

IN THE SUPREME COURT OF OHIO

CLEVELAND CONSTRUCTION, INC., : Case No. 07-0114
: :
Appellee, : :
: :
v. : On Appeal from the
: Hamilton County Court of Appeals,
: First Appellate District
CITY OF CINCINNATI, et al., : :
: :
Appellants. : Court of Appeals
: Case Nos.: C050749, C050779, C050888

BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

Pursuant to Rule VI, section 6 of the Rules of Practice of the Supreme Court of Ohio, Pacific Legal Foundation (PLF) respectfully files this brief amicus curiae in support of Cleveland Construction, Inc. A Motion for Admission Pro Hac Vice of Sharon L. Browne and Ralph W. Kasarda is pending before this Court.

PLF is a nonprofit, tax-exempt foundation incorporated under the laws of the State of California, organized for the purpose of litigating important matters of public interest. PLF has offices in Bellevue, Washington; Stuart, Florida; Honolulu, Hawaii; and a liaison office in Anchorage, Alaska. PLF has numerous supporters and contributors nationwide, including in the State of Ohio.

For more than 30 years, Pacific Legal Foundation has litigated in support of the rights of individuals to be free of racial discrimination and preferences. PLF has participated as amicus curiae in nearly every major racial discrimination case heard by the United States Supreme Court in the past three decades, including *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1* (2007), 127 S.Ct. 2738; *Johnson v. California* (2005), 543 U.S. 499; *Gratz v. Bollinger* (2003), 539 U.S. 244; *Grutter v. Bollinger* (2003), 539 U.S. 306; *Adarand Constructors, Inc. v. Pena* (1995), 515 U.S. 200; *City of Richmond v. J.A. Croson Co.* (1989), 488 U.S. 469; *Wygant v. Jackson Bd. of Educ.* (1986), 476 U.S. 267; and *Regents of the Univ. of Cal. v. Bakke* (1978), 438 U.S. 265. Additionally, PLF attorneys were counsel of record in, among other cases, *Monterey Mech. Co. v. Wilson* (C.A.9, 1997), 125 F.3d 702, *rehg. denied*, (C.A.9, 1998), 138 F.3d 1270; and *Coal. for Econ. Equity v. Wilson* (N.D.Cal.1996), 946 F.Supp. 1480.

In furtherance of PLF's continuing mission to defend individual and economic liberties, PLF strongly supports the policy that public contracts should be awarded to the lowest responsible bidder

and that low bidders who have been wrongfully denied the award of public contracts on the basis of race or sex, or deprived of a constitutionally protected property interest, should be compensated to the full extent of their losses. PLF thus urges affirmance of the First Appellate District's decision in *Cleveland Constr. Inc. v. City of Cincinnati* (2006), 169 Ohio App.3d 627; 864 N.E.2d 1116, which recognized a disappointed bidder's right to seek lost profits in this situation.

Despite Justice John Marshall Harlan's admonition over one-hundred and sixteen years ago that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson* (1896), 163 U.S. 537, 559 (Harlan, J., dissenting), municipalities across the country continue to ignore this truism and the subsequent supporting case law by adopting race- and sex-based preference programs in public contracting, employment, and education.

In the case at bar, the evidence is uncontested that the Cincinnati City Council intentionally adopted a facially unconstitutional minority business enterprise/women business enterprise program. The City Council then abused its authority and discretion by awarding a drywall construction contract to the bidder whose bid exceeded the bid of the lowest and otherwise responsible qualified bidder by an amount that violated the City's own municipal code.

PLF's attorneys are familiar with the legal issues raised by this case and the briefs on file in this Court. Amicus believes that its public policy perspective and litigation experience will provide a necessary additional viewpoint on the issues presented in this case.

ARGUMENT

This case presents an important public policy consideration—whether a municipality should be subject to liability for compensatory damages including lost profits when it rejects the bid of the lowest and otherwise qualified bidder in violation of its own local rules, and where its treatment of bidders and subcontractors using racial- and sex-based classifications violates the Equal Protection

Clause. The public interest can best be served under these circumstances by allowing the lowest qualified bidder in this case to seek compensatory damages, including lost profits.

I

A MUNICIPALITY THAT DEPRIVES A BIDDER OF A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST AND EMPLOYS AN UNCONSTITUTIONAL RACE- AND SEX-BASED PREFERENCE SCHEME IS LIABLE FOR COMPENSATORY DAMAGES, INCLUDING LOST PROFITS, PURSUANT TO 42 U.S.C. § 1983

A. Cleveland Construction Has a Constitutionally Protected Property Interest in the Construction Contract

The Sixth Circuit has held that to prevail on a section 1983 claim, a plaintiff must establish that the defendant acted under the color of state law to deprive the plaintiff of a right secured by the Constitution or laws of the United States. *United of Omaha Life Ins. Co. v. Solomon* (C.A.6, 1992), 960 F.2d 31, 33. A constitutionally protected property interest in a publicly bid contract can be demonstrated in two ways. A bidder can either show that it actually was awarded the contract and then deprived of it, or that, under state law, the City had limited discretion, which it abused, in awarding the contract. *Enertech Elec., Inc. v. Mahoning County Comm'rs* (C.A.6, 1996), 85 F.3d 257, 260 (citing *United of Omaha*, 960 F.2d at 34) (“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 state officials as to whom the contract should be awarded.”).

In this case, the City of Cincinnati had local rules in place which strictly limited its discretion in the award of public contracts. CMC 321-37(c) allows the City of Cincinnati to award a public contract to the bidder who best satisfied its Small Business Enterprise (SBE) program, but only if the selected bid does not exceed an otherwise qualified bid by ten percent (10%) or Fifty Thousand Dollars (\$50,000.00), whichever is lower. CMC 321-37(c). Those rules were violated by the City

of Cincinnati when it awarded the drywall contract to Valley Interior in this case. So in this case, the City of Cincinnati was free to accept Valley Interior's SBE-compliant bid, but only if it did not exceed Cleveland Construction's bid by the \$50,000 or 10% cap. *Cleveland Constr. Inc.*, 169 Ohio App.3d at 635.

The findings of both courts below was that the bid by Valley Interior exceeded the bid of Cleveland Construction by an amount not allowed by CMC 321-37(c), (*id.*), and that Cleveland Construction was an otherwise qualified bidder. *Id.* at 638 ("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.").

The City of Cincinnati did not receive any bid for the drywall contract that was within \$50,000 or 10% of Cleveland Construction's lowest, and "otherwise qualified" bid. Thus, if the City of Cincinnati chose to award a public contract in response to the solicitation for drywall construction bids, its local rules required it to select only Cleveland Construction's bid. By awarding the contract to Valley Interior in violation of CMC 321-37(c), the City of Cincinnati abused its discretion, and deprived Cleveland Construction of a constitutionally protected property interest.

The argument by the City of Cincinnati that Cleveland Construction was not an "otherwise qualified" bidder pursuant to City Municipal Code 321-37(c) is devoid of merit. City Municipal Code 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:

. . . .

- (3) Information concerning compliance with the Non-Discrimination in Purchasing and Contracts rules and regulation issued by the city manager pursuant to . . . section 321-159 [race- and sex-based quotas], or
- (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.)

The term “otherwise qualified bid” does not mean only other SBE-compliant bids, as the City of Cincinnati now argues. Prior to enactment of the “10%/\$50,000 cap” the Assistant City Manager advised the Cincinnati City Council’s Law and Public Safety Committee 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 when 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.

Entry at 15 (July 13, 2005) (citing Rashid Young deposition).

It is clear that the Assistant City Manager was then envisioning the limited situations where a SBE-compliant bid could be accepted over a non-SBE-compliant bid. The statement that “it didn’t make a lot of sense to spend nine hundred thousand dollars more to comply with the regulations of SBE” could not be describing a situation where both hypothetical bids were SBE-compliant, otherwise there would be no need to consider spending an extra nine hundred thousand dollars to comply with the SBE goals.

Other City of Cincinnati documents also indicate that non-SBE-compliant bids could be an “otherwise qualified bid.” The City of Cincinnati’s “Subcontracting Outreach Program Summary” describes SBE goals for various trades, including the drywall contract. Supplement to Merit Brief of Appellant City of Cincinnati at 115. The document states that, “[f]ailure to meet this goal *may* cause a bid to be rejected as non-responsive” (emphasis added). The City of Cincinnati argues in its merit brief that the word “may” denotes “permissive” rather than “requisite.” By the City of Cincinnati’s own definition, the 35% SBE goal is therefore a permissive requirement. Had the City of Cincinnati wanted to exclude all bids that did not comply with the 35% SBE goal, it could have explicitly stated in the Subcontracting Outreach Program Summary that “failure to meet this goal *shall* cause a bid to be rejected.”

The City of Cincinnati is arguing that the City Purchasing Agent had no discretion to even consider the bid of Cleveland Construction. This reasoning is flawed because the automatic rejection of all bids merely for being non-SBE-compliant could result in great expenditure by the City. If only one drywall bid had satisfied the SBE goal, but it exceeded all other lower and responsible bids by \$10 million, by the City of Cincinnati’s reasoning only the higher \$10 million bid would ever be considered. The intent of competitive bidding is to protect the taxpayer, prevent excessive costs and corrupt practices, and provide open and honest competition in bidding for public contracts. *Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgmt. Dist.* (1995), 73 Ohio St.3d 590, 602; 653 N.E.2d 646, 656. The City of Cincinnati’s position does not protect the taxpayer or prevent excessive costs and is therefore against public policy. It is no surprise that the Court of Common Pleas found by clear and convincing evidence that 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.’” Entry, *supra*, at 3.

On the one hand, the City of Cincinnati points out that the City Purchasing Agent has broad discretion in awarding contracts that the agent feels is in the best interest of the City. On the other hand, the City of Cincinnati also claims that the City Purchasing Agent had absolutely no discretion to consider the bid of Cleveland Construction. This argument is illogical, especially when there is no evidence that Cleveland Construction's bid was deficient other than for not meeting the 35% SBE goal. As the First Appellate District court noted, "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." *Cleveland Constr., Inc.*, 169 Ohio App.3d at 638, 864 N.E.2d at 124.

To support its arguments that Cleveland Construction was not deprived of a constitutionally protected property interest, the City of Cincinnati relies on *Peterson Enterprises, Inc. v. Ohio Dep't of Mental Retardation & Developmental Disabilities* (C.A.6, 1989), 890 F.2d 416 (Table), 1989 WL 143563 (unpublished per curiam), and *TriHealth, Inc. v. Bd. of Comm'rs, Hamilton County, Ohio* (C.A.6, 2005), 430 F.3d 783, 793. Reliance on both cases is misplaced.

In the unpublished case of *Peterson*, which the City of Cincinnati references in its merit brief, the Sixth Circuit stated the rule of law regarding constitutionally protected property interests, which it would later again state in *United of Omaha*, 960 F.2d at 34, and *Enertech*, 85 F.3d at 260:

Case law suggests that a legitimate claim of entitlement to the award of a building contract could arise in two ways. First, if Plaintiff actually had been awarded the contract at any procedural stage, he might have claimed a protected interest. *Hixon v. Durbin* (E.D.Pa.1983), 560 F.Supp. 654 Second, if the [contracting authority] 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 if he were the beneficiary of the state law mandate.

Peterson, 1989 WL 143563, at *2.

Peterson is inapplicable here because it did not involve a local rule which limited the discretion of the contracting authority. *Id.* (“The facts of this case, however, suggest that the [contracting authorities] all had discretion in the recommendation and award of the building contract.”). *TriHealth* is also inapplicable, because it did not even involve a contract awarded through public bidding laws or a disappointed bidder. *TriHealth*, 430 F.3d at 793 (“[T]he fact remains that the 2002 Agreement between the County and the University of Cincinnati and University Hospital was not and is not a publicly bid contract. TriHealth did not even submit a bid . . .”).

TriHealth does not stand for the proposition that a disappointed bidder cannot establish a due process violation under 42 U.S.C. § 1983, as the City of Cincinnati attempts to imply. City of Cincinnati Merit Brief at 10. In *TriHealth*, the defendant County Commissioners entered into contracts with certain health care providers to provide health care services to indigent county residents without first conducting public bidding. *Id.* at 786. *TriHealth*, which was not one of the contracting parties, claimed the County Commissioners violated the requirements of Ohio bidding law, and sued for infringement of its due process and equal protection rights. *Id.* The Sixth Circuit recognized that *TriHealth* was claiming a property interest in the *process* of bidding for a contract, not for denial of an actual bid. “*TriHealth*’s due process claim does not actually rest on a claim of entitlement to award of the contract. Rather, *TriHealth* alleges it was entitled under Ohio law to compete for the contract in a competitive bidding process.” *Id.* at 793. Thus, in *TriHealth*, the Sixth Circuit held that even if the defendant County violated Ohio bidding requirements by not obtaining

the contract through public bidding, TriHealth did not have a property interest in the procedure itself, whereby the contract was or ought to have been awarded. *Id.* TriHealth has nothing to do with disappointed bidders, or violation of a strict local rule which limits the contracting authority's discretion.

The facts of this case involve a bidder who was ultimately denied a construction contract because the City of Cincinnati flagrantly abused its discretion by violating Cincinnati Municipal Code section 321-37(c). The purpose of section 321-37(c) was to put a cap on government spending. By violating its own Municipal Code, the City of Cincinnati irresponsibly cost local taxpayers \$1,246,022 when it failed to award the drywall contract to Cleveland Construction, which was the lowest responsible bidder.

B. Cleveland Construction Is Entitled to Compensatory Damages Including Monetary Damages Not Allowed by State Law

The City of Cincinnati deprived Cleveland Construction of a constitutionally protected property interest, and violated the rights of Cleveland Construction under the Equal Protection Clause to the Fourteenth Amendment. Since 42 U.S.C. § 1983 damage remedies are based on federal standards, Cleveland Construction is entitled to compensatory damages, even if such remedies are not contemplated under state law.

“The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty.” *Carey v. Piphus* (1978), 435 U.S. 247, 254-255 (citing 2 Fowler V. Harper & Fleming James, *Law of Torts* 1299 (1956)). This principal applies to civil rights violations because “the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights.” *Farrar v. Hobby* (1992), 506 U.S. 103, 112 (quoting *Carey*, 435 U.S. at 254).

The City of Cincinnati's argument that the remedy of lost profits is unavailable since state law does not allow lost profits to a disappointed bidder ignores the fact that Cleveland Construction's claim is based upon a constitutional tort, the remedy for which is not bounded by state law. For instance, the Eleventh Circuit held that "the state of Florida may not limit the damages available under § 1983 which, of course, is a matter of federal law." *Gamble v. Florida Dep't of Health & Rehabilitative Servs.* (C.A.11, 1986), 779 F.2d 1509, 1518 n.11 (citing *City of Oklahoma City v. Tuttle* (1985), 471 U.S. 808, 844 (Stevens, J., dissenting)).

"Because the Section 1983 damages principles enunciated by the Supreme Court are based on federal standards, state law monetary limitations on the recovery of damages should not be applied to Section 1983 claims." Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* 16-73 (4th ed. 2005). Several courts have held that "state rules limiting the amount of damages recoverable for a violation of federally protected rights are inconsistent with Section 1983 because they frustrate Congress's purpose of providing full compensation for deprivations of federal constitutional rights." *Id.* (citing *Bell v. City of Milwaukee* (C.A.7, 1984), 746 F.2d 1205; *Rosa v. Cantrell* (C.A.10, 1982), 705 F.2d 1208, *cert. denied*, (1983), 464 U.S. 821; *Gamble*, 779 F.2d at 1518 n.11; *Patrick v. City of Florida* (M.D.Ala.1992), 793 F.Supp. 301, 302; *Hegarty v. Somerset County* (D.Me.1994), 848 F.Supp. 257, *aff'd in part*, (C.A.1, 1995), 53 F.3d 1367; *Sager v. City of Woodland Park* (D.Colo.1982), 543 F.Supp. 282; *County of L.A. v. Superior Court of L.A. County* (2000), 78 Cal.App.4th 212; 92 Cal.Rptr.2d 668; *Thompson v. Vill. of Hales Corners* (1983), 115 Wis.2d 289; 340 N.W.2d 704).

The United States Supreme Court has observed that state common law damages rules may not provide a suitable model for section 1983 actions in every case. When they do not, "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.” *Carey*, 435 U.S. at 258. State law will not be used when its application would frustrate the purposes of federal law. “The purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action.” *Id.*

“State statutes purporting to limit the damages available in a suit against a state actor are not applicable to suits brought under § 1983.” *Patrick*, 793 F.Supp. at 302. Therefore, Cleveland Construction’s entitlement to damages arising out of its section 1983 claim should not be limited by state common law remedies.

C. Compensatory Damages May Include Lost Profits

Compensatory damages awarded in a federal Civil Rights Act case may include lost profits. In *Adarand*, the Court impliedly recognized a contractor’s right to seek lost profits as a remedy for constitutional tort liability. “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” *Adarand*, 515 U.S. at 210.

Other federal courts have upheld damage awards consisting of lost profits. In *W.H. Scott Constr. Co., Inc. v. City of Jackson, Miss.* (C.A.5, 1999), 199 F.3d 206, 220, the Fifth Circuit considered an equal-protection challenge to a city policy which impermissibly encouraged racial- and gender-based preferences in city construction projects. Regarding the disappointed bidder’s successful section 1983 claim, the court upheld an \$11,600 award of lost profits.

In *Hershell Gill Consulting Eng’rs, Inc. v. Miami-Dade County, Fla.* (S.D.Fla.2004), 333 F.Supp.2d 1305, the court found the defendant county liable under section 1983 for compensatory damages resulting from its unconstitutional minority and women business programs. The court considered awarding lost profits, but did not, because of a deficiency of proof. *Id.* at 1339. Here,

Cleveland Construction was denied the ability to prove its damages because of the directed verdict by the trial court. “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.” *Cleveland Constr., Inc.*, 169 Ohio App.3d at 645; 864 N.E.2d at 130.

State courts have also awarded lost profits to disappointed bidders depending on the circumstances. “If a bidder has complied with all requirements but is deprived of the contract through some conduct of the awarding authority tantamount to bad faith, then the recovery of lost profits is the measure of damages.” *Peabody Constr. Co., Inc. v. City of Boston* (1989), 28 Mass.App.Ct. 100, 105-06; 546 N.E.2d 898, 902 (citing *Bradford & Bigelow, Inc. v. Commonwealth* (1987), 24 Mass.App.Ct. 349, 359; 509 N.E.2d 30, 36).

The First Appellate District Court of Appeals correctly applied federal law over state law when it recognized Cleveland Construction’s entitlement to claim lost profits, and by distinguishing this case from *Cementech, Inc. v. Fairlawn* (2006), 109 Ohio St.3d 475; 849 N.E.2d 24. In *Cementech*, a disappointed bidder was not allowed to recover lost profits when a municipality violated state competitive-bidding laws. The facts were simply that the City of Fairlawn accepted bids for a service-road project; Cementech’s bid was rejected for lack of documentation, and a higher bid was chosen as the lowest and most responsive. *Id.* The issues before this Court in *Cementech* were limited, and did not include a claim for damages under 42 U.S.C. § 1983. 109 Ohio St.3d at 476; 849 N.E.2d at 27 (“Does the availability of injunctive relief if timely filed but denied preclude an award of lost profits in a municipal contract case?”).

Cementech did not involve deprivation of a constitutionally recognized property interest, or a city’s invidious and invalid race- and sex-based scheme in violation of the Fourteenth Amendment.

Cementech is thus distinguishable because it did not require analysis of Constitution torts or remedies under section 1983 claims.

D. Consideration of the City of Cincinnati's Equal Protection Clause Violation Is Germane to Cleveland Construction's Entitlement to Seek Lost Profit Damages

The Equal Protection Clause mandates that, “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Because the “Fourteenth Amendment[] protect[s] *persons*, not *groups* . . . all governmental action based on race—a *group* classification long recognized as ‘in most circumstances irrelevant and therefore prohibited,’—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.” *Adarand Constructors*, 515 U.S. at 227 (citation omitted). *See also Loving v. Virginia* (1967), 388 U.S. 1, 10 (“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.”).

In *Adarand*, 515 U.S. at 227 (citing *Hirabayashi v. United States* (1943), 320 U.S. 81, 100), the Court stated that free people, “should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons.”

[T]he central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications “constitutionally suspect,” and subject to the “most rigid scrutiny” and “in most circumstances irrelevant” to any constitutionally acceptable legislative purpose.

Adarand, 515 U.S. at 216 (citations omitted). For race-based public contracting policies to withstand strict scrutiny analysis, the City of Cincinnati must demonstrate that its policy of apportioning public contracting opportunities on the basis of race is narrowly tailored to further a compelling interest.

See Croson, 488 U.S. at 505 (majority opinion) (holding that the City of Richmond failed to identify a compelling interest because it could not identify discrimination in the construction industry).

In *Croson*, the Richmond City Council adopted a Minority Business Utilization Plan that required prime contractors to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises. *Id.* at 477. The plan was adopted even though there was no direct evidence of race discrimination on the part of Richmond in awarding contracts, or evidence that the city's prime contractors had discriminated against minority owned subcontractors. *Id.* at 480. In its application of strict scrutiny, the Court held that the City of Richmond failed to act with "a 'strong basis in evidence for its conclusion that remedial action was necessary,'" *id.* at 500 (majority opinion) (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)). The Court also thought it, "obvious that [the] program is not narrowly tailored to remedy the effects of prior discrimination." *Id.* at 508 (majority opinion).

The City of Cincinnati's SBE requirement is inextricably intertwined with its Minority Business Enterprise (MBE) and Women Business Enterprise (WBE) programs. Under the City of Cincinnati's SBE rules and guidelines, all bidders are required to use "good faith efforts" to promote opportunities for minority- and women-owned businesses to the extent of their availability as determined by the City. *Cleveland Constr.*, 169 Ohio App.3d at 640. With respect to the drywall portion of the project, the City of Cincinnati estimated that the availability of minority business entities was 13.09%, and that it was 1.05% for women business entities. *Id.* at 642. These requirements were communicated to bidders in the Subcontracting Outreach Program Summary, with the directions that, "[b]idders should be able to include minority and female firms at the level of availability indicated." Supplement to Merit Brief of Appellant City of Cincinnati at 115.

The SBE program rules and guidelines created race- and sex-based classifications that rendered the program facially unconstitutional. *Id.* at 636. These unconstitutional classifications were thus subsumed within the SBE program, such that during the bidding process contractors had to try to satisfy the racial and gender preferences. The City of Cincinnati impermissibly pressured and encouraged Cleveland Construction and other bidders to draw upon race- and sex-based classifications. *Id.* Under the SBE Program, bidders were required to provide documentation of their efforts to achieve participation of minority subcontractors in a percentage set by the City. *Id.* at 642. Those bidders that did not comply were subject to investigation for discrimination. *Id.*

The City of Cincinnati's SBE program creates preferences on the basis of race and sex, and fails to survive strict scrutiny. The City of Cincinnati conceded that it could not justify race- or sex-based classifications. "At trial, the city did not put forth any argument or evidence to demonstrate that its SBE program could withstand such heightened scrutiny." *Id.* at 640.

The City of Cincinnati's instructions that bidders select subcontractors based upon race and sex is "contrary to both the letter and spirit of a constitutional provision whose central command is equality." *Crosby*, 488 U.S. at 506 (majority opinion). Because the City failed to identify the need for race-based remedial action, "its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause." *Id.* at 511 (plurality opinion).

Cleveland Construction is entitled to monetary remedies pursuant to 42 U.S.C. § 1983 for the loss of its constitutionally protected property and due process rights. The award of lost profits should be allowed in this case as compensatory damages, and in furtherance of public policy.

II

AN AWARD OF COMPENSATORY DAMAGES, INCLUDING LOST PROFITS, WILL BEST SERVE TO DETER FUTURE MISCONDUCT BY MUNICIPALITIES THAT DEPRIVE BIDDERS OF PROPERTY INTERESTS AND ESTABLISH UNCONSTITUTIONAL RACE- AND SEX-BASED PREFERENCE SCHEMES

A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed.

Owen v. City of Independence, Mo. (1980), 445 U.S. 622, 651.

A. An Award of Compensatory Damages Will Serve as a Deterrent in the Public Interest

A primary purpose of competitive bidding in Ohio, under either the state statutes or a municipal charter, is, "to provide for open and honest competition in bidding for public contracts and to save the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms." *Cedar Bay Constr., Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 21; 552 N.E.2d 202, 204 (citing *Bd. of Educ. of Chillicothe City Sch. Dist. v. Sever-Williams Co.* (1970), 22 Ohio St.2d 107, 115; 258 N.E.2d 605, 610 (construing R.C. 3313.46 as relating to the competitive bidding requirement for school boards)). The use of illegal race conscious quotas and the arbitrary abuse of discretion by municipalities undermines the purpose of competitive bidding, and erodes faith in elected officials because such practices encourage favoritism and fraud. The deterrence effect resulting from an award of lost profits is thus required and justified given the facts presented by this case.

The imposition of constitutional tort damage awards against individual officers or their municipal employees does have a deterrent effect on the behavior of these governmental actors and

entities. Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga. L. Rev. 845, 848 (2001). When the government is ordered to pay damages, it is induced to take affirmative remedial steps to eliminate socially undesirable activity. The principal of deterrence was well articulated by the Second Circuit when it stated:

Perhaps even most important to society, however, is the ability to hold a municipality accountable where official policy or custom has resulted in the deprivation of constitutional rights. A judgment against a municipality not only holds that entity responsible for its actions and inactions, but also can encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue.

Amato v. City of Sarasota Springs, N.Y. (C.A.2, 1999), 170 F.3d 311, 317-18.

A judgment consisting of just nominal damages, or damages based simply upon the paltry amount of bid preparation costs, only provides disappointed bidders with a symbolic vindication of their claims, but without real deterrence of future abuses. In addition, there is a danger that low damage awards will lead to the municipality's tolerance of unconstitutional policies and customs, because of such minor consequences.

On the other hand, awards that are based upon provable compensatory damages, as section 1983 contemplates, provide greater incentives for municipalities to be intolerant of constitutional abuses, because of the possibility that voters will discipline the responsible city officials. "[S]ection 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well." *Owen*, 445 U.S. at 651 (see *Robertson v. Wegmann* (1978), 436 U.S. 584, 590-91; *Carey*, 435 U.S. at 256-57).

Professor Gilles, *supra*, identified three important reasons for awarding compensatory damages for the commission of constitutional torts. The first are the important information functions. When constitutional tort victims pursue litigation motivated by the availability of

compensatory damages, the discovery process and media attention unearth the, “cultural and political forces” that gave rise to the abuses. *Id.* at 859.

Second, claims against municipalities cause policy makers to consider reformatory measures. It is these officials who “possess[] the resources and broad vantage point with which to identify the particular deficiencies, and . . . take appropriate corrective action,” thereby furthering the deterrence goal of section 1983 remedies. *Id.* at 863; *see also Owen*, 445 U.S. at 652 n.36 (“In addition, the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates.”).

Finally, Professor Gilles notes that when liability is predicated on a municipality’s unconstitutional policies or customs, the imposition of constitutional tort remedies against the municipality will lead to favorably predictable and salutary effects. Gilles, *supra*, at 867. This assertion is well recognized. Mark R. Brown, in *Deterring Bully Government: A Sovereign Dilemma*, 76 Tul. L. Rev. 149, 153 (2001), proclaims that, “[i]t is no exaggeration to say that almost all commentators today accept the proposition that holding government financially accountable deters future wrongdoing.”

This is not a case where taxpayers are being forced to pay for a bureaucratic manager’s minor indiscretion or administrative blunder, as in *Cementech*. This is a case where the City of Cincinnati’s unconstitutional discriminatory policy and the irrational violation of a city municipal code threaten to undermine the bidding for public contracts. The level of deterrence needed here is thus much higher than in *Cementech*.

The challenge this case presents is determining the level of deterrence needed to prevent the future use of an unconstitutional public contracting scheme based upon race- and gender-based quotas, and the denial of constitutionally protected property interests. If the desired outcome in this

case is for the municipalities of Ohio to be completely intolerant of unconstitutional racial distinctions and deprivations of property interests, then Cleveland Construction's claim for compensatory damages including lost profits should be allowed in furtherance of that goal.

B. The Deterrent Effect of an Award of Lost Profits Will Ultimately Benefit Taxpayers

The establishment of color-blind and gender-neutral ordinances and adherence by municipalities to local rules allow public entities to receive goods and services at the lowest possible cost. As an example, the First District noted that the City of Cincinnati solicited bids for the drywall contract two times, and each time Cleveland Construction submitted the lowest bid. *Cleveland Constr.*, 169 Ohio App.3d at 634-635. Yet the City of Cincinnati rejected Cleveland Construction's bid each time, and ultimately expended over a million dollars more in costs by awarding the contract to a higher bidder. *Id.*

It has been argued that a disappointed bidder should not be allowed to recover lost profits because taxpayers would be injured twice: the first time, through the unjustified additional expenditure of funds on the awarded contract and, then, a second time through the necessity for paying a judgment for lost profits to the aggrieved low bidder. *Hardrives Paving & Constr., Inc. v. City of Niles* (1994), 99 Ohio App.3d 243, 247; 650 N.E.2d 482, 485. However, research has shown this fear to be unfounded.

Professors Theodore Eisenberg and Eric Schwab concluded that constitutional tort litigation under section 1983 has only a limited impact on the public treasury. *See* Theodore Eisenberg, *Cases and Materials on Civil Rights Legislation* 151-62 (3d ed. 1991) (summarizing Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. Chi. L. Rev. 501 (1989); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort*

Litigation, 72 Cornell L. Rev. 641 (1987); and Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719 (1988)).

Professors Eisenberg and Schwab studied field data gathered during the 1980-1981 fiscal year from three major federal districts: the Eastern District of Pennsylvania, the Northern District of Georgia, and the Central District of California. They found that constitutional tort damages comprised only 0.02% of the relevant government entities' budgets. Eisenberg, *supra*, at 159. Even after including the costs of defending lawsuits, Professors Eisenberg and Schwab concluded that their, "study could not support new legislative or judicial restrictions on constitutional tort litigation in the name of reducing the federal docket or decreasing the fiscal drain on state and local defendants." Schwab & Eisenberg, *supra*, 73 Cornell L. Rev. at 780-81. The empirical observations by Professors Eisenberg and Schwab's persuasively refute the policy reasons courts typically rely upon to justify the denial of lost profit awards to disappointed bidders.

Bernard P. Dauenhauer & Michael L. Wells, in *Corrective Justice and Constitutional Torts*, 35 Ga. L. Rev. 903, 923 (2001), further contend that it is not unfair to make taxpayers accountable for the actions of elected officials. This is because the number of taxpayers in a given municipality is generally equal to the number of voters. It is likely then, that these voters/taxpayers reap whatever benefit is to be obtained by the misconduct of their elected officials. That being the case, "it does not seem unfair to hold the voters/taxpayers to account for the misbehavior of either the persons they elect or the persons hired by those elected officials." *Id.*

Affirming that Cleveland Construction is entitled to claim lost profits in this case, rather than just bid preparation costs, will best deter municipalities from future constitutional abuses.

CONCLUSION

The City of Cincinnati established a small business program with provisions that violated the rights of Cleveland Construction under the Equal Protection Clause of the Fourteenth Amendment. In addition, Cleveland Construction was denied a public contract, although it was the lowest responsible bidder, because the City of Cincinnati violated its local rules which strictly limited its discretion in the awarding of public contracts. Cleveland Construction was thus deprived of a constitutionally protected property interest.

Cleveland Construction has a valid claim under 42 U.S.C. § 1983 against the City of Cincinnati and is entitled to compensatory damages. Such damages may include lost profits, to fully compensate Cleveland Construction, and in the public interest, to provide the best deterrence against future constitutional abuses by state municipalities.

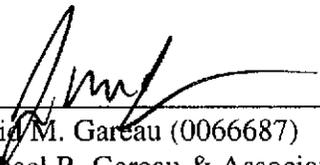
The decision of the First Appellate District to reverse the directed verdict on Cleveland Construction's claim for lost profits under 42 U.S.C. § 1983 should, therefore, be affirmed.

DATED: September 4, 2007.

Respectfully submitted,

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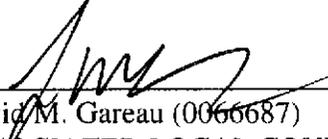
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