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' OPPOSITION TO DEFENDANT MIDTOWN MANAGEMENT DISTRICT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Defendant Midtown Management District freely admits that its Minority, Women, and Disadvantaged Business Enterprise (MWDBE) program discriminates against bidders based on race. Midtown's justification for this blatant violation of the constitution and civil rights laws is that the Texas Legislature made them do it. Midtown's attempt to pass the buck does not approach the high bar needed for government programs that use racial classifications. Midtown's Motion for Summary should be denied.

STATEMENT OF FACTS

Midtown's Motion misstates several basic facts. First is that "Landscape is not contending that it suffered its own injury but is also seeking recovery[1] from Midtown because Landscape is co-owned with Metropolitan." Dkt. 69 at 3. Landscape Consultants has always claimed that it is injured by Midtown's MWDBE program. Dkt. 1 ¶ 63. Plaintiffs made clear in their Complaint that they "would like to bid on [Midtown] contracts in the future but cannot submit competitive bids for many or all of those contracts due to the 10-point disadvantage they suffer as non-[minority] certified businesses." Dkt. 1 ¶ 45. Plaintiffs were equally clear in their Opposition to Midtown's Motion to Dismiss that Landscape Consultants "is qualified, willing, and able to bid on government contracts in the Houston area,

[1] Plaintiffs seek only declaratory and injunctive relief, not "recovery from Midtown" in the form of damages. Dkt. 69 at 3; Dkt. 1 at 16–17.

which includes [Midtown], and that it is prevented from doing so on an equal basis by [Midtown's] MWDBE program." Dkt. 31 at 6.

Relatedly, Midtown wrongly states that the "crux" of Plaintiffs' Complaint is that Midtown was not awarded a Field Maintenance Service contract due to Midtown's MWDBE program. Dkt. 69 at 4. That is not true legally or factually. As Plaintiffs have repeatedly explained, "[i]n a forward-looking equal protection claim to a racial bid preference program like [Midtown's], the '"injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract.'" Dkt. 31 at 5 (quoting *N.E. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)). Plaintiffs repeatedly allege this forward-looking injury in their Complaint.

Next, Midtown incorrectly states that Metropolitan "has been awarded contracts for the District under the District's Minority, Women and Disadvantaged Program, as Metropolitan and Landscape owner Gerald Thompon [sic] admitted." Dkt. 69 at 4. Mr. Thompson admitted no such thing. Metropolitan does not qualify as a minority-owned business under Midtown's MWDBE program and therefore cannot be awarded the extra ten points that are available only to minority and women-owned businesses during bid evaluations. Mr. Thompson testified that *despite* this significant racial disadvantage, Metropolitan has won contracts with Midtown in the past. Ex. 1, Thompson Dep. Tr. 80:7–13. Mr. Thompson also

testified that Metropolitan lost the Field Maintenance Service contract due to Midtown's racially discriminatory MWDBE program: "[W]e lost the bid because we got no points for the Minority Program." *Id.* at 95:21–22.

Midtown also faults Metropolitan for not pursuing a women-owned business certification through the "Houston Women's Council." Dkt. 69 at 8. It's unclear who the Houston Women's Council is—Midtown provides no support for this contention and the organization does not appear to have an online presence. But even if it is a real organization, it wouldn't move the needle. Being woman-owned is not the only requirement for certification as a woman-owned business. In addition to ownership percentage, the female owner must exercise day to day control over the business' operations—something Metropolitan's majority female owner does not do. Ex. 1, Thompson Dep. Tr. 119:15–17; 34 Tex. Admin. Code § 20.283(a); Houston Code § 15-82.

ARGUMENT

I. State Law Does Not Require Midtown's Program

Midtown openly admits that it lacks any evidence of discrimination against minority owned businesses. Dkt. 69 at 20. Despite this, Midtown operates a public contracting program that uses racial classifications for an ostensibly remedial purpose. Ex. 2, nos. 5–6, 8–9; Ex. 3, nos. 1–2, 4–6, 13, 21. But Midtown cannot say what it is remedying. Instead, Midtown's justification for this racial discrimination is, essentially, that the state government made them do it. Dkt. 69 at 17–18. This is

both factually incorrect and legally insufficient to justify its race-conscious contracting program.

Factually, Tex. Local Gov't Code § 375.222 does not force Midtown to enact a race-conscious program. In fact, Tex. Local Gov't Code § 375.222(d) expressly prohibits it. Instead, it requires that programs established under the statute "must attempt to remedy any statistically significant disparities *that are found to exist*," and may continue "only until its purposes and objectives are met as determined by the regular periodic review." *Id.* (emphasis added). Midtown does not know whether statistically significant disparities exist because it has never conducted a study to find out, and Midtown admits it has no statistical basis for its program. Ex. 3, no. 6. Instead, "discussions by staff and/or committees" determined that the race-based 10-point award "would be the most efficient way to address the history of discrimination[.]" Ex. 2, no. 8. Accordingly, Midtown's program does not even meet the standard set by Tex. Local Gov't Code § 375.222. And it certainly does not demonstrate the compelling government interest and narrow tailoring required to survive strict scrutiny.

There are only two compelling interests that permit 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 …." *Students for Fair*

Admissions v. President and Fellows of Harvard College, 600 U.S. 181, 207 (2023) (*SFFA*). Midtown contends that its program satisfies the first *SFFA* prong because in enacting Tex. Local Gov't Code § 375.222(b), the Texas Legislature "already determined that there was prior discrimination that violated the Constitution in enacting these laws requiring Midtown to create and operate its disadvantaged business program." Dkt. 69 at 17–18.

Even if the Texas Legislature could satisfy *Midtown*'s compelling interest, it has done no such thing. Midtown can establish a compelling interest in remedying racial discrimination only if it meets three criteria: (1) it identifies a specific instance of past discrimination and does not rely on general allegations of bias in the industry; (2) it provides direct evidence of intentional discrimination as opposed to mere disparities; and (3) it shows past participation in the discrimination it seeks to remedy. *Miller v. Vilsack*, No. 4:21-CV-0595-O, 2021 WL 11115194, at *8 (N.D. Tex. July 1, 2021) (*citing Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (summarizing U.S. Supreme Court precedents)). Here, Midtown admits it is aware of no specific instances of past discrimination in its contracting process. Ex. 2, no. 7; Ex. 3, no. 21 Further, Midtown has no direct evidence of intentional discrimination (or even "mere disparities," for that matter) and instead intuits them from a statewide statute. Ex. 3, nos. 16, 21–22. And Midtown has no evidence that it has participated in discrimination in its public contracting program. Ex. 3, nos. 1–2, 4–6, 21.

Midtown also misunderstands the requirement that racial classifications be narrowly tailored. First, there is no "good faith effort" exception to the Equal Protection Clause, as Midtown contends. Dkt. 69 at 18–19. Midtown's program awards ten points to businesses based on their owner's skin color, without any evidence whatsoever that the race-based preference is necessary. Midtown's explanation for this racial bonus is that it "*felt* that this was the most effective way to address the history of discrimination of public contractors while ensuring that highly qualified contractors provided the District with quality goods and services, while not overly disadvantaging anybody." *Id.* at 19 (emphasis added).

Of course, Midtown's feelings are not evidence. It's also not evidence of narrow tailoring that Midtown is "awaiting the results of a disparity study currently being conducted by the City of Houston, which is expected to be received by the District for review and possible adoption within the next month."[2] *Id.* at 19. Equally irrelevant is Midtown's claim that because Plaintiff Metropolitan has previously won Midtown contracts, the program is "narrowly tailored enough[.]" *Id.* at 20. Neither of these statements demonstrate the "serious, good faith consideration of workable race-neutral alternatives" required for a race-conscious program to be narrowly tailored. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *City of Richmond v. J.A.*

[2] Midtown has not adopted local disparity studies in the past. For example, it did not adopt the 2020 Harris County disparity study as the basis for the compelling interest of its MWDBE policy or 10-point bid award. Ex. 3, no. 23.

Croson Co., 488 U.S. 469, 507 (1989). And while Midtown is correct that quotas of the type struck down in *Croson* are unconstitutional, it does not follow that Midtown's program is constitutional because it awards a rote ten-point bonus. Dkt. 69 at 20. The Supreme Court struck down such a point system in *Gratz v. Bollinger*, finding that a policy that automatically distributed points to minority applicants solely because of race was not narrowly tailored. 539 U.S. 244, 270 (2003).

Midtown concedes that its program is a racial remedy in search of an injury: "The District admittedly does not have a history of discriminating against minority or women owned businesses because it has only existed for a shirt [sic] time[.]" Dkt. 69 at 20. Race-conscious programs "should be the remedy of last resort." *Walker v. City of Mesquite*, 169 F.3d 973, 982–83 (5th Cir. 1999). Midtown presents no evidence that any remedy, let alone a race-conscious one, is needed for its public contracting program, and Texas law does not give Midtown cover to violate federal law and the Constitution. Midtown's Motion should be denied.

II. Landscape Consultants Has Standing for Its Section 1983 Claim

After failing to prove that its program serves a compelling interest and is narrowly tailored, Midtown resorts to repeating the same standing arguments this Court previously rejected in Midtown's Motion to Dismiss. Dkt. 26; Dkt. 36. With the benefit of discovery, Midtown's claims are even less persuasive now.

As it did in its Motion to Dismiss, Midtown once again argues that Landscape Consultants fails to state a claim under section 1983 because it "does not adequately allege" disparate treatment and because Landscape Consultants does not have a "relationship" with Midtown. Dkt. 26 at 9–10; Dkt. 69 at 15. Midtown still does not understand the nature of the injury in a forward-looking equal protection case like this one. Landscape Consultants has not brought a Title VII disparate impact or a claim of racial harassment under Title VI—it alleges, and has now conclusively proven, that Midtown's program facially discriminates against non-minority businesses in violation of the Equal Protection Clause. Dkt. 1 ¶¶ 47–55; Dkt. 68 at 13–18.

As this Court already held, Landscape Consultants suffers an "injury in fact" sufficient to sustain Article III standing in its equal protection claim against Midtown. Dkt. 36; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). In a forward-looking equal protection challenge to a race-conscious contracting program, the "'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract." *N.E. Fla.*, 508 U.S. at 666. Landscape Consultants does not have to prove that it previously held or lost contracts because of Midtown's racial discriminatory program, only that the program forces Landscape Consultants to compete for contracts "on an unequal basis." *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 213 (5th Cir. 1999) (citing *N.E. Fla.*, 508 U.S. at 666: "The

'injury in fact' … is the denial of equal treatment resulting from the imposition of [a] barrier, not the ultimate inability to obtain the benefit."). There is no requirement—and Midtown cites none—that a plaintiff must first bid for a racially discriminatory contract before it can challenge the discriminatory bidding process. *Northeastern Florida* says the opposite, 508 U.S. at 666, and imposing such a requirement would add an administrative exhaustion requirement for exercising one's constitutional rights, which the Supreme Court has flatly rejected. *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 500–01 (1982) ("this Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983 ….").

Additionally, Midtown is incorrect that Landscape Consultants must allege that (1) it received different treatment from others and (2) the unequal treatment came from discriminatory intent in order to raise a successful equal protection claim. Dkt. 69 at 15. Discriminatory intent or animus is not required in equal protection challenges to race-based government programs. *See, e.g.*, *Croson*, 488 U.S. at 500 (striking down race-based contracting program despite supposedly benign purpose); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995) ("good motives" not enough when state employs explicit racial classification system). The cases Midtown cites in support of its argument do not involve race-based public contracting programs and are not relevant to Landscape Consultants' equal protection claim. Dkt. 69 at 15–16. *Fennell v. Marion Independent School District* involved a Title VI

racially hostile environment claim and an equal protection claim by a student against her school district for racial discrimination and harassment. 804 F.3d 398, 401 (5th Cir. 2015). Similarly, *Priester v. Lowndes County* involved a racially motivated attack on a high school student. 354 F.3d 414, 418 (5th Cir. 2004). These cases have no relevance here whatsoever.

III. Plaintiffs Are Entitled to Summary Judgment on Their § 1981 Claims

Midtown does not dispute Plaintiffs' claims that Midtown's program violates Plaintiffs right to the full and equal benefit of all laws under 42 U.S.C. § 1981. Instead, as it did in its Motion to Dismiss, Midtown once again claims that section 1981 does not provide an independent cause of action against government actors and that Landscape Consultants lacks standing for a section 1981 claim. Dkt. 25 at 4; Dkt. 69 at 10–15. This Court has already dismissed Midtown's arguments once and should do so again at summary judgment. Dkt. 36.

A. Plaintiffs' section 1981 claims seek only equitable remedies

Section 1981 supports an independent cause of action against government entities like Midtown when the claim for relief is entirely forward-looking. Midtown's reliance on *Jett v. Dallas Independent School District*, 491 U.S. 701 (1989), is misplaced because Plaintiffs here seek only prospective injunctive relief, not damages. Dkt. 69 at 12. In *Jett*, the Supreme Court concluded that section 1983 "provides the exclusive federal *damages remedy* for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor." 491 U.S. at

735 (emphasis added). Interpreting the history of the Civil Rights Act of 1866 and 1871, the Court determined that "Congress intended that the explicit remedial provisions of § 1983 be controlling *in the context of damages actions* brought against state actors alleging violation of the rights declared in § 1981." *Id.* at 731 (emphasis added); *see also Escamilla v. Elliott*, 816 F. App'x 919, 922 (5th Cir. 2020) (applying *Jett* to find that section 1983 claims required "in order to obtain a *monetary* remedy for violations of civil rights protected by § 1981.") (emphasis added); *Scelsa v. City Univ. of New York*, 806 F. Supp. 1126, 1138 (S.D.N.Y. 1992) (prospective injunctive relief and attorney's fees available in section 1981 claim against public officials); *Javinsky-Wenzek v. City of St. Louis Park*, 829 F. Supp. 2d 787, 794–95 (D. Minn. 2011) (claim for injunctive relief against municipality was justiciable).

Yet again, Midtown does not dispute that Plaintiffs seek only declaratory and injunctive relief, nor does it cite any case holding that section 1981 does not provide an *equitable* remedy for claims against state actors. *Oden v. Oktibbeha County*, 246 F.3d 458 (5th Cir. 2001), does not help Midtown; the plaintiff in that case sought compensatory and punitive damages against the government defendants. *Id.* at 462. *Bluitt v. Houston Independent School District* is equally unhelpful; the plaintiff in *Bluitt* sought damages and the decision quotes *Jett*'s holding that section 1983 is the exclusive federal damages remedy for section 1981 violations. 236 F. Supp. 2d 703, 720 (S.D. Tex. 2002). Unlike the plaintiffs in those cases, Plaintiffs seek forward

looking relief only and may seek that relief through section 1981 claims against Midtown.

B. Section 1981 claims do not require an ongoing contractual relationship

Midtown also rehashes its failed Motion to Dismiss argument that Landscape Consultant must have bid on and lost a Midtown contract in order to bring a section 1981 claim. Dkt. 69 at 12. As in its Motion to Dismiss, Midtown again fails to identify any case that stands for this proposition.

Instead, Midtown contends that Landscape Consultants' section 1981 claims are too speculative. Dkt. 60 at 12–13. They are not. To establish a prima facie case under section 1981, Landscape Consultants must show that: (1) they are members of a racial minority;[3] (2) Midtown had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 288–89 (5th Cir. 2004).

It is not speculative that Midtown's program intentionally discriminates on the basis of race; Midtown's program expressly awards ten points to minority-owned bidders based on race alone, and admits that its program "may disadvantage non-MWBE firms even if such firms have not shown a history of discrimination

[3] Section 1981 "protects the equal right of all persons … without respect to race." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (cleaned up).

themselves." Ex. 3, no. 16. It is also not speculative that Midtown's discriminatory public contracting policy concerns an activity enumerated under section 1981: Plaintiffs' "making … of contracts" with Midtown for landscaping services. 42 U.S.C. § 1981(b). A contract "need not already exist" to trigger section 1981's protections; the statute "protects the would-be contractor along with those who already have made contracts." *Domino's Pizza*, 546 U.S. at 476.

Given that Midtown admits to advantaging some businesses over others depending on the race of the business' owners, Midtown's renewed claim that "[n]o contractor is meaningfully deterred from submitting a bid" is as irrelevant as it is ridiculous. Dkt. 69 at 14. Whether a business is deterred from submitting a bid—and Midtown's assertion is completely unsupported—does not change that every business is discriminated against and disadvantaged from receiving a contract. That's the whole purpose of Midtown's ten-point racial bonus plan—to give businesses a preference on the basis of race.

The same cases that failed to support this argument in Midtown's Motion to Dismiss continue to fail here. In *Meyers v. La Port Independent School District*, a high school softball player claimed that her failure to be promoted to the varsity team until her senior year was due to her race and that it prevented her from "generating playing statistics that would have led colleges and universities to consider her for athletic scholarships." No. Civ.A H-05-1987, 2007 WL 7119878, at *1 (S.D. Tex.

Apr. 25, 2007). A possible athletic scholarship on a team of unknown caliber at an unknown university is in no way comparable to a defined landscaping contract. The myriad factors that determine whether a student is offered a college athletic scholarship, like athletic ability, injury status, team needs, GPA, or open roster positions—none of which the Court addressed in *Meyers*—are in no way comparable to Midtown's program, which awards ten points only to minority business enterprises. Midtown's remaining cases apply only in the retail context. Dkt. 69 at 13–14; *Morris v. Dillard Dep't Stores, Inc*., 277 F.3d 743, 752 (5th Cir. 2001) (customer detained for shoplifting); *Arguello v. Conoco, Inc*., 330 F.3d 355, 358 (5th Cir. 2003) ("the law in this circuit for section 1981 claims in the *retail* context is established by *Morris*.").

CONCLUSION

For the foregoing reasons, Midtown's Motion for Summary Judgment should be denied and Plaintiffs' Motion for Summary Judgment, dkt. 68, should be granted.

DATED: December 20, 2024.

Respectfully submitted,

s/ Erin E. Wilcox

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2024, I served this document via the Court's electronic filing system to Defendants' counsel of record as follows:

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LANDSCAPE CONSULTANTS OF TEXAS, INC., and METROPOLITAN LANDSCAPE MANAGEMENT, INC., Plaintiffs,	)	
v.	)	Civil Action No. 4:23-cv-03516
CITY OF HOUSTON, TEXAS, and MIDTOWN MANAGEMENT DISTRICT, Defendants.	)	

ORAL VIDEOTAPED DEPOSITION OF

GERALD THOMPSON

November 6, 2024

ORAL VIDEOTAPED DEPOSITION OF GERALD THOMPSON, produced as a witness at the instance of the Defendants and duly sworn, was taken in the above-styled and numbered cause on the 6th day of November, 2024, from 10:00 a.m. to 1:33 p.m., before Dawn McAfee, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Husch Blackwell LLP, 600 Travis Street, Suite 2350, Houston, Texas 77002, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

keep doing the work because of the program.

Q. Okay. Do you intend to bid for that Field Services Project in the future, if it comes up for bid again?

A. Yes, of course. Depending on the -- the minority programs in that.

Q. Okay. Was the same Minority, Women, and Disadvantaged Business Program for Midtown applied to the contract for Baldwin and Glover Park?

A. I think so. I believe so.

Q. And then Metropolitan was awarded that contract even under that program, correct?

A. Yes.

Q. What do you understand to be the way that Midtown's Minority, Women, Disadvantaged Business Program operates?

A. Well, it's different than the City's. There are -- I guess there's a factoring that they use. It's a point system that is weighed against all the other competitors. And you have price. You have reputation, minority contract, if you're a minority. And I believe there was one other. But the minority aspect of the -- of the bid gives them a 10 percent advantage before anybody else comes in to bid on that, and that's the disadvantage.

Proposed Approach is 15 points. And Minority Women Disadvantaged Business Enterprises automatically get 10 points starting out. So that puts me at a 10 percent disadvantage on the points system.

When we got the bid results, we won on Financial Consideration, which is a low-bid contract, which should be the primary objective, which it is because it's weighted so heavily. Organizational Qualifications and References. I'm sure we scored high on that. I was a little surprised at some of the other ones that Midtown had very little working relationship with scored as high as that. And the Proposed Approach, I'm sure we scored high on that because we'd had the contract on and off, and very little problems with the contract over the 15 -- 18 years we've had it, on and off.

So, right -- so when this was considered, we had to consider the -- the largeness of the contract and how it was part of our business, eight employees. We had to take -- we took the pricing down in order to compensate for that. But we lost the bid because we got no points for the Minority Program.

Q. Your company, in fact, was not the lowest bidder on the project, was it? If you look in the complaint, there's a bid chart that was included in your

certified.

Q. Okay.

A. And at that time, we weren't running into a lot of contracts that required, you know, using minority subcontractors.

Q. Okay.

A. So it didn't seem to make sense to go through all that paperwork again for something that wasn't very necessary at the time.

Q. And do you recall if you changed your share percentages, you and Theresa, after you were no longer HUB certified by the State of Texas?

A. I don't remember that. I don't remember doing that.

Q. Okay. Does Theresa currently exercise any day-to-day control over Metropolitan?

A. No.

Q. All right. So, I believe you testified a while ago that over the last five years, about 10 percent of your income has come from the City of Houston; is that right?

A. It's an estimate.

Q. Estimate. Sure.

A. Wait a minute. Say -- ask that question one more time. I want to make sure I got that right.

Gerald Thompson
November 06, 2024

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LANDSCAPE CONSULTANTS OF TEXAS, INC., and METROPOLITAN LANDSCAPE MANAGEMENT, INC., Plaintiffs,	)	
v.	)	Civil Action No 4:23-cv-03516
CITY OF HOUSTON, TEXAS, and MIDTOWN MANAGEMENT DISTRICT, Defendants.	)	

ORAL DEPOSITION OF GERALD THOMPSON

November 6, 2024

I, Dawn McAfee, Certified Shorthand Reporter in and for the State of Texas, do hereby certify to the following:

That the witness, GERALD THOMPSON, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

I further certify that pursuant to FRCP Rule 30(e)(1) that the signature of the deponent:

U.S. LEGAL SUPPORT, INC
713-653-7100

Gerald Thompson
November 06, 2024

__X__ was requested by the deponent or a party before the completion of the deposition and is to be returned within 30 days from the date of receipt of the Signature Page contains any changes and the reasons therefor;

__ was not requested by the deponent or a party before the completion of the deposition.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys to the action in which this proceeding was taken. Further, I am not a relative or employee of any attorney of record in this cause, nor am I financially or otherwise interested in the outcome of the action.

Subscribed and sworn to on this _____ day of _____, _____.

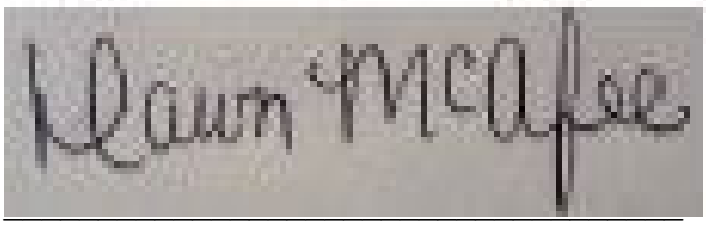

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EXHIBIT 2

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 MIDTOWN MANAGEMENT DISTRICT'S ANSWERS AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF DISCOVERY

TO: Plaintiff, Landscape Consultants of Texas, Inc. by and through their attorney of record, Erin E. Wilcox, Pacific Legal Foundation, 555 Capitol Mall Suite 1290, Sacramento, CA 95814.

COMES NOW Midtown Management District, Defendant in the above-entitled and numbered cause, and pursuant to the provisions of the Federal Rules of Civil Procedure, files these Responses to Plaintiff's First Set of Interrogatories, Request for Admission, and Request for Production.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify by my signature below that the above Discovery have been served upon counsel for Plaintiff via electronic service, under Federal Rules of Civil Procedure on this 5th day of April 2024.

/s/Brett J. Sileo
Brett J. Sileo

ANSWERS TO INTERROGATORIES

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.

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713-221-1202

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

ANSWER: The District referred to Texas Local Government Code §375.222 in answering Interrogatory 4, 7, 8, and 9, a copy of which is being produced with these responses.

3. Identify all District 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.

ANSWER: The District contends that it awarded all of its contracts to the lowest responsive and responsible bidder.

4. Identify each compelling interest you contend is advanced by the MWDBE Program and/or 10-point bonus.

ANSWER:

The District followed the directive established by the Texas State Legislature when the Legislature enacted Texas Local Government Code §375.222 by enacting a program to stimulate the growth of disadvantaged businesses and afford those disadvantaged businesses a full and fair opportunity to compete for district contracts, further remedial goals and eradicate the effects of prior discrimination in the public procurement process. The Texas Legislature found that there was a history of discrimination in the award of public contracts that necessitated the enactment of this statute.

5. Identify all District contractors or other business enterprises sanctioned or penalized by the District for discriminating against subcontractors on the basis of race, ethnicity, or sex from January 1, 2019, to present.

ANSWER: None.

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

ANSWER: None.

7. Identify each specific, past violation of the U.S. Constitution or statute that the MWDBE Program and/or 10-point bonus is intended to remedy.

ANSWER:

The District followed the directive established by the Texas State Legislature when the Legislature enacted Texas Local Government Code §375.222 by following a program to stimulate the growth of disadvantaged businesses and afford those disadvantaged businesses a full and fair opportunity to compete for district contracts, further remedial goals and eradicate the effects of prior discrimination. The Texas Legislature found that there was a history of discrimination in the award of public contracts that necessitated the enactment of this statute.

8. Identify each way the MWDBE program and/or 10-point bonus is narrowly tailored to remedy each violation identified in Interrogatory No. 8.

ANSWER:

The District did not identify a specific violation of the U.S. Constitution or statute in response to Interrogatory 8, as the District is following the directive of Texas Local Government Code $375.222 enacted after the Legislature determined that there was a history of discrimination against minority and woman-owned businesses. The District also follows requirements from the City of Houston to have a program to help remedy the effects of prior discrimination on minority and woman owned businesses. The District's MWBDE program was created in a fashion to remedy the prior discrimination that existed through discussions by staff and/or committees that determined that awarding 10 points to qualified and certified minority and woman owned businesses would be the most effective way to address the history of discrimination in public contracting while ensuring that highly qualified contractors who would provide the District with quality goods and services would be selected as winning bidders for District contracts while not overly disadvantaging any bidder. The District determined that awarding 10 points to qualified minority and women-owned businesses was the best good faith effort that the District could comply with the requirements of Texas Local Government Code §375.222 and the requirements of the City of Houston. The District also notes that it does not consider the award of 10 points to minority and women-owned businesses to bidders on District contractors to be a "bonus," as the ten points is included in the total evaluation of bidders. Qualified and certified minority and women-owned businesses are awarded 10 points out of the total 100 points for each bidder's score, not an add on "bonus" applied after evaluation of the bids.

9. Identify the statistical basis for the 10-point bonus.

Answer:

The District follows the directive of Texas Local Government Code $375.222 enacted after the Legislature determined that there was a history of discrimination against minority and women-owned businesses. The District also follows requirements from the City of Houston to have a program to help remedy the effects of prior discrimination on minority and women-owned businesses. The District's MWBDE program was created in a fashion to remedy the prior discrimination that existed through discussions by staff and/or committees that determined that awarding 10 points to qualified and certified minority and woman-owned businesses would be the most effective way to address the history of discrimination in public contracting while ensuring that highly qualified contractors who would provide the District with quality goods and services would be selected as winning bidders for District contracts while not overly disadvantaging any bidder. The District also notes that it does not consider the award of 10 points to minority and women-owned businesses to bidders on District contractors to be a "bonus," as the ten points is included in the total evaluation of bidders. Qualified and certified minority and women-owned businesses are awarded 10 points out of the total 100 points for each bidder's score, not an add on "bonus" applied after evaluation of the bids.

EXHIBIT 3

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 MIDTOWN MANAGEMENT DISTRICT'S ANSWERS AND OBJECTIONS TO PLAINTIFF'S FIRST SET OF DISCOVERY

TO: Plaintiff, Landscape Consultants of Texas, Inc. by and through their attorney of record, Erin E. Wilcox, Pacific Legal Foundation, 555 Capitol Mall Suite 1290, Sacramento, CA 95814.

COMES NOW Midtown Management District, Defendant in the above-entitled and numbered cause, and pursuant to the provisions of the Federal Rules of Civil Procedure, files these Responses to Plaintiff's First Set of Interrogatories, Request for Admission, and Request for Production.

Respectfully submitted,

HARRIS HILBURN, PLLC

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CERTIFICATE OF SERVICE

I certify by my signature below that the above Discovery have been served upon counsel for Plaintiff via electronic service, under Federal Rules of Civil Procedure on this 5th day of April 2024.

/s/Brett J. Sileo
Brett J. Sileo

ANSWERS TO REQUEST FOR ADMISSIONS

1. Admit that the District 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.

ANSWER: Admit

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

ANSWER: Admit

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

ANSWER: The District denies this request to the extent that it does not have a specific written procurement policy prohibiting discrimination but admits that the District's procurement policies follow state and federal law to the extent that state and federal law prohibit discrimination.

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

ANSWER: Admit

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

ANSWER: Admit

6. Admit that the District 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.

ANSWER: Admit

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

ANSWER: Admit

8. Admit that as part of its MWDBE policy, the District awards 10 points to minority-owned and woman-owned business enterprises when evaluating bids.

ANSWER: Denied, although the District admits that it awards 10 points in the contracting process to businesses that qualify for such points under the District's diversity program, which requires a good faith effort to comply with the District's MWBE goal. The 10 points is not considered a "bonus" but part of the overall score for bidders out of 100 total points.

9. Admit that MWBEs certified by the City of Houston are eligible for the 10-point bonus on District contracts.

ANSWER: Admit

10. Admit that the District has adopted the City of Houston's definition of "minority person," as found in Houston Code § 15-82, when determining eligibility for the 10-point bonus.

ANSWER: Denied. The District did not adopt this definition by a board resolution, but it has been the policy of the District to use the City's definition of "minority person" when evaluating bidders.

11. Admit that the definition of "minority person" in Houston Code §15-82, as adopted for use by the District, is not based on specific data from the Houston metropolitan area.

ANSWER: The District cannot admit or deny this request, as it calls for knowledge of the City of Houston's process in adopting its code that the District does not possess.

12. Admit that Houston Code §15-82, as adopted for use by the District, includes individuals originating from five continents and dozens of countries.

ANSWER: Admitted from a plain reading of the code section.

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

ANSWER: Admitted, particularly because there are so many countries listed in this code section.

14. 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.

ANSWER: The District cannot admit or deny this request, as it calls for knowledge of the City of Houston's process in MBE certification that the District does not possess.

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

ANSWER: The District cannot admit or deny this request, as it calls for knowledge of the City of Houston's process in MWBE certification that the District does not possess.

16. Admit that the MWDBE policy and/or 10-point bonus disadvantages non-M/WBE certified firms that the District has never found to have engaged in discriminatory business practices.

ANSWER: The District's diversity program in procurement was designed to comply with state law requiring such a diversity program, and the District admits that state law requires the District to have a policy that may disadvantage non-MWBE firms even if such firms have not shown a history of discrimination themselves. The District further denies that the ten points included in the bid score for qualified and certified minority and women-owned businesses is considered a "bonus."

17. Admit that businesses interested in bidding on District contracts must take specific actions to compete for those contracts.

ANSWER: Admit

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

ANSWER: Admit

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

ANSWER: Objection. This request is vague as it does not define what is meant by "located" The District does not look to determine where a business bidding on its contract has its headquarters, principal place of business or state of incorporation. The District believes that all of its service vendors have a physical presence in the Houston area (otherwise they would not be able to provide services to the District), and therefore, subject to this objection, this request is denied.

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

ANSWER: This request can neither be admitted nor denied, as a stockholder owned corporation may be classified as either a MWBE or not an MWBE, and therefore a question asking to admit facts about a corporation that cannot be classified cannot be answered. The District would classify a corporation as either a qualified and certified MWBE or not a qualified and certified MWBE.

21. Admit that the District 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.

ANSWER: Admit

22. Admit that the 10-point bonus does not remedy past, specific instances of discrimination that violate Constitutional or statutory requirements.

ANSWER: Deny

23. Admit that the District has not formally adopted the 2020 Harris County disparity study as the basis for a compelling interest of its MWDBE policy and/or 10-point bonus.

ANSWER: Admitted to the extent that the District did not formally adopt the disparity study through a formal board resolution.

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 Defendant Midtown Management District's Motion for Summary Judgment. For the reasons stated herein, it is hereby

ORDERED that Defendant Midtown Management District's Motion for Summary Judgment is DENIED.

Dated: _____

_____
Hon. David Hittner
UNITED STATES DISTRICT JUDGE