

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

LANDSCAPE CONSULTANTS OF
TEXAS, INC., and
METROPOLITAN LANDSCAPE
MANAGEMENT, INC.,

Plaintiffs,

v.

CITY OF HOUSTON, TEXAS, and
MIDTOWN MANAGEMENT
DISTRICT,

Defendants.

Civil Action No. 4:23-cv-03516

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT, AND
MEMORANDUM IN SUPPORT,
AGAINST DEFENDANT CITY
OF HOUSTON**

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MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Plaintiffs Landscape Consultants of Texas, Inc., and Metropolitan Landscape Management, Inc., move this Court for Summary Judgment and an order declaring Defendant City of Houston's Minority, Women, and Small Business Enterprise (MWSBE) program unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983, and permanently enjoining enforcement thereof.

INTRODUCTION

Landscape Consultants of Texas and Metropolitan Landscape Management (Plaintiffs) are two small Houston-area landscaping companies. They regularly contract with governments in and around the City of Houston. For years, the City of Houston's MWSBE Program (Program) has put these small businesses at a significant disadvantage because of the race of their owner. This blatant and unconstitutional racial discrimination must stop, and it must stop immediately.

With discovery still open, Plaintiffs are aware of the unusual posture of this motion for summary judgment. But it is Houston's unilateral actions that have forced their hand. Rather than cease what is an obviously unconstitutional MWSBE Program while it adopts a replacement, Houston has asked this Court to allow it to continue unlawfully discriminating against contractors while it pursues a strategy that it believes might moot the case and divest the Court of jurisdiction. This tactic is not only a transparent attempt to dodge accountability but also a flagrant abuse of

the legal process. It effectively seeks to place Houston above the law, allowing it to evade immediate judicial scrutiny by dangling the mere possibility of future compliance. As the concurrently-filed opposition to Houston's stay motion argues, that attempt should be rejected. ECF No. 43.

Not only should the Court reject Houston's motion for a stay, the Court ought to declare the Program unconstitutional and enjoin Houston from enforcing it. There is no need to further the charade that the current MWSBE Program could survive constitutional scrutiny. The evidence is overwhelming and irrefutable.¹ Houston admits that it knows of no evidence of a prime contractor discriminating in the past five years. Ex. 1, City of Houston's Resp. to Pltfs.' Requests for Admissions No. 4. Houston admits that it has not adopted any study that identifies discrimination in public contracting in the past five years. Ex. 1, No. 6. And Houston admits it knows of no constitutional or statutory violation related to its public contract procurement process in the past five years. Ex. 1, No. 20. Each of these admissions independently

¹ Indeed, the unconstitutionality of the current program is so painfully obvious even the Mayor and City Attorney recognize it. *See* Houston Television, Houston City Council Consolidated Session Meeting (Jan. 17, 2024), <https://houstontx.new.swagit.com/videos/295029> at 39:29 (City Attorney Arturo Michel: "You have to have a disparity study to show what the issue is. They get stale over time. Ours is now stale."), 39:43 (Mayor John Whitmire: "We probably need to review the process to emphasize how important it is. It seems to me like some of the valuations are pretty subjective. I heard the other day that one prime [contractor] had gone through 31 possible [MWBE] subs and the issue wasn't resolved and the firm was rejected, so it just seems to me like we need to review our process, support it, and be prepared to go to court with our strongest case.").

suffice to prove that the race-based Program does not further a compelling government interest. Together they undeniably compel the conclusion that the Program is unconstitutional.

The entire impetus for the Program is a disparity study that is nearly two decades old.² Relying on historical grievances to justify contemporary inequities is a legal and moral anachronism that has no place in a society that aspires to be fair and just. No Court has ever upheld a race-conscious set-aside program based on decades-old disparities. This Court should not be the first. When and whether Houston adopts a new discriminatory procurement policy does nothing to change the fact that the one before the Court is unconstitutional.

STATEMENT OF FACTS

City of Houston's MWSBE Program

Houston's MWSBE Program exists to "stimulate the growth of local minority, women, and small business enterprises by encouraging the full participation of these business enterprises in various phases of city contracting." Houston Code § 15-81(a). The MWSBE Program is not intended to "remedy any single specific, past violation of the U.S. Constitution," Ex. 2, City of Houston's Resp. to Pltfs.' Interrogatories No. 7, but is rather "designed to mitigate and remedy the effects of past discrimination and its lingering effects against minority and women-owned

² Office of Business Opportunity, Disparity Study, https://www.houstontx.gov/obo/disparity_study.html.

businesses, and to make public contracting opportunities equally available to such businesses.” Ex. 2, No. 4. In pursuit of this objective, the City Council sets annual citywide percentage goals for city contracts in three areas: construction, goods and nonprofessional services, and professional services. Houston Code § 15-83(b). City departments then set contract-specific percentage goals for individual contracts, with limited exceptions. Houston Code §§ 15-82, 15-83(c)(1)–(2). Companies awarded city contracts who do not satisfy the contract-specific percentage goal or prove good faith efforts to do so can be banned from all Houston contracts for five years. Houston Code § 15-86(a).

Every five years, Houston “shall make its best efforts” to review the MWSBE program to determine if its racial preferences are still necessary. Houston Code § 15-81(b). The most recent comprehensive study of gender and racial disparities in Houston public contracting is dated December 31, 2006 (2006 Disparity Study).³ At a City Council meeting on January 17, 2024, Houston City Attorney Arturo Michel admitted that the 2006 Disparity Study “is now stale.”⁴ Houston received but never released a 2016 comprehensive disparity study. *Supra* n.1. On March 28, 2023, Houston again contracted for a comprehensive disparity study. Hoyrd Aff. ¶ 5, ECF

³ Mason Tillman Associations, Ltd., *The City of Houston Disparity Study*, (Dec. 2006) <https://www.houstontx.gov/obo/docsandforms/2006-COH-Disparity-Study.pdf>.

⁴ Houston Television, Houston City Council Consolidated Session Meeting (Jan. 17, 2024), <https://houstontx.new.swagit.com/videos/295029> at 39:29.

No. 41-1. According to the Interim Director of the City’s Office of Business Opportunity, this disparity study was “expected” to be provided to City administrators by May 1, 2024 (ECF No. 41 at 2; Ex. 2, Hoyrd Aff. ¶ 6) or May 15, 2024 (Hoyrd Aff. ¶ 5, ECF No. 41-1). As of the date of this motion, Plaintiffs are unaware if that has occurred.

Houston has specific policies in place that forbid discrimination in awarding public contracts. Ex. 1, No. 3. It has identified no prime contract awards based on intentional discrimination against minority-owned business enterprise (MBE) or woman-owned business enterprise (WBE) bidders in the last five years, nor has it disciplined any employee or City official for discriminating in the award of public contracts during that period. Ex. 1, Nos. 1, 2. In fact, Houston has not identified *any* specific Constitutional or statutory violations related to its public contracting or procurement process or awards in the last five years. Ex. 1, No. 20. Instead, “[t]he compelling interests advanced by the MWSBE program include the City of Houston’s attempts to remedy past discrimination by rectifying its own actions.” Ex. 1, No. 4.

The Plaintiffs

Plaintiffs Landscape Consultants of Texas, Inc. (Landscape Consultants) and Metropolitan Landscape Management, Inc. (Metropolitan) are small family-owned landscaping businesses that share approximately fifty employees. Thompson Decl.

¶ 3. The companies have operated in the Houston area since 2006, and approximately 80–90 percent of each company’s annual revenue comes from winning local government landscaping contracts. *Id.* at ¶¶ 2, 4. Neither Landscape Consultants nor Metropolitan qualify as an MBE or WBE under Defendant City of Houston’s MWSBE Program, Houston Code § 15-82. *Id.* at ¶ 5.

Procedural History

Plaintiffs filed their Complaint on September 19, 2023. ECF No. 1. On January 12, 2024, this Court denied separate motions to dismiss filed by Houston and codefendant Midtown Management District (Midtown). ECF No. 36. On May 6, 2024, Houston filed an opposed motion to stay the lawsuit pending its receipt and review of the 2024 disparity study and the City Council’s enactment of amendments to Chapter 15, Article 5 of the City’s Code of Ordinances consistent with the 2024 disparity study. ECF No. 41. Plaintiffs filed their opposition to Houston’s motion to stay on May 28, 2024. ECF No. 43.

STANDARD OF REVIEW

Under Fed. R. Civ. P. 56(a), summary judgment is appropriate where the moving party “shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Wilson v. Tregre*, 787 F.3d 322, 325 (5th Cir. 2015) (quoting Rule 56(a)). “A factual dispute is ‘genuine’ if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Crowe v. Henry*, 115 F.3d 294, 296 (5th Cir. 1997) (citing *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). Where the nonmoving party bears the burden of proof on an issue at trial, the movant need only point to the absence of evidence, shifting the burden to the nonmoving party to show why summary judgment should not be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

ARGUMENT

The “core purpose” of the Equal Protection Clause is “doing away with all governmentally imposed discrimination based on race.” *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (*SFFA*) (cleaned up) (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)); *see also id.* at 214 (“Racial discrimination is invidious in all contexts.”) (cleaned up) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991)). Thus, the Supreme Court has “consistently denied the constitutionality of measures which restrict the rights of citizens on account of race.” *Id.* at 205 (quoting *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967)). To satisfy the Constitution, a statute or regulation that discriminates based on race must “survive a daunting two-step examination” of strict scrutiny. *Id.* at 206. That is, the statute’s racial discrimination must (1) further a compelling government interest, (2) in a manner that is “‘narrowly tailored’—meaning ‘necessary’—to achieve that interest.” *Id.* at 206–07 (quoting *Fisher v. Univ. of Tex.*, 570 U.S. 297, 311–12 (2013)).

Houston has no compelling interest that it can use to justify its racially discriminatory MWSBE Program. The compelling interest requirement is designed to “assur[e] that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). Under current Supreme Court precedent, there are only two recognized interests that can be sufficiently compelling to allow the government to treat individuals differently based on race: (1) “remediating specific, identified instances of past discrimination that violated the Constitution or a statute,” and (2) “avoiding imminent and serious risks to human safety in prisons.” *SFFA*, 600 U.S. at 207.

For three undisputed legal reasons, Houston cannot show that its MWSBE Program serves a compelling governmental interest. First, it flatly admits that it cannot identify any “specific Constitutional or statutory violations related to its public contracting or procurement process” in the past five years. Ex. 1, No. 20. Second, Houston cannot identify or specify any discrimination within Houston contracting in the past five years. Ex. 1, Nos. 2, 4, 5. Third, Houston’s MWSBE Program is not based on any contemporary evidence of disparities or discrimination within the Houston area. Ex. 1, Nos. 6, 22. Each of these bases independently suffice to grant Plaintiffs’ motion for summary judgment. Together, they make Houston’s MWSBE Program the most obviously unconstitutional public procurement program in the nation.

First. *SFFA* clarified what *Croson* said over 35 years ago: government may not enact race-conscious set-aside programs unless there is an underlying statutory or constitutional violation that it is attempting to remedy. *SFFA*, 600 U.S. at 207; *Croson*, 488 U.S. at 500. *Croson* dealt with a contracting program in Richmond, Virginia, that required prime contractors to set aside 30% of their contract dollars to minority business enterprises. *Id.* at 477–78. In remarking on the type of interest that is needed to uphold such a facially discriminatory program, the Court explained that courts must undertake a “searching judicial inquiry into the justification” to ensure that governments are “pursuing a goal important enough to warrant use of a highly suspect tool.” *Id.* at 493. Richmond’s plan failed because it had “nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry.” *Id.* at 500.

Any argument that this holding of *Croson* is not binding on Houston is no longer tenable after *SFFA*. The Court could not have been clearer that the only interest sufficiently compelling to justify a race-conscious program is one that attempts to remedy prior statutory or constitutional violations. *SFFA*, 600 U.S. at 207. For its part, Houston admits that it knows of no “specific Constitutional or statutory violations related to its public contracting or procurement process or award” in the past five years. Ex. 1, No. 20. Given this admission, plaintiffs are entitled to summary judgment as a matter of law.

Second. Despite the clarity of the Supreme Court on this point, Houston believes it is not required to show any statutory or constitutional violation to maintain its MWSBE Program. Ex. 2, No. 7. Instead, Houston states that the Program can be upheld because it is “designed to mitigate and remedy the effects of past discrimination and its lingering effects against minority and women-owned businesses, and to make public contracting opportunities equally available to such businesses.” Ex. 2, No. 4.

Assuming, *arguendo*, that Houston is not required to show its Program is designed to remedy a statutory or constitutional violation, it has still utterly failed to “identify the discrimination” its Program is purporting to remedy. *Croson*, 488 U.S. at 499, 500, 505, 507, 509. “[A] governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry.” *W.H. Scott Const. Co. v. City of Jackson*, 199 F.3d 206, 217 (5th Cir. 1999). Specific findings ensure that racial classifications are not merely unthinking discrimination or a form of racial politics. *Croson*, 488 U.S. at 493. It is well settled that cities “must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.” *Id.* at 504. Thus, Houston must identify past illegal discrimination before it can institute its discriminatory MWSBE Program.

Time and again, when asked to identify discrimination in Houston contracting, the City fails. It cannot identify any public contractor it has penalized for discrimination in the past five years. Ex. 2, No. 5; Ex. 1, No. 5. It cannot identify any city employee that it has sanctioned—or even investigated—for discrimination in the past five years. Ex. 2, No. 6; Ex. 1, No. 1. Houston admits that it has identified no prime contract awards in the past five years based on intentional discrimination. Ex. 1, No. 2. Houston does not know of any prime contractor that has discriminated against an M/WBE in the past five years. Ex. 1, No. 4. Put simply, Houston has no evidence of discrimination. None. And without identifying any illegal discrimination, Houston cannot demonstrate that it has a “strong basis in evidence” for its MWSBE Program. *See Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (citation omitted).

Third. Even assuming Houston is not required to tailor its discriminatory program to a violation of the Constitution or statute—and even assuming Houston is not required to identify the discrimination it is purporting to remedy with precision—its MWSBE Program still fails as a matter of law because the disparity study upon which the program rests is nearly *20 years old*. As the City Attorney recognizes, this means that it is legally stale and cannot form the basis of a race-conscious program. *Supra* n.1.

While it's true that "gross [] disparities" may create an "inference of discriminatory exclusion,"⁵ *Croson*, 488 U.S. at 501, 509, those disparities must, at an absolute bare minimum, reflect contemporary reality. *See, e.g., O'Donnell Const. Co. v. D.C.*, 963 F.2d 420, 427 (D.C. Cir. 1992) (reliance on eight-year-old statistics for current MBE goal was "arbitrary"); *L. Tarango Trucking v. Cnty. of Contra Costa*, 181 F. Supp. 2d 1017, 1032 (N.D. Cal. 2001) (ten-year-old statistics were too stale); *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 258 (D.D.C. 2012) (dismissing stale disparity study evidence as not probative of compelling interest). Indeed, the United States Commission on Civil Rights has recommended abandoning disparity studies that are over five years old. U.S. Commission on Civil Rights, *Disparity Studies as Evidence of Discrimination in Federal Contracting*, at 76 (2006) ("States and localities must discard disparity studies conducted using data that is more than five years old. The results are too outdated to justify preferential awards given.")

⁵ This oft-relied upon passage by governments is not intended as carte blanche to enact race-conscious programs in the presence of bare statistical disparities. An "inference of exclusion" simply means that governments can use gross disparities as a starting point for attempt to root out illegal discrimination. But they still must find the statutory or constitutional violation and identify it with specificity—a point the *Croson* Court made immediately after this passage. "The city could act ... by taking appropriate measures *against those who discriminate* on the basis of race." *Croson*, 488 U.S. at 509 (emphasis added). "In *the extreme case*, some form of narrowly tailored racial preference might be necessary to break down patterns of *deliberate exclusion*." *Id.* (emphasis added).

Whatever the line is—five years, eight years, ten years—Plaintiffs agree with Houston’s City Attorney that the disparity study used to justify the current program is well beyond stale. It’s moldy. As such, Houston has no compelling reason to continue discriminating against Plaintiffs.

CONCLUSION

Houston Code § 15-81(a) is unconstitutional. Houston plainly has no compelling interest that allows it to administer and enforce its racially discriminatory procurement program. And the City knows it too. That’s why, eight months into this lawsuit—as its discovery responses are rolling in—it is asking the Court to stay the case. The writing is on the wall. But Houston doesn’t get to discriminate while they try to divest this Court of jurisdiction. The Constitution does not allow it. And Plaintiffs don’t need further evidence to prove what is already admitted: Houston has zero evidence of contemporary discrimination in public contracting.

Plaintiffs’ motion for summary judgment should be granted.

DATED: May 28, 2024.

Anastasia Boden
Of Counsel
Cal. Bar No. 281911
S.D. Tex. Bar No. 3495077
Joshua P. Thompson*
Of Counsel
Cal. Bar No. 250955
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Fax: (916) 419-7747
aboden@pacificlegal.org
jthompson@pacificlegal.org

**Pro Hac Vice*

Counsel for Plaintiffs

Respectfully submitted,
s/ Erin E. Wilcox
Erin E. Wilcox
Attorney-in-Charge
Cal. Bar No. 337427
S.D. Tex. Bar No. 3369027
Pacific Legal Foundation
555 Capitol Mall
Suite 1290
Sacramento, CA 95814
Telephone: (916) 419-7111
Fax: (916) 419-7747
ewilcox@pacificlegal.org

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2024, I served this document via the Court's electronic filing system to Defendants' counsel of record as follows:

Lori Yount
Senior Assistant City Attorney
Darah Eckert
Senior Asst. City Attorney, General Litigation Section
City of Houston Legal Department
P.O. Box 368
Houston, Texas 77001-368
900 Bagby, 4th Floor
Houston, TX 77002
lori.yount@houstontx.gov
darah.eckert@houstontx.gov

Ben Stephens
Sandy Hellums-Gomez
Jarrett Dillard
HUSCH BLACKWELL LLP
600 Travis St., Suite 2350
Houston, Texas 77002
ben.stephens@huschblackwell.com
sandy.gomez@huschblackwell.com
jarrett.dillard@huschblackwell.com
Counsel for City of Houston

Brett J. Sileo
Britton B. Harris
Harris Hilburn P.L.L.C.
1111 Rosalie
Houston, Texas 77004
bsileo@hhstxlaw.com
bharris@hhstxlaw.com
Counsel for Midtown Management District

s/ Erin E. Wilcox
Erin E. Wilcox
Pacific Legal Foundation

EXHIBIT 1

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

LANDSCAPE CONSULTANTS OF
TEXAS, INC., and METROPOLITAN
LANDSCAPE MANAGEMENT, INC.,

Plaintiffs,

v.

CITY OF HOUSTON, TEXAS, and
MIDTOWN MANAGEMENT DISTRICT,

Defendants.

Civil Action No. 4:23-cv-03516

**CITY OF HOUSTON'S
RESPONSES TO PLAINTIFFS' REQUESTS FOR ADMISSION**

TO: Plaintiffs Landscape Consultants of Texas, Inc. and Metropolitan Landscape Management, Inc., by and through their counsel of record.

Defendant City of Houston, Texas ("Defendant" or "the City") submits this as its Responses to Plaintiffs' Requests for Admission.

-signatures follow-

Respectfully submitted,

By: /s/ Ben Stephens
Ben Stephens
State Bar No. 24098472
SDTX Bar No. 2898153
ben.stephens@huschblackwell.com
Sandy Hellums-Gomez
State Bar No. 24036750
SDTX Bar No. 561314
sandy.gomez@huschblackwell.com
Jarrett Dillard
State Bar No. 24099801
SDTX Bar No. 2980302
jarett.dillard@huschblackwell.com

HUSCH BLACKWELL LLP
600 Travis St., Suite 2350
Houston, Texas 77002
Telephone: (713) 647-6800
Facsimile: (713) 647-6884

/s/ Darah Eckert
Darah Eckert
Senior Assistant City Attorney
State Bar No. 24007141
SDTX Bar No. 1890045
darah.eckert@houstontx.gov
Lori J. Yount
Senior Assistant City Attorney
State Bar No. 2209496
SDTX Bar No. 24084592
lori.yount@houstontx.gov

ARTURO G. MICHEL
CITY ATTORNEY
SUZANNE R. CHAUVIN
CHIEF, GENERAL LITIGATION SECTION
CITY OF HOUSTON LEGAL DEPARTMENT
P.O. Box 368
Houston, Texas 77001-368
900 Bagby, 4th Floor
Houston, Texas 77002
Telephone: (832) 393-6219
Facsimile: (832) 393-6259

ATTORNEYS FOR THE CITY OF HOUSTON

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2024, a true and correct copy of Defendant City of Houston, Texas' Responses to Plaintiffs' Request for Admission was served on counsel of record by email.

/s/ Ben Stephens

Ben Stephens

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1:

Admit that the City has not disciplined, terminated, or otherwise sanctioned any employee or official for discrimination in the award of public contracts from January 1, 2019, to present.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, not proportional to the needs of the case, and is overbroad.

RESPONSE:

Subject to and without waiving the foregoing, admit.

REQUEST FOR ADMISSION NO. 2:

Admit that the City has identified no prime contract awards based on intentional discrimination against M/WBE bidders from January 1, 2019, to present.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, not proportional to the needs of the case, and is overbroad.

RESPONSE:

Subject to and without waiving the foregoing, admit.

REQUEST FOR ADMISSION NO. 3:

Admit that the City has specific procurement policies that forbid discrimination in awarding public contracts.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 4:

Admit that the City has identified no instances of a prime contractor discriminating against M/WBE subcontractors on a City contract from January 1, 2019, to present.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, not proportional to the needs of the case, and is overbroad. Additionally, the terms “instances” and “discriminating” are vague, overbroad, and ambiguous.

RESPONSE:

Subject to and without waiving the foregoing, the City lacks sufficient information to admit or deny this request.

REQUEST FOR ADMISSION NO. 5:

Admit that the City has not debarred or sanctioned a public contractor for discrimination against M/WBE subcontractors from January 1, 2019, to present.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, not proportional to the needs of the case, and overbroad. Additionally, the terms “debarred” and “sanctioned” are vague, overbroad, and ambiguous.

RESPONSE:

Subject to and without waiving the foregoing, the City admits that no public contractor has been debarred.

REQUEST FOR ADMISSION NO. 6:

Admit that the City has not adopted any study, report, or research that identifies specific instances of discrimination in procurement or public contracting from January 1, 2019, to present.

RESPONSE:

Subject to and without waiving the foregoing, the City admits it has not adopted any study, report, or research that identifies specific instances of discrimination in procurement or public contracting from January 1, 2019, to present. The City denies, however, that such a finding is necessary in evaluating the constitutionality of its MWBE program.

REQUEST FOR ADMISSION NO. 7:

Admit that from January 1, 2019, to present, the City has awarded the majority of its public construction contract dollars to the lowest responsive and responsible bidder through a competitive procurement process.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, not proportional to the needs of the case, and is overbroad. Furthermore, the City objects that the competitive procurement process is not always based on a “lowest responsive and responsible bidder” standard, and bidders may or may not be awarded a contract for any number of reasons. Accordingly, this request is confusingly phrased and is not capable of being answered as written.

RESPONSE:

Subject to and without waiving the foregoing, the City is unable to admit or deny this request as written.

REQUEST FOR ADMISSION NO. 8:

Admit that since at least January 1, 2019, to present, City contracts valued at \$50,000.00 or more must be approved by the Houston City Council.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 9:

Admit that the definition of “minority person” in Houston Code §15-82 is based on the federal definition of “socially disadvantaged individuals” as used by federal agencies such as the U.S. Small Business Administration (13 C.F.R. 124.103(b)(1)) or U.S. Department of Transportation (49 C.F.R. 26.67(a)(1)).

OBJECTIONS:

The City objects that this request seeks admission of a legal conclusion.

RESPONSE:

Subject to the foregoing objection, this request cannot be admitted or denied.

REQUEST FOR ADMISSION NO. 10:

Admit that the definition of “minority person” in Houston Code §15-82 is not based on specific data from the Houston metropolitan area.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 11:

Admit that Houston Code §15-82 includes persons who originate from five continents and dozens of countries.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, not proportional to the needs of the case, and is overbroad.

RESPONSE:

This request is not capable of being admitted or denied with certainty, and accordingly is denied.

REQUEST FOR ADMISSION NO. 12:

Admit that the City cannot identify for each of the countries encompassed or listed in Houston Code § 15-82 individuals who have suffered discrimination by the City of Houston in its procurement process or awards since January 1, 2019.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, and not proportional to the needs of the case, and is overbroad.

RESPONSE:

Subject to and without waiving the foregoing, the City admits it has not identified for each of the countries encompassed or listed in Houston Code § 15-82 individuals who have suffered discrimination by the City of Houston in its procurement process or awards since January 1, 2019. The City denies, however, that such a finding is necessary in evaluating the constitutionality of its programs.

REQUEST FOR ADMISSION NO. 13:

Admit that for purposes of MBE certification through the City of Houston, it is irrelevant whether an applicant is owned by a recent immigrant to the United States or an individual who has been a United States citizen for decades.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 14:

Admit that when determining whether to certify a M/WBE applicant, the City does not require evidence that an applicant has experienced previous discrimination.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 15:

Admit that the MWSBE program disadvantages non-M/WBE certified firms that the City has never found to have engaged in discriminatory business practices.

RESPONSE:

Deny.

REQUEST FOR ADMISSION NO. 16:

Admit that businesses interested in bidding on contracts offered by the City must take specific actions to compete for those contracts.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 17:

Admit that City contracts are not awarded based on a random selection drawn from all businesses in any particular geographic area.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 18:

Admit that from January 1, 2019, to present, City contracts have been awarded to businesses which are not located in the City of Houston, Harris County, or the Houston Metropolitan area.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 19:

Admit that from January 1, 2019, to present, at least one City contract has been awarded to stockholder-owned corporations which cannot be classified as M/WBEs or non-M/WBEs.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, and not proportional to the needs of the case.

RESPONSE:

The City lacks sufficient information to answer this request, and accordingly denies the request.

REQUEST FOR ADMISSION NO. 20:

Admit that the City has not identified any specific Constitutional or statutory violations related to its public contracting or procurement process or awards from January 1, 2019, to present.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 21:

Admit that the MWSBE Program does not remedy past, specific instances of discrimination that violate Constitutional or statutory requirements.

OBJECTIONS:

This request is vague and ambiguous. Strong evidence exists to evidence past racial and/or gender discrimination in public contracting.

RESPONSE:

This request cannot be admitted or denied as written.

REQUEST FOR ADMISSION NO. 22:

Admit that the City has not formally adopted the 2020 Harris County disparity study as the basis for a compelling interest of its MWSBE program.

RESPONSE:

Admit.

EXHIBIT 2

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

LANDSCAPE CONSULTANTS OF
TEXAS, INC., and METROPOLITAN
LANDSCAPE MANAGEMENT, INC.,

Plaintiffs,

v.

CITY OF HOUSTON, TEXAS, and
MIDTOWN MANAGEMENT DISTRICT,

Defendants.

Civil Action No. 4:23-cv-03516

**DEFENDANT CITY OF HOUSTON TEXAS’
RESPONSES TO PLAINTIFFS’ INTERROGATORIES**

TO: Plaintiffs Landscape Consultants of Texas, Inc. and Metropolitan Landscape Management, Inc., by and through their counsel of record.

Defendant City of Houston, Texas (“Defendant” or “the City”) submits this as its Responses to Plaintiffs’ Interrogatories.

-signatures follow-

Respectfully submitted,

By: /s/ Ben Stephens
Ben Stephens
State Bar No. 24098472
SDTX Bar No. 2898153
ben.stephens@huschblackwell.com
Sandy Hellums-Gomez
State Bar No. 24036750
SDTX Bar No. 561314
sandy.gomez@huschblackwell.com
Jarrett Dillard
State Bar No. 24099801
SDTX Bar No. 2980302
jarett.dillard@huschblackwell.com

HUSCH BLACKWELL LLP
600 Travis St., Suite 2350
Houston, Texas 77002
Telephone: (713) 647-6800
Facsimile: (713) 647-6884

/s/ Darah Eckert
Darah Eckert
Senior Assistant City Attorney
State Bar No. 24007141
SDTX Bar No. 1890045
darah.eckert@houstontx.gov
Lori J. Yount
Senior Assistant City Attorney
State Bar No. 2209496
SDTX Bar No. 24084592
lori.yount@houstontx.gov

ARTURO G. MICHEL
CITY ATTORNEY
SUZANNE R. CHAUVIN
CHIEF, GENERAL LITIGATION SECTION
CITY OF HOUSTON LEGAL DEPARTMENT
P.O. Box 368
Houston, Texas 77001-368
900 Bagby, 4th Floor
Houston, Texas 77002
Telephone: (832) 393-6219
Facsimile: (832) 393-6259

ATTORNEYS FOR THE CITY OF HOUSTON

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2024, a true and correct copy of Defendant City of Houston, Texas' Responses to Plaintiffs' Interrogatories was served on counsel of record by email.

/s/ Ben Stephens

Ben Stephens

ANSWERS AND OBJECTIONS TO INTERROGATORIES

INTERROGATORY NO. 1:

Identify all persons who contributed or consulted in the preparation of answers to these interrogatories and indicate the interrogatory or interrogatories for which they were consulted.

OBJECTIONS:

The City of Houston objects to this Interrogatory to the extent that it seeks the disclosure of communications protected by the attorney-client or work-product privileges.

ANSWER:

The City of Houston prepared these answers with the advice and assistance of counsel. Marsha Murray and Cylenthia Hoyrd provided information for the answers contained herein.

INTERROGATORY NO. 2:

Identify all documents referred to or examined in the preparation of the answers to these interrogatories and indicate the interrogatory or interrogatories for which each document was referred to or examined.

OBJECTIONS:

The City of Houston objects to this interrogatory as overly broad, unduly burdensome, and imposing burdens beyond those required by the Federal Rules of Civil Procedure. The City of Houston further objects to this interrogatory because, as phrased, it seeks the disclosure of communications protected by the attorney-client privilege.

ANSWER:

Subject to and without waiving the foregoing objections, please see the City of Houston's responses to Plaintiff's requests for production. The City's production of documents is ongoing

and will continue on a rolling basis, and the City will supplement its response to this interrogatory as necessary and appropriate.

INTERROGATORY NO. 3:

Identify all City contracts that normally would have been awarded to the lowest responsive and responsible bidder, but were instead awarded to a business other than the lowest responsive and responsible bidder, from January 1, 2019, to present.

OBJECTIONS:

The City objects that this request is overbroad, unduly burdensome, and seeks information not proportional to the needs of the case. The request is vague and ambiguous in that it seeks information pertaining to “lowest responsive and responsible bidders,” but fails to specify which specific contracts are at issue. The competitive procurement process is not always based on a “lowest responsive and responsible bidder” standard, and bidders may or may not be awarded a contract for any number of reasons. Accordingly, this request is confusingly phrased and is not capable of being answered as written.

INTERROGATORY NO. 4:

Identify each compelling interest you contend is advanced by the MWSBE Program.

OBJECTIONS:

The City of Houston objects to this interrogatory as improperly asking the City to state all assertions and/or marshal all available evidence. Discovery is ongoing and the City’s answer to this interrogatory will be supplemented as necessary or appropriate.

ANSWER:

Subject to and without waiving the foregoing, the City of Houston's MWSBE Program has been designed to mitigate and remedy the effects of past discrimination and its lingering effects against minority and women-owned businesses, and to make public contracting opportunities equally available to such businesses. The compelling interests advanced by the MWSBE program include the City of Houston's attempts to remedy past discrimination by rectifying its own actions. Evidence demonstrates discriminatory barriers to fair competition between minority and non-minority contractors. As such, the City of Houston strives to be inclusive of all minority and non-minority contractors.

INTERROGATORY NO. 5:

Identify all City contractors or other business enterprises sanctioned or penalized by the City, including pursuant to Houston Code §15-86, for discriminating against subcontractors on the basis of race, ethnicity, or sex from January 1, 2019, to present.

OBJECTIONS:

The City objects that "sanctioned" and "penalized" are vague, ambiguous, and undefined. The City further objects that this interrogatory seeks information neither relevant nor proportional to the needs of the case.

RESPONSE:

The City has not debarred a public contractor for discrimination against M/WBE subcontractors from January 1, 2019 to the present.

INTERROGATORY NO. 6:

Identify all City employees or officials who have been investigated or sanctioned for discriminating in procurement or the award of City contracts on the basis of the contractor's race, ethnicity, or sex from January 1, 2019, to present.

OBJECTIONS:

The City objects that "investigated" and "sanctioned" are vague, ambiguous, and undefined. The City further objects that this interrogatory seeks information neither relevant nor proportional to the needs of the case.

ANSWER:

Subject to and without waiving the foregoing objections, none.

INTERROGATORY NO. 7:

Identify each specific, past violation of the U.S. Constitution or statute that the MWSBE Program is intended to remedy.

ANSWER:

Please refer to the answer to Interrogatory No. 4, and please refer to Chapter 15, Article V of the City of Houston Code of Ordinances. The City does not contend that the MWSBE program is intended to remedy any single specific, past violation of the U.S. Constitution. Rather, a strong basis in evidence of past constitutional or statutory violations exists specifically, past racial and/or gender discrimination. The City of Houston has a disparity study supporting this conclusion.

INTERROGATORY NO. 8:

Identify each way the MWSBE program is narrowly tailored to remedy each violation identified in Interrogatory No. 7.

ANSWER:

Please refer to Chapter 15, Article V of the City of Houston Code of Ordinances, specifying, among other things, the public policy underlying the MWSBE program reporting requirements for the measurement of application of the program establishing and defining the responsibilities of the Office of Business Opportunity defining the obligations of department directors in connection with the program providing criteria for the determination of established business enterprise status and provide instructions for notice, appeal, and waiver determinations.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LANDSCAPE CONSULTANTS OF
TEXAS, INC., and METROPOLITAN
LANDSCAPE MANAGEMENT, INC.,

Plaintiffs,

v.

CITY OF HOUSTON, TEXAS, and
MIDTOWN MANAGEMENT DISTRICT,

Defendants.

Civil Action No. 4:23-cv-03516

THE STATE OF TEXAS §
 §
COUNTY OF HARRIS §

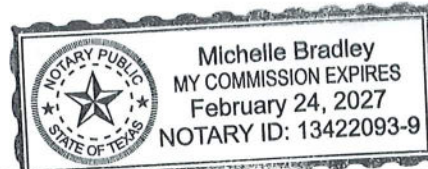
AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared CYLENTHIA HOYRD, Interim Director, Office of Business Opportunity, City of Houston, Texas, who, being first duly sworn, upon her oath, deposed and said:

"My name is CYLENTHIA HOYRD. I am the Interim Director of the City of Houston's Office of Business Opportunity. I am authorized to make the Answers to Plaintiffs' Interrogatories Nos. 1, 4, and 5. I hereby swear that such statements contained in those answers to Plaintiffs' Interrogatories are true and correct based on my personal knowledge."


CYLENTHIA HOYRD

SUBSCRIBED AND SWORN TO before me on this 6 day of May, 2024.



NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS



AFFIDAVIT OF CYLENTHIA HOYRD

THE STATE OF TEXAS §
 §
COUNTY OF HARRIS §

Before me, the undersigned notary, on this day personally appeared Cylenthia Hoyrd, who, being duly sworn by me, deposed and stated under oath as follows:

1. “My name is Cylenthia Hoyrd. I am over 18 years of age, am of sound mind, have never been convicted of a crime, and am capable of making this affidavit. The facts stated in this affidavit are true and correct as they are based on my personal knowledge.
2. I am currently the Interim Director of the City of Houston’s Office of Business Opportunity. Prior to my appointment on March 29, 2024, I served as the Deputy Director of the Office of Business Opportunity for approximately one year. I also worked for the City of Houston from 2011 to 2017 as an Administration Manager.
3. As a City of Houston (the “City”) employee I have negotiated contracts, assisted in updating City ordinances, managed the build-out and renovation of public facilities, prepared audits, and provided staff supervision and training. Along with my duties, I have had the opportunity serve in the following units associated with the City:
 - i. The City of Houston’s Department Services, which serves as the unit that assists with contract specific settings and goal waivers;
 - ii. The City of Houston’s Certification & Designations Division where my duties focused on reviewing and approving applications for certification with the City of Houston;
 - iii. Contract Compliance Division, which monitors all city contracts for labor, prevailing wages, and goal compliance with the Minority and Women-owned Small Business Enterprises (“MWSBE”), which ultimately hears and adjudicates appeals in accordance with the MWSBE certification and determination processes; and
 - iv. External Affairs Division, which promotes education and capacity building for small underutilized and underserved businesses.
4. During my current employment with the Office of Business Opportunity I have managed the monitoring system and augmentation for prime level contracts with MWSBE goals and decided appeals on MWSBE certification appeals.
5. As the Interim Director I am familiar with MGT OF AMERICA CONSULTING, LLC (“MGT”). The City of Houston contracted MGT to conduct a Disparity Study Analysis

(the "Study") on March 28, 2023. The overall purpose of the Study is to understand the effects of race, ethnicity and gender. The Study and its corresponding results are based on a respective business' ability to conduct business in the City's marketplace, determining if a disparity exists in awarding contracts to businesses owned and operated by minorities and women that are qualified and available to furnish various services to the City.

6. MGT is expected to provide its Disparity Study to the City of Houston's Administration by May 1, 2024.
7. Once this study is delivered, the City's Administration will review the study and make recommendations based the City's standing ordinance, and department policies and procedures. Based on history and my experience, the City will update Chapter 12, Section 5 of the City of Houston Ordinances to reflect the Study's findings. However, I do not anticipate that any updates to City Ordinances will be completed before September of 2024, as any recommendations concerning changes to the City's Ordinances will need to be reviewed and approved by City Counsel.

Further, Affiant sayeth not.


Cylenhia Hoyrd

Title: Interim Director

SUBSCRIBED AND SWORN TO before me on this 6th day of May, 2024.



Notary Public
In and for the State of Texas

(Seal)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LANDSCAPE CONSULTANTS OF
TEXAS, INC., and METROPOLITAN
LANDSCAPE MANAGEMENT,
INC.,

Civil Action No. 4:23-cv-03516

Plaintiffs,

v.

CITY OF HOUSTON, TEXAS, and
MIDTOWN MANAGEMENT
DISTRICT,

Defendants.

Declaration of Gerald Thompson

I, Gerald Thompson, declare as follows:

1. The facts set forth in this declaration are based on my knowledge and, if called as a witness, I can competently testify to their truthfulness under oath. As to those matters that reflect a matter of opinion, they reflect my personal opinion and judgment upon the matter.

2. Since 2006, my wife and I have owned Landscape Consultants of Texas, Inc. (Landscape Consultants) and Metropolitan Landscape Management, Inc. (Metropolitan).

3. Landscape Consultants and Metropolitan are small, family-owned landscaping businesses that share approximately fifty employees.

4. Approximately 80-90 percent of Landscape Consultants and Metropolitan's annual revenue comes from winning local government landscaping contracts with entities like the City of Houston, Harris County, and Midtown Management District.

5. Neither Landscape Consultants nor Metropolitan qualify as a Minority or Woman-owned Business Enterprise under the City of Houston's Minority, Women, and Small Business Enterprise (MWSBE) Program.

6. It is my understanding and belief that the City of Houston's MWSBE Program puts non-MWBE companies like Landscape Consultants and Metropolitan at a disadvantage when bidding for City contracts by treating them differently because of the race of their owners.

7. Landscape Consultants and Metropolitan intend to bid for public contracts with the City of Houston in future and would like to do so free from the disadvantage created by the MWSBE Program's racial preferences.

* * *

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 26th day of May, 2024, at Spring, Texas.



Gerald Thompson

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

LANDSCAPE CONSULTANTS OF
TEXAS, INC., and
METROPOLITAN LANDSCAPE
MANAGEMENT, INC.,

Plaintiffs,

v.

CITY OF HOUSTON, TEXAS, and
MIDTOWN MANAGEMENT
DISTRICT,

Defendants.

Civil Action No. 4:23-cv-03516

[PROPOSED] ORDER

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment Against Defendant City of Houston. For the reasons stated herein, it is hereby

ORDERED that Plaintiffs' Motion for Summary Judgment Against Defendant City of Houston is GRANTED.

Dated: _____

Hon. David Hittner
UNITED STATES DISTRICT JUDGE