

IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANT
CITY OF CINCINNATI

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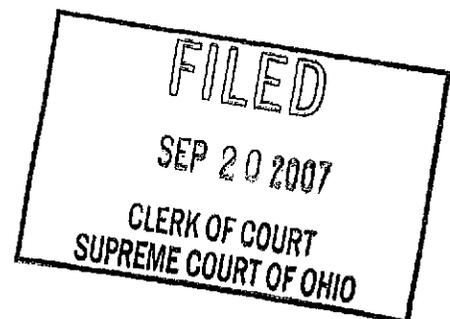


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INTRODUCTION

Under any scenario, Cleveland Construction did not have a constitutionally protected property interest in its attempted “lowest and best bid” for the Convention Center drywall contract. The first scenario is that, as the City contends, the 35% small business requirement was an essential prerequisite for any bidder for the contract. This is evidenced by the fact that the City initially disqualified all bidders because none satisfied that prerequisite. Cleveland Construction also did not satisfy that prerequisite the second time and it again was not considered for the contract for the same reason. The second scenario is that, as the City contends, the “SBE Subcontracting Outreach Program” in Cincinnati Municipal Code Section 321-37(c)(4) refers to the good faith efforts of bidders to include minority-owned and women-owned subcontractors to the extent of their availability. The third scenario is that, as Cleveland contends, the “SBE Subcontracting Outreach Program” in Cincinnati Municipal Code Section 321-37(c)(4) refers to the 35% small business requirement and is accompanied by a financial limit.

The first scenario defeats Cleveland Construction’s claim to a constitutionally protected property interest because it did not comply with the bid requirements. The second scenario also defeats Cleveland Construction’s claim because the lower courts already affirmed that Cleveland Construction’s failure to demonstrate good faith efforts to include minority-owned and women-owned subcontractors to the extent of their availability was irrelevant to the award of the drywall contract.

In any event, the third scenario also falls short for Cleveland Construction for two reasons. Regardless whether Section 321-37(c)(4) means the 35% small business requirement, or the good faith efforts to include minority-owned and women-owned

subcontractors, that section was part of a non-exhaustive set of criteria that could be considered, but was not required to be considered, by the City employees evaluating the “lowest and best bid” for the drywall contract. Furthermore, even *if* that factor was considered to determine the “lowest and best bid,” the ordinance itself adds further discretion by permitting, but not requiring, that the bid be made subject to a financial limit. Cleveland Construction did not have a constitutionally protected property interest in the Convention Center drywall bid.

Moreover, the common law of torts controls Cleveland Construction’s claim to compensatory damages for the alleged deprivation of procedural due process. Cleveland Construction’s own failure to timely pursue its claim to enjoin the award of the Convention Center drywall contract was an intervening cause precluding its claim for compensatory damages in this “lowest and best bid” public contract dispute.

STATEMENT OF FACTS

The Merit Brief of Appellee Cleveland Construction creates a misimpression that the part of the City of Cincinnati procurement system requiring a good faith effort by bidders to include minority-owned and women-owned subcontractors based on their availability was applied by City employees to deny Cleveland Construction the Convention Center drywall bid.¹ It is uncontroverted that did not happen. Instead, as the Court of Common Pleas held: “As applied in this case, however, those [allegedly]

¹ For example, Cleveland Construction falsely asserted that the Court should be less concerned about “protect[ing] the public purse” when a municipality “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” Merit Brief of Appellee, p. 36.

unconstitutional elements² did not cause Cleveland to lose the contract award, rather, Valley was awarded the contract because of its higher SBE subcontracting percentage as calculated *without regard to race or gender*.³ The Court of Common Pleas further held:

The trial elicited no testimony, however, that the City in fact gave weight to bidders' compliance with MBE or WBE availability estimates in making the contract award with regard to subcontracting percentages. Plaintiff failed to establish that City officials looked beyond whether drywall bidders met the City's 35% SBE [race and gender neutral small business] requirement . . . The evidence indicates that the City awarded the contract to Valley, and not to Cleveland, because Valley's bid complied with the City's [race and gender neutral] requirement that 35 percent of the work go to small business enterprises and Cleveland's bid did not.⁴

Furthermore, the Court of Common Pleas emphasized: “. . . Cleveland has not established that the City's race and sex based classifications (as opposed to the City's small business preference) resulted in the loss of the contract award.”⁵ Nevertheless, the lower courts did prospectively enjoin operation of that part of the City's procurement system designed to provide equal opportunity to participate to minority-owned and women-owned subcontractors. This Court declined to accept jurisdiction of that equal protection issue. The City appealed the equal protection issue to the United States Supreme Court and the Petition for Writ of Certiorari is pending.

Cleveland Construction's Merit Brief of Appellee also erroneously asserts that the City “had no discretion under CMC §321-37.”⁶ As discussed in the City's Merit Brief of Appellant, and further discussed below, Ohio's “lowest and best bid” procurement system is inherently discretionary. Cincinnati Municipal Code Section 321-37 enhances

² The City filed a Petition for Writ of Certiorari to the United States Supreme Court challenging the lower courts' ruling that the City's procurement system violated equal protection principles. That Petition is pending (United States Supreme Court Case No. 07-113).

³ App., p. 46.

⁴ It is uncontroverted that the small business requirement is race and gender neutral.

⁵ App., pp. 51-52.

⁶ Merit Brief of Appellee, p. 3.

that discretion with its non-exhaustive list of criteria that may be considered by the City's purchasing agent.

ARGUMENT

PROPOSITION OF LAW NO. I:

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

Cleveland Construction erroneously argues both that City employees lacked discretion under Cincinnati Municipal Code Section 321-37 to award the Convention Center drywall contract to Valley and that the City's purpose in awarding the contract was to "achieve race and gender-conscious subcontract percentage goals."⁷ These allegations are legally and factually inaccurate. First, Cincinnati Municipal Code Section 321-37 expressly enhances the discretion already conferred upon City employees under Ohio law for determining the "lowest and best bid" for a City contract. Second, the Court of Common Pleas and the First District Court of Appeals found that the sole reason the City employees awarded the drywall contract to Valley is that Cleveland Construction failed to meet the race-neutral and gender-neutral 35% small business requirement for that contract.⁸ Further, as the City noted in its Merit Brief and described above, the minority-owned and women-owned businesses components of the City's SBE program played no part in the procurement decision for the Convention Center drywall contract.⁹

In order for Cleveland Construction to prove a constitutionally protected property interest in the drywall contract, it must have had a "legitimate claim of entitlement" to the

⁷ *Id.*

⁸ Merit Brief of Appellant p. 3; App. 38; Merit Brief of Appellee pp. 2-3.

⁹ Merit Brief of Appellant p. 2 n.9.

contract.¹⁰ A legitimate claim of entitlement only existed if City officials were mandated to award the contract to Cleveland Construction. As Cleveland Construction itself admits in its Merit Brief, “the finding of a constitutionally protected property interest in a public contract is likely to be a rare event.”¹¹ Nonetheless, Cleveland Construction alleges that Cincinnati Municipal Code Section 321-37 creates a legitimate claim of entitlement. More specifically, Cleveland Construction claims that its property interest in the drywall contract arises out of the facts of this particular case. Therefore, Cleveland Construction misstates and misinterprets the basic legal premises governing how a legitimate claim of entitlement to a benefit is created, *i.e.*, the fact of entitlement to the benefit must exist, in and of itself, *before* the government applies its regulations. Even assuming *arguendo* that City employees misapplied the City’s regulations governing “lowest and best bids,” that misapplication cannot *retrospectively* create a *preexisting* legitimate claim of entitlement.

Cleveland Construction falsely asserts that the City’s Merit Brief of Appellant engages in “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.”¹² City employees not only *could* reject all bids but *did* reject all bids when the drywall contract was initially bid because none of the bidders satisfied the race-neutral and gender-neutral 35% small business requirement.¹³ Moreover, the issue is not how the City employees acted in this case but whether Ohio law, and Cincinnati Municipal Code Section 321-37 *on its face*, provide the employees with *ex ante* discretion when awarding a contract to the lowest and

¹⁰ *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972).

¹¹ Merit Brief of Appellee p. 11.

¹² *Id.* at p. 10.

¹³ *Id.* at p. 2; T.p. 247-48, 358-59, 512-13; Joint Ex. 11; City Supp. pp 7-8, 10-11, 25-26, 49, 50.

best bidder. Because Ohio law and Cincinnati Municipal Code Section 321-37 reserve discretion in the City's purchasing agent when determining the lowest and best bidder for a contract, Cleveland Construction cannot have a legitimate claim of entitlement to that contract.

Cleveland Construction unsuccessfully attempts to distinguish this case from the holdings in *Peterson Enterprises, Inc. v. Ohio Department of Mental Retardation and Developmental Disabilities*¹⁴ and *TriHealth v. Hamilton County Commissioners*.¹⁵ Cleveland Construction's argument that *Peterson* is inapplicable rests upon its erroneous interpretation of Cincinnati Municipal Code Section 321-37. The plaintiff in *Peterson*, just like Cleveland Construction, erroneously relied on cases where a governmental entity was found to have abused its discretion in awarding a contract because the standards for awarding the contract did not contain any flexibility.¹⁶ However, City employees, like the awarding authority in *Peterson*, retained discretion in the awarding of "lowest and best bid" City contracts because they relied on a non-exhaustive list of factors.¹⁷

In its discussion of *TriHealth*, Cleveland Construction again makes the mistake of ignoring the *ex ante* essence of a legitimate claim of entitlement, an *ex ante* essence existing in and of itself without regard to subsequent conduct. The similarity between the case at bar and *TriHealth* is whether a violation of regulations can create a constitutionally protected property interest.¹⁸ Just like the plaintiff in *TriHealth*, Cleveland Construction cannot establish a legitimate claim of entitlement giving rise to a constitutionally protected property interest in the drywall contract.

¹⁴ 890 F.2d 416, 1989 WL 143563 (6th Cir. 1989).

¹⁵ 430 F.3d 783 (6th Cir. 2005).

¹⁶ *Peterson*, 890 F.2d at *2.

¹⁷ *Id.*

¹⁸ *TriHealth*, 430 F.3d at 793.

Cleveland Construction denies that its bid was non-responsive and cites the City's own bid documents in an attempt to support this argument. Cleveland Construction states that "*Other than compliance with the SBE Program's subcontracting outreach percentages, Cleveland's bid was otherwise acceptable to the Purchasing Agent.*"¹⁹ This statement is factually incorrect. The reason Cleveland Construction failed to secure the contract award is that it failed to meet the prerequisite 35% small business percentage for the contract—not the minority-owned and women-owned subcontracting outreach percentages. Moreover, the very same documents cited by Cleveland Construction clearly indicate that the Office of Contract Compliance (charged with monitoring the SBE component of the contract)²⁰ found Cleveland Construction's bid *unacceptable*.²¹ The reason that Cleveland Construction's bid was *unacceptable* to the Office of Contract Compliance (as both parties and the lower courts acknowledged) was because Cleveland Construction failed to meet the prerequisite small business percentage for the drywall contract.²² The City's own bid documents provided that drywall contract bids would be nonresponsive and rejected if they failed to meet the 35% small business requirement.²³ Since Cleveland Construction's bid did not meet this particular requirement, it indisputably was *nonresponsive* to this requirement.

It is also noteworthy that even if Cleveland Construction was an "otherwise qualified bidder" within the meaning of Cincinnati Municipal Code Section 321-37, City employees still retained discretion under that code provision to award the drywall contract to Valley. The First District Court of Appeals found that Cincinnati Municipal

¹⁹ Merit Brief of Appellee p. 13 (emphasis added).

²⁰ Cincinnati Municipal Section 323-15.

²¹ Plaintiff's Ex. 22; City Supp. p. 57.

²² See n.8, *infra*.

²³ T.p. 367-69; Cleveland Construction Ex. 32; City Supp. pp. 12-14, 15.

Code Section 321-37 “set forth a *non-exhaustive* list of factors that the city purchasing agent could consider in determining the lowest and best bid” for the drywall contract.²⁴ A non-exhaustive list of factors is, on its face, discretionary in nature. The city purchasing agent had discretion to consider any or all of these factors, or others, in awarding the bid. Moreover, the city purchasing agent had discretion to reject any and all bids in the best interest of the City.²⁵ The fact that Cleveland Construction failed to meet the 35% small business requirement does not change the nature of the non-exhaustive list of factors that the City employees utilize when determining whether to award a public contract to a particular bidder.

Cincinnati Municipal Code Section 321-37(c) provides that “the city purchasing agent *may consider* [certain factors] in determining the lowest and best bid.”²⁶ As described in the City’s Merit Brief of Appellant, “may” “denotes the permissive.”²⁷ In the very same code chapter, “shall” conversely “denotes the imperative.”²⁸ The fact that both “shall” and “may” are defined in Cincinnati Municipal Code Chapter 321 and that “may” is the word that the City’s legislative body chose to use in Cincinnati Municipal Code Section 321-37(c) clearly indicate the legislative intent that City employees retain discretion to determine whether or not to apply the 10%/\$50,000 limitation contained in Cincinnati Municipal Code Section 321-37(c)(4). If the City’s legislature intended to create a mandate to be ministerially applied by City employees when awarding public contracts, it would have provided that a contract *shall* be subject to the 10%/\$50,000 limitation.

²⁴ Opinion, Dec. 8, 2006; App. 10 (emphasis added).

²⁵ Cincinnati Municipal Code Section 321-43.

²⁶ Cincinnati Municipal Code Section 321-37(c) (emphasis added).

²⁷ Cincinnati Municipal Code Section 321-1-M; City App. 90.

²⁸ Cincinnati Municipal Code Section 321-1-S1.

The City's statutory interpretation of Cincinnati Municipal Code Section 321-37(c) is not only supported by reference to other code provisions but also by the principles of statutory interpretation under Ohio state law. As this Court has stated, "Although it is true that in some instances the word, 'may,' must be construed to mean 'shall,' and 'shall' must be construed to mean 'may,' in such cases the intention that they shall be so construed must clearly appear. Ordinarily, the word 'shall' is a mandatory one, whereas 'may' denotes the granting of discretion."²⁹ In the case at bar, there can be no question but that the City's legislature intended to reserve discretion to the City's purchasing agent under Cincinnati Municipal Code Section 321-37(c), as the statute *on its face* is based upon a discretionary standard.

Cleveland Construction attempts to bolster its argument that City employees lacked discretion to award the drywall contract to anyone other than Cleveland Construction by citing *City of Dayton, ex. rel. Scandrick v. McGee*.³⁰ In that case, Dayton city officials awarded a contract under a lowest and best bid standard to the highest bidder because he was a city resident.³¹ The *Scandrick* court did not object to the notion of offering preferential treatment to resident bidders over non-residents in awarding public contracts; rather, the issue revolved around the fact that Dayton city officials had not informed the bidders of this criterion until after the bids were opened. On that basis, the *Scandrick* court determined that "due to the lack of announced standards" Dayton's actions constituted an abuse of its discretion.³²

²⁹ *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St.2d 102, 108 (1971) (citing *Dennison v. Dennison*, 156 Ohio St. 146 (1956) (emphasis added)).

³⁰ 67 Ohio St.3d 356 (1981)

³¹ *Id.* at 358.

³² *Id.* at 361.

As Cleveland Construction itself noted, “[A] bidder’s legitimate claim of entitlement is not created by his or her subject 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.”³³ There is a dispositive difference between the *Scandrick* case and the case at bar. Cleveland Construction knew about the 35% small business requirement contained in the actual bid documents and the official invitation to bid.³⁴ All bidders even had to resubmit bids for the sole reason that none of the bidders originally satisfied the 35% small business requirement. Cleveland Construction and all the other drywall contract bidders were put on notice by these documents that the failure to meet the 35% small business requirement—*i.e.*, the failure to be bound to the “rules of the game”—would result in rejection of the bid.³⁵ The fact that City employees retained discretion over the qualitative determination of the lowest and best bidder does not equate with the notion of “unfettered discretion” that this Court rejected in *Scandrick*.

Cleveland Construction erroneously asserts that the City may be liable for the alleged conduct of its employees. It insufficiently argues that the municipal corporation may be liable if the employees acted “pursuant to ordinance.”³⁶ As a matter of law, contrary to Cleveland Construction’s assertions, the City purchasing agent’s alleged abuse of discretion in awarding the drywall contract should not be mistaken as a constitutional deprivation attributable to the City as a municipal corporation. The City might be liable if it had enacted an *unconstitutional ordinance*, but Cleveland

³³ Merit Brief of Appellee p. 9.

³⁴ Cleveland Construction Ex. 29A; Cleveland Construction Ex. 32; Supp. pp. 90, 115.

³⁵ T.p. 367-69; Cleveland Construction Ex. 32; Supp. pp. 12-14, 115.

³⁶ Merit Brief of Appellee, p. 24.

Construction does not challenge the City's ordinance on the ground that the ordinance itself deprives persons of their alleged right to procedural due process.

Cleveland Construction also seems to assert that when awarding the Convention Center drywall contract, a policymaker of the City acted unconstitutionally in his capacity as a policymaker.³⁷ Whether a particular official has "final policymaking authority" for a specific act and whether the act has been taken pursuant to a policy adopted by that official is a question of state law.³⁸ The United States Supreme Court was clear that the mere exercise of discretion by a municipal employee does not subject the corporation to liability.³⁹ Consequently, the City employees' discretionary application of the non-exhaustive "lowest and best bid" criteria authorized by Ohio law and the Cincinnati Municipal Code could not, by definition, be a policymaking act of the City. The selection of a "lowest and best bid" drywall contractor is not a policy statement authorized by the City's policymakers. Cleveland Construction's argument is simply an attempt to circumvent the rule that a municipal corporation does not have *respondeat superior* liability for claims brought pursuant to 42 U.S.C. §1983.

Finally, even if Cleveland Construction 1) had a legitimate claim of entitlement and therefore a property interest in the drywall contract, and 2) the City was liable under *respondeat superior* for the alleged abuse of discretion by City employees, Cleveland Construction did not prove that it was deprived of procedural due process. The burden of proof was on Cleveland Construction to demonstrate that the City's bid protest practices were constitutionally inadequate. Yet Cleveland Construction attempts to use its *own* failures to learn about the City's protest practices—for example, the failure to ask a City

³⁷ *Id.*

³⁸ *St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

³⁹ *Id.* at 126.

official about the process—as evidence that the City’s procedures are inadequate. Cleveland Construction did not invoke the City’s protest practices before filing suit. It did not prove that the City’s practices are facially unconstitutional or that they were unconstitutionally applied in the case at bar. There were also other procedural remedies available to Cleveland Construction under state law.⁴⁰

PROPOSITION OF LAW NO. II

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

Cleveland Construction argues that Ohio’s common law of torts cannot circumscribe its demand for compensatory damages. The City argues that Ohio law can and does limit Cleveland Construction’s demand for compensatory damages and it is immaterial whether Cleveland Construction’s cause of action is a state law claim or a federal law claim.

The City’s position is directly supported by the United States Supreme Court decisions cited by both the City and Cleveland Construction. For instance, in *Memphis Community School District v. Stachura*,⁴¹ the Supreme Court held that “the level of damages is ordinarily determined according to *principles derived from the common law of torts.*” Furthermore, establishing proximate cause is an essential prerequisite to compensatory damages (compensation may be available only for “injuries *caused by the*

⁴⁰ Cleveland Construction failed to recognize that Ohio Revised Code Section 9.31 and Ohio Revised Code 9.312 are two different code sections. While Ohio Revised Code Section 9.31 is expressly disallowed under Cincinnati Municipal Code Section 321-7, Ohio Revised Code Section 9.312 is not.

⁴¹ 477 U.S. 299, 307 (1986) (emphasis added).

deprivation of constitutional rights”⁴²). In *Carey v. Piphus*,⁴³ the Supreme Court held that *the common law of torts* defined “the elements of damages *and the prerequisites for their recovery*”⁴⁴ and that it provided “the appropriate starting point for the inquiry under §1983 as well.”⁴⁵ Therefore, Cleveland Construction’s basic premise is false.

Cleveland Construction also emphasizes *Adarand Constructors, Inc. v. Pena*.⁴⁶ *Adarand*, however, was a constitutional challenge to *federal* regulations and was not a constitutional challenge to *state* policy or practices. *Adarand* provides no support for the proposition that a party accusing a *municipality* of an official policy or custom of depriving citizens of rights to procedural due process is entitled to mandatory compensatory damages under the common law of torts.

Cleveland Construction cites *Shepard v. City of Batesville*⁴⁷ as “a case similar to the one at bar.” However, *Shepard v. City of Batesville* interpreted Mississippi state law and Mississippi’s materially different procurement system. The court further interpreted Mississippi state law to establish prerequisites for recovering damages. The case provides no support for Cleveland Construction’s erroneous proposition that the common law of torts cannot circumscribe its constitutional tort claim for compensatory damages.

*Hershell Gill Consulting Engineers v. Miami-Dade County*⁴⁸ was an equal protection case cited by Cleveland Construction also holding that damages are “determined according to the principles derived from the common law of torts.”⁴⁹ Not surprisingly, given the common law of torts, the Court only allowed compensatory

⁴² *Id.* (emphasis added).

⁴³ 435 U.S. 247, 257-58 (1978).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 515 U.S. 200 (1995).

⁴⁷ 2007 WL 108288.

⁴⁸ 333 F. Supp.2d 1305 (S.D. Fla. 2004).

⁴⁹ *Id.* at 1338.

damages when proximate cause was established (“compensatory damages *resulting from* the unconstitutional MWBE programs”).⁵⁰ Similarly, *W.H. Scott Construction Company, Inc. v. City of Jackson, Mississippi*⁵¹ was yet one more equal protection case cited by Cleveland Construction that required proof of proximate cause as a prerequisite to damages (“and [to] have *caused* compensable injury”).⁵²

Finally, Cleveland Construction asks this Court to subjugate the common law under the Supremacy Clause of the U.S. Constitution.⁵³ The fallacy in Cleveland Construction’s argument is that, as delineated above and in the City’s initial Merit Brief of Appellant, the United States Supreme Court has itself incorporated the common law of torts for the principles underlying consideration of damages in an action filed pursuant to 42 U.S.C. § 1983. Had the Supreme Court looked elsewhere for the prerequisites and elements of damages, the issue might be different. However, the Supreme Court looked to the common law of torts for the conceptual predicate for damages awards including principles of mitigation and causation.⁵⁴

Just as federal law can determine the elements of a federal cause of action by reference to state law (e.g., *state* law determines whether a person has a constitutionally protected property interest subject to procedural due process), federal law can determine the prerequisites to, and elements of, damages. This Court’s decision in *Cementech, Inc.*

⁵⁰ *Id.* at 1333 (emphasis added).

⁵¹ 199 F.3d 206 (5th Cir. 1999).

⁵² *Id.* at 219 (emphasis added).

⁵³ Merit Brief of Appellee, pp. 35-37.

⁵⁴ Cleveland Construction cites the inapposite *Howlett v. Rose*, 496 U.S. 356 (1990), and *Owen v. City of Independence*, 445 U.S. 622 (1980). Those cases simply support the proposition that, in the first instance, federal law determines the elements of a federal cause of action. They do not undermine the fact that federal law can incorporate state law for the elements of a cause of action or for the prerequisites and elements of damages.

*v. City of Fairlawn*⁵⁵ that injunctive relief provides a sufficient remedy for plaintiffs bringing state law challenges in the context of competitive bidding for public contracts is equally applicable to federal law challenges. The common law of torts requires no more and the Supreme Court of the United States relies on the common law of torts.

Cleveland Construction's claimed deprivation of procedural due process was avoidable. Its remedies included complaining to the appropriate City employees so they could investigate its objections and also included seeking timely injunctive relief against the contract award. It did not avail itself of the City's practice of investigating complaints and it stopped pursuing timely injunctive relief.⁵⁶

CONCLUSION

Cleveland Construction did not have a constitutionally protected property interest in the City's "lowest and best bid" procurement process for the drywall work at the Convention Center, there were no findings that the City's practices available to unsuccessful bidders were constitutionally inadequate, there were no conclusions that those unspecified City practices proximately caused Cleveland Construction to lose the drywall contract, injunctive relief is a sufficient remedy for plaintiffs challenging competitive bids for public contracts, and under the common law of torts, and the related principles articulated in *Cementech, Inc. v. City of Fairlawn*, the City is not liable for compensatory damages.

⁵⁵ 109 Ohio St.3d 19, 552 N.E.2d 202 (1990).

⁵⁶ The trial court's Entry dated July 13, 2005 (App. 37, *et seq.*) does not make any findings that the City's practice of investigating complaints was inadequate or that it would have been futile for Cleveland Construction to timely pursue its claim for injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief of Appellant City of Cincinnati's has been sent to David L. Barth, Esq. and Kelly A. Armstrong, Esq., Cors & Bassett, LLC, 537 East Pete Rose Way, Suite 400, Cincinnati, Ohio 45202 and to W. Kelly Lundrigan, Esq. and Gary E. Powell, Esq., Manley Burke, 225 West Court Street, Cincinnati, Ohio 45202 this 19 day of September, 2007, by ordinary U.S. Mail.



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