

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI	:	CASE NO. 07-0114
	:	
Appellant	:	On Appeal from the
	:	Hamilton County Court of Appeals
v.	:	First Appellate District
	:	
	:	Appeal No. C050749
CLEVELAND CONSTRUCTION, INC.	:	Appeal No. C050779
	:	Appeal No. C050888
Appellee	:	(Consolidated)

**MERIT BRIEF OF APPELLEE
CLEVELAND CONSTRUCTION, INC.**

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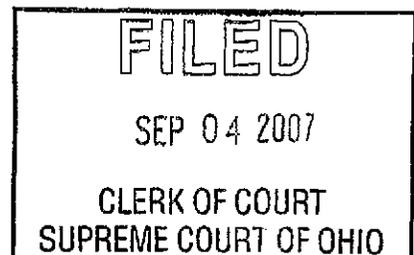


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PROPOSITION OF LAW NO. 1:

A Bidder Whose Bid For A Competitively Bid Municipal Contract Is Lowest And Otherwise Qualified Has A Constitutionally Protected Property Interest In That Contract When (1) The Municipality Has No Discretion To Award The Contract To Any Bidder But The Lowest Qualified Bidder And (2) But For The Municipality’s Illegal Exercise Of Discretion, The Bidder Would Have Been Awarded The Contract 7

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I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Facts

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

The City Council decided that if the selection of the lowest and best bid is based primarily on compliance with the SOP, the higher bidder may be awarded the contract subject to the express limitation that "the bid may not exceed an otherwise qualified bid by ten percent (10%) or Fifty Thousand Dollars, whichever is lower."² There is no dispute that Cleveland Construction's bid was otherwise qualified except for the fact that Cleveland did not attain the 35% SBE Program's subcontracting requirement.³ However, the bidder that was awarded the

¹ The Subcontracting Outreach Program was adopted and implemented as part of the SBE Program in anticipation of the Convention Center project and specifically applied to all City-funded construction contracts over \$100,000. Plaintiff's Ex. 13 and 13(a), Joint Ex. 7, T.p. 875, Cleveland's Supp. 44.

² CMC §321-37(c)(4), Plaintiff's Exhibit 14, T.p. 875, City's Supp. 91.

³ As the trial court noted, "Defendants have maintained throughout this litigation that Plaintiff Cleveland was excluded from contract consideration because it failed to meet the City's SBE

contract was \$1,246,022 higher than Cleveland's bid, or more than 24 times higher than the "cap" allowed. (A third bidder, Kite, was even higher in price than Valley).⁴

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

What this ordinance allows us to do is be clear about when it is appropriate to award a bid to a SBE compliant (bidder) if they are not the lowest. This ordinance would allow us to award a bid if the bid is \$50,000 or less difference away from the lowest bid. We had an example where the SBE-compliant bidder was some nine hundred thousand dollars in excess of the lowest bid and, it doesn't make a lot of sense to spend nine hundred thousand dollars more to comply with the regulations of SBE.⁵

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

By this appeal, the City of Cincinnati seeks to have this court overturn the factual finding of both the trial court and the affirming decision of the First District Court of Appeals that Cleveland Construction, Inc. ("Cleveland") proved a deprivation of its due process rights under the United States Constitution and an accompanying violation of 42 U.S.C. § 1983. The City denied Cleveland the award of the Drywall Contract for the expansion of the Cincinnati Convention Center Project despite the fact that Cleveland was the lowest bidder by over 1.2 million dollars. It is undisputed that the sole basis for the City's refusal to award the contract to

requirement, the evidence provides no indication of other infirmities in Cleveland's bid or capacity to perform the work, and the City previously conceded that Cleveland was otherwise qualified to perform the work, *see* SJ Entry at 10." T.d. 262, Entry, July 13, 2005, p. 2, App. 38. The City's Brief (at p. 3) acknowledged, "Cleveland lost the drywall bid because it failed to satisfy the prerequisites for the contract by reserving at least 35% of the work for small business enterprises as the bid documents required."

⁴ Plaintiff's Exhibit 22; T.p. 877, City Supp. 57.

⁵ T.d. 262, Entry dated July 13, 2005, p. 3-4, App. 39-40.

Cleveland was Cleveland's failure to subcontract a sufficient amount of its work, as dictated by the percentages established by the SOP, a component of the City's SBE Program.⁶ It is also clear that the award to Valley Interior Systems, Inc. ("Valley") was based upon Valley's attainment of that percentage.⁷ Cleveland's legitimate entitlement to the contract, and its property interest in the contract, was created by Cincinnati Municipal Code § 321-37. CMC § 321-37 sets a clear and unambiguous numeric formula—which a bid either exceeds or does not exceed—and places an absolute limitation upon the discretion of the City when the proposed award of a contract is "based primarily upon" a bidder's compliance with the SBE Program's subcontracting outreach percentages. When that is the case, (as it was here), the contract award to a higher bidder "may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars (\$50,000.00), whichever is lower."

The undisputed facts establish that (1) the City based the drywall contract award on Valley's compliance with the subcontracting outreach percentages, and (2) Valley's bid exceeded the monetary cap of CMC §321-37 by twenty-four times. The City awarded the drywall contract to Valley, rather than Cleveland, and ignored the fact that it had no discretion under CMC §321-37, so it could achieve race and gender-conscious subcontracting percentage goals that, at the time, were part of the City's SBE Program.⁸ Both the trial court and the First

⁶ T.p. 432, 436-438, 443; 501, Cleveland Supp. 16, 19-21, 22, 27; Plaintiff's Exhibit 22, City Supp. 57; T.p. 877, Plaintiff's Exhibit 32, T.p. 878, City Supp. 115; See also Brief of City p. 3.

⁷ *Id.*

⁸ As part of the bid documents, the City informed bidders that they "should be able to include minority and female firms at the level of availability" as determined by the City. For the drywall contract, the City calculated the minority business enterprise ("MBE") availability to be 13.09 percent and the women's business enterprise ("WBE") availability at 1.05 percent. Plaintiff's Exhibit 29(a), T.p. 885, City Supp. 59; Plaintiff's Exhibit 30, T.p. 878, Cleveland Supp. 139. The SBE Program required all bidders to document their efforts to meet the availability estimate for MBEs and WBEs and cautioned all bidders that if they "failed to achieve levels of minority or women business enterprise participation ... , the bidder shall be subject to an inquiry by the

District Court of Appeals determined that these goals violated the equal protection clause of the U.S. Constitution's 14th Amendment by encouraging and pressuring all bidders, including Cleveland, to discriminate based on race and gender in order to obtain the SBE Program's subcontracting outreach percentages.⁹

Upon learning that the City awarded the contract to Valley based upon Valley's compliance with the SBE Program's subcontracting percentages in violation of the cap provisions, Cleveland asserted that the City violated its constitutional rights to equal protection of the law and due process, giving rise to its claims for damages under 42 U.S.C. §1983. Despite the admitted basis of the City's contract award being Valley's attainment of the SBE Subcontracting Outreach Program percentage goal, and Cleveland's failure to attain that percentage, and the fact that Valley's bid exceeded the monetary cap of CMC § 321-37 by twenty-four times what it allows, the City awarded the contract to Valley anyway. The City awarded to Valley, rather than Cleveland, and ignored its lack of discretion to do so under CMC § 321-37, so that it could achieve race and gender-conscious subcontracting percentage goals, which both the trial court and the First District Court of Appeals held violated the equal protection guarantees of the 14th Amendment to the U.S. Constitution. In so doing, Cleveland asserted that the City violated its constitutional rights of equal protection and due process, giving rise to claims for damages under 42 U.S.C. § 1983.

Office of Contract Compliance." Plaintiff's Exhibit 17, SBE Program Rules and Guidelines, p. 6, T.p. 876, Cleveland Supp. 58.

⁹ Decision of First District Court of Appeals, ¶48-49, p. 22 App. of City.

B. Procedural History

Because the City's description of the procedural history of this case omits most of what actually occurred, and the City has made Cleveland's diligence in pursuing this litigation an issue, Cleveland will provide a more complete version here.

The second round of bids for the Convention Center drywall contract were opened on February 19, 2004.¹⁰ Cleveland, knowing that its bid was lowest by over \$1.2 million, repeatedly attempted to find out the status of the bid review process and the City's intentions with respect to the award of the drywall contract. Unbeknownst to Cleveland, the City awarded the contract to Valley on either March 2 or 3, 2004.¹¹ The City never informed Cleveland that it had not been awarded the contract prior to awarding the contract to Valley.¹²

Following an investigation into the matter through public documents, on March 30, 2004, Cleveland filed its First Verified Complaint, requesting, among other remedies, temporary, preliminary and permanent injunctive relief and damages, and at the same time, Cleveland filed a Motion for Temporary Restraining Order ("TRO").¹³ The trial court denied Cleveland's motion for a TRO.¹⁴ The court set the case for a hearing on Cleveland's request for a preliminary injunction,¹⁵ but the City filed a Notice of Removal to federal court.¹⁶ The case was removed improperly and eventually remanded.¹⁷

¹⁰ Plaintiff's Ex. 24, T.p. 877, City Supp. 58.

¹¹ City Brief, p. 3; T.p. 9.

¹² T.p. 599-602; Cleveland Supp. 28.

¹³ T.d. 2, 3, 4, 5, 6.

¹⁴ T.d. 36; T.p. 20, Cleveland Supp. 3.

¹⁵ T.p. 25, Cleveland Supp. 4.

¹⁶ T.d. 19.

¹⁷ T.d. 34.

The City and Valley each filed motions to dismiss Cleveland's amended complaint.¹⁸ The trial court denied the motions to dismiss as to the City and Valley, but granted dismissal of the claims against the individual defendants.¹⁹ The parties agreed that a hearing on Cleveland's request for preliminary injunctive relief would be combined with a trial on the merits.²⁰ All parties filed cross motions for summary judgment.²¹ Cleveland combined with its motion for summary judgment a request for a permanent injunction, or, in the alternative, preliminary injunctive relief.²² All cross-motions and Cleveland's requests for injunctive relief were denied.²³

After Cleveland presented its case to a jury, the trial court directed a verdict against Cleveland on its damage claims, leaving only claims for declaratory and injunctive relief and attorney's fees for decision by the court.²⁴ The trial court found in favor of Cleveland on its claims of 14th Amendment equal protection and due process violations and corresponding violations of 42 U.S.C. §1983.²⁵ The trial court awarded declaratory relief as to those findings, issued prospective permanent injunctive relief against the City's use of certain unconstitutional parts of its SBE Program, and also found Cleveland to be a prevailing party entitled to its attorney's fees and costs under 42 U.S.C. §1988.²⁶ Cleveland filed a Motion for New Trial, which was denied.²⁷ Cleveland appealed the trial court's final judgment relating to the directed

¹⁸ T.d. 37, 38, 41.

¹⁹ T.d. 54.

²⁰ T.d. 240.

²¹ T.d. 135, 139, 140.

²² T.d. 139.

²³ T.d. 156.

²⁴ T.d. 252, 253; T.p. 953-960, Cleveland Supp. 35.

²⁵ T.d. 262.

²⁶ T.d. 262, 279.

²⁷ T.d. 280, 286.

verdict on damages, and the City filed a cross-appeal. The Court of Appeals consolidated the appeals.²⁸

The First District reversed the trial court's directed verdict on Cleveland's damages and upheld the findings that the City violated Cleveland's rights to equal protection and due process and Cleveland's entitlement to attorney fees under 42 U.S.C. §1988. This Court accepted two of the five issues presented for review by the City and declined to exercise jurisdiction over the lower courts' determinations on Cleveland's equal protection claims.

II. ARGUMENT

PROPOSITION OF LAW NO. 1:

A Bidder Whose Bid For A Competitively Bid Municipal Contract Is Lowest And Otherwise Qualified Has A Constitutionally Protected Property Interest In That Contract When (1) The Municipality Has No Discretion To Award The Contract To Any Bidder But The Lowest Qualified Bidder And (2) But For The Municipality's Illegal Exercise Of Discretion, The Bidder Would Have Been Awarded The Contract.

A. The Law Governing Creation Of A Constitutionally Protected Property Interest.

The First District's decision comports with established principles of constitutional law espoused by the United States Supreme Court, the lower federal courts that have applied those principles, and with the decisions of this Court. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire" and "more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."²⁹ "Property interests are not created by the Constitution; rather, they are created and their dimensions are

²⁸ T.d. 280, 283, 285, 287.

²⁹ *Board of Regents v. Roth* (1972), 408 U.S. 565, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548.

defined by existing rules or understandings that stem from an independent source such as state statutes, local ordinances, contractual provisions, or mutually explicit understandings.”³⁰

In the course of analyzing the wide range of interests which are subject to due process protection, the United States Supreme Court has “made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money,”³¹ and has stated that the “types of interests protected as ‘property’ are varied and, as often as not, intangible, ‘relating to the whole domain of social and economic fact.’”³² “The United States Supreme Court has found ‘property’ interests in a number of different areas, including welfare benefits, disability benefits, public education, utility services, government employment, as well as other entitlements that defy easy categorization.”³³ This Court has, likewise, extended and applied these existing constitutional principles over time to varied factual circumstances.³⁴

As a logical extension and application of these constitutional principles, the Sixth Circuit Court of Appeals has held that a constitutionally protected property interest in a publicly bid contract can be proved by either showing that the bidder was actually awarded the contract and then deprived of it, or that the awarding entity had only limited discretion in making the

³⁰ *Shepard v. City of Batesville, Mississippi* (Jan 8, 2007), N.D. Miss. No. 2:04CV330-D-B, 2007 WL 108288 at *7, unreported (citing *Blackburn v. City of Marshall* (5th Cir. 1995), 42 F.3d 925, 936-37, 63 USLW 2435; *Paul v. Davis* (1976), 424 U.S. 693, 709, 96 S.Ct. 1155, 47 L.Ed.2d 405; *Perry v. Sinderman* (1972), 408 U.S. 593, 599-601, 92 S.Ct. 2693, 33 L.Ed.2d 570; *Roth*, 408 U.S. at 577, 92 S.Ct. 2701, 33 L.Ed.2d 548; see also *Phillips v. Washington Legal Found.* (1988), 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174).

³¹ *Roth*, 408 U.S. at 571-72, 92 S.Ct. 2701, 33 L.Ed.2d 548; *State v. Hochhausler* (1996), 76 Ohio St.3d, 455, 668 N.E.2d 457; *State v. Cowan* (1994), 103 Ohio St.3d 144, 2004-Ohio-4777.

³² *Logan v. Zimmerman Brush Co.* (1982), 455 U.S. 422, 430, 102 S.Ct. 1148, 71 L.Ed.2d 265; see also *Perry v. Sinderman* (1972), 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570.

³³ *Shepard*, 2007 WL 108288 at *7.

³⁴ *1946 St. Clair Corp. v. City of Cleveland* (1990), 49 Ohio St.3d 33, 550 N.E.2d 456; *State v. Cowan* (2004), 103 Ohio St.3d 144, 814 N.E.2d 846.

award and abused that discretion.³⁵ Requiring proof of limited discretion in the award process ensures that a bidder has a “legitimate entitlement” under objective criteria and prerequisites, and not simply a “unilateral expectation or abstract desire.” The bidder’s legitimate claim of entitlement is not created by his or her subjective desire for the contract sought; rather, it is an expectation created by the local ordinance and bid documents which establish the “rules of the game” by which the bidding authority has itself determined and announced to bidders it will be bound.

The City seeks to have this Court ignore its own admitted factual basis for the drywall contract award. However, the legal principles established by the United States Supreme Court which determine the creation of property interests protected by due process require a very particularized and fact-specific analysis of the particular set of state laws and rules applicable in each case. The City relies upon provisions in its municipal code and the bidding documents for this project which allow the City discretion under factual circumstances which indisputably do not exist in this case. If the City’s hypothetical reasoning were sound, (and it is not in this case) a bidder could never acquire a constitutionally protected property interest in a competitively bid public contract, even if the undisputed basis for the decision were illegal. Yet federal and state courts have repeatedly found that disappointed bidders can possess property interests in publicly bid contracts under the constitutional principles enunciated by the U.S. Supreme Court.³⁶

³⁵ *Enertech Electrical, Inc. v. Mahoning County Commissioners* (6th Cir. 1996), 85 F.3d 257, 260; see also *United of Omaha Life Ins. Co. v. Solomon* (6th Cir. 1992), 960 F.2d 31.

³⁶ See *Shepard*, 2007 WL 108288; *Systems Contractors Corp. v. Orleans Parish School Bd.* (5th Cir. 1998), 148 F.3d 571; *Ervin and Associates, Inc. v. Dunlap* (D.C. Cir. 1997), 33 F.Supp.2d 1; *Pataula Electric Membership Corp. v. Whitworth* (11th Cir. 1992), 951 F.2d 1238; *Flint Electric Membership Corp. v. Whitworth* (11th Cir. 1995), 68 F.3d 1309; *Teleprompter of Erie, Inc. v. City of Erie* (D.C. Pa. 1981), 537 F.Supp. 6; *Three Rivers Cablevision, Inc. v. City of Pittsburgh* (W.D. Pa. 1980), 502 F.Supp. 1118; *Haughton Elevator Division v. State of Louisiana* (La. 1979), 367 So.2d 1161.

Rather than deal with the record evidence in this case, which indisputably establishes that the City primarily based its award of the drywall contract on compliance with the SBE Program's subcontracting outreach percentages, and the corresponding mandatory application of the "cap" provisions, the City instead focuses on hypothetical factual scenarios under which the City *would have* discretion, but which never happened in this case. For example, the City points to the fact that it *could have* rejected all bids and rebid the project. It did not do that.³⁷ The City then points out it *could have* cancelled the contract after executing it.³⁸ It did not do that either.³⁹ Finally, the City argues that CMC § 321-37 provides a "non-exhaustive list of factors" that the City's Purchasing Agent *could* consider in determining the lowest and best bid, and points out that its contract award *could have been* based on any of these, or virtually any other unspecified basis.⁴⁰ But it was not.

The basis for the contract award, according to the City's Purchasing Agent herself, was the fact that the higher bidder, Valley, obtained the SBE subcontracting outreach percentage and Cleveland did not. Cleveland's bid was otherwise acceptable to the Purchasing Agent in every respect.⁴¹ Under the City's own municipal code, the City Purchasing Agent's decision to award the contract to the higher bidder based on compliance with the SOP should have triggered the monetary cap limitation in CMC §321-37(c)(4). But the City ignored it.

³⁷ That happened in the first round of bidding on this contract. Even though it was the low bidder in the first round, Cleveland did not contest the City's decision, but participated in the rebid, and was still the low bidder. The City did not reject all bids on the rebid, however. It proceeded to award the contract based on that second round of bidding.

³⁸ Brief of City, p. 14.

³⁹ In fact, the City could not constitutionally have done so without a pre-deprivation due process hearing under the legal standards discussed below.

⁴⁰ Brief of City, p. 10.

⁴¹ T.p. 432, 436-438; 501; Cleveland Supp. 16, 19-21, 27; Plaintiff's Exhibit 22; T.p. 877, City Supp. 57.

The City (and its Amici) protest that the First District's application of well settled federal law in finding a constitutionally protected property interest in Cleveland will open the floodgates of liability for municipalities in the arena of public contracting. However, the finding of a constitutionally protected property interest in a public contract is likely to be a rare event. It is always a fact-specific analysis based upon the particular facts, bidding ordinances and bid documents at issue in each case. The City's ordinances, as they interrelate with the City's SBE Program and the "monetary cap" provision in CMC 321-37, are unique to Cincinnati. The fact that the City admits that its contract award to the higher bidder was based upon one factor, a factor that was subject to an express limitation in the City's code, and that but for its consideration of that factor, the award would have gone to Cleveland, is also a rarity in public bidding disputes. The facts of this case are particularly novel. The legal issues are not.

This case is likely of little general applicability on a statewide basis and hardly worthy of the alarmist concern that it will drain the public purse. Rather, the decision of the First District prevents taxpayers from *overpaying* for public contracts by enforcing the restrictions set up by public bodies in competitive bidding situations. Had the City applied its own laws in this case and awarded the drywall contract to Cleveland, it would have saved City taxpayers well over one million dollars. The fact that the City consciously decided to ignore the cap provision that Council adopted shortly before the bid offering should not insulate the City from liability here. Instead, such liability should, in the long run, protect both taxpayers and bidders on public contracts by ensuring that public bodies comply with bidding requirements put in place to protect taxpayer dollars and the integrity of the public bidding process itself.

While the City correctly recites the law governing creation of constitutionally protected property interests for the most part, it relies on two cases which simply have no

applicability to the specific facts in this case. *Peterson Enterprises, Inc. v. Ohio Department of Mental Retardation and Developmental Disabilities*⁴² bears no resemblance to the facts of this case. In *Peterson*, an unpublished per curiam decision, the awarding authority relied upon many factors, rather than a sole factor to which a clear limitation was applicable. The determining factor upon which the City based its award—compliance with the SBE Program’s subcontracting outreach percentage—is subject to an absolute limitation upon the City’s discretion: the monetary cap of CMC § 321-37. The court in *Peterson* recognized that “...if the Board had limited discretion under local rules as to whom should be awarded the contract (e.g. state law mandated the award of government contracts to the lowest bidder), then Plaintiff might have a protected property interest in the award...”⁴³ Thus, the very authority relied upon by the City employs the same test to determine whether a property interest exists that the First District used in this case.

The City’s reliance upon *TriHealth v. Hamilton County Commissioners*⁴⁴ is also misplaced. *TriHealth* did not present any of the same issues raised here. In *TriHealth*, a public competitive bidding process was not used. As a result, no competitive bidding ordinance limiting the public body’s discretion was even under consideration.

The City’s position does not comport with the law, and is tantamount to claiming that because certain provisions in its code provide it with broad discretion under the “lowest and best bid” test to award to a bidder of its choosing, it can virtually ignore other more specific limitations upon its discretion. It also ignores the tax savings rationale for the monetary cap provision as discussed immediately before Council’s amendment of CMC §321-37 to include the

⁴² (6th Cir. 1989), 890 F.2d 416, (Table) 1989 WL 143563, (unpublished per curiam).

⁴³ *Id.* at *1.

⁴⁴ (6th Cir. 2005), 430 F.3d 783.

“cap” provision. As a result, Cleveland had a constitutionally protected property interest in the drywall contract. The City, by awarding the drywall contract to Valley in violation of the “cap” provision, deprived Cleveland of that property interest without due process of law.

B. It Is Undisputed That Cleveland Was The “Otherwise Qualified” Lowest Bidder And Would Have Been Awarded The Contract If Not For The City’s Decision To Award The Contract Based On Compliance With The SBE Program’s Subcontracting Outreach Percentage.

The City’s theory that Cleveland’s bid was non-responsive, and could not even be considered because Cleveland did not attain the SBE Program’s subcontracting outreach percentages, is belied by the City Purchasing Agent’s own testimony, as well as the City’s own SBE Program language and its bid documents.⁴⁵ Other than compliance with the SBE Program’s subcontracting outreach percentages, Cleveland’s bid was otherwise acceptable to the Purchasing Agent. It is undisputed by the City that the only factor which prevented Cleveland from being awarded the contract was its lack of compliance in obtaining the SBE subcontracting outreach percentage.⁴⁶ The City described the requirements of its SBE Subcontracting Outreach Program in a “Subcontracting Outreach Program Summary” given to bidders with the bid documents. The summary states that bidders are required to show “they’ve made a good faith effort to get the participation of SBEs on this project.”⁴⁷ That a good faith effort was required, and not mandatory attainment of the SBE Program’s subcontracting outreach percentages, is also clear from the City’s SBE Rules and Guidelines, which state that if the low bidder’s percentage is “less than the goal and the City determines that the bidder did not make a good faith effort, then the bid can be rejected as non-responsive. The Contract administrator must review all of the

⁴⁵ T.p. 432, 436-438; 501, Cleveland Supp. 16, 19-21, 27; Plaintiff’s Exhibit 22; T.p. 877, City Supp. 57.

⁴⁶ *Id.*

⁴⁷ Plaintiff’s Exhibit 32; T.p. 878, City Supp. 115.

documentation of good faith efforts and draft a written finding that the bidder failed to make a good faith effort before rejecting the bidder.”⁴⁸ As the City’s own listing of “Compliant and Responsive Bids” demonstrates, Cleveland was never determined to be “non-responsive.”⁴⁹ In fact, the City admitted that it did not evaluate Cleveland’s “good faith efforts” to meet the SBE Program’s subcontracting outreach percentage. The City simply determined that Cleveland did not meet the subcontracting outreach percentage, and therefore would not receive the contract.⁵⁰

Alicia Townsend, the head of the SBE Division of the Office of Contract Compliance, explained that “[t]he bidder was required to sign off that they did use methods on— show good faith efforts. But our decision as far as whether you did or did not meet the program goals was based upon the numerical percentage that a bidder would have achieved.”⁵¹ When questioned about the contradiction between what bidders were told was required by the bid documents (either meet the percentage or show good faith efforts), and what the SBE Division of Contract Compliance actually reviewed (the attainment of the SBE subcontracting outreach percentages regardless of the bidder’s good faith efforts) Ms. Townsend could not explain the discrepancy:

- Q. “Ma’am, if the only thing that matters in the program is meeting the goal, and that’s the standard that bidders are held to, why don’t the bid documents just say that?”
- A. That’s a good question. It would make everyone’s life a lot simpler. But its my understanding that some of these other components needed to be included within the bid documents.⁵²

⁴⁸ Plaintiff’s Exhibit 17, p. 54; T.p. 876, Cleveland Supp. 58.

⁴⁹ Plaintiff’s Exhibit 22, T.p. 877, City Supp. 57.

⁵⁰ T.p. 341-343, Cleveland Supp. 5-7.

⁵¹ T.p. 341, Cleveland Supp. 5.

⁵² T.p. 343, Cleveland Supp. 7.

The “good faith” efforts of the SBE Program were reduced to a mere tautology in actual practice: a bidder could meet the program requirements by engaging in a good faith effort to meet the percentage goal, but a good faith effort means meeting the percentage goal.

C. Cincinnati Municipal Code § 321-37 Foreclosed The City’s Discretion To Award To A Higher Bidder On The Basis That The Bidder Complied With The SBE Subcontracting Outreach Program, And The City Abused Its Discretion By Doing So.

The essence of this case is most analogous to the situation where a city is bound by a legal requirement to make a contract award to the lowest bidder, rather than the “lowest and best bidder.” Because none of the bidders in the second round of bidding on the drywall contract were declared “non-responsive” by the City, CMC §321-37 applied to limit the City’s discretion in awarding the bid based on a numerical analysis.

The City has actually created a hybrid ordinance that is a cross between a “lowest and best” award standard, and an ordinance that requires an award to the lowest bidder under the facts of this case. When the “monetary cap” of CMC 321-37 applies because the basis of the proposed award to a higher bidder is primarily for reasons of that bidder’s compliance with the SBE Program’s subcontracting outreach, the City’s discretion to award to the higher bidder is foreclosed. CMC 321-37 provides in relevant part:

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:

* * *

- (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. (Emphasis supplied).

The trial court found that the City violated this clear and unambiguous limitation:

[T]he 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).⁵³

CMC § 321-37, amended by the City in November 2003 so that the amended provisions (including the cap) would be in place for the Convention Center bid process, is clearly intended to strike a balance between the goals of inclusion of SBE subcontractors on City projects and the economic goal of acquiring work at the most competitive price for Cincinnati taxpayers, a goal at the heart of the public competitive bidding process.⁵⁴ It is beyond reasonable argument that CMC 321-37 was structured as an objective monetary *limitation* on the discretion of the City Purchasing Agent to award to a bidder who is not lowest based upon a bidder’s attaining the SBE Program’s subcontracting percentage. Reading it otherwise renders it meaningless and no limitation at all.

Under the unequivocal, plain language of this municipal code section, the City was required to award the job to Cleveland, despite the fact Cleveland did not reach the SBE subcontracting percentage. The next lowest bid exceeded Cleveland’s bid by more than \$50,000

⁵³ T.d. 262 p. 7.

⁵⁴ Plaintiff’s Exhibits 13 and 13(a), T.p. 875, Cleveland Supp. 44.

and 10%. The third bidder, who also achieved the SBE Program's subcontracting outreach percentage, was even higher in price.⁵⁵

The City's recently concocted interpretation that Cleveland's bid was non-responsive because it did not meet the 35% SBE subcontractor participation percentage, and therefore the City was not required to even consider Cleveland's bid, does not comport with the record evidence that the City did not deem Cleveland's bid "non-responsive" at the relevant time under the City's municipal code provisions. Neither does it comport with the language of CMC §321-37. At the time the bids were reviewed, Cleveland's bid was deemed a qualified bid that simply did not include a high enough subcontractor participation percentage. Therefore, the City Purchasing Agent made the decision to award the contract to Valley despite the presence of the cap provision in CMC §321-37.

The City's tortured interpretation of the monetary cap limitation in §321-37 would effectively eliminate the words "otherwise qualified" from the ordinance. The City argues that a bidder that does not meet the subcontracting outreach percentage is non-responsive and, therefore, not otherwise qualified. "Otherwise qualified" as used in CMC §321-37 has to mean that the bidder is qualified to perform the contract in all respects but has not achieved the SBE Program's subcontracting outreach percentage. The cap limitation would only come into play in a situation like that presented here, where there are at least two qualified bidders for a contract, one of which met the subcontractor percentage but has the higher bid and one which did not meet the subcontractor percentage but has the lower bid.

In this case, the City did not deem either Cleveland or Valley to be non-responsive at the time the bids were reviewed; to the contrary, both bids were deemed qualified

⁵⁵ Plaintiff's Exhibit 20, T.p. 876, City Supp. 53.

by the City's Purchasing Department.⁵⁶ However, when the bids were reviewed by the Office of Contract Compliance to determine compliance with the City's SBE subcontracting percentage, it was determined that Cleveland did not meet the subcontracting percentage and that Valley did. At that point, the cap provision applied and eliminated the City's discretion in awarding the bid; the higher, SBE subcontracting compliant bidder could receive the bid only if the bid was within \$50,000 or 10% of the lower, non-SBE subcontracting compliant bidder. Cleveland's bid was \$1,246,022 lower than Valley's bid. As a result, the City had no discretion under the cap provision to award the contract to any bidder other than Cleveland.

CMC §321-37 does not contain language, despite the City's best attempts to graft language to it, which makes this limitation on discretion applicable only when all bidders have complied with the SBE Program's subcontracting outreach percentage. Such a reading would render the obvious cost-saving intent of the ordinance a nullity. If all "otherwise qualified" bidders complied in meeting the SBE Program's subcontracting outreach percentage, clearly then such compliance would not be an issue, and would not be a factor upon which to base the contract award. In a situation where all "otherwise qualified" bidders met the SBE subcontracting percentage, the threshold trigger of CMC 321-37(c)(4) would never be reached, and *price* would be the determining factor between the higher, SBE subcontracting compliant bidders. The City's interpretation turns the ordinance on its head.

CMC §321-37 must be interpreted according to the plain meaning of the language Council used in that section, in harmony and within the context of all of the City's public bidding ordinances. As this Court long ago decided:

The court must look to the statute itself to determine legislative intent, and if such intent is clearly expressed therein, the statute may not be restricted,

⁵⁶ Plaintiff's Exhibit 22, T.p. 877, City's Supp. 57.

constricted, qualified, narrowed, enlarged or abridged; significance and effect should, if possible, be accorded to every word, phrase, sentence and part of an act, and in the absence of any definition of the intended meaning of the words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.⁵⁷

CMC §321-37(c)(4) is not convoluted despite the City's attempt to make it so. It simply means a contract may not be awarded to a bidder who meets the SBE Program's subcontractor outreach percentage over one who does not where the price differential is greater than \$50,000 or ten percent.

The City would also have the Court find that the limitation contained in CMC §321-37(c)(4) is permissive rather than mandatory. The City asserts that the word "may" in the phrase "the contract 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" means that the City was free to either apply the limitation or not in awarding the contract. Such an interpretation flies not only in the face of the plain language of the Code, but it also flies in the face of common sense and the maxims governing statutory construction. Further, such an interpretation ignores the use of the words "may not" later in the same phrase.

The clear intent of CMC §321-37 is to protect City taxpayers by imposing a monetary limitation on the Purchasing Agent's discretion to disregard the lowest bidder, and to impose a limitation upon the City's discretion to make a decision intended solely to achieve the SBE subcontracting outreach goals. Under the City's interpretation of CMC §321-37, the "lowest" half of the "lowest and best" rule is meaningless. Indeed, to give this code section the

⁵⁷ *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 36 O.O. 554, 78 N.E.2d 370 (at syllabus ¶5).

interpretation urged by the City would give the City administration virtually limitless discretion in awarding contracts, even the ability to disregard City laws relating to public bidding.

This Court has soundly rejected such unfettered discretion. In *City of Dayton, ex rel. Scandrick v. McGee*,⁵⁸ the plaintiff challenged the city's determination of the lowest and best bid in awarding a contract for a public construction project. Two bids were submitted for the project. The qualifications of the two bidders were virtually identical.⁵⁹ Although the plaintiff's bid was the lowest, the city awarded the contract to the other bidder based upon the City's power to make a determination as to which bidder was not only the lowest, but also the best. The city awarded the contract to the higher bidder because he was a city resident and the plaintiff was not.⁶⁰ The city argued that in the exercise of its sound discretion, it was entitled to consider and give controlling weight to this residency factor.⁶¹ The Second District Court of Appeals and this Court disagreed.

First, the Court found that use of the unannounced residency criterion was an abuse of discretion.⁶² However, the Court then went further in its analysis. The Court noted testimony from the city that it would not have used the residency factor if the second lowest bid had been too "many percentages" greater than the lowest bid, and this court struck down this limitless use of discretion as arbitrary:

The evil here is not necessarily that "resident" bidders are preferred but that there are absolutely no guidelines or established standards for deciding by how "many percentages" a bid may exceed the lowest bid and yet still qualify as the "lowest and best" bid. Absent such standards, the bidding process becomes an uncharted desert, without landmarks or guideposts, and subject to a city official's shifting definition of what

⁵⁸ (1981), 67 Ohio St.2d 356, 21 O.O.3d 225, 423 N.E.2d 1095.

⁵⁹ *Id.* at p. 358.

⁶⁰ *Id.* at p. 357-58.

⁶¹ *Id.* at p. 358.

⁶² *Id.* at p. 359.

constitutes “many percentages.” Neither contractors nor the public are well served by such a situation. 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 . . . ⁶³

The same is true here. If the City's interpretation of CMC §321-37(c)(4) is accepted, the City has virtually unlimited discretion when determining which bid is the lowest and best. As shown above, the City's SBE Program does not make a bid non-responsive in the event the bidder fails to achieve the SBE Program's subcontracting outreach percentage. To impose the program in that fashion amounts to an unannounced requirement that contradicts the plain language of the City's own SBE Program rules and the applicable bid documents. If the City may in its discretion disregard the ten percent or \$50,000.00 limitation placed upon its determination of the lowest and best bidder, the City is virtually unlimited in its determination of how “many percentages” the second lowest bidder may exceed the lowest bidder and still be deemed the “best” bidder. This Court has soundly rejected such unlimited discretion. This should be true in situations where the City Council has mandated a limitation. The ten percent or \$50,000 limitation was meant to impose clear guidelines and monetary limitations upon the City Purchasing Agent in making such a determination on the primary (or exclusive) basis of compliance with the SBE's subcontracting outreach percentage. Absent such standards, the City's bidding process would be an “uncharted desert” that serves neither contractors nor the public.

The trial court and the First District were both correct to find an abuse of the City's discretion for failure to abide by its own limitation in CMC §321-37. While the City is correct in pointing out that Ohio municipalities are entitled to discretion in making a

⁶³ *Id.* at p. 360.

determination of a “lowest and best bidder,”⁶⁴ that discretion, as pointed out by the First District, and by this Court in past cases, is not without limits.⁶⁵ 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.’”⁶⁶ A municipality “may by its actions commit itself to follow rules it has itself established.”⁶⁷

The City committed itself to following its own municipal code, but abandoned its own legal determining principles and fixed rules for decision making in this instance in order to achieve the race and gender-conscious goals of the SBE Program that have been determined to be unconstitutional. The City’s professed reasons for failing to apply the monetary cap of CMC §321-37 have been varied (and all spurious), and have even included the City Purchasing Agent testifying at trial that she did not apply the limitation of the ordinance because it was “not in effect when the convention center project was being planned,”⁶⁸ a reason that the City seems to have since (wisely) abandoned here. Such a continuous and deliberate shifting of the excuses for the City’s failure to apply the clear limitation within its own ordinance demonstrates not only the City’s lack of candor on this point, but is also a damning indictment against its assertion that the decision not to apply the monetary cap was governed by any adequate determining principles, fixed rules or standards. The City’s failure to abide by the clear limitation within its own code is nothing less than a hornbook example of abuse of discretion.

⁶⁴ See *Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d, 552 N.E.2d 202.

⁶⁵ *Danis Clarkco Landfill Co. v. Clark Cty Solid Waste Mgmt Dist.*, 73 Ohio St.3d 590, 604, 653 N.E.2d 646, 1995-Ohio-301.

⁶⁶ *Dayton, ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, 21 O.O.3d 225, 423 N.E.2d 1095.

⁶⁷ *Danis*, 73 Ohio St.3d at 603.

⁶⁸ T.p. 494; 443-446, Cleveland Supp. 26, 22-25.

The language contained in CMC §321-37(c)(4) must be construed as a mandatory limitation upon the discretion of the City to award a contract to the lowest and best bidder when that decision is based primarily upon a bidder's compliance with the SBE Program's subcontracting outreach percentage. The City clearly failed to follow its own rules for the awarding of public contracts in this case. In doing so, the City illegally exercised discretion where it had none, and it wrongfully denied Cleveland the contract to which it was legally entitled, at a cost of \$1.2 Million to Cincinnati taxpayers.

D. Cleveland Was Provided With No Pre-Deprivation Due Process, Which Was Required By Law, And Pursued All Post-Deprivation Process Available To It By Seeking Judicial Relief.

Procedural due process requires as one of its core elements the grant of notice and a hearing at a meaningful time and in a meaningful manner.⁶⁹ Due process will also ordinarily require some type of hearing *prior to* the deprivation of a significant property interest.⁷⁰ A critical component of due process “is that an individual be given the opportunity for a hearing *before* he is deprived of any significant property interest.”⁷¹ Where a state employee's random, unauthorized conduct is at issue, adequate state law post-deprivation remedies are implicated, but pre-deprivation remedies are what are at issue when actions are taken “in accordance with an ‘official policy,’” and conduct is not “random and unauthorized...if the state delegated the power and authority to effect the very deprivation complained of.”⁷²

⁶⁹ *Armstrong v. Manzo* (1965), 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62.

⁷⁰ *Memphis Light, Gas & Water Div. v. Craft* (1978), 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30; *Fuentes v. Shevin* (1972), 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556.

⁷¹ *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dept. of Bus. Regulation of Fla.* (1990), 496 U.S. 18, 37, 110 S.Ct. 2238, 110 L.Ed.2d 17.

⁷² *Shepard*, 2007 WL 108288 at *9 (citing *Zinermon v. Burch*, (1990), 494 U.S. 113, 115, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990), and *Allen v. Thomas* (5th Cir. 2004), 388 F.3d 147, 149).

The City attempts to insert a new argument that has not been accepted for review by this Court by arguing that to impose liability on the City under these circumstances would be an improper imposition of respondeat superior principles under 42 U.S.C. § 1983.⁷³ But “[l]ocal governing bodies (and local officials sued in their official capacities) can ... be sued directly under § 1983 for monetary, declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy. In addition, local governments, like every other § 1983 "person," may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the government's official decisionmaking channels.”⁷⁴

The City’s action to award this public contract was taken pursuant to ordinance, and was the official policy of the City. Contracts with the City are entered into only according to the CMC by the Purchasing Agent, as delegated by the City Manager.⁷⁵ The Purchasing Agent acted here with explicit approval by the Assistant City Manager who had supervisory oversight for the convention center project, Timothy Riordan. Mr. Riordan also acted as Board of Control in the contract process, along with full knowledge and participation of a city task force which met each week and also reviewed the contract award process before contracts were awarded.⁷⁶ The City’s insinuation that this was somehow a random, unauthorized act of an employee acting

⁷³ Brief of City p. 8, nt. 51.

⁷⁴ *Monell v. New York City Dep’t of Social Serv.*, (1978), 436 U.S. 658, 690-691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (syllabus at 2).

⁷⁵ CMC 321-1-C, Plaintiff’s Exhibit 14, T.p. 875, Cleveland Supp. 54.

⁷⁶ T.p. 413-419, 434-436, Cleveland Supp. 8-13, 17-19

on her own is without any factual basis. “Conduct is not ‘random and unauthorized’ ... if the state ‘delegated the power and authority to effect the very deprivation complained of.’”⁷⁷

This Court has also recognized in applying the constitutional due process analysis that where “the alleged deprivation was the predictable result of established state procedures,” the state must provide a meaningful opportunity to be heard prior to the taking.⁷⁸ To determine what process would be due, a balancing test applies.⁷⁹ The factors balanced are: “First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the safeguards used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”⁸⁰

The inquiry is drastically foreshortened here for a simple reason: the City failed to provide the most basic element of due process: pre-deprivation notice of the proposed bid award. The City stonewalled Cleveland until after it had already awarded the contract to Valley and provided it no information on the status of the bids or contract award, failing to respond to phone calls and provided no information to Cleveland prior to awarding to Valley.⁸¹ Therefore, Cleveland was only able to request its TRO after the contract had been awarded and executed. The most elementary requirement of due process of notice is missing here.

The CMC provides an opportunity for an appeal where a determination of noncompliance with the SBE Program is found by the City’s staff. The procedure requires the

⁷⁷ *Shepard v. City of Batesville* (Jan 8, 2007), N.D. Miss. No. 2:04CV330-D-B, 2007 WL 108288 at *9, unreported.

⁷⁸ *1946 St. Clair Corp. v. City of Cleveland* (1990), 40 Ohio St.3d 33, 550 N.E.2d 456.

⁷⁹ *Matthews v. Eldridge* (1976), 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18.

⁸⁰ *Id.*

⁸¹ T.p. 599-602, Cleveland Supp. 28, Plaintiff’s Exhibit 27, T.p. 877, Cleveland Supp. 137.

City to immediately notify a bidder of the City's finding and allows an appeal to the Contract Compliance Advisory Board and an opportunity for a hearing and decision by the Board "before the contract is awarded or penalties are imposed, except in emergency situations as determined by the city purchasing agent."⁸² However, it was clear that those provisions did not apply in this case because the City conducted the second drywall bid under an "emergency basis" so as to not delay the convention center project's tight timeline. For the City to now assert that this procedure was in place and could have provided Cleveland with a meaningful opportunity to be heard at a meaningful time is disingenuous at best, especially where the City deliberately delayed informing Cleveland of the bid award to Valley until two weeks *after* the contract was awarded, thereby depriving Cleveland of its opportunity to resolve this matter prior to the award of the drywall contract.

The City argues, perhaps without carefully reviewing the language of its own municipal code and bid documents, that Cleveland did not "even inquire about the City's own protest practice after the drywall contract was awarded to Valley," nor attempt to invoke the procedures in Ohio law, referencing Ohio Revised Code Section 9.312(B).⁸³ Even if pre-deprivation notice had been given, there is not much of a balancing analysis in which to engage in this case. Neither the City's procurement code, CMC Chapter 321, nor the bid documents themselves, provide for any pre-deprivation (nor post-deprivation) process for a bidder to contest a proposed or accomplished contract award.⁸⁴ Nor does the City's code provide for a bidder to utilize the procedures of R.C. § 9.312(B) (a statute which does recognize the need for pre-deprivation due process to be afforded with regard to deprivation of a publicly bid contract). In

⁸² CMC §323.13, Plaintiff's Exhibit 15, T.p. 875, Cleveland Supp. 56.

⁸³ Brief of City, p. 19, n102.

⁸⁴ Plaintiff's Exhibit 14, T.p. 875, Cleveland Supp. 54, 55.

fact, the City's code states just the opposite. CMC 321-7, entitled "Procurement Statutes Declared Inoperable" provides that "Ohio Revised Code Sections 9.31 [other cites omitted] are declared inoperative with respect to contracts of the City of Cincinnati."⁸⁵ It is strange, and disingenuous to say the least, for the City to argue here that Cleveland was entitled to a process which the City's code expressly disallows.

Again, even if R.C. § 9.31 did apply, it also requires notice prior to the final award of any contract, which was never provided to Cleveland. The existence of R.C. § 9.31, and the City's attempt to rely upon it, although misplaced, provides evidence of the fact that deprivation of a contract in the public competitive bidding arena is a "predictable result of established state procedures," and therefore "the state must provide a meaningful opportunity to be heard prior to the taking."⁸⁶ No such opportunity was provided to Cleveland.

The City's reliance upon *Marco Outdoor Advertising, Inc. v. Regional Transit Auth.*⁸⁷ is seriously misplaced because in *Marco* not only did the Fifth Circuit actually agree that a property interest could be created in a disappointed bidder, it also held that *pre-deprivation* process was required to satisfy constitutional standards with regard to the deprivation of a contract in the competitive bidding process, and noted with regard to the argument that "state court injunctive relief is a post-deprivation remedy, [internal cite omitted], the Supreme Court has indicated otherwise."⁸⁸

While pre-deprivation due process was required in this instance for the reasons argued above, this Court has also stated in the past that a plaintiff whose claim arose in the post-

⁸⁵ *Id.*

⁸⁶ 1946 St. Clair, 40 Ohio St.3d 33.

⁸⁷ (5th Cir. 2007), 2007 WL 1723107, 489 F.3d 669.

⁸⁸ *Id.* at 675 (citing *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dept. of Bus. Regulation of Fla.* (1990), 496 U.S. 18, 37, 110 S.Ct. 2238, 110 L.Ed.2d 17).

deprivation context, where the deprivation was not a “predictable result of established state procedures,” must prove the inadequacy of those post-deprivation procedures, including the adequacy of state law tort remedies.⁸⁹ Cleveland diligently pursued the only *post-deprivation* process it had available to it to obtain a remedy: litigation. And the adequacy of state remedies as opposed to federal remedies under 42 U.S.C. § 1983 has been at issue since the inception of this litigation, and is before this Court now.

Cleveland requested injunctive relief on its state law claims at every stage of this proceeding. Cleveland moved quickly to obtain a temporary restraining order following actual notice that the City had awarded the contract to Valley, and one month prior to Valley commencing work on the Project.⁹⁰ In its Motion for a Temporary Restraining Order, which occurred prior to this Court’s decision in *Cementech v. City of Fairlawn*,⁹¹ Cleveland pointed out to the trial court that under Ohio law, for municipal code violations relating to competitive bidding, injunctive relief was the preferred, and perhaps the only, remedy.⁹² Cleveland proved, by clear and convincing evidence, a violation of CMC 321-37’s “monetary cap” provision, which relied upon nothing more than an application of the plain language of that ordinance to the internal City documents analyzing the bids, which demonstrated on their face that compliance with the SBE Subcontracting Outreach Program’s 35% goal was the basis for the City’s award.⁹³ Beyond that, all that was required to figure out that there was a violation was performing the math to see if Valley’s bid was more than \$50,000 or ten percent higher than Cleveland’s. It was, by more than 24 times.

⁸⁹ *Id.*

⁹⁰ T.p. 1132, Cleveland Supp. 43; T.d. 3.

⁹¹ (2006), 109 Ohio St.3d 475, 849 N.E.2d 24, 2006-Ohio-2991.

⁹² T.d. 3; T.p. 11-12, Cleveland Supp. 1-2.

⁹³ City App. 53-58, which were Exhibits to Plaintiff’s Verified Complaint, T.d. 2 and 3.

The potential equal protection violations were also obvious at that point because the City's program document, the SBE Rules and Guidelines, as well as the forms from the Rules and Guidelines incorporated within the bid documents, stated racial goals and preferences on their face. However, at that point the City had not yet abandoned its "Disparity Study" as a potential legal justification for having a race conscious program. That did not occur until much later, in Rodney Strong's deposition.⁹⁴ In fact, the City would not even admit that it had officially adopted its own SBE Rules and Guidelines until trial, despite the fact there were official ordinances authorizing and promulgating them and they were used in the bid documents, which was a matter of some further disingenuousness noted by the trial court.⁹⁵

This was the juncture at which injunctive relief could have been most effectively accomplished, supported by a showing of a clear legal violation of the competitive bidding laws of the City. Paradoxically, the trial court denied the TRO, at least in part, because it was not convinced that Cleveland did not have an adequate remedy at law in damages under 42 U.S.C. § 1983.⁹⁶ The trial court further granted a directed verdict on Cleveland's damage claims, but also denied permanent injunctive relief in its final decision, which came after a hearing on Cleveland's request for a preliminary injunction combined with a hearing on the merits.⁹⁷ The First District noted the absurdity of the result:

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

⁹⁴ T.d. 127 p. 44-45; 81-82, 89-91.

⁹⁵ T.d. 262, p. 4-5; T.d. 279, p. 2-3.

⁹⁶ T.p. 20, Cleveland Supp. 3.

⁹⁷ T.d. 240.

had the absurd result of denying redress because of Cleveland's diligence in asserting its claims.⁹⁸

Cleveland can not be held responsible for the reality that complex litigation of this sort is time consuming and required time consuming discovery efforts by Cleveland. Discovery efforts which were made drastically more difficult and time-consuming due to the City's continuous efforts to delay and play "hide the ball" by refusing to even acknowledge that its own SBE Program Rules and Guidelines were even officially adopted.

SECOND PROPOSITION OF LAW:

A Bidder That Establishes A Violation Of Its Constitutional Due Process Rights Is Entitled To Recover Compensatory Damages In The Form Of Lost Profits Caused By That Violation In An Action Under 42 U.S.C. § 1983.

A. The Right To Seek Compensatory Damages For A Constitutional Violation Is A Fundamental Aspect Of A Plaintiff's Claim Under 42 U.S.C. § 1983 And Cannot Be Displaced By State Law Rules.

42 U.S.C. § 1983 is clear in establishing a right to monetary damages for its violation:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, *shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...*

In *Carey v. Piphus*,⁹⁹ the Supreme Court explained that, "[t]he basic purpose of a §1983 damages award is to compensate persons for injuries caused by the deprivation of constitutional rights."¹⁰⁰

In a later case, the Supreme Court declared that under §1983, compensatory damages may be

⁹⁸ App. of City p. 27.

⁹⁹ (1978), 435 U.S. 247, 98 S.Ct. 1042 (at syllabus).

¹⁰⁰ *Id.*

appropriate, including “out-of-pocket loss and other monetary harms.”¹⁰¹ The court further stated that, “[jury] instructions concerning damages for constitutional violations are thus impermissible unless they reasonably could be read as authorizing compensatory damages.”¹⁰² Thus, the United States Supreme Court has made it abundantly clear that §1983, to accomplish its remedial purpose, allows the recovery of damages:

We have repeatedly noted that 42 U.S.C. §1983 creates “a species of tort liability” in favor of persons who are deprived of “rights, privileges, or immunities secured” to them by the Constitution.” . . . Accordingly, 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.¹⁰³

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

Punitive damages aside, damages in tort cases are designed to provide “compensation for the injury caused to plaintiff by defendant's breach of duty.” [internal citations omitted] Deterrence is also an important purpose of this system, but it operates through the mechanism of damages that are compensatory-damages grounded in determinations of plaintiffs' actual losses. . . . Congress adopted this common-law system of recovery when it established liability for “constitutional torts.” Consequently, “the basic purpose” of §1983 damages is “to compensate persons for injuries that are caused by the deprivation of constitutional rights.” *Carey v. Piphus*, 435 U.S., at 254, 98 S.Ct., at 1047 (emphasis added). See also *id.*, at 257, 98 S.Ct., at 1049 (“damages awards under §1983 should be governed by the principle of compensation”).¹⁰⁴

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

The range of compensatory damages flowing from a constitutional tort and recoverable under § 1983, “which, of course, is a matter of federal law,” may not be limited by

¹⁰¹ *Memphis Community School District v. Stachura* (1986), 477 U.S. 299, 307, 106 S.Ct. 2537, 91 L.Ed.2d 249 (internal citations omitted).

¹⁰² *Id.*

¹⁰³ *Id.* at 306.

¹⁰⁴ *Id.* at 306-307 (citations omitted.)

the states,¹⁰⁵ Where state law rules would frustrate the remedial purpose of § 1983 to provide compensation, “the task will be...one of adapting common-law rules of damages to provide fair compensation for injuries caused by the deprivation of a constitutional right.”¹⁰⁶ Under these well established principles, it would be incorrect for this Court to decide that Ohio law does, or could, divest a plaintiff who establishes a constitutional due process violation of the ability to seek compensatory damages proximately flowing from that violation, including lost profits.

B. The United States Supreme Court And Lower Federal Courts Recognize A Bidder’s Right To Recover Lost Profits As An Element of Compensatory Damages Under § 1983.

The City tries to characterize the statement from the United States Supreme Court in its latest pronouncement on racial set-asides in construction, the *Adarand* case,¹⁰⁷ that a bidder on a competitively bid project who demonstrates a constitutional violation is entitled to lost profits, as mere dicta, but the City is wrong. The court was considering whether *Adarand* had standing:

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 clauses. App. 22-23 (complaint). 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...*¹⁰⁸

¹⁰⁵ *Gamble v. Florida Dept. of Health and Rehabilitative Services* (11th Cir. 1986), 779 F.2d 1509, 1518 n. 11(citing cf *Oklahoma City v. Tuttle* (1985), 471 U.S. 808, 844 (Stevens, J., dissenting); see also *Bell v. City of Milwaukee* (7th Cir. 1984), 746 F.2d 1205.

¹⁰⁶ *Carey*, 435 U.S. at 258.

¹⁰⁷ *Adarand Constructors, Inc. v. Pena* (1995), 515 U.S. 200, 210, 115 S.Ct. 2097, 132 L.Ed.2d 158 (emphasis added).

¹⁰⁸ *Id.* at 210 (emphasis added).

The finding that Adarand had suffered injuries in the form of the loss of the contract, and could seek damages for that loss, was part of the basis of the court's holding that Adarand had standing to sue in federal court.

In a case similar to the one at bar, *Shepard v. City of Batesville*,¹⁰⁹ a federal district court held that a bidder who demonstrated a due process deprivation of a property interest in a publicly bid contract by proving he was never provided with pre-deprivation notice and a hearing was entitled to lost profits, and upheld a jury verdict for lost profits on the contract.¹¹⁰ In its due process analysis, the court noted the fact that several federal circuit courts of appeal had established that property interests could exist in bidders who had been deprived of contracts under various state competitive bidding laws.¹¹¹

In the case of *W. H. Scott Construction Company, Inc. v. City of Jackson, Mississippi*,¹¹² an equal protection challenge to a "small business" program similar to the one challenged here was brought under 42 U.S.C. §1983. The plaintiff combined a request for declaratory judgment with a claim for damages, but did not make a claim for injunctive relief at any point in the proceeding. The trial court issued judgment declaring the racially preferential "small business" program unconstitutional, and awarded the plaintiff its lost profits on the lost contract.¹¹³

In *Hershell Gill Consulting Engineers v. Miami-Dade County*,¹¹⁴ the issue of lost profits as compensatory damages under §1983 arose in the competitive bidding context involving the racially preferential small business program of Miami-Dade County, Florida. The court

¹⁰⁹ *Shepard*, 2007 WL 108288 at *9.

¹¹⁰ *Id.*

¹¹¹ *Id.* at *8.

¹¹² (5th Cir. 1999), 199 F.3d 206.

¹¹³ *Id.* at 219-20.

¹¹⁴ (S.D. Fla. 2004), 333 F.Supp.2d 1305, 1333.

found “Miami-Dade County is liable under §1983 to the plaintiffs for any compensatory damages resulting from the unconstitutional MWBE programs,” in addition to awarding prospective declaratory and injunctive relief.¹¹⁵ Although not proven in the case, the court found that the plaintiff could recover lost profits caused by the unconstitutional program under §1983 as an element of compensatory damages, recognizing that under §1983 “damages for violations of constitutional rights are determined according to the principles derived from the common law of torts.”¹¹⁶

The First District’s decision in this case does not conflict with this Court’s decision in *Cementech v. Fairlawn*.¹¹⁷ *Cementech* foreclosed a disappointed bidder from seeking lost profit damages under Ohio law when a municipality violates those laws in awarding a competitively bid contract, but the facts in *Cementech* did not support a finding of such limited discretion in the municipality that the plaintiff had a legitimate entitlement to the contract at issue, nor an equal protection violation.¹¹⁸ In fact, the plaintiff in *Cementech* never even alleged a property interest in the contract. Thus, whether the abuse of discretion in *Cementech* would have amounted to deprivation of a property interest was completely unaddressed. While Cleveland did initially pursue a claim for damages under state law, it also sought damages under §1983 for deprivation of its property interest in the contract without due process of law.

¹¹⁵ *Id* at 1334.

¹¹⁶ *Id* at 1338.

¹¹⁷ *Cementech, Inc. v. City of Fairlawn* (2006), 109 Ohio St.3d 475, 849 N.E.2d 24, 2006-Ohio-2991.

¹¹⁸ *Id.* (An earlier unreported opinion of the Ninth District in *Cementech* indicated that the abuse of discretion came from the fact that the law director had no legal ability himself under Fairlawn’s code to reject Cementech’s bid as non-responsive for failure to include all documentation, which came nowhere close to proving that Cementech had a legitimate entitlement to the contract if the proper process had been followed). *Id.* at 2003-Ohio-3145, 2003 WL 21396510.

C. Any State Rule of Law Which Denies A Plaintiff Who Has Suffered A Constitutional Violation The Ability To Seek Compensatory Damages Proximately Caused By That Violation As A Remedy Under 42 U.S.C. §1983 Violates The Supremacy Clause.

Any decision to strip §1983 damage remedies from Cleveland to make it “co-exist” with state law relating to competitive bidding disputes violates the Supremacy Clause of the U.S. Constitution.

Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum--although both might well be true--but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws “the supreme Law of the Land,” and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. “The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are....”¹¹⁹

§1983’s remedial statutory scheme to provide a cause of action and substantive remedies to those whose constitutional rights have been violated and state common law relating to public bidding disputes serve different purposes and relate to different duties and public policies. Underlying the state common law decisions not to allow a bidder damages is the goal of protecting the public funds. Those laws create a duty to the public, not to any the individual bidder.¹²⁰ The Congressional intent behind 42 U.S.C. §1983 was to create a remedy for violations of constitutional rights accomplished using color of state law.¹²¹ Or, put differently, to create a remedy for violation of the legal duty flowing to the individual from his local government not to violate his constitutional rights. Very different purposes and duties are implicated by each body of law. Holding that a wrongfully excluded bidder whose constitutional rights have been

¹¹⁹ *Howlett v. Rose* (1990), 496 U.S. 356, 367, 110 S.Ct. 2430, 110 L.Ed.2d 332.

¹²⁰ *Cedar Bay Constr., Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 21, 552 N.E.2d 202.

¹²¹ *Carey*, 435 U.S. 247.

violated should only be able to enforce the duty to the public arising from the competitive bidding laws by means of an injunction simply cannot stand in the context of a coexistent constitutional violation, as this amounts to a state court's judicial abrogation of a substantive federal remedy specifically provided for by Congress in 42 U.S.C. §1983. Furthermore, the same purpose and policy to protect the public purse should not be paramount, and, in fact, should simply not be at issue when a local government does not commit merely a "technical foul" by failing to follow its competitive bidding procedures, but also intentionally enacts a racially preferential legislative scheme directly contrary to law in order to deprive a bidder of a contract where no discretion exists in order to achieve the goals of that scheme, thereby violating the bidder's 14th Amendment equal protection and due process rights.

In the case of *Howlett v. Rose*,¹²² the issue was whether a Florida state court's refusal to entertain § 1983 actions against a school board violated the Supremacy Clause. The Supreme Court found that it did, stating that:

If the District court of Appeal meant to hold that governmental entities subject to § 1983 liability enjoy an immunity over and above those already provided in §1983, that holding directly violates federal law. The elements of, and the defenses to, a federal cause of action are defined by federal law.¹²³

The trial court's decision to direct a verdict on damages in this case amounts to nothing less than a judicially created form of immunity from liability under §1983 in public bidding cases. The duty not to violate individual constitutional rights flows directly from the City to the bidder, not to the public, and 42 U.S.C. §1983 was enacted specifically to provide a damage remedy for such violations, not to protect the public purse from the wrongdoing local government. In fact, to the contrary, §1983 was a waiver of sovereign immunity for municipalities when it was enacted by

¹²² *Howlett*, 496 U.S. 356.

¹²³ *Id.* at 375.

Congress.¹²⁴ The trial court's decision cannot stand under the Supremacy Clause because it would eliminate a substantive remedy for violations of constitutional rights under §1983:

Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. §1983 or § 1985(3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.¹²⁵

The rationale which underlies state common law principles limiting bidders to injunctive relief for violations of competitive bidding laws does not exist in the context of a violation of a bidder's constitutional rights under §1983. They are legal violations of a completely different nature, involving different legal duties, and implicating different purposes and policies. These differences compel different results. In fact, the policy and purpose behind 42 U.S.C. §1983 compels exactly the opposite result: that a damage remedy be afforded for violations of constitutional rights. To find otherwise would both thwart the remedial purpose underlying § 1983, and violate the supremacy clause.

II. CONCLUSION

In this rare instance, Cleveland had a constitutionally protected property interest in this contract as the City had no discretion to award the contract to Valley under CMC 321-37, and admitted that Cleveland would have been awarded the contract but for the City's admitted basis for its award being Valley's attaining the SBE Subcontracting Outreach percentage. The City afforded Cleveland no due process prior to depriving Cleveland of the contract, and under 42

¹²⁴ *Owen v. City of Independence* (1980), 445 U.S. 622, 647 n. 30, 100 S.Ct. 1398, 63 L.Ed.2d 673.

¹²⁵ *Howlett*, 496 U.S. at 376-377 (citing *Martinez v. California* (1980), 444 U.S. 277, 284, 100 S.Ct. 553, 62 L.Ed.2d 481).

U.S.C. § 1983, Cleveland is entitled to seek its compensatory damages in the form of lost profits for this violation of its constitutional rights. Appellee Cleveland Construction, Inc. respectfully requests that this Court affirm the decision of the First District Court of Appeals in all respects.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellee is being mailed to all parties entitled to service under XIV of the Ohio Supreme Court Rules of Practice on the 4th day of September, 2007.



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