

**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**

Plaintiffs Landscape Consultants of Texas, Inc. (Landscape Consultants) and Metropolitan Landscape Management, Inc. (Metropolitan), by counsel and pursuant to Rule 56 of the Federal Rules of Civil Procedure, for the reasons stated in the accompanying brief, move for summary judgment on the grounds that no dispute of material fact exists and Plaintiffs are entitled to judgment as a matter of law on their Equal Protection and 42 U.S.C. § 1981 claims.

Dated: November 29, 2024

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IN SUPPORT OF MOTION FOR
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For the reasons set forth below, Plaintiffs are entitled to summary judgment pursuant to Fed. R. Civ. P. 56.

STATEMENT OF UNDISPUTED MATERIAL FACTS


Defendant City of Houston

Houston's Minority, Women, and Small Business Enterprise (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 Program is not intended to "remedy any single specific, past violation of the U.S. Constitution," Ex. 1, no. 7, but "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." *Id.* at no. 4. Houston sets annual citywide minority and women-owned business enterprise (MWBE) goals, then City departments impose contract-specific percentage goals for individual contracts, with limited exceptions. Houston Code §§ 15-81, 15-83(b), (c)(1)–(2). The penalty for failing to comply with a contract-specific goal or prove good faith efforts to do so is debarment from all Houston contracts for five years. Houston Code § 15-86(a).

Houston's most recent comprehensive disparity study is from 2006, despite a requirement that the city "make its best efforts" to review the Program every five years to determine if the racial preferences are necessary. Houston Code § 15-81(b).

A disparity study was completed in 2020, but—despite a nearly \$1 million price tag—the City Council never adopted it.¹ [REDACTED]

¹ Matt Sledge, “Houston paid \$821,000 for a contracting study it later scrapped, officials won’t say why,” Houston Landing (Aug. 25, 2023), <https://houstonlanding.org/houston-paid-821000-for-a-contracting-study-it-later-scrapped-officials-wont-say-why/>; *see also* Dkt. 53 at 2. The implication here is obvious. Houston buried the 2020 Study because its results undercut the rationale for its racially discriminatory Program. To that end, Houston has fought Plaintiffs’ attempt to get discovery that would definitively prove this. Dkt. 48, 58.



Rather than accept the results of this nearly \$ 1 million disparity study, Houston contracted for a new disparity study on March 28, 2023. Dkt. 41-1, Hoyrd Aff. ¶5. The study was “expected” to be provided to City administrators in May 2024, *id*; Plaintiffs are unaware if that has occurred.

Houston has not identified any prime contract awards based on intentional discrimination against MWBE 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. 3, nos. 1–2. Houston has not identified any specific constitutional or statutory violations related to its public contracting or procurement process or awards during that period. Ex. 1, no. 20. Instead, “[t]he compelling interests advanced by the MWSBE program includes the City of Houston’s attempts to remedy past discrimination by rectifying its own actions.” *Id.* at no. 4.

Defendant Midtown Management District

Defendant Midtown Management District (Midtown)’s policy is “to stimulate the growth of minority, women, and disadvantaged business enterprises by encouraging the full participation of MWDBE businesses in all phases of its procurement activities and affording those firms a full and fair opportunity to

compete for contracts.” Ex. 4, Marshall Dep. Tr., Ex. 3 at 4. Midtown awards ten out of one hundred points to bids from minority and women-owned business enterprises. *Id.* Midtown’s program is not based on a disparity study of its market area; it has not adopted any study, report, or research that identifies specific instances of discrimination in public contracting in the last five years, nor has it adopted Harris County’s 2020 disparity study. Ex. 7, nos. 6, 23.

MWBEs certified by Houston are eligible for Midtown’s 10-point preference. Ex. 7, no. 9. Midtown admits that its Program may disadvantage non-MWBE companies—even if those companies have never themselves been guilty of discrimination. *Id.* at no. 16. Most significantly, Midtown has zero evidence of racial discrimination in its public contracting program: in the last five years it has identified no prime contract awards based on intentional discrimination against MWBE bidders in the last five years; it has not disciplined, sanctioned, or terminated any employee or official for discrimination in awarding public contracts; it has not identified instances of a prime contractor discriminating against a subcontractor; it has not debarred or sanctioned a prime contractor for such discrimination; and it can identify no specific constitutional or statutory violations related to its public contracting or procurement process awards. *Id.* at nos. 1–2, 4–5, 21.

The Plaintiffs

Plaintiffs Landscape Consultants and Metropolitan are small, family-owned landscaping businesses that share approximately fifty employees. Ex. 8, 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 MWBE. *Id.* at ¶ 5; Ex. 5, Thompson Dep. Tr. 117:16–22.

Landscape Consultants is currently performing on a five-year, \$1.3 million contract with Houston that has an 11 percent MWBE goal. Ex. 5, 20:21–25. In 2022, Metropolitan bid for Midtown’s Field Maintenance Service Project, a contract it held off-and-on over the last fifteen years. *Id.* at Ex. 8. The successful bidder and highest point-scorer earned 87.68 points total, including 10 points awarded for being certified as an MWBE. *Id.* at Ex. 9. Metropolitan scored second highest, with 84.98 total points but zero points awarded in the MWBE category. *Id.* But for the 10 points awarded based on the race of the bidding company’s owner, Metropolitan would have scored the highest and secured the \$350,000 contract. *Id.* About 95 percent of Plaintiffs’ employees are racial minorities. *Id.* at 4:20–21.

Procedural History

Plaintiffs filed their Complaint on September 19, 2023. Dkt. 1. On January 12, 2024, this Court denied separate motions to dismiss filed by Houston and

Midtown. Dkt. 36. On July 3, 2024, this Court denied without prejudice Plaintiffs’ Motion for Summary Judgment against Houston. Dkt. 47. This motion follows.

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

I. Defendants’ Programs Violate the Equal Protection Clause

The Supreme Court is unequivocal: “Racial discrimination is invidious in all contexts.” *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll. (SFFA)*, 600 U.S. 181, 214 (2023) (cleaned up) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991)). Race-based classifications are presumptively unconstitutional and can only be overcome if the government satisfies

the “daunting two-step examination” of strict scrutiny. *SFFA*, 600 U.S. at 206. Both Houston and Midtown must first demonstrate that their programs’ racial classifications are used to “further compelling governmental interests.” *SFFA*, 600 U.S. at 206–07 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)). Second, they must show that the “use of race is ‘narrowly tailored’—meaning ‘necessary’—to achieve that interest.” *SFFA*, 600 U.S. at 207 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311–12 (2013)). Defendants can do neither; their programs should be declared unconstitutional and permanently enjoined.

A. Defendants lack a compelling interest to racially discriminate

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.” *SFFA*, 600 U.S. at 207. A Defendant may establish a compelling interest in remedying racial discrimination 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 governmental 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)). Courts must undertake a “searching judicial inquiry into the justification” of a race-based program to ensure that government entities are “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).

1. Defendant City of Houston

This Court need not search far—Houston 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. 3, no. 20. In fact, Houston cannot identify *any* racial discrimination within its contracting program in the past five years and admits that its Program is not based on any contemporary evidence of disparities or discrimination within the greater Houston area. Ex. 3, nos. 2, 4–6, 22. Nor has it sanctioned—or even investigated—any city employee for racial discrimination in the last five years. Ex. 1, no. 6; Ex. 3, no. 1. Houston could not even identify a single prime contractor that has discriminated against an MWBE in the past five years. Ex. 3, no. 4. Houston has zero evidence of contemporary discrimination.

Instead, Houston claims that its 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. 1, no. 4. This word salad

does not provide a compelling interest for operating a race-based public contracting program. And most troubling, Houston rejected evidence [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Houston buried the study.

Houston’s Program does not target a specific episode of past discrimination.

It can’t possibly do so, because Houston is not aware of any racial discrimination within its Program. Ex. 3, nos. 2, 4–5, 22. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Houston claims its Program seeks to “mitigate and remedy the effects of past discrimination and its lingering effects against minority and women-owned businesses.” Ex. 1, no. 4. However, programs that rest on a “generalized assertion that there has been past discrimination in an entire industry” cannot justify race-based preferences. *Croson*, 488 U.S. at 498; *see also Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996) (“[A]n effort to alleviate the effects of societal discrimination is not

a compelling interest.”); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (plurality opinion) (“remedying past societal discrimination does not justify race-conscious government action”); *Vitolo*, 999 F.3d at 361 (general societal discrimination against business owners insufficient to justify race-based policy).

In *Nuziard v. Minority Business Development Agency*, the court rejected that volumes of congressional testimony demonstrated intentional discrimination, because the federal government failed to identify a specific episode of discrimination for most of the racial groups preferred by the program. 676 F. Supp. 3d 473, 482 (N.D. Tex. June 5, 2023). Without pointing to specific episodes of racial discrimination, the program lacked a compelling governmental interest. *Id.*

Similarly, in *Strickland v. United States Department of Agriculture*, the court found that “minimizing and remediating the effects of [past] discrimination” was not a compelling interest in operating a race-based farm loan-forgiveness program where the government failed to identify discriminatory actions it previously took or link those actions to its statistical findings of racial disparities. No. 2:24-CV-60-Z, 2024 WL 2886574, at *7 (N.D. Tex. June 7, 2024). And in *Miller*, the court found the government’s lack of evidence of intentional discrimination for the past decade against minority farmers “falls short of demonstrating a compelling interest, as any past discrimination is too attenuated from any present-day lingering effects to justify

race-based remedial action by Congress.” 2021 WL 11115194, at *9. The consensus is clear: race-based policies must target specific episodes of past discrimination and preference only actual victims. Houston’s program, by its own admission, does not.

Houston has no evidence of past intentional discrimination. Instead, it relies on broad, decades-old statistical disparities from a 2006 study. But “statistical disparities don’t cut it.” *Vitolo*, 999 F.3d at 361. This is because equating disparities with discrimination gives government “license to create a patchwork of racial preferences based on statistical generalizations.” *Croson*, 488 U.S. at 499. In *Vitolo*, a challenge to race and sex-based preferences for COVID relief funds, the Sixth Circuit found that the government’s patchwork of racial preferences—granting priority to Pakistanis but not Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners—were supported only by broad statistical disparities that did not show intentional discrimination. 999 F.3d at 361–62.

Houston’s 2006 disparity study is worse. It is woefully inadequate to prove past intentional discrimination towards any racial or ethnic group granted a preference under its Program. Despite including individuals who originate from five continents and dozens of countries, Houston admits that its Program’s definition of a “minority person” is not based on specific data from the Houston metropolitan area and that it has not identified individuals from any of those countries who have suffered discrimination in Houston public contracting. Ex. 3, nos. 2, 10, 12.

That was all true in 2006; it is certainly true twenty years later. Houston’s 2006 study is too old and stale to constitute evidence of past intentional discrimination today. Houston’s City Attorney recognized as much at a January City Council Meeting, telling the council that disparity studies “get stale over time. Ours is now stale.”² 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).

In *Miller*, the district court found that the government’s lack of evidence of intentional discrimination in at least the past decade “requires a logical leap, as well as a leap back in time” that “falls short of demonstrating a compelling interest, as any past discrimination is too attenuated from any present-day lingering effects to justify race-based remedial action by [government].” 2021 WL 11115194, at *9. Without any recent evidence of disparities—much less actual intentional racial

² 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.”).

discrimination—Houston cannot show a compelling interest in operating a race-based contracting program.

Houston did not participate in the discrimination it seeks to remedy. To the contrary, Houston admits it has not disciplined, terminated, or otherwise sanctioned any employee or official for discrimination in the award of public contracts, identified no prime contract awards based on intentional discrimination against MWBE bidders, identified no instances of a prime contractor discriminating against MWBE subcontractors, and has not debarred or sanctioned a public contractor for discrimination against MWBE subcontractors in the last five years. Ex. 3, nos. 1–2, 4–5. Houston admits it has not adopted any study, report, or research identifying specific instances of discrimination in procurement or public contracting in the last five years and in fact has specific procurement policies that forbid discrimination in awarding public contracts. Ex. 3, nos. 6–7. Though government participation can be either active or passive, *Croson*, 488 U.S. at 492, Houston admits it has done neither.

2. Defendant Midtown Management District

Midtown lacks any evidence—let alone a “strong basis in evidence”—for its race-conscious contracting program that awards ten points to certain bidders based on skin color. *See Shaw*, 517 U.S. at 910 (citation omitted). It asserts that following Tex. Local Gov’t Code § 375.222 relieves it of the burden of demonstrating a compelling interest for its discriminatory program. Ex. 6, no. 4. To that end,

Midtown relies on the Texas Legislature’s generic finding of “a history of discrimination in the award of public contracts that necessitated the enactment of this statute.” *Id.*

Of course, a state law allowing localities to adopt a tailored race-conscious program where evidence of discrimination is present is not a mandate to adopt such a program in the absence of such evidence. Tex. Local Gov’t Code § 375.222 even says so explicitly. It requires that programs established under that section “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.* at (d). Midtown has never conducted a study to determine whether statistically significant disparities exist and admits it has no statistical basis for its Program. Ex. 7, no. 6. Instead, “discussions by staff and/or committees” determined that the race-based 10-point award “would be the most effective way to address the history of discrimination[.]” Ex. 6, no. 8

Midtown’s Program does not target a specific episode of past discrimination. Midtown admits it has identified no specific constitutional or statutory violations related to its public contracting or procurements process or awards in the last five years. Ex. 7, no 21. Additionally, Midtown cannot identify any specific, past constitutional or statutory violation that its Program is intended to remedy. Ex. 6, no. 7. Midtown’s race-conscious program seeks only to remedy the effects of general

societal discrimination, which is not a compelling interest. *Shaw*, 517 U.S. at 909–10.

Midtown has no evidence of past intentional discrimination. In addition to admitting that it cannot identify specific, past constitutional or statutory violations, Midtown also admits that it has identified no prime contract awards based on intentional discrimination against MWBE bidders in the last five years. Ex. 7, no. 2. In the last five years, Midtown has not disciplined, terminated, or otherwise sanctioned any employee or official for discrimination in public contracting, nor has it debarred or sanctioned a contractor for discriminating against a MWBE subcontractor. *Id.* at nos. 1, 4–5. In other words, Midtown operates a race-based public contracting program despite no evidence of past intentional discrimination against contractors of any race or sex whatsoever.

Midtown did not participate in the discrimination it seeks to remedy. Midtown’s Program does not even seek to remedy specific instances of past intentional discrimination. *Id.* at nos. 1–2, 4–6, 21. Nor can it; none exists. Without a specific constitutional or statutory violation to remedy, Midtown has no compelling interest in operating a race-based contracting program.

The prohibition against enacting race-conscious set-aside programs that do not attempt to remedy underlying statutory or constitutional violations is nothing new; in *Croson*, the Court struck down Richmond’s 30% contracting set-aside

because there was “nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry.” *Croson*, 488 U.S. at 500. *SFFA* clarified last year 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. Defendants’ programs do exactly what *Croson* prohibited, and they are unconstitutional.

B. Defendants’ discriminatory programs are not narrowly tailored

A race-conscious program should be the remedy of last resort. *Walker v. City of Mesquite*, 169 F.3d 973, 982–83 (5th Cir. 1999). For a race-based program to survive narrow-tailoring analysis, the government must show “serious, good faith consideration of workable race-neutral alternatives.” *Grutter*, 539 U.S. at 339; *Croson*, 488 U.S. at 507. Courts must strike down race-based programs unless it is “satisfied that no workable race-neutral alternative” would achieve the compelling interest. *Fisher*, 570 U.S. at 312. Further, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications, *Croson*, 488 U.S. at 507–08; *Gratz v. Bollinger*, 539 U.S. 244, 273–75 (2003), and it must have an end point. *SFFA*, 600 U.S. at 225.

1. Defendant City of Houston

Houston’s Program fails on all fronts. First, Houston has used racial preferences in awarding public contracts for four decades, yet there is no evidence

that it ever attempted a workable race-neutral alternative to its race-conscious program. To the contrary, [REDACTED]

[REDACTED]. Second, the Program is both underinclusive and overinclusive. It is underinclusive in that it excludes many minority-owned businesses, like those with owners from the Middle East or North Africa, as well as any minority business owner who owns less than 51% of their business. *Nuziard*, 676 F. Supp. 3d at 483–84. The Program is overinclusive because it includes businesses who may never have been discriminated against. Houston admits that it does not require evidence that an applicant has experienced previous discrimination when determining whether to grant MWBE status. Ex. 3, no. 14. Nor does Houston distinguish between recent immigrants and those whose families have been established in the United States for generations. *Id.* at no. 13. This “scattershot approach” is not sufficient narrow tailoring. *Vitolo*, 999 F.3d at 364. Finally, the Program never ends, as its forty-year history and infrequent review attest. Race-based programs must end. *SFFA*, 600 U.S. at 225.

2. Defendant Midtown Management District

Midtown’s Program is not tailored in any way, let alone narrowly. To start, Midtown admits its policy is to use Houston’s definition of “minority persons” when evaluating bidders for its 10-point bonus. Ex. 7, no. 10. Therefore, Midtown’s Program suffers the same underinclusive and overinclusive defects as Houston’s

Program. *See* p. 17, *supra*. Indeed, Midtown admits that this policy grants a racial preference to individuals originating from five continents and dozens of countries, yet it cannot identify any individuals from those countries who have suffered discrimination by Midtown, “particularly because there are so many countries listed in this code section.” Ex. 7, nos. 11, 13.

There is no evidence that Midtown attempted any race-neutral alternatives to its race-based contracting program. Instead, Midtown “staff/committees” simply decided to award 10 points to MWBE bidders that are not available to non-MWBE bidders. Ex. 6, no. 8; Ex. 7, no. 8. And since Midtown does not evaluate its Program to determine whether a race-based policy is necessary, the Program has no end point. Ex. 4, 26:24–27:9.

C. The programs violate the “twin commands” of equal protection

The Equal Protection Clause’s “twin commands” require that race never be used as a negative and that it may never operate as a stereotype. *SFFA*, 600 U.S. at 218. Defendants’ programs do both. Like college admissions, contracting awards are zero-sum; Midtown’s 10-point policy and Houston’s MWBE goals are a benefit provided to some companies but not others based on race, and “[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.” *Id.* at 218–19.

Defendants’ programs also use race as a stereotype. All black, Hispanic, Native American, Asian American, or Subcontinent Asian American business owners are treated according to group membership. No individualized showing of discrimination is necessary, because Houston and Midtown assume all individuals from racial groups are the same. Ex. 7, no. 13; Ex. 3, no. 12. Defendants’ racial stereotyping is “contrary ... to the core purpose of the Equal Protection Clause.” 600 U.S. at 221 (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

II. Defendants’ Programs Discriminate on the Basis of Race in Violation of 42 U.S.C. § 1981

42 U.S.C. § 1981(a) states that “[a]ll persons ... shall have the same right ... to make and enforce contracts ... and to the full and equal benefit of all laws ... as is enjoyed by white citizens.” To establish a prima facie case under § 1981, Plaintiffs must show that: (1) they are members of a racial minority; (2) Defendants had an intent to discrimination 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). Despite the racial minority requirement, the statute “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). Its “broad terms” bar discrimination “against, or in favor of, any race.” *McDonald v. Santa Fe Trail Co.*, 427 U.S. 273, 295 (1976).

Both Houston and Midtown’s programs violate § 1981 by expressly excluding Plaintiffs due to the race of their owners. This racial discrimination is intentional. Houston Code § 15-81, et seq. creates a program that advantages some businesses over others based on the race or ethnicity of the business’ majority owner, and Midtown admits that its policy is to use Houston’s definition of “minority person” when evaluating bidders to determine which ones receive a race-based preference. Ex. 7, no. 10. A law or policy that expressly classifies people on the basis of a protected characteristic is direct evidence of discriminatory intent. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213, 227–29 (1995); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610.

Defendants’ programs also implicate an activity enumerated under § 1981: Plaintiffs’ “making ... of contracts” with Houston or Midtown for landscaping services. 42 U.S.C. § 1981(b). A contract “need not already exist” to trigger § 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 475. Defendants’ programs discriminate against Plaintiffs on the basis of race and should be struck down.

CONCLUSION

For the foregoing reasons, Plaintiffs’ Motion for Summary Judgment should be granted.

Dated: November 29, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 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

**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
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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 §

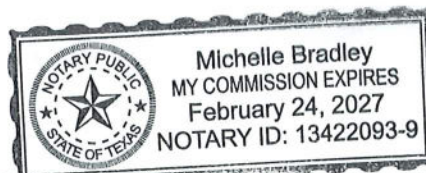
AFFIDAVIT

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)

EXHIBIT 2

FILED UNDER SEAL

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

**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,

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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

RE UESTS FOR ADMISSION

RE UEST 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.

RE UEST 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.

RE UEST 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.

RE UEST 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.

RE UEST 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.

RE UEST FOR ADMISSION NO. 1 :

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.

RE UEST FOR ADMISSION NO. 2 :

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.

RE UEST 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.

RE UEST 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 4

UNITED STATES DISTRICT COURT
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.

DEPOSITION OF

MARLON MARSHALL

30 (B) (6)

TAKEN ON

WEDNESDAY, JUNE 12, 2024

10:13 A.M.

HARRIS HILBURN & SHERER, LLP

1111 ROSALIE STREET

HOUSTON, TEXAS 77004

MARLON MARSHALL 30 (B) (6)
75250

June 12, 2024

2

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MARLON MARSHALL 30 (B) (6)
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June 12, 2024

3

APPEARANCES (Continued)

Appearing on behalf of the Defendant, City of
Houston, Texas:

JARETT DILLARD, ESQUIRE

Husch Blackwell

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Houston, Texas 77002

(713) 647-6800

(713) 647-6884 (Fax)

jarett.dillard@huschblackwell.com

MARLON MARSHALL 30 (B) (6)
75250

June 12, 2024

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MARLON MARSHALL 30 (B) (6)
75250

June 12, 2024

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MARLON MARSHALL 30 (B) (6)
75250

June 12, 2024

6

DEPOSITION OF
MARLON MARSHALL

TAKEN ON
WEDNESDAY, JUNE 12, 2024
10:13 A.M.

THE REPORTER: We are on the record at 10:13 a.m.

And, Mr. Marshall, will you please raise your right
hand?

Do you affirm under penalty of perjury that the
testimony you're about to give will be the truth, the whole
truth, and nothing but the truth?

THE DEPONENT: Yes.

THE REPORTER: Thank you, sir.

Will each attorney please state their name and whom
they represent?

MR. THOMPSON: Josh --

MR. SILEO: I'm -- oh, go ahead.

MR. THOMPSON: I'm sorry. Joshua Thompson. I
represent Landscape Consultants of Texas and the Metropolitan
Landscape Management Incorporated.

MR. SILEO: And this is Brett Sileo, and I represent
Midtown Management District.

MR. DILLARD: This is Jarett Dillard, and I represent
the City of Houston.

1 Q. On the next page at the top it says, "The district
2 will make itself available to answer questions of DBEs and to
3 provide information as to how a firm may effectively compete
4 for work in the district." Do you know how the district
5 effectuates that provision?

6 A. The district has participated in procurement events
7 that were targeted for disadvantages -- disadvantaged
8 businesses that were invited to those events.

9 Q. And 4 says the district keeps records of all these.
10 Are you -- are you aware of the records of these?

11 A. No.

12 Q. And 5 says that the district will review its
13 disadvantaged business program each year. Are you aware of --
14 of -- if the district has done that?

15 A. The district has entered into an agreement with
16 Midtown Redevelopment Authority since this was drafted to
17 administer and comply with laws of the state. And the Midtown
18 Redevelopment Authority has administrative policy that is
19 reviewed annually.

20 Q. Does that mean that the district does not review its
21 DBE program each year?

22 A. I'm unsure if it means that.

23 Q. Do you know -- strike that.

24 Are you aware of any review that the district has
25 undertaken for its disadvantaged business program last year?

MARLON MARSHALL 30 (B) (6)
75250

June 12, 2024

27

1 A. No.

2 Q. And then on E, "Reporting, the personnel shall
3 complain --"

4 A. Excuse me. Excuse me. I would like to correct that.

5 Q. Of course.

6 A. In its agreement with Midtown Redevelopment
7 Authority, the program was reviewed last year.

8 Q. What did that review consist of?

9 A. I'm not sure.

10 Q. Is that review documented somewhere?

11 A. It is documented in minutes, from board meetings for
12 approval of the document.

13 Q. Approval of the document. Which document are you
14 referring to?

15 A. The Midtown Redevelopment Authority's policies and
16 procedures.

17 Q. Back under reporting it says that, "Personnel should
18 compile activities, results into an annual report." If you
19 read on it says that, "Report will be prepared 90 days after
20 the end of each fiscal year." To your knowledge, does Midtown
21 Management District produce such reports?

22 A. Not to my knowledge.

23 Q. Okay. Are you doing okay? I'm going to move on to a
24 different topic if --

25 A. Okay.

MARLON MARSHALL 30 (B) (6)
75250

June 12, 2024

60

UNITED STATES DISTRICT COURT
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.

REPORTER'S CERTIFICATION
DEPOSITION OF MARLON MARSHALL
JUNE 12, 2024

I, Barbara Molina Court Reporter, hereby certify to the following:

That the witness, Marlon Marshall, 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;

That the deposition transcript was submitted on June 28, 2024, to the witness or to the attorney for the witness for examination, signature and return to NAEGELI DEPOSITION AND TRIAL by July 18, 2024;

1 That the amount of time used by each party at the
2 deposition is as follows:

3 JOSHUA THOMPSON - 1hr 48min

4 ANASTASIA BODEN - 0hr 0min

5 BRET J. SILEO - 0hr 0min

6 JARETT J.P. DILLARD - 0hr 0min

7 That pursuant to information given to the deposition
8 officer at the time said testimony was taken, the following
9 includes counsel for all parties of record:

10 JOSHUA THOMPSON ATTORNEY FOR PLAINTIFF

11 ANASTASIA BODEN ATTORNEY FOR PLAINTIFF

12 BRETT J. SILEO ATTORNEY FOR DEFENDANT

13 JARETT J.P. DILLARD ATTORNEY FOR DEFENDANT

14 I further certify that I am neither counsel for, related
15 to, nor employed by any of the parties or attorneys in the
16 action in which this proceeding was taken, and further that I
17 am not financially or otherwise interested in the outcome of
18 the action.

19 Certified to by me this 28th day of June, 2024.

20
21
22 

23 Barbara Molina 818
24
25

EXHIBIT 3

EXHIBIT	
3	
DEPONENT NAME:	DATE:
m. Marshall	06/12/24

Midtown Management District
Invitation to Bid
Field Maintenance Services Project

Dated Issued: October 21, 2022

The Midtown Management District (the “Midtown District”) seeks a qualified, experienced, and professional contractor to provide landscape maintenance and general cleanup services in public spaces and right-of-way of the streets within the boundaries of the Midtown District. Prospective Responders are invited to submit their bids and qualifications.

BACKGROUND: The area commonly known as “Midtown” is a mixed-use urban area located generally between the Houston Central Business District and the Texas Medical Center.

The Midtown District has established a Services and Maintenance Program to support the revitalization and redevelopment of Midtown. The goal of the Services and Maintenance Program is to enhance the Midtown’s pedestrian nature, viability, and image by providing well-maintained public spaces and rights-of-way. The Field Maintenance Services Project is designed to help achieve this goal by providing landscape and maintenance services and the removal of trash, debris, and other unsightly objects in the public rights-of-way of the Midtown District.

PROJECT: The Midtown District’s Field Maintenance Services Project is intended to provide daily landscape maintenance and general cleanup services in public spaces and along the right-of-way of the streets throughout the entire Midtown District. A map showing the boundaries of the Midtown District is attached hereto as *Exhibit C*.

SCOPE OF SERVICES: The selected contractor shall furnish all personnel, labor, materials, machinery, tools, equipment, fuel, and services required to perform and complete all work in an efficient and workman-like manner as described in these specifications. The Field Maintenance Services contractor will provide at least eight (8) full-time employees to perform field maintenance services a minimum of eight (8) hours per day, five (5) days per week (Monday through Friday). A more detailed description of the services required is set forth in the “Scope of Services (General Provisions)” attached hereto as *Exhibit A* and in the “Scope of Services (Specific Provisions)” attached hereto as *Exhibit B*. The anticipated project start date is January 1, 2023 or such other date as determined by the Midtown District.

PRICE PROPOSAL: Please provide a price proposal to accomplish the scope described above and in *Exhibit A and Exhibit B*. Responders must complete the “Official Midtown District Bid Form” attached hereto as *Exhibit D*.

NOTE: Responders must include Supplemental Bid to include daily rate (8 hours) and half-day rate (4 hours) to provide four (4) employees to perform maintenance operations during special events and/or weekend days

This invitation for bid should not be construed as an agreement to purchase goods or services. The District reserves the right to reject any or all bids.

ADDITIONAL INFORMATION: In addition to providing the Bid Form, Responders must provide the following additional information in order to comply with this Invitation to Bid ("ITB"). Please complete all sections and respond with a maximum of 20 pages. The Bid Form and key personnel resumes are in addition to the 20-page response limit.

Title Page - The title page should include the ITB subject, the name and address of the Responder, and the required submission date of the Response.

Cover Letter - In the cover letter, outline the sales, operational, customer service and technical contacts within your organization. Include phone numbers and e-mail addresses. In addition, this letter shall include a statement by the Proposer i) accepting all terms and conditions contained in this ITB; ii) that the person signing the transmittal letter is authorized to legally bind the Proposer; and iii) that the proposal and pricing contained therein shall remain firm for a period of 180 days from the date of receipt by the Midtown District.

Company Profile - Provide the following general information about your company and personnel key to providing landscape maintenance services:

1. Name, address, website (if any), and phone number of your company headquarters.
2. Age of company, year of incorporation/formation, and number of employees and revenues related specifically to the delivery of landscape maintenance services.
3. Number of current customers and years of experience in this line of business.
4. Identify all key personnel designated to work on the ongoing aspects of landscape maintenance services of this project.
5. Describe your company's experience with specific examples of work on similar projects, including name of project, name, physical address, email address and phone number of contact person, and a narrative description of the services provided.
6. Description of equipment your company will utilize to perform the identified Scope of Services under this contract.
7. Describe any current or previous relationship with the Midtown District including services and products provided.

Summary of Proposed Approach - Provide the following regarding your company's approach and key personnel to providing field maintenance services:

1. Provide a summary that defines your overall approach to provide and manage the field maintenance services. Provide supporting information, such as organization charts or flow charts that define how your proposed solution is designed to meet the requirements of this ITB. Highlight the capabilities, services, and/or attributes of your firm that differentiate your proposal.
2. Provide copies of any relevant certifications and accreditations obtained by personnel who will be assigned to the project.
3. Provide details about any "Value Added Services" your company proposes in providing field maintenance services to the Midtown District. "Value Added Services" means either voluntary contributions or services from the Contractor in furtherance of the Agreement, which shall not be charged to the Midtown District or which will result in cost savings to the Midtown District.

References - Provide the following reference information about your company:

1. Provide up to three references of companies/organizations that have used your services for a minimum of three years on the same or similar basis as is proposed to Midtown District. Contact name(s) and phone number(s) must be included. Also, please indicate the length of the relationship, date of service commencement, and what products or services are supplied to each such company.
2. Provide up to three references of companies that have used your services on the same or similar basis as is proposed to the Midtown District for a period of more than 12 months, but less than 24 months. Contact name(s), email address, and phone number(s) must be included.
3. Provide at least two references for companies that recently issued a Proposal to your company that you were **not** awarded, or that replaced your services with another provider within the last 24 months. Contact name(s), email address, and phone number(s) must be included.

Financial Considerations – In addition to the information requested on the Official Midtown District Bid Form, please provide the following financial related information:

1. Provide a summary that defines your overall pricing strategy proposed for this project. Briefly describe all fees that may be incurred by the Midtown District over the Agreement term.
2. Explain how the proposed pricing strategy will ensure that service and performance levels will be maintained consistently at all times.
3. Identify any other fees or costs the Midtown District will incur as a result of your proposal

INSURANCE REQUIREMENTS: Responders must provide proof of insurance with, at a minimum, the following coverage and limits of liability:

<u>Coverage</u>	<u>Limit of Liability</u>
Worker's Compensation	Statutory for Workers Compensation
Employer's Liability	Bodily Injury \$1,000,000
Comprehensive Commercial General Liability, Including Broad Form Coverage, Contractual Liability, Bodily and Personal Injury, and Completed Operations	Combined limits of \$1,000,000 per occurrence and \$2,000,000 in the aggregate
Automobile Liability Insurance (for automobiles used by the contractor in the course of its performance under the Agreement including employer's non-owned and hired auto coverage)	\$1,000,000 combined single limit per occurrence

If the required insurance is not in place at the time responses are submitted, responders must show evidence of insurability at the above described coverage limits, which evidence can be in the form of a valid insurance quote or such other evidence of insurability acceptable to the Midtown District. Alternatively, the responders may submit a copy of a valid Certificate of Insurance with the above coverage and limits of liability as proof of insurance.

Insurance must be in effect at the time a Contract is executed with the successful bidder.

PARTICIPATION OF MINORITY, WOMEN, AND DISADVANTAGED BUSINESS

ENTERPRISES (MWDBE): It is the policy of the Midtown District to stimulate the growth of minority, women, and disadvantaged business enterprises (MWDBEs) by encouraging the full participation of MWDBE businesses in all phases of its procurement activities and affording those firms a full and fair opportunity to compete for contracts. MWDBE firms must be certified by the City of Houston, Houston Minority Business Council, and /or the Houston Women's Business Council. Proof of such certifications should be included with the Response.

EVALUATION CRITERIA: The contract will be awarded to one or more Responders at the sole discretion of the Midtown District after consideration of the quality of service, product, price and other factors that are deemed relevant to the services to be performed. Prospective Responders must have a satisfactory record of contract performance, integrity and business ethics, and adequate financial resources to meet the contractual requirements over the life of the Agreement. By submitting this Response, Responder warrants that it is legally authorized to do business in the State of Texas (a "Certificate of Registration" from the Texas Secretary of State's Office will be required of the selected Responder prior to contract award), is in compliance with all applicable laws and regulations, is not prohibited from doing business with the Midtown District or with the City of Houston (the "City") by law, order, regulation, or otherwise, and the person submitting the Response on behalf of the Responder is authorized by the Responder to bind it to the terms of the Response.

In addition to the factors already set forth, the adequacy of the Proposer's proposal will be evaluated according to the following criteria:

Financial Considerations - 50 POINTS

Organizational Qualifications and References - 25 POINTS

Proposed Approach - 15 POINTS

Minority, Women, Disadvantaged Business Enterprise (MWDBE) - 10 POINTS

CONTRACT AWARD AND TERMS: The Midtown District will negotiate final contract terms upon selection. Any contract presented is subject to review by the Midtown District staff and its legal counsel. Final approval and contract award will be by the Midtown Management District Board of Directors.

PRE-BID CONFERENCE: A Pre-Bid Conference will be held on **November 1, 2022 at 2:00 PM (CST)** at the Midtown District offices located at 410 Pierce Street, Suite 355, Houston, TX 77002. Attendance at the pre-bid conference is strongly encouraged but is not mandatory.

BID SUBMISSION: The Response to this Invitation to Bid should be electronically submitted in a single package (.pdf file) clearly marked for identification in the subject reference line with the Respondent's name and the words "**Response to Invitation for Bid for Field Maintenance Services Project**". All Responses must be **RECEIVED** on or before **2:00 PM(CST) on November 15, 2022. NO LATE SUBMISSIONS WILL BE CONSIDERED.** Responses should be submitted via email to mmarshall@midtownhouston.com.

Questions concerning this Invitation To Bid must be submitted via www.CivCastUSA.com (search "Midtown – Landscape and Field Maintenance Services") on or before 2:00 p.m. (CST) on November 8, 2022.

Exhibit A

Midtown Field Maintenance Services

Scope of Services

(General Provisions)

Contractor shall provide all personnel, materials, tools, equipment, and services required to provide daily general maintenance, landscape and cleanup services including but not limited to mowing, edging, weeding, blowing, hand irrigation, power washing, tree trimming, trash collection, debris and litter removal ("Field Maintenance Services") in public spaces and right-of-ways in the area commonly known as "Midtown" in the City of Houston, Texas. Contractor will provide at least eight (8) full-time employees, one (1) of which shall be a working supervisor, who are assigned solely to perform Field Maintenance Services on behalf of the Midtown District at least five (5) days a week. Each full-time employee shall work a minimum of 40 hours per week within the District and shall at all times be dressed appropriately (specifically, employees shall wear a Midtown uniform consisting of a shirt and vest containing the Midtown name and logo, which shirt and vest will be supplied by the Midtown District). Contractor represents that it has the necessary current licenses, including but not limited to pest control and irrigation licenses, to perform its obligations under this Agreement.

To the extent the Field Maintenance Services to be performed hereunder entails landscape maintenance, such services shall be provided in accordance with the Midtown Field Maintenance Services Specifications set forth in the Scope of Services (Specific Provisions) attached hereto as Exhibit B.

Contractor shall provide at its sole cost and expense two (2) EZ Go Carts or similar type golf cart vehicles for use in trash and debris collection within the Midtown District. At all times while in the Midtown District, vehicles shall display clearly visible signage containing the Midtown District's name and logo. Any such signage shall be provided by the Midtown District for use by the Contractor and must be surrendered to the Midtown District upon termination of this Agreement. Contractor shall be solely responsible for the disposal of trash and debris collected and shall properly dispose of any such trash and debris in accordance with any applicable municipal, state or federal law.

Contractor shall provide at its sole cost and expense a watering tank for use in hand irrigation within the Midtown District.

Contractor shall provide, at its sole cost and expense, a facility for storage of its materials, tools, and equipment required to provide the services required under this Agreement. The Midtown District shall have no responsibility for any loss or damage to any of the Contractor's materials, tools or equipment.

Contractor shall provide weekly written reports in form and substance as is required by the Executive Director of the Midtown District or his designee. The form, substance and frequency of such reports shall be in the sole discretion of and may be changed periodically by the Executive Director of the Midtown District or his designee and Contractor shall be given at least 1-week advance notice of such changes in reporting requirements.

Contractor shall coordinate weekly with the Executive Director of the Midtown District or his designee for work assignments and to determine an appropriate schedule for performance of such Field Maintenance Services. In the event of a change in such schedule for any reason, Contractor will notify the Executive Director or his designee immediately of such change.

In the event, Contractor shall be unable to perform the Field Maintenance Services due to inclement weather, such Field Maintenance Services shall be performed at the next earliest possible date when inclement weather no longer prohibits Contractor from performing such services.

Exhibit B

Midtown Field Maintenance Services

Scope of Services

(Specific Provisions)

PART I GENERAL

1.01 SCOPE

A) Work included: perform all work necessary utilizing acceptable horticultural practices for the landscape maintenance of the public spaces and rights of way within the Midtown District. Such work includes, but is not limited to the following:

1. Mowing, edging, and trimming of lawn areas
2. Pruning and trimming of plant material
3. Weeding and cleaning of plant beds
4. Application of fertilizer, insecticides, fungicide, and herbicides
5. Removal of trash, litter and debris
6. Monitor adjustments, coverage and repair of sprinkler systems
7. Hand irrigation of landscaping not serviced by the automatic sprinkler systems
8. Power washing of brick pavers, planters and hardscape material.

B) Related work under a separate contract:

1. Sprinkler repair (excluding that which damaged by Contractor)
2. Plant replacement

C) Extra Services:

All services not covered under this contract shall be considered “**EXTRA SERVICES**” and will be charged separately according to the nature of the task and work involved. **WRITTEN AUTHORIZATION** for **EXTRA SERVICES** must be obtained prior to performance.

1.02 CONTRACTOR'S PERFORMANCE

The Contractor shall perform all work required as necessary to fulfill the intent of the contract. All work shall be performed in a professional manner, noise shall be kept to a minimum and work staged from a location on the site as to not interfere with the users of the site.

1.03 CONTRACTOR'S RESPONSIBILITIES

- A) Trees, shrubs or turf that are damaged or killed due to Contractor's operations, chemicals or negligence shall be replaced by the Contractor at no expense to the Midtown District.
- B) Sprinklers or structures that are damaged due to the Contractor's operations or negligence must be repaired or replaced by the Contractor promptly.

1.04 EMERGENCIES

The Contractor shall respond to emergency or complaint calls regarding conditions in the public right of way requiring immediate attention, including but not limited to, fallen trees or branches or water leaks. Contractor shall immediately notify the Midtown District of any water leaks or other conditions requiring an immediate response.

PART II EXECUTION

2.01 TURF MAINTENANCE

- A) Mowing, edging, trimming and blowing.
 - 1. During cool weather mow at 1 1/2", hot weather at a height of 2".
 - 2. Never scalp the lawn or remove more than one half the existing top growth in one mowing.
 - 3. Trim grass around sprinkler heads each time the grounds are mowed.

2.02 TREE AND SHRUB MAINTENANCE

- A) Contractor shall be responsible for staking and tying of trees at all times. Broken ties and stakes shall be replaced as needed. Adjustments or removals of ties and stakes shall be made from time to time to allow proper growth of the tree.
 - 1. All suckers shall be continually removed.
 - 2. Periodically prune or shape trees to promote correct growth (10' below).
 - 3. Periodically adjust or replace ties and stakes to insure the correct growth of trees.
 - 4. All major pruning shall be done only under the direction of the Midtown District.

2.03

FERTILIZATION

A) Yearly Program-Lawn

Mar 1 - Mar 31: 19-5-9 with 50% SCU, 2% FE
May 1- May 31: 19-5-9 with 50% SCU, 2% FE
July 1 - July 31: 19-0-6 with 2% FE
Oct 1 - Oct 31: 8-8-19 Winterize

1. Apply at a rate of 10 lbs/1000 sq. ft. in the spring and fall.
2. Apply at a rate of 7 lbs/1000 sq. ft. in the summer.

B) Shrubs and trees need a 13-13-13 analysis fertilizer but at a rate of 8 lbs/1000 sq. ft.

C) Contractor shall notify the Midtown District prior to fertilization application.

2.04

PESTICIDES OR CHEMICAL APPLICATIONS

A) The Contractor is hereby granted permission to use such pesticides and chemicals as found necessary and advantageous. The Contractor assumes all liability for damage and/or injury from use of these products or equipment. The Midtown District shall be notified prior to application and advised of any potential danger associated with the use of these products.

- 1) An approved insecticide shall be used as required for chinch bugs and grubs.
- 2) Plant material insecticides will be used as necessary to control brownpatch.
- 3) Lawn fungicides will be used as required to control brownpatch.
- 4) Plant fungicides shall be used as necessary to control fungus.
- 5) A herbicide spray shall be used to prevent growth in paved areas where vegetation growth is not permitted.

2.05

HAND IRRIGATION

A) Contractor shall be responsible for hand watering of landscaping in areas not serviced by automatic sprinkler systems.

2.06

POWER WASHING

A) Contractor shall be responsible for power washing of brick pavers, planters, and hardscape material in designated areas of the District.

2.07

GENERAL CLEAN UP

- A) The Contractor shall remove and dispose of all waste material or refuse from their operations immediately after maintenance functions have been performed.
 - 1) Leaves, paper, grass clippings or other debris shall be bagged and removed from site during each visit.
 - 2) No turf clippings, litter or debris should be raked or blown in such a way that it ends up on privately owned property, public streets, sidewalks or in the City of Houston's water and sewer system.

Part III SPRINKLER MAINTENANCE SPECIFICATIONS

3.01 SCOPE

- A) Work included: perform all work necessary utilizing acceptable practices for the sprinkler maintenance of the project as required herein. Such work includes but is not limited to:
 - 1) Check controller settings for proper operations.
 - 2) Activate system and check each station for the following:
 - a) Proper valve operation
 - b) Broken lines
 - c) Proper operation of heads and nozzles
 - d) Proper coverage of all landscaped areas
 - e) Proper elevation and alignment of sprinkler heads
- B) Work not included:
 - 1) Repair work on controllers and valves
 - 2) Repair of broken lines
 - 3) Correction of improper elevation of sprinkler heads
 - 4) Placement of donuts

3.02

EXECUTION

- A) The Contractor shall monitor and program the automatic controlling devices to provide optimum moisture levels in all areas.
- 1) Irrigation cycles shall be set to take place prior to sunrise (usually 4:00-5:00 a.m.) unless otherwise instructed by the District. Avoid watering on days scheduled for maintenance visits by landscape personnel.
 - 2) If there is more than one irrigation controller, do not program to water during the same time period, as overdraft of water meters will result. Set controllers so that one finishes water cycle before next one starts.
 - 3) Adjust sprinklers to avoid windows, buildings, and walkways.
 - 4) Replace sprinkler heads damaged by mowers or other maintenance functions. Such repairs or replacements shall be made at no cost to the owner.
 - 5) Clean all clogged nozzles and flush system if necessary.
 - 6) Contractor shall complete a sprinkler check form and return it to the Midtown District after each sprinkler check. This form shall include the following:
 - a) any malfunction in the controller, valves or heads.
 - b) description of areas not receiving coverage.
 - c) work that has been performed.
 - d) work that has not been performed. Specify any problems that exist which cannot be corrected at that time. Include an approximate cost for all repairs which are not included in a sprinkler check.
 - 7) Advise Midtown District in the event that the sprinkler system is not entirely operational. Provide details of the specific work that needs to be completed to repair the sprinkler system.

Exhibit C
Map of the Midtown Management District

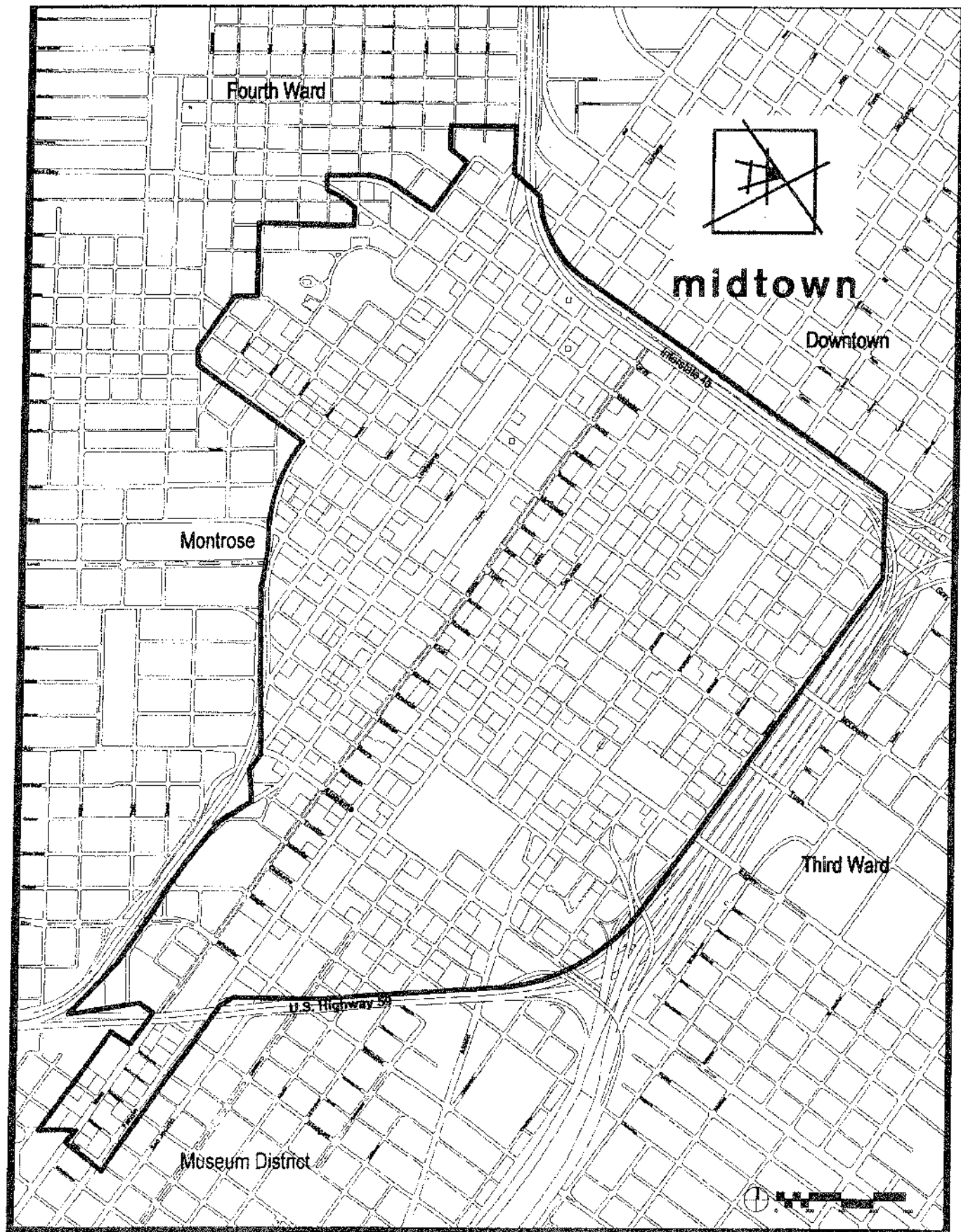


Exhibit D

Official Midtown District Bid Form

To: **Midtown Management District**
Attention: Mr. Marlon Marshall
410 Pierce Street, Suite 355
Houston, Texas 77002

Project: **Field Maintenance Services Project**

In compliance with the Invitation To Bid by the Midtown Management District and subject to all conditions and specifications thereof, the undersigned offers and agrees to furnish all equipment and labor as provided in the above-mentioned specifications.

Bidder: _____

Bid Price (monthly): \$ _____ (per month)

Supplemental Bid Price: (special events/weekends) \$ _____ (daily rate)
\$ _____ (half-day rate)

MWDBE STATUS: Is your company a Minority, Women, or Disadvantaged Business Enterprise (MWDBE) certified by the City of Houston, Houston Minority Business Council, and /or the Houston Women's Business Council?

_____ Yes _____ No

If yes, please attach certificate*

Years in Business: How many years has your company been in business? _____
Please attach Certificate of Business Formation.*

*Name on the certificate must match the name of the Responder.

EXHIBIT 5

Gerald Thompson
November 06, 2024

1

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION
4 LANDSCAPE CONSULTANTS OF TEXAS, INC., and)
5 METROPOLITAN LANDSCAPE MANAGEMENT, INC.,)
6 Plaintiffs,)
7 v.) Civil Action No. 4:23-cv-03516
8 CITY OF HOUSTON, TEXAS,)
9 and MIDTOWN MANAGEMENT)
10 DISTRICT,)
11 Defendants.)

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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.

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

Gerald Thompson
November 06, 2024

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APPEARANCES

FOR THE PLAINTIFFS:

Ms. Erin E. Wilcox Gerald Thompson
November 06, 2024
PACIFIC LEGAL FOUNDATION
555 Capitol Mall, Suite 1290
Sacramento, CA 95814
Telephone: 916.419.7111
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FOR DEFENDANT MIDTOWN MANAGEMENT DISTRICT:

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Telephone: 713.223.3936
Email: bsileo@hhstxlaw.com

ALSO PRESENT:

Mr. Orfelio De Ochoa Jr.
HUSCH BLACKWELL LLP

Mr. Bill Marsh - Videographer

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

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713-653-7100

Gerald Thompson
November 06, 2024

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Gerald Thompson
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GERALD THOMPSON

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Gerald Thompson
November 06, 2024

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1 THE VIDEOGRAPHER: This is beginning of
2 File Number 1 in the deposition of Gerald Thompson. The
3 time is 10:27, and we're on the record. Would the court
4 reporter please swear the witness?

5 GERALD THOMPSON,
6 having been first duly sworn, testified as follows:

7 EXAMINATION

8 BY MR. STEPHENS:

9 Q. Sir, can you state and spell your name for our
10 record, please.

11 A. Gerald Raymond Thompson. G-E-R-A-L-D, Raymond,
12 R-A-Y-M-O-N-D, Thompson, T-H-O-M-P-S-O-N.

13 Q. All right. And I'll call you Mr. Thompson. My
14 name is Ben Stephens. I'm a lawyer representing the
15 City of Houston. Can you -- can you tell me, in your
16 own words, what this lawsuit is about?

17 A. Well, quite frankly, the lawsuit is about
18 discrimination against my companies from being able to
19 fully and capably use our employees to perform contracts
20 in the -- for the City of Houston. And because we are
21 white owners with 95 percent Hispanic employees, it just
22 seems very strange that we would have to do that. So,
23 my main -- my main concern is to protect my employees,
24 not someone else's employees, for payroll and things
25 like that.

Gerald Thompson
November 06, 2024

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1 Q. Okay. So you and your wife, Theresa, both own
2 shares in Metropolitan; is that right?

3 A. Yes.

4 Q. Okay. And you wrote in the complaint in
5 Exhibit 3 -- if you want to take a look at that exhibit
6 again.

7 A. Exhibit 3?

8 Q. Yeah.

9 A. Okay.

10 Q. Let's go back to this. Okay. Sorry. You're
11 gonna have to give me a minute to find it. There we go.

12 A. Which page?

13 Q. We are looking at page 3 of Exhibit 3, and this
14 is Paragraph 8.

15 A. Okay.

16 Q. And do you see where the second sentence says,
17 "Metropolitan is 51 percent owned by a female individual
18 who does not exercise day-to-day control and does not
19 qualify as an MBE under the City's MBE ordinance."

20 A. Yes.

21 Q. Okay. And that's correct?

22 A. Yes.

23 Q. Okay. And you mentioned that Metropolitan was
24 certified as a HUB through the State of Texas; is that
25 right?

Gerald Thompson
November 06, 2024

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1 Gerald Thompson
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE SOUTHERN DISTRICT OF TEXAS
4 HOUSTON DIVISION
5 LANDSCAPE CONSULTANTS OF)
6 TEXAS, INC., and)
7 METROPOLITAN LANDSCAPE)
8 MANAGEMENT, INC.,)
9 Plaintiffs,)
10 v.) Civil Action No 4:23-cv-03516
11)
12)
13 CITY OF HOUSTON, TEXAS,)
14 and MIDTOWN MANAGEMENT)
15 DISTRICT,)
16 Defendants.)

13 ORAL DEPOSITION OF GERALD THOMPSON

14 November 6, 2024

16
17 I, Dawn McAfee, Certified Shorthand Reporter
18 in and for the State of Texas, do hereby certify to the
19 following:

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

24 I further certify that pursuant to FRCP Rule
25 30(e)(1) that the signature of the deponent:

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713-653-7100

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713-653-7100

Gerald Thompson
November 06, 2024

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Gerald Thompson
November 06, 2024

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

6 — was not requested by the deponent or a
7 party before the completion of the deposition.

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

14 Subscribed and sworn to on this _____
15 day of _____, ____.

Blawn McAfee

Dawn McAfee
Texas CSR No. 4578
Expiration Date: 09/30/25
U.S. Legal Support
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EXHIBIT 6

**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

/s/ Britton B. Harris

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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.

ANSWER:

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Matt Thibodeaux, Executive Director
Marlon Marshall, Sr. Director of Engineering and Strategic Development
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Houston, Texas 77002
713-526-7577

With the assistance of counsel
Brett Sileo
Harris Hilburn PLLC
1111 Rosalie
Houston, Texas 77004

Clark Lord
Bracewell LLP
711 Louisiana Street, Suite 2300
Houston, Texas 77002
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 7

**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

/s/ Britton B. Harris

Britton B. Harris

Attorney in Charge

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Telephone: (713) 223-3936
Facsimile: (713) 224-5358

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.

EXHIBIT 8

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

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

**PLAINTIFFS' SUMMARY OF
MEMORANDUM IN SUPPORT
OF MOTION FOR SUMMARY
JUDGMENT**

SUMMARY OF ARGUMENT

Plaintiffs Landscape Consultants of Texas and Metropolitan Landscape Management are small, family-owned Houston-area landscaping companies. Local government contracts form the bulk of their business, including contracts with Defendants City of Houston and Midtown Management District (Midtown). For years—four decades in Houston’s case—both Defendants have operated race-based public contracting programs that put businesses like Plaintiffs at a significant disadvantage because of the race of their owners. Defendants’ programs blatantly violate both the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1981’s guarantee of the full and equal benefit of the laws regardless of race. This unlawful and unconstitutional racial discrimination must end immediately.

I. Defendants’ Programs Violate the Equal Protection Clause

The evidence that Defendants’ programs do not satisfy strict scrutiny is overwhelming and irrefutable. First, neither Houston nor Midtown have a compelling interest to justify their use of racial classifications. Both Defendants openly admit that their programs do not remediate specific, identified instances of past discrimination that violated the Constitution or a statute. Both Defendants admit they know of no evidence of a prime contractor or one of their own employees discriminating against minority or women-owned businesses in the past five years. Both Defendants also admit that they know of no constitutional or statutory violations related to their public contracting programs in the past five years. Neither

Defendant has adopted any study that identifies discrimination within their public contracting programs' recent memory. Houston's program is based on an eighteen-year-old study; Midtown's program is based on nothing at all.

Neither program is narrowly tailored. Midtown relies on Houston's definition of a minority contractor; Houston's definition encompasses individuals from five continents and dozens of countries, though both Defendants admit that they have not identified individuals from any of those countries who have suffered actual discrimination in public contracting. The definition itself is both overinclusive and underinclusive, and neither Defendants' program has an end point—both hallmarks of a narrow tailoring failure.

Together, the lack of *any* evidence of discrimination in Defendants' public contracting programs and the complete absence of narrow tailoring within those programs mean this Court should grant Plaintiffs' motion for summary judgment and finally put an end to Defendants' unconstitutional racial discrimination.

II. Defendants' Programs Discriminate on the Basis of Race in Violation of 42 U.S.C. § 1981

Defendants' intentional racial discrimination in violation of the Equal Protection Clause also violates Plaintiffs' right to the full and equal benefit of the law under § 1981. Section 1981's protections extend to everyone, regardless of race, leaving Plaintiffs to show only that Defendants intentionally discriminated against Plaintiffs due to their race, and that the discrimination concerned one of the activities

enumerated in the statute. And they can; Defendants' programs on their face exclude Plaintiffs due to the race of their owners while interfering with Plaintiffs' ability to contract with Houston and Midtown—an activity expressly protected by § 1981. Metropolitan lost a \$350,000 contract with Midtown because its bid did not receive 10 points reserved for minority-owned businesses. Landscape Consultants is forced to give 11 percent of its current contract with Houston to a minority-owned competitor, even though Landscape Consultants' own (mostly minority) employees can do the work themselves. In addition to violating the Equal Protection Clause, Defendants' race-based programs both run afoul of § 1981 and should be struck down.

Dated: November 29, 2024.

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Respectfully submitted,
s/ Erin E. Wilcox
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2024, I served this document via the Court's electronic filing system to Defendants' counsel of record as follows:

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