec. 321-1-E. Environmentally Preferable.**

"Environmentally Preferable" shall mean supplies, services or construction that have a lesser or reduced effect on human health and the environment when compared with competing supplies, services or construction that serve the same purpose. This comparison may consider raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, or disposal of the supply, service or construction.

(Ordained by Ord. No. 141-1994, eff. 6-3-94)

**Sec. 321-1-I. Invitation for Bid.**

"Invitation for bid" shall mean the solicitation by the city purchasing agent or designee for quoted prices, and in some cases, specifications, on supplies, services and construction.

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

**Sec. 321-1-M. May.**

"May" denotes the permissive.

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

**Sec. 321-1-O. Offeror.**

"Offeror" shall mean the individual, partnership, corporation, or other entity responding to the

shall mean the communication between the city and the bidder regarding the bid. Such communication shall not change the bid, the competitive nature of all bids or violate any ordinance, statute or law and shall not prejudice the right of the public.

In considering any clarification the city purchasing agent shall attempt to procure the best supply, service or construction at the lowest practicable price and shall make such clarifications in such a manner as to fairly and reasonably accomplish such purpose with the sole reference to the public interest.

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

### **Sec. 321-37. Bid; Award to Lowest and Best.**

(a) Selection of Lowest and Best in Award of City Contracts: Except where otherwise provided by ordinance, the city purchasing agent shall award a contract to the lowest and best bidder.

(b) Environmentally Preferable Comparison Bids: In invitations to bid designated by the city purchasing agent as an environmentally preferable comparison bid, the city purchasing agent, in determining the lowest and best bid, shall deem as favorable the fact that the bidding company offers supplies that contain recycled material, and shall select such bidder as the lowest and best bidder if its bid does not exceed by more than three (3%) percent to a maximum of Ten Thousand Dollars (\$10,000.00) any other lowest and otherwise qualified non-recycled bidder.

In such circumstances where more than one bidder offers supplies with recycled material that do not exceed by more than 3% to a maximum of \$10,000.00 any other lowest and otherwise qualified non-recycled bidder, the city purchasing agent may consider information concerning compliance with the rules and regulations issued by the city manager pursuant to CMC Section 321-37.

The decision of the city purchasing agent or designee, including whether the environmentally preferable product satisfies the bid requirements, shall be final in the determination of the award.

(c) Factors to be Considered: Other factors that the city purchasing agent may consider in determining the lowest and best bid include, but are not limited to:

- (1) Information concerning the bidder's performance on prior and current contracts with the city; or
- (2) Information concerning the bidder's current, past and proposed payment of prevailing wages; or
- (3) Information concerning compliance with the "Non-Discrimination in Purchasing and Contracting" rules and regulations issued by the city manager pursuant to CMC Section 321-159; or
- (4) Information concerning compliance with the "SBE Subcontracting Outreach Program" rules and regulations issued by the city manager pursuant to CMC Section 323-31.

In the event that the selection of the lowest and best bidder is based primarily upon factors 3 or 4 above, 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.

(d) Total Preference Percentages Permissible: The total accumulation of all preference percentages from all preference programs now in existence or hereafter established shall not exceed thirteen (13%) percent to a maximum of Sixty Thousand Dollars (\$60,000.00).

(Ordained by Ord. No. 426-1992, eff. 10-23-92; a. Ord. No. 11-1994, eff. 2-11-94; a. Ord. No. 141-1994, eff. 6-3-94; a. Ord. No. 398-2003, eff. 11-26-03)

**Sec. 321-39. Bid; Award on Equal Bids.**

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 as shall 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 endeavored to 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. 321-67. Proposal; Rejection.**

The city may reject any or all proposals or any item within a proposal for any reason, or reject all proposals for no reason as deemed by the city purchasing agent or designee to be in the best interest of the city.

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

**Sec. 321-69. Proposal; Surety.**

Proposal surety may be required in an amount deemed necessary by the city purchasing agent or designee.

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. 321-71. Reserved.**

**Sec. 321-73. Right to Request Information.**

The city manager, city purchasing agent, board or commission may request information needed to determine the lowest and best bid or the most advantageous proposal. Such information may include, but is not limited to financial ability, resources, skills, capability, business integrity, past performance, equal employment opportunity and related programs.

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

**Sec. 321-75. Right to Audit Records.**

The city shall be entitled to audit the books and records of a contractor or any subcontractor under any contract or subcontract to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records shall be maintained by the contractor for a period of one year from the date of final payment under the prime contract and by the subcontractor for a period of one year from the date of final payment under the subcontract, unless a shorter period is authorized in writing.

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

**Sec. 321-77. Reserved.**

**Sec. 321-79. Reserved.**

**Sec. 323-25. Contractors and Subcontractors Assistance to Comply with Applicable SBE Requirements.**

The OCC and purchasing department staffs are available to assist contractors and subcontractors in implementing this program. As a standard procedure, such assistance includes:

- (a) Clear identification of the city of Cincinnati's SBE provisions in all the city of Cincinnati's solicitations;
- (b) Pre-bid/proposal conference to explain the city of Cincinnati's SBE program;
- (c) Identification of certified SBEs per the city of Cincinnati solicitation including a list of certified SBEs available to all document holders;
- (d) Lists of document holders will be available to interested SBEs.
- (e) The OCC in conjunction with other city agencies will monitor SBE participation levels on projects throughout the duration of a contract.

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

Sec. 323-27. Repealed.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999; r. Ord. No. 438-2002, eff. Jan 17, 2003)

Sec. 323-29. Repealed.

(Ordained by Ord. No. 335-1999, eff. Aug. 4, 1999; r. Ord. No. 438-2002, eff. Jan 17, 2003)

**Sec. 323-31. Subcontracting Outreach Program.**

The city manager shall issue and enforce rules and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program, substantially in conformance with the content of Part II, Section 1, the "Legislative Recommendation Report To The City of Cincinnati" dated December 17, 2002, prepared by Griffin & Strong, P.C., (hereinafter referred to as the "Legislative Recommendation Report"), a copy of which is on file in the office of the Clerk of City Council.

(Ordained by Ord. No. 438-2002, eff. Jan. 17, 2003)

**Sec. 323-99. Penalties.**

The provisions of this section shall be incorporated into city contracts. The contractor shall agree that a breach of the provisions of this chapter or the contract shall subject the contractor to any or all of the following penalties:

Withholding of ten percent (10%) of all future payments under the contract until it is determined that the contractor is in compliance;

Withholding of all future payments under the contract until it is determined that the contractor is in compliance;

Default; payment withheld under Section 321-155 of the Cincinnati Municipal Code; or

Default; further bids or proposals refused under Section 321-153 of the Cincinnati Municipal Code.

A minimum of two (2) years suspension from new awards to do business with the city;

Permanent debarment from doing business with the city.

For good cause shown, the director of OCC may grant a stay of the penalty pending appeal; however, in no case shall the stay impede the city's contracting authority.

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

lowest bidder.

Effective Date: 08-01-1980

### **9.311 Bonds accompanying bid to be executed by approved surety.**

(A) A bid for a contract with the state or any political subdivision, district, institution, or other agency of the state, for the rendering of services, or the supplying of materials, or for the construction, demolition, alteration, repair, or reconstruction of any public building, structure, highway, or other improvement shall be deemed nonresponsive and shall be rejected if the bidder submits with his bid a bid bond, performance bond, payment bond, or combination of those bonds, executed by a surety not licensed, or a surplus lines company not approved, by the superintendent of insurance to execute such a bond in the state.

(B) All of those bonds shall affirmatively state on their face that the surety is authorized to execute bonds in the state and that the liability incurred is within the limits of section 3929.02 of the Revised Code. Failure to include this statement shall not cause the bid to be deemed nonresponsive and rejected if the surety is in fact authorized to execute bonds in the state and the liability incurred is within the limits of section 3929.02 of the Revised Code.

Effective Date: 08-08-1991

### **9.312 Factors to determine whether bid is responsive and bidder is responsible.**

(A) If a state agency or political subdivision is required by law or by an ordinance or resolution adopted under division (C) of this section to award a contract to the lowest responsive and responsible bidder, a bidder on the contract shall be considered responsive if the bidder's proposal responds to bid specifications in all material respects and contains no irregularities or deviations from the specifications which would affect the amount of the bid or otherwise give the bidder a competitive advantage. The factors that the state agency or political subdivision shall consider in determining whether a bidder on the contract is responsible include the experience of the bidder, the bidder's financial condition, conduct and performance on previous contracts, facilities, management skills, and ability to execute the contract properly.

For purposes of this division, the provision of a bid guaranty in accordance with divisions (A)(1) and (B) of section 153.54 of the Revised Code issued by a surety licensed to do business in this state is evidence of financial responsibility, but a state agency or political subdivision may request additional financial information for review from an apparent low bidder after it opens all submitted bids. A state agency or political subdivision shall keep additional financial information it receives pursuant to a request under this division confidential, except under proper order of a court. The additional financial information is not a public record under section 149.43 of the Revised Code.

An apparent low bidder found not to be responsive and responsible shall be notified by the state agency or political subdivision of that finding and the reasons for it. Except for contracts awarded by

the department of administrative services pursuant to section 125.11 of the Revised Code, the notification shall be given in writing and by certified mail. When awarding contracts pursuant to section 125.11 of the Revised Code, the department may send such notice in writing by first class mail.

(B) Where a state agency or a political subdivision that has adopted an ordinance or resolution under division (C) of this section determines to award a contract to a bidder other than the apparent low bidder or bidders for the construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decoration of a public improvement, it shall meet with the apparent low bidder or bidders upon a filing of a timely written protest. The protest must be received within five days of the notification required in division (A) of this section. No final award shall be made until the state agency or political subdivision either affirms or reverses its earlier determination. Notwithstanding any other provisions of the Revised Code, the procedure described in this division is not subject to Chapter 119. of the Revised Code.

(C) A municipal corporation, township, school district, board of county commissioners, any other county board or commission, or any other political subdivision required by law to award contracts by competitive bidding may by ordinance or resolution adopt a policy of requiring each competitively bid contract it awards to be awarded to the lowest responsive and responsible bidder in accordance with this section.

Effective Date: 09-20-2002

### **9.313 Reduction of performance bond after substantial performance.**

A contract for the rendering of services or the supplying of materials entered into on or after the effective date of this section shall be deemed to include a provision that authorizes the contracting authority, in its sole discretion, to reduce any bond filed by the person contracting to render the services or supply the materials by twenty-five per cent of the total amount of the bond upon demonstration satisfactory to the contracting authority that at least fifty per cent of the services have been rendered or materials have been supplied in accordance with the terms of the contract, and by fifty per cent of the total amount of the bond upon demonstration satisfactory to the contracting authority that at least seventy-five per cent of the services have been rendered or materials have been supplied in accordance with the terms of the contract.

As used in this section, "contracting authority" means an officer, board, or other authority of the state or any political subdivision, district, institution, or other agency thereof authorized to contract for the rendering of services or the supplying of materials, but does not include an officer, board, or other authority of the Ohio Department of Transportation.

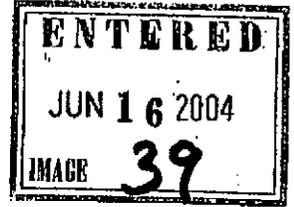
Effective Date: 04-16-1993

### **9.314 Purchasing services or supplies by reverse auction.**

(A) As used in this section:

Leonard A. Weakley, Esq. (Oh. #0000152)  
Christopher J. Aluotto, Esq. (#0059556)  
Attorneys for Defendant, City of Cincinnati

**COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO**



**CLEVELAND CONSTRUCTION, INC.,**

**Plaintiff,**

- vs -

**CITY OF CINCINNATI, et al.,**

**Defendant.**

: Case No. A0402638  
:  
: Judge Nelson  
: Presiding Equity Judge

: ENTRY DENYING PLAINTIFF'S  
: MOTION FOR TEMPORARY  
: RESTRAINING ORDER

This matter, having come before the Court for a hearing on Plaintiff's Motion for Temporary Restraining Order on March 31, 2004, and the Court being fully advised and having heard arguments as to the merits therein, this Court hereby **DENIES** Plaintiff's Motion.

**IT IS SO ORDERED.**

**ENTERED**

JUN 16 2004

**Fred Nelson, Judge**

Hon. Frederick D. Nelson, Judge

Have Seen and Agreed To:

*per Kelly Lundrigan's telephone authority  
on June 15, 2004*

Robert E. Manley, Esq.  
Kelly M. Lundrigan, Esq.  
Manley Burke  
225 West Court Street  
Cincinnati, OH 45202-1098  
and



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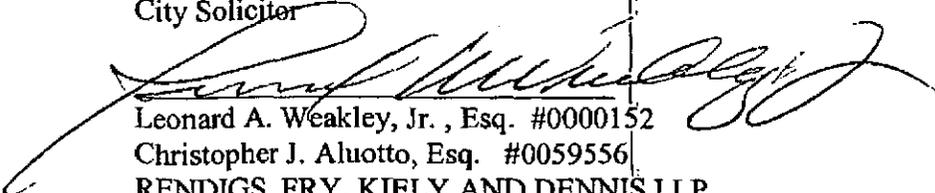
Fred A. Ungerman, Jr., Esq.  
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**Attorneys for Plaintiff, Cleveland Construction, Inc.**



*per David L. Barth's telephone authority  
on June 15, 2004*

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