

**IN THE  
SUPREME COURT OF OHIO**

CLEVELAND CONSTRUCTION, INC.,	:	CASE NO. 2007-0114
	:	
Plaintiff-Appellee,	:	APPEAL NO. C050749
	:	APPEAL NO. C050779
vs.	:	APPEAL NO. C050888
	:	(Consolidated)
CITY OF CINCINNATI,	:	
	:	COURT OF APPEALS
Defendant-Appellant.	:	FIRST APPELLATE DISTRICT
	:	CASE NO. A-0402638

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**MERIT BRIEF OF AMICUS CURIAE  
NORTHERN OHIO CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS  
URGING AFFIRMANCE  
ON BEHALF OF APPELLEE CLEVELAND CONSTRUCTION, INC.**

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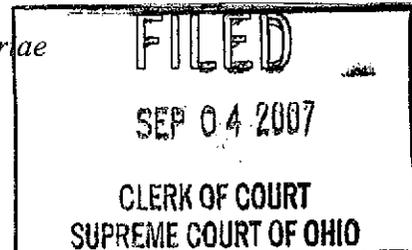
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## I. INTRODUCTION

This case presents a rare and intensely fact-specific situation involving the recognition of a construction project bidder's constitutionally protected property interests by virtue of its competitive bid. Under the particular language of the municipal code at issue and the facts of this case, in light of the bidder's (Cleveland Construction) constitutionally protected property interest, the City was bound to award the contract to Cleveland. The City abused its discretion by ignoring the clear restriction in its Code. The City disregarded its own law to achieve the percentage goals of its SBE Program, which were found by both the trial court and the First District to contain race and gender preferences which bidders were required to implement in subcontracting percentages of their bid to small businesses. That finding of a constitutional equal protection violation is not at issue. This Court has accepted review only of the finding that Cleveland had a property interest in the contract, and is entitled to seek damages of lost profits for being deprived of that contract without due process.

The decision of the First District should be affirmed. It comports with established constitutional jurisprudence governing the creation of property interests, and the unique facts of this case support the decision. The decision not only preserves and promotes the integrity of the competitive bidding process but the right to equal protection by deterring government entities from trodding upon bidders' constitutional rights by requiring such governmental authorities to compensate those whose rights have been violated. The City's assertion that the decision unfairly forces taxpayers to compensate disappointed bidders is misplaced. Public policy favors the right to compensation for constitutional wrongs under 42 U.S.C. § 1983, which mandates such redress whenever a constitutional violation has been proven. Holding local governments responsible for their intentional violations of constitutional rights promotes a desirable deterrent effect resulting in long term savings to taxpayers. "Among the purposes of competitive bidding legislation are the

protection of the taxpayer [and the] prevention of excessive costs.”<sup>1</sup> The most effective and lasting protection of the taxpayers interest is to force local governments to abide by the requirements of their own competitive bidding statutes, which are specifically designed to accomplish that goal, and to provide compensation to victims of constitutional violations. The First District’s decision helps advance those important public interests.

## II. STATEMENT OF AMICUS INTEREST

The Northern Ohio Chapter of Associated Builders and Contractors, Inc., (“the Chapter”) is part of a national association representing more than 24,000 merit shop construction and construction-related firms in 79 local chapters across the United States. ABC and the Chapter adhere to the philosophy that construction projects should be awarded based upon merit to the lowest responsible bidder. ABC’s mission is to encourage open competition in an atmosphere of free enterprise so that contracts are awarded based solely upon merit and to actively protect against governmental law and regulatory or private sector initiatives that undermine or diminish such free enterprise opportunities or principles. The decision of the First District advances the mission of ABC by striking down the unconstitutional race and gender based preferences of the City’s SBE Program, which required contractors to engage in subcontracting portions of their contract based not the competitive merits of a subcontractor’s proposal, but instead upon illegal discrimination on the basis of race and gender. The decision further advances the mission of ABC by holding the City financially responsible for its constitutional violations of Cleveland’s equal protection and due process rights, which promotes a deterrent effect upon Cincinnati and other local governments from engaging in such conduct in the future. This also promotes the efficacy of the competitive bidding

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<sup>1</sup> *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt Dist.* (1995), 73 Ohio St.3d 590, 602, 653 N.E.2d 646.

process, which is designed to provide for the award of public contracts on the basis of a bidder's competitive merits.

### III. STATEMENT OF THE CASE AND FACTS

The basis for the City's failure to award the contract to Cleveland, and the City's award of the contract to Valley Interiors, ("Valley") who was \$1.2 Million higher in price than Cleveland, was Cleveland's failure to subcontract out a sufficient percentage of its work in the percentage established by the City's SBE Subcontracting Outreach Program, (which is a part of the City's Small Business Enterprise (SBE) Program), and Valley's attaining that percentage in its bid.<sup>2</sup>

CMC 321-37, which provides the basis for the City's award, 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.

### IV. ARGUMENT

#### **FIRST PROPOSITION OF LAW:**

**A Responsive Low Bidder on a City Contract has a Constitutional Property Interest in that Contract where the City Abused Its Discretion when it Awarded the Contract to a Higher Bidder Based upon the Higher Bidder's Compliance with a Constitutionally Flawed SBE Program.**

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<sup>2</sup> (T.p. 432, 436-438; 501); Plaintiff's Exhibit 22; T.p. 877).

**A. The Applicable Law**

Property interests “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”<sup>3</sup> In the context of competitive bidding, a person has a property interest in a public contract if the person has a legitimate claim of entitlement to it.<sup>4</sup> To do so, a disappointed bidder must either show that it was actually awarded the contract and then deprived of it or that the government abused its limited discretion in awarding the contract to another bidder.<sup>5</sup> An abuse of discretion “implies an unreasonable, arbitrary, or unconscionable attitude . . . ‘Arbitrary’ means ‘without adequate determining principle; . . . not governed by any fixed rules or standard.’ . . . ‘unreasonable’ means ‘irrational.’”<sup>6</sup> In this case, the City deprived Cleveland of a constitutionally protected property interest without due process of law by abusing its limited discretion in awarding the drywall contract to another bidder when Cleveland’s bid was lowest and best.

**B. Cleveland had a Constitutionally Protected Property Interest in the Contract and was Afforded No Due Process Prior to Deprivation of that Interest.**

While government entities generally do have great discretion in awarding public contracts, a municipality “may by its actions commit itself to follow rules it has itself established.”<sup>7</sup> The City explicitly limited its discretion through the imposition of a monetary cap per CMC §321-37.

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<sup>3</sup> *Bd of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972).

<sup>4</sup> *Cleveland Construction v. Ohio Dept. of Admin. Servs.*, 121 Ohio App.3d 372, 700 N.E.2d 54 (10<sup>th</sup> Dist.1997).

<sup>5</sup> *United of Omaha Life Ins. Co. v. Solomon* (C.A. 6, 1992) 960 F.2d 31; *Enertech Elec. v. Mahoning Cty Commrs* (C.A. 6, 1996), 85 F.3d 257; *Peterson Enterprises, Inc. v. Ohio Dept. of Mental Retardation* (C.A. 6, 1989), 890 F.2d 416, 1989 WL 143563.

<sup>6</sup> *Dayton, ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, 423 N.E.2d 1095.

<sup>7</sup> *Danis Clarko Landfill*, 73 Ohio St.3d at 603.

In the case of the drywall contract, there was a clear monetary limitation imposed on city officials by CMC §321-37 and only by failing to abide by this restriction could the City avoid awarding the drywall contract to Cleveland, the lowest and best bidder. Because the contract was awarded “primarily” on the basis of Valley’s compliance with the SBE Subcontracting Outreach Program, the City’s arbitrary decision to award the contract to Valley, a contractor whose bid was more than 24 times higher than what was permissible under the plain language of CMC §321-37, where the City retained no discretion to do so, deprived Cleveland of a constitutionally protected property interest without due process of law.

The City provided Cleveland with no notice nor any opportunity to be heard prior to its bid award to Valley, violating a fundamental requirement of due process.<sup>8</sup> No pre-deprivation process is provided by the City’s own procurement code, CMC Chapter 321. Contrary to the City’s suggestion that Cleveland could have utilized the procedures of Ohio Revised Code 9.31(B),<sup>9</sup> the Cincinnati Municipal Code expressly makes those procedures inapplicable at CMC 321-7. Where a constitutional deprivation is a “predictable result of established state procedures,” the City must provide a meaningful pre-deprivation opportunity to be heard.<sup>10</sup> The First District was correct to find a violation of Cleveland’s constitutional due process rights that proximately resulted in a deprivation of the contract.

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<sup>8</sup> *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.

<sup>9</sup> City’s Brief, p. 19.

<sup>10</sup> *1946 St. Clair Corporation v. City of Cleveland* (1990), 40 Ohio St.3d 33, 550 N.E.2d 456.

**C. The City Abused Its Discretion in Awarding the Drywall Contract Based on Unannounced Criteria.**

The Supreme Court of Ohio has clearly stated that a contract must be awarded based on announced criteria.<sup>11</sup> The Court has warned against situations wherein there are no standards or guidelines that would both restrain the government from acting arbitrarily and illustrate to a bidder how its bid is to be evaluated so the bidder may maximize its odds of being selected.<sup>12</sup> The Court cautioned that, “Absent such standards, the bidding process becomes an uncharted desert, without landmarks or guideposts. . . . 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.”<sup>13</sup>

In this case, the monetary cap helped the bidder understand how its bid was to be evaluated. Unbeknownst to the bidders, while the City purportedly restrained itself in imposing a “fixed rule,”<sup>14</sup> it blatantly ignored that rule in awarding the contract to Valley. The City’s brazen failure to evaluate bids based on its own announced criteria severely undercuts a bidder’s ability to tailor its bid so that it has the best chance of winning the contract. It also defeats the bidder’s fair expectation that the contract will be awarded based on the application of a fixed set of standards and guidelines.

**D. Appellant’s Reliance On *Trihealth v. Bd. of Cty Commrs and Peterson Enterprises, Inc. v. Ohio Department of Mental Retardation and Developmental Disabilities* is Misplaced.**

In support of its argument that Cleveland has no protected property interest in the drywall contract, the City cites *Trihealth v. Bd. of County Commissioners*,<sup>15</sup> a case involving a civil rights action against the county stemming from the county’s refusal to permit Trihealth, a hospital

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<sup>11</sup> *Dayton, ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 423 N.E.2d 1095.

<sup>12</sup> *Id.*

<sup>13</sup> *Scandrick*, 67 Ohio St.2d at 360.

<sup>14</sup> *Cedar Bay Construction, Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 22, 552 N.E.2d 202.

<sup>15</sup> (C.A. 6, 2005), 430 F.3d 783

partnership, to share in levy funds. The court found, first and foremost, that the case did not even involve a publicly bid contract. Second, Trihealth's argument that denial of its right to competitively bid on the contract deprived it of a protected property interest was erroneous because Trihealth could not claim a property interest in a procedure. Finally, in pure dicta, the court speculated that even if Trihealth had a protected property interest, state law would have afforded it a remedy comporting with due process, specifically declaratory and injunctive relief. However, the court noted that "the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."<sup>16</sup> In Trihealth's particular situation, a declaratory judgment or an injunction would have protected its due process rights, but the court is not suggesting that this is true in every scenario. The City's interpretation of *Trihealth* as a universal statement that Cleveland has no protected property interest is flawed. *Peterson Enterprises, Inc. v. Ohio Department of Mental Retardation and Developmental Disabilities*<sup>17</sup> is likewise inapplicable. In *Peterson*, the facts indicate that there were factors upon which the awarding authority relied, not one factor which actually removed discretion, as here.

## **SECOND PROPOSITION OF LAW:**

**Where a Bidder for a Competitively Bid Contract in Ohio Proves a Deprivation of Its Constitutional Due Process Rights Under 42 U.S.C. § 1983, that Bidder is Entitled to Seek Recovery of Lost Profits on the Contract as Compensatory Damages.**

**A. One of the Central Purposes of 42 U.S.C. § 1983 is to Compensate Parties for Violations of their Constitutional Rights.**

Under §1983, "a party who has been deprived of a federal right under the color of state law may seek relief through an action at law, suit in equity, or other proper proceedings for redress." The basic purpose of §1983 is to compensate persons for injuries caused by the deprivation of their

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<sup>16</sup> *Id.* at 794 (quoting *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001))

<sup>17</sup> (6<sup>th</sup> Cir. 1992), 890 F.2d 416, (Table) 1989 WL 143563, (unpublished per curiam).

constitutional rights.<sup>18</sup> The United States Supreme Court has specifically stated that, “To the extent that Congress intended that awards under §1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.”<sup>19</sup> Violation of a person’s constitutional rights, “creates ‘a species of tort liability’ in favor of persons who are deprived of ‘rights, privileges, or immunities secured’ to them by the Constitution.’ . . . The level of those compensatory damages is ordinarily determined according to the principles derived from the common law of torts.”<sup>20</sup> The court in *Stachura* went on to describe the purpose underlying the award of damages under §1983, stating that, “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.’”<sup>21</sup>

The United States Supreme Court further declared that under §1983, compensatory damages may include “out-of-pocket loss and other monetary harms.”<sup>22</sup> The court elaborated that, “[jury] instructions concerning damages for constitutional violations are thus impermissible unless they reasonably could be read as authorizing compensatory damages.”<sup>23</sup> Thus, the United States Supreme Court has made it clear that §1983, to accomplish its remedial purpose, allows the recovery of damages.

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<sup>18</sup> *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042 (1978).

<sup>19</sup> *Id.* at 255

<sup>20</sup> *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305, 106 S.Ct. 2537 (1986) (internal citations omitted).

<sup>21</sup> *Id.* (internal citations omitted)

<sup>22</sup> *Id.* at 307

<sup>23</sup> *Id.*

**B. The Ability to Seek Lost Profit Damages for the Unlawful Deprivation of Constitutional Rights is Mandated by 42 U.S.C. § 1983.**

The proper application of §1983 permits Cleveland to recover its lost profits as compensatory damages. In *Adarand Constructors v. Pena*, the United States Supreme Court stated that a subcontractor that was not awarded a federal contract due to the contract's subcontractor compensation clause that provided financial incentives to the prime contractor for hiring disadvantaged subcontractors could seek damages for the loss of that contract. Specifically, the Court stated that, “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.*”<sup>24</sup> (emphasis added) Those damages may include lost profits.<sup>25</sup>

In *W.H. Scott Constr. Co., Inc. v. Jackson*, a general contractor brought a §1983 equal protection challenge against Jackson’s “small business” program alleging that the city’s policy promoting minority participation in construction contracts was unconstitutional.<sup>26</sup> The Fifth Circuit upheld the award of lost profit damages.<sup>27</sup>

And in *Hershell Gill Consulting Engineers v. Miami Dade Cty, Fla.*, the issue of lost profits as damages under §1983 arose in the competitive bidding context involving a racially preferential small business program.<sup>28</sup> 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.

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<sup>24</sup> *Adarand Constructors v. Pena*, 515 U.S. 200, 210, 115 S.Ct. 2097 (1995).

<sup>25</sup> *Flores v. Pierce* (C.A. 9, 1980), 617 F.2d 1386; *Chalmers v. Los Angeles* (C.A. 9, 1985), 762 F.2d 753.

<sup>26</sup> *W.H. Scott Constr. Co., Inc. v. Jackson* (C.A. 5, 1999), 199 F.3d 206.

<sup>27</sup> *Id.* at 219-20.

<sup>28</sup> *Hershell Gill Consulting Engineers v. Miami Dade Cty, Fla* (S.D. Fla. 2004), 333 F.Supp.2d 1305.

**C. The First District's Decision in this Case Does Not Conflict with *Cementech v. Fairlawn*.<sup>29</sup>**

Despite the City's assertions to the contrary, the First District's decision in this case does not conflict with this Court's decision in *Cementech*. *Cementech* prohibited a disappointed bidder from seeking lost profit damages under Ohio law when a municipality violates those laws in awarding a competitively bid contract.<sup>30</sup> The abuse of discretion alleged in *Cementech* came nowhere near to proving a legitimate entitlement in that Plaintiff to the contract at issue, and in fact, never even alleged a property interest in the contract as an issue in the case. Thus, whether the abuse of discretion in *Cementech* would have amounted to a property interest 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. The First District acknowledged, as did Cleveland, that *Cementech* resolved Cleveland's claim for damages under state law but not its claim under federal law.<sup>31</sup> *Cementech* does not prohibit a disappointed bidder like Cleveland from seeking its lost profit damages under §1983.

**V. CONCLUSION**

The Decision of the First District should be affirmed in all respects. The decision is correct under well established principles of constitutional law governing due process deprivations, as established by the United States Supreme Court and extended and applied by this Court. The City's failure to abide by its own "fixed rule," the monetary cap of 321-37 which the City itself established to preserve taxpayer funds, all to achieve goals which included blatantly unconstitutional requirements to discriminate on the basis of race and gender, is an abuse of discretion, a priori. Holding the City accountable for its violation of Cleveland's due process rights by recognizing

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<sup>29</sup> *Cementech, Inc. v. City of Fairlawn* (2006), 109 Ohio St.3d 475, 849 N.E.2d 24.

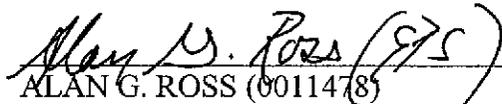
<sup>30</sup> *Id.*

<sup>31</sup> 2006-Ohio-6452, ¶57-58

Cleveland's right to seek compensatory damages in the form of lost profits under 42 U.S.C. § 1983 compensates Cleveland for the constitutional violation it suffered, has the important deterrent effect of dissuading the City from such conduct in the future, and has the long term effect of protecting the taxpayer purse by promoting the efficacy of competitive bidding law.

September 4, 2007

Respectfully submitted,



Handwritten signature of Alan G. Ross in cursive, with the initials "ARS" in parentheses to the right.

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing, Merit Brief of Amicus Curiae Northern Ohio Chapter of Associated Builders and Contractors Urging Affirmance on Behalf of Appellee Cleveland Construction, Inc., was served via ordinary U.S. mail, postage prepaid, upon the following:

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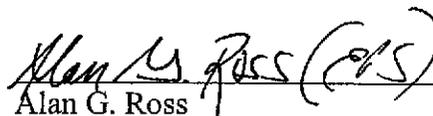
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