

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

SUBURBAN MAINTENANCE & CONSTRUCTION CO.,)	CASE NO. CV 12 777280
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs)	<u>JOURNAL ENTRY AND</u>
)	<u>PRELIMINARY INJUNCTION</u>
THE CITY OF CLEVELAND, et al.)	<u>SUSPENDING THE CONTRACT</u>
)	<u>BETWEEN CLEVELAND AND</u>
Defendants)	<u>PLATFORM CEMENT, INC.</u>

John P. O'Donnell, J.:

STATEMENT OF THE CASE

In January, 2012 defendant the City of Cleveland invited general contractors to submit bids for a capital improvement project at the city's football stadium. The contract was eventually awarded to the second lowest bidder, intervening defendant Platform Cement, Inc. The lowest bidder, plaintiff Suburban Maintenance & Construction, Inc., then filed this lawsuit alleging that the city abused its discretion by not selecting its bid. Specifically, the plaintiff claims that the city erred in concluding that Suburban failed to make a good faith effort to incorporate into its bid the use of subcontractors who are qualifying minority-owned, female-owned or Cleveland small businesses under the city's Cleveland Area Business Code.¹

The complaint included a motion for a preliminary injunction by which Suburban asks the court to enjoin the city and Platform from proceeding on the contract and declaring that it

¹ Chapter 187 of the Cleveland Codified Ordinances.

should be awarded to Suburban. A hearing on that motion was held on March 12 and 13, 2012 and this entry follows.

FACTS

Cleveland owns Cleveland Browns Stadium and rents it to the city's National Football League team. The lease requires the city to make and pay for capital repairs and improvements to the stadium. The city and the Cleveland Browns Stadium Company, LLC agreed early this year that the building is in need of certain concrete replacement and restoration, seat refurbishment, waterproofing, preventive maintenance and other miscellaneous repairs. The city set out to solicit bids for the work, the cost of which could not exceed \$5,850,000.

An invitation to bid went out to interested prime, or general, contractors. The project manual provided to potential bidders is a thick packet of documents. Relevant to this case, those documents include: the Cleveland Area Business Code Notice to Bidders & Schedules; Standard Form of Invitation to Bid, General Conditions, Specifications and Bid for a Public Improvement; a Bidder's Checklist; and a page captioned Important Notices.

The Cleveland Area Business Code was enacted to increase the participation of local small businesses, minority businesses, and female enterprises in city contracts. Bidders are notified that failure to comply with the code may result in a rejected bid.² The code allows the city to set participation goals in contracts for Cleveland area small businesses (CSBs), female business enterprises (FBEs) and minority business enterprises (MBEs).³ Participation goals are expressed as a percentage of the entire contract amount. For this project, the explicit goals were for 15% MBE participation, 8% CSB participation, and 7% FBE participation.

² Hearing Exhibit A, project manual, at City of Cleveland Office of Equal Opportunity notice to bidders, section 1.

³ A CSB is, essentially, a small business located in Cuyahoga County; an FBE is a Cuyahoga County business with more than 50% female ownership and managerial control; an MBE is a Cuyahoga County business with more than 50% minority ownership and managerial control.

The goals are just that: goals, not requirements. But the bidding prime contractors are placed on notice that “bidders are required to actively participate and demonstrate good faith in attempting to meet all OEO⁴ goals for this procurement. A good faith effort to meet certified CSB, MBE and/or FBE subcontractor participation goals as established in this contract is of the essence of the contract.”⁵ That portion of the invitation to bidders describes good faith as including: “making and documenting a serious effort” to get eligible subcontractors to participate; “achieving or exceeding” the participation goals, or “documenting the practical steps taken by the bidder in attempting to comply”; and “timely and accurate submittals” of all required forms and schedules.⁶ Moreover, “the final determination of good faith effort shall be made by the Office of Equal Opportunity based upon each bidder’s actions as documented in the required forms and as verified by OEO follow up.”⁷

The forms required by the Office of Equal Opportunity were four schedules. Schedule 1 is a bidder contact information form that includes an “evaluation summary” where the bidder is supposed to show the total dollar amount of CSB, MBE and FBE participation, and then show each dollar amount as a percentage of the total contract. Schedule 2 is a list of *all* prospective subcontractors, the type of work they will provide, and the amount of each subcontract. Schedule 3 is for completion by subcontractors and represents a statement of the subcontractor’s intent to perform. Finally, Schedule 4 is captioned “CSB/MBE/FBE Subcontractor Unavailability/Impracticality Certification.” By this schedule, a contractor who has not met the project’s participation goals is required to set forth honest and purposeful

⁴ Office of Equal Opportunity.

⁵ Hearing Exhibit A, project manual, Part A – Instructions to Bidders, paragraph A-22.

⁶ *Id.*

⁷ *Id.*

attempts to solicit participation by qualified subcontractors and the reasons that, despite those attempts, the goals still were not met.

Five prime contractors submitted bids, which were opened on February 10, 2012. Suburban's bid was the lowest at \$5,634,090. However, the city is not required to award the contract to the lowest bidder. Section 185.01 of the Cleveland Codified Ordinances requires the contract to go to the lowest responsible bidder and section 185.12 reserves the city's right to "consider all elements entering into the question of determining the responsibility of the bidder." A bidder's good faith effort to meet the project's qualified subcontractor goals is one of those elements, and Schedules 1 through 4 of four of the bidders⁸ were then evaluated by the Office of Equal Opportunity to determine whether they met the project's participation goals or, if not, whether the bidder demonstrated a good faith effort to meet them.

The schedules were reviewed by Diana Anthony, an Office of Equal Opportunity employee charged with evaluating the schedules and deciding whether a bid meets the goals or, if not, nevertheless demonstrates a good faith effort to meet them. Anthony testified at the hearing. She acknowledged that "good faith effort" is not defined anywhere in the documents available to bidders and she described how she decided whether a bidder showed a good faith effort to include qualified subcontractors.

First, her knowledge of the project was limited only to the total amount of each bidder's estimate and its four schedules. She did not review the project manual and specifications. Second, she created a spreadsheet showing the total amount of each bid, the percentage of each bid to be performed by CSB, MBE or FBE subcontractors, and total amount of qualified subcontractor contracts. That table is reproduced here:

⁸ The amount of the fifth bid, from Donley's, was almost \$500,000 higher than the fourth-lowest bid and was not evaluated by the Office of Equal Opportunity.

Bidder/Proposer	Contract Amount		%	Amount
Suburban Maintenance	\$5,634,090.00	CSB	0.177%	\$432,600.00
		MBE	0.994%	
		FBE	6.507%	
Platform Cement	\$5,817,000.00	CSB	0.000%	\$1,480,000.00
		MBE	15.128%	
		FBE	10.315%	
Harry S. Peterson Co.	\$6,028,500.00	CSB	2.313%	\$801,758.00
		MBE	1.080%	
		FBE	10.372%	
Grunwell-Cashero Co. ⁹	\$6,512,320.00	CSB	0.000%	\$876,368.00
		MBE	2.065%	
		FBE	11.392%	

To create the table, Anthony checked the subcontractors identified by the bidder against a current list of qualified CSB, MBE and FBE contractors. She also compared the amount of each subcontract shown by the bidder on Schedule 2 to the commitment shown by the individual subcontractor on Schedule 3. Last, Anthony prepared a memorandum to the city's Department of Public Works summarizing her findings and giving her conclusion about whether a bidder did or did not make a good faith effort to meet the contract's preferred subcontractor goals.

That memorandum, which includes the table of percentages, is dated February 13, 2012 and was admitted as Exhibit D at the hearing. Anthony concluded that Platform's total qualified subcontractor participation, as a percentage of the total amount of the bid, was 25.443%. She pegged Suburban's percentage at 7.678%. For the third-highest bidder, the Harry S. Peterson Co., and the fourth-highest, Grunwell-Cashero Co., she found participation percentages of 13.764% and 13.457% respectively. Since it was obvious that no bidder met the participation goals, she concluded the memorandum with a finding that Suburban "has not

⁹ *Sic.* This contractor's name is actually Grunwell-Cashero.

demonstrated a good faith effort in meeting the goal for this contract” but that the other three bidders did prove a good faith effort.

Anthony testified to her reasoning in reaching those conclusions. The gist of her consideration of Platform’s bid is that coming less than 5% short of the goal, by itself, showed a good faith effort to reach the goal. It was more difficult to discern why she found that the two other contractors, who each reached less than half of the stated goal, demonstrated a good faith effort. She testified that she reviewed all the bids in light of the “four points” she must take into account in deciding good faith effort: opportunities, availability, commitment and efforts. These factors are part of the Office of Equal Opportunity’s definition of good faith effort, a document her office has used since 2009 but that is not made known to bidders.¹⁰ Because Anthony and Natoya J. Walker Minor, the director of the Office of Equal Opportunity, each testified that the definition provides four objective criteria for evaluating bids it is worth examining these standards in detail.

The definition provides that “opportunities are verified with the contracting department via: the bid specification, scope of service, and scope of work.” In this case, Anthony admitted she never examined the contract documents. She did not know whether the work required special skills or equipment possessed by only a few contractors. She did not know what amount, if any, of the work would be self-performed by the prime contractor, leaving more or less work available for preferred subcontractors. She did not know the estimated completion date of the contract, which might have affected the willingness of preferred contractors to participate.

As for availability, it is “determined, only, through the Office of Equal Opportunity MBE/FBE/CSB Certification Registry.” As to this factor, Suburban’s bid included a proposed

¹⁰ Hearing Exhibit N.

subcontract with Hydracrete Pumping Co., Inc. Hydracrete was a certified qualified CSB contractor as of the February 10 bid date, but, unknown to Suburban, its certification (which can be renewed easily) was set to expire on February 14. Despite that, on February 13, Anthony rejected Hydracrete as “non-certified.”

To demonstrate the commitment component of a good faith effort, the Office of Equal Opportunity requires that “Schedules 1-4 must be completely filled out and signed” and that “Schedule 4 must list efforts to obtain subcontracting participation.” As for effort, the city mandates that a “Prime Contractor must submit an explanation of unavailability or impracticality when they have not met the goal for a bid or proposal.” While the evidence did show that Suburban’s schedules were less than complete in these respects, the evidence also showed that Platform did not complete Schedule 1 and inaccurately certified on Schedule 4 that it had met the project goal, rendering that schedule incomplete too. Other than suggesting that Platform thought it met the goal and still came close, Anthony offered no rationale why Platform was excused from these requirements while Suburban was penalized for what she considered perfunctory completion of the schedules. For example, on its Schedule 4 Suburban identified Dunlop Industries as a qualifying steel contractor that Suburban asked for a bid. Despite the solicitation, Dunlop declined to bid. However, Anthony checked the registry of qualified contractors for “Dunlap” Industries. Finding none, she gave no credit to Suburban for trying to include Dunlop in its bid. Additionally, while criticizing Suburban for its conclusory attachment to Schedule 4 that because of the kind of work involved “many of these contractors are not qualified or would not submit bids,” she attached no significance at all to Platform’s utter failure to explain the impracticality of using, or the unavailability of, preferred contractors.

Based upon Anthony's opinion that Suburban did not make a good faith effort to meet the participation goals, the city rejected Suburban's bid and, on March 1, entered into a contract with Platform to complete the work.

LAW AND ANALYSIS¹¹

In deciding whether to grant a preliminary injunction, a court must look at four factors: 1) whether there is a substantial likelihood that the plaintiff will prevail on the merits; 2) whether the plaintiff will suffer irreparable injury if the injunction is not granted; 3) whether third parties will be unjustifiably harmed if the injunction is granted; and 4) whether the public interest will be served by the injunction. *Blakeman's Valley Office Equip., Inc. v. Bierdman*, 152 Ohio App.3d 86, 2003-Ohio-1074, ¶36 (7th Dist.).

The party seeking the preliminary injunction must establish a right to the injunction by showing clear and convincing evidence of each element of the claim. *VanGuard Transp. Sys., Inc. v. Edwards Transfer and Storage Co., Gen. Commodies Div.*, 109 Ohio App.3d 786, 790 (10th Dist. 1996). No one factor is dispositive. When there is a strong likelihood of success on the merits, preliminary injunctive relief may be justified even though the plaintiff's case of irreparable injury may be weak. *Cleveland v. Cleveland Elec. Illum. Co.*, 115 Ohio App.3d 1, 14 (8th Dist. 1996).

By law, the city is required to enter into a contract with the lowest responsible bidder. While it is no difficult task to discern the lowest bid, the question of a bidder's responsibility ordinarily involves a determination of many other characteristics of the bidder, such as its

¹¹ Incidentally, Suburban is not challenging the Cleveland Area Business Code's constitutionality even though, as far as this court can discern, it has never been conclusively established. Walker Minor did testify that the statute is constitutional because, unlike the municipality in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), Cleveland performed a disparity study to establish a legally sufficient basis for the statutory set-asides. But a study alone doesn't ensure that the law would survive strict judicial scrutiny, although a similar state program did withstand such scrutiny by the Ohio Supreme Court in *Ritchey Produce Co., Inc. v. Ohio Dept. of Adm. Serv.*, 85 Ohio St.3d 194 (1999).

general ability and capacity to carry on the work, its equipment and facilities, its promptness, conduct and performance on previous contracts, its suitability to the particular task, and other qualities that would help determine whether or not it could execute the contract properly. *Triton Services, Inc. v. Talawanda City School District*, 12th Dist. No. CA2010-05-112, 2011-Ohio-667, 2011 WL 497162, ¶8. In Cleveland, a bidder's good faith effort to achieve the preferred subcontractor participation goals is another factor bearing upon that bidder's responsibility. Indeed, the evidence in this case is that it was the only factor taken into account. Nevertheless, the decision about which bidder submitted a responsible bid involves discretion and "this discretion is not vested in the courts and the courts cannot interfere in the exercise of this discretion unless it clearly appears that the city authorities in whom such discretion has been vested are abusing the discretion so vested in them." *Cedar Bay Constr., Inc. v. Fremont*, 50 Ohio St.3d 19, 21 (1990). The plaintiff's likelihood of success on the merits here therefore depends upon whether Suburban can prove an abuse of discretion.

An abuse of discretion connotes more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude. *Id.*, at 22. "Arbitrary" means without adequate determining principle; not governed by fixed rules or standard. *Id.* "Unreasonable" means irrational. *Id.*

To justify its finding that Suburban did not demonstrate a good faith effort to include the preferred subcontractors the city points to deficiencies in the four schedules submitted by Suburban. For example, the city notes that where a bidder's estimate does not meet the goals for preferred subcontractors then the bidder "must provide an explanation for the failure to meet the goals in Schedule 4"¹² and that Suburban's submittal "failed to justify its failure to

¹² Defendant City of Cleveland's brief in opposition to the preliminary injunction motion, page 4.

attain the goals.”¹³ But Platform, which similarly “failed to justify” in writing on Schedule 4 the reason why its bid fell short of the goal, was deemed to have made a good faith effort while Suburban, which at least filled out Schedule 4 – albeit obligatorily – was deemed lacking. Equally telling is that Grunwell-Cashero did not complete Schedule 4 at all yet Anthony decided that Grunwell-Cashero made a good faith effort to meet the goal. Since Platform’s erroneous Schedule 4 was not held against it and Grunwell-Cashero’s blank Schedule 4 was not held against it there would be no reason for Anthony to hold Suburban’s incomplete Schedule 4 against it.

The city also argues that Suburban “simply did not endeavor to achieve the subcontracting participation goals.”¹⁴ Yet Suburban proposed to use six different preferred contractors¹⁵ and clearly solicited bids from another four,¹⁶ not including many subcontractors identified only by fax number. By contrast, Platform’s schedules show only that it proposed to use four preferred subcontractors and did not list any others Platform solicited but who declined to bid, and Grunwell-Cashero would have used five¹⁷ preferred subcontractors and also failed to name other certified contractors who were invited but declined to participate. Since none of the bidders met the goal, but Platform showed a good faith effort to reach it by soliciting four contractors and Grunwell-Cashero showed a good faith effort by soliciting five, then surely Suburban, by trying to involve at least ten certified contractors, did “endeavor to achieve” the goal.

¹³ *Id.*, p. 5.

¹⁴ *Id.*, p. 8.

¹⁵ Tech Ready Mix, Solar Testing Laboratories, Hydracrete, Mohawk Rebar, Relmec Mechanical, Berkshire Constructors and All Aspects Contracting.

¹⁶ Cuyahoga Fence, Dunlop Industries, Frank Novak & Sons and Dependable Painting.

¹⁷ Roma Designs, Price Builders, Tech Ready Mix, Relmec and Frank Novak & Sons.

Ultimately, the evidence shows that Suburban's subjective efforts to include preferred contractors were at least equal to those of two other bidders, so that the only thing distinguishing Suburban's effort from the other three bidders is the result, *i.e.* the percentage participation that each bidding prime contractor was able to reach. Yet as far as the bidders knew, the only measurement that mattered was 30%, and if that wasn't reached then they would be judged on the good faith of their efforts without regard to whether those efforts resulted in participation at 1% or 29% or anywhere between. But that was not the case. The only conclusion supported by the evidence is that Anthony threw out Suburban's bid because it had the lowest percentage of preferred subcontractor participation. She did so without reference to any fixed rule or standard and therefore acted arbitrarily. If the result – an objective fact – is going to be used to gauge good faith effort – a subjective determination – then that standard should be disclosed.

Because Anthony abused her discretion by using an arbitrary, undisclosed standard to measure the bidders' good faith efforts to reach the project's preferred subcontractor participation goals Suburban is substantially likely to succeed on the merits and a consideration of the other three factors justifying injunctive relief is necessary.

A wrongly jilted bidder for a public improvement contract may not sue to recover its lost profits. *Cementech, Inc. v. Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991, paragraph one of the syllabus. Suburban therefore has no adequate remedy at law and the second factor justifying injunctive relief is present.

The next factor is whether third parties will be *unjustifiably* harmed if injunctive relief is not granted. The city and Platform argued at the hearing that, if the contract between them is suspended or canceled, Platform will suffer a loss of expenses incurred to date in preparing to

do the work, including paying for a building permit. Even assuming that some of Platform's expenses cannot be either refunded or minimized, those losses will exist not because Suburban sued to vindicate its rights but because the city abused its discretion. Platform cannot be the beneficiary of the city's arbitrary decision-making and then complain that it would be unjustifiable to undo the decision because Platform might incur expense as a result. The same goes for the city's own claim that its schedule for repairs is so tight that delaying the repairs by an injunction here "would effectively prevent Cleveland Browns Stadium from being made ready for"¹⁸ a July 29 Kenny Chesney concert and the NFL season. That kind of reasoning would give the city free rein to time an abuse of discretion to avoid any consequence. Any harm to Cleveland is not unjustifiable since it will come from its own actions, not Suburban's.

Finally, the plaintiff must show that an injunction will not disserve the public interest. In this regard, Jack Krebs, who testified as the Browns' project engineer who prepared the drawings and specifications¹⁹, implied that the stadium cannot be used for a concert or football game in its current condition. But if that is the case, the court has no doubt that the public will be protected from whatever hazard an unrepaired stadium represents by the city not permitting it to be used until it is fixed. Krebs also testified that it would be difficult to use the stadium while repairs are in progress. That may be true, but there is no evidence to suggest that such practical obstacles to the full use of the stadium during construction cannot be overcome by a solution that protects the public while minimizing the contractors' expense and duplication of effort.

¹⁸ Cleveland's br. in opp., p. 2.

¹⁹ See Hearing Exhibit A, at Ordinance No. 9-12: "the Cleveland Browns will donate to the City, without charge, the plans and specifications for making the Capital Repairs."

CONCLUSION

The plaintiff has shown: a substantial likelihood of success in proving that the defendant City of Cleveland abused its discretion by finding that Suburban did not make a good faith effort to meet the qualified subcontractor participation goals on this project; that it has no adequate remedy at law; that no third parties will be unjustifiably harmed by an injunction suspending Platform's contract; and that an injunction will not disserve the public. Therefore, the plaintiff's motion for a preliminary injunction is granted.

The preliminary injunction set forth below is intended to restore the status quo as it existed immediately prior to the city's decision that Suburban did not demonstrate a good faith effort to include preferred subcontractors, and to maintain that status quo until a jury decides whether the city abused its discretion. Contrary to the plaintiff's suggestion in its motion for a temporary restraining order, a bond should be required since there was evidence at the hearing of pre-mobilization efforts by Platform and the city. A bond of \$15,000 will therefore be a condition of the preliminary injunction.

PRELIMINARY INJUNCTION

Based upon the foregoing, the March 1, 2012 contract for capital improvements to Cleveland Browns Stadium between the City of Cleveland and Platform Cement, Inc. is suspended and those defendants, and their agents, are enjoined from undertaking any activity in furtherance of the parties' contractual obligations. This order is effective upon service on the defendants and the filing by plaintiff Suburban Maintenance & Construction, Inc. of a bond in the amount of \$15,000.

This order will remain in effect until further order of the court.

A discovery and trial schedule will be set by a separate order.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: _____

CERTIFICATE OF SERVICE

A copy of this journal entry was sent by e-mail on March 22, 2012, to the following:

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Judge John P. O'Donnell