

In the  
Supreme Court of Ohio

MECCON, INC., et al.,

Plaintiff-Appellee,

v.

THE UNIVERSITY OF AKRON,

Defendant-Appellant.

Case No. 09-0950

On Appeal from the  
Franklin County  
Court of Appeals,  
Tenth Appellate District

Court of Appeals Case  
No. 08AP-727

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF  
DEFENDANT-APPELLANT THE UNIVERSITY OF AKRON**

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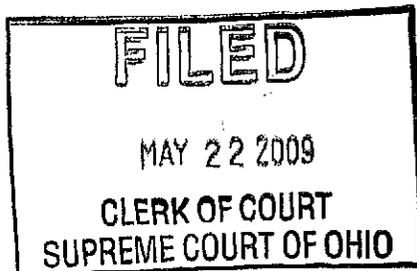
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## INTRODUCTION

In this case, an appeals court has upended one of this Court's most important public bidding cases: *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991. This Court stated unequivocally in *Cementech* that "a rejected bidder is limited to injunctive relief" in public bidding violation cases—that is, no money damages are allowed. *Id.* at ¶ 10. This Court held that injunctive relief provides a remedy to disappointed bidders that prevents excessive costs and corrupt bidding practices, and that protects the integrity of the bidding process, the public, and bidders. *Id.* at ¶ 11. Moreover, this Court ruled that punishing government entities through money damages only served to punish the very people the competitive bidding laws are meant to protect—the taxpayers.

But the Tenth District Court of Appeals has now relegated the holding of *Cementech* to mere dicta, and has opened the door for courts to consider a range of money damages—including bid preparation costs—in public contract cases. That ruling conflicts directly with *Cementech*; it exposes state and local contracting authorities to significant damages liability; and it runs contrary to the intent of the competitive bidding laws, which is to protect the public from excessive costs on public contracts.

For those reasons and the reasons set forth below, this Court should review and reverse the Tenth District's erroneous decision.

## STATEMENT OF THE CASE AND FACTS

This public bidding case arises out of the University of Akron's construction of a new football stadium. Mecon, Inc., is a disappointed bidder that sued the University in the Court of Claims for bidding law violations. The ultimate issue is whether the Court of Claims has jurisdiction over Mecon's suit. But that question hinges on the larger issue presented by this appeal: whether a disappointed bidder can recover money damages in public contract cases (in

which case, jurisdiction in the Court of Claims is proper), or whether a rejected bidder's only remedy is injunctive relief (in which case, there is no jurisdiction in the Court of Claims).

**A. Meccon sued the University in the Court of Claims for bidding law violations after the University awarded the HVAC, plumbing, and fire protection contracts to S.A. Comunale.**

In April 2008, the University invited bids for its new football stadium project. The University awarded three contracts to S.A. Comunale: the heating, ventilation, and air conditioning (HVAC) contract; the prime plumbing contract; and the fire protection contract. S.A. Comunale was the lowest bidder on each one. By the end of June 2008, the parties had executed the three contracts and they were approved by the Ohio Attorney General.

On August 6, 2008, more than two months after the bids were opened and after the contracts had been signed and performance had begun, Meccon sued the University in the Court of Claims, alleging competitive bidding law violations with respect to the award of the three contracts (although Meccon had only bid on the HVAC contract, and not the plumbing or fire protection contracts). Meccon sought a temporary restraining order, a declaratory judgment, preliminary and permanent injunctive relief, bid preparation costs, and "other" damages.

**B. The Court of Claims dismissed the case for lack of jurisdiction; Meccon then sought relief from Summit County and an injunction pending appeal from the Tenth District.**

The Court of Claims granted the University's motion to dismiss the case for lack of subject matter jurisdiction, holding that this Court's ruling in *Cementech* authorized only injunctive relief for a disappointed bidder, thus rendering Meccon's claims for money damages improper. Because the Court of Claims lacks jurisdiction absent a cognizable claim for money damages, it dismissed the case. (Court of Claims Entry of Dismissal, attached as Ex. 3.)

Meccon then filed the same action, absent claims for money damages, in the Summit County Court of Common Pleas. Finding no relief there after an initial hearing, Meccon

voluntarily dismissed the case and sought an injunction pending appeal from the Tenth District Court of Appeals. The Tenth District denied Mecon's request for an injunction on August 26, 2008, finding that Mecon failed to demonstrate the requisite elements for injunctive relief.

**C. The Tenth District reversed the Court of Claims' dismissal, finding that a disappointed bidder can recover money damages in public bidding law violation cases.**

Mecon appealed the Court of Claims decision denying its claims for money damages and dismissing its TRO motion. The Tenth District held that Mecon had stated a cognizable claim for money damages—and in particular, bid preparation costs—and that jurisdiction therefore was proper in the Court of Claims. The Tenth District Concluded that the only issue resolved by the *Cementech* Court was that lost-profit damages were improper in public bidding cases, and that therefore, *other* types of money damages are allowed. *Mecon, Inc. v. University of Akron* (10th Dist.), 2009-Ohio-1700, at ¶¶ 15-23. (Attached as Ex. 2.) The Tenth District essentially dismissed as dicta *Cementech's* pronouncement that “a rejected bidder is limited to injunctive relief,” and concluded that there were “good public policy reasons” favoring other types of money damages—chief among them, that such damages serve as a “penalty” against the State and a “deterrent” to competitive bidding violations. *Id.* at ¶¶ 10, 24.

**THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

**A. The Court of Appeals decision conflicts with this Court's opinion in *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991, which held that a rejected bidder's only remedy is injunctive relief.**

This case calls for review because the Tenth District's decision, which allows disappointed bidders to recover money damages in public contract cases, directly conflicts with the rule of law announced by this Court in *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991, which held that a rejected bidder's only remedy is injunctive relief.

In *Cementech*, this Court stated unequivocally that “[a] rejected bidder is limited to injunctive relief” in public bidding violation cases—that is, no money damages are allowed. *Id.* at ¶ 10. This Court explained that “injunctive relief provides a remedy that prevents excessive costs and corrupt practices, as well as protects the integrity of the bidding process, the public, and the bidders.” *Id.* at ¶ 11. Although the contractor in *Cementech* had argued—just as the Tenth District below did here—that money damages were a necessary penalty to deter bidding violations, this Court rejected that argument completely, ruling that “the injunctive process and the resulting delays serve as a sufficient deterrent to a [public owner’s] violation of competitive-bidding laws.” *Id.*

Until now, that ruling has been treated as the binding precedent that it is, and until now, no Ohio court has defied *Cementech* by suggesting that disappointed bidders can, in fact, recover money damages in public contract cases.

Mecon argued to the Court of Appeals, however, that *Cementech*’s decision to authorize only injunctive relief was “dicta beyond the scope of the syllabus and the narrow issue that was before the court,” and that *Cementech* only held that lost-profit damages are not allowed. *Mecon*, 2009-Ohio-1700, at ¶ 13. The court accepted Mecon’s theory, and reasoned that *Cementech* only extended to “the availability of lost profits versus injunction,” and therefore did not preclude *other* types of money damages, such as bid preparation costs. *Id.* at ¶¶ 20, 22.

In short, despite *Cementech*’s firm ruling that a rejected bidder’s sole remedy is injunctive relief, the Court of Appeals decided that the door was actually left open for courts to consider a range of money damages other than lost profits. This Court’s review is therefore essential in order to clarify the *Cementech* holding and to resolve whether money damages are available to disappointed bidders in cases involving competitive bidding law violations.

**B. The Tenth District’s decision exposes state, county, and municipal contracting authorities to significant damages, contrary to the intent of the competitive bidding laws to protect the taxpayers from excessive costs on public contracts.**

The decision below not only conflicts with this Court’s decision in *Cementech*, but also forces Ohio taxpayers to incur excessive costs for public contracts—first, for the work actually performed on the contract, and then for money damages to disappointed bidders. Accordingly, the decision below exposes state and local governments to significant damages.

Disappointed bidders, even bidders who never would have been awarded the contract, now have an incentive to sue for damages based on contracts they did not receive and work they did not perform. And certain types of costs—bid preparation costs, for example—are incurred by, and would therefore be payable to, *every* bidder who participates in the bid process. Thus, public entities, and ultimately the taxpayers, would pay multiple times for a public project—not only for the contract price, but also money damages for potentially multiple bidders.

The decision below would also permit a disappointed bidder to collect damages even after the project has begun or been completed. That costly possibility contrasts sharply with the remedy adopted by the *Cementech* Court, whereby an injunction can correct any error in the award or allow re-bidding of a contract *before any party incurs significant costs*.

The damages liability authorized below contravenes the purpose of the competitive bidding laws, which is to protect the taxpayers, prevent excessive costs and corruption, and promote open and honest competition in bidding for public contracts. *Cementech*, 2006-Ohio-2991, at ¶ 9; *Cedar Bay Constr., Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 21. Although the Tenth District reasoned that certain money damages are an appropriate “penalty” to “deter[]” public bidding violations, that remedy only serves to punish taxpayers for the mistakes of their government officials. *Meccon*, 2009-Ohio-1700, at ¶24. More importantly, this Court already

held in *Cementech* that injunctive relief fully protects bidders and also satisfies the other purposes of the public bidding laws: “[I]njunctive relief provides a remedy that prevents excessive costs and corrupt practices, as well as protects the integrity of the bidding process, the public, and bidders.” *Cementech*, 2006-Ohio-2991, at 477, ¶ 11.

In sum, although the analysis below was cursory, its consequences are expansive: The decision impugns the adequacy of injunctive relief as a remedy in public bidding cases and exposes public entities to significant damages liability. Before the enormous equitable benefit of injunctive relief is dismissed so casually and before such significant public expenses are legitimated, this Court’s scrutiny is warranted.

**C. Review is warranted because the Court of Appeals decision provided no legal basis for authorizing money damages as a remedy.**

Finally, this Court’s review is warranted because the Tenth District’s decision provided no legal basis for a money damages remedy. Instead, the decision cited “good public policy reasons favoring such recovery.” *Meccon*, 2009-Ohio-1700, at ¶ 24.

But no public bidding statute authorizes a cause of action for money damages for disappointed bidders. Nor are money damages proper under contract law, since a disappointed bidder is precisely one that was *not* awarded a contract. Indeed, in most public solicitations in Ohio, including here, the public entity reserves the right to reject *all* bids. This absence of any contractual entitlement, and the absence of an actual contract between a disappointed bidder and the State, preclude money damages under any type of contract theory.

Likewise, disappointed bidders have no cause of action for money damages under theories of tort or due process, since bidders have no property interest in the prospect of an award where the government entity has discretion to deny a bid, or as here, all bids. *Cleveland Constr., Inc. v. City of Cincinnati*, 118 Ohio St.3d 283, 2008-Ohio-2337.

The lower court also cited “public policy reasons,” but those reasons do not withstand scrutiny, let alone constitute causes of action. As its foremost public policy reason, the Tenth District cited the punitive and deterrent value of money damages. As the Tenth District stated: “without some penalty, there is little deterrent to a public entity who fails to follow the competitive bidding statutes.” *Meccon*, 2009-Ohio-1700, at ¶ 24. But the court’s reliance on a punitive theory is wrong, because punitive damages are not allowed against State entities under Ohio law absent specific statutory authority. See *Drain v. Kosydar* (1978), 54 Ohio St.2d 49, 55-56; see also *Spires v. City of Lancaster* (1986), 28 Ohio St.3d 76, syllabus (no punitive damages against municipal corporations absent explicit statutory authority); see also R.C. 2744.05(A) (no punitive damages allowed against political subdivisions).

In fact, this Court forbids money damages as a penalty against the government precisely because such damages “*contravene* public policy,” since the parties who ultimately bear the burden of the punishment are “the taxpayers and citizens who constitute the very persons who as a group are to benefit from the public example which the granting of such damages is supposed to make of a wrongdoer.” *Drain*, 54 Ohio St.2d at 55-56 (quotation and citation omitted) (emphasis added). Thus, damages that the Tenth District admits are a “penalty” against the State are improper. Moreover, and contrary to the Tenth District’s conclusion, no such “penalty” is even needed as a “deterrent,” since the *Cementech* Court already ruled that injunctive relief and the resulting delays “serve as a sufficient deterrent to a [public entity’s] violation of competitive-bidding laws.” *Cementech*, 2006-Ohio-2991, at ¶ 11.

As to its second public policy ground, the Tenth District speculated that “contractors may be reluctant to bid on public projects when they suspect that competitive bidding will not be conducted fairly.” *Meccon*, 2009-Ohio-1700, at ¶ 24. But bidders who deal with the State and

political subdivisions are presumed to know of the limited remedies available, and so being refused money damages should come as no disappointment. Moreover, as the Tenth District recognized, bidders and the public benefit most from a fair and equitable bidding process. Only injunctive relief can ensure that the process ultimately is conducted fairly.

Finally, the Tenth District concluded that money damages other than lost profits are an acceptable deterrent because “[a]ny harm to the public from these types of damages is de minimus when compared to the harm to the public from recovery from lost profits.” *Id.* at ¶ 24. But that reasoning fails on multiple levels. First, certain costs, such as bid preparation costs, are incurred by *every* bidder on a public contract, and so those damages would quickly become substantial when multiplied by the number of bidders. Second, the Tenth District understated the magnitude of its decision. By reading *Cementech* only to bar lost profits, the Tenth District opened the door for all sorts of money damages—not just bid preparation costs—and therefore the decision’s ramifications are substantial. Lastly, given that *Cementech* rejected the deterrent and punitive value of lost-profit damages (arguably the most substantial type of damages), it is impossible that *lesser* types of damages would serve a *greater* punitive or deterrent purpose.

In sum, the Tenth District’s decision to authorize substantial money damages against public entities without grounding those remedies in a legitimate cause of action—and the grounding of its decision in flawed public policy theories instead—warrants this Court’s review.

## ARGUMENT

### **The University of Akron’s Proposition of Law:**

*Money damages are not available to disappointed bidders in public bidding violation cases; injunctive relief is the only available remedy.*

The Tenth District’s decision should be reversed. The decision directly conflicts with the *Cementech* holding. But even if *Cementech*’s holding were limited to lost profit damages, the

*reasoning* in *Cementech* applies with equal force to bar other types of money damages, including bid preparation costs. Only injunctive relief protects both the bidders' interest in fair competition and the public's interest in avoiding excessive payment for public contracts.

**A. This Court held in *Cementech* that a disappointed bidder is limited to injunctive relief in public contract cases.**

This Court in *Cementech* could not have been clearer: “[A] rejected bidder is limited to injunctive relief” in cases alleging public bidding violations. *Cementech*, 2006-Ohio-2991, ¶ 10. That statement is not dictum; it is binding precedent. Dicta are expressions from the Court that are either on issues “not before the court” or “unnecessary to [the] holding.” *State ex rel. Polcyn v. Burkhardt* (1973), 33 Ohio St.2d 7, 9; *State ex rel. Kaylor v. Bruening* (1997), 80 Ohio St.3d 142, 147. But the question whether injunctive relief is the sole remedy was squarely before the *Cementech* Court, and the Court's answer was essential to—and thus, part of—the holding.

The certified conflict in *Cementech* was whether “the availability of injunctive relief . . . preclude[d] an award of lost profits in a municipal contract case.” *Cementech*, 2006-Ohio-2991, at ¶ 8. To resolve the conflict among the districts, this Court had to determine whether money damages were available to disappointed bidders, *Cementech v. City of Fairlawn* (9th Dist.), 2003-Ohio-1709, or whether “an injunction is the *only* remedy available.” *Hardrives Paving & Constr., Inc. v. City of Niles* (11th Dist. 1994), 99 Ohio App.3d 243, 247 (emphasis added); see also *Cavanaugh Bldg. Corp. v. Bd. of Cuyahoga Cty. Comm'rs* (8th Dist.), 2000 Ohio App. LEXIS 241, \*11. It is irrelevant that these decisions involved lost-profit damages, as opposed to other money damages. The certified conflict directly presented, and the Court definitively answered, the question whether injunctive relief was the “sole remedy.” *Hardrives Paving*, 99 Ohio App.3d at 248. Thus, unlike statements that this Court has deemed dicta, limiting disappointed bidders to injunctive relief did more than “provide[] context and reveal[] [the

Court's] overall rationale,” *Bickers v. W. & S. Life Ins. Co.*, 116 Ohio St.3d 351, 2007-Ohio-6751, at ¶ 15.

The reason courts traditionally discount dicta further illustrates why *Cementech*'s ruling about injunctive relief is binding precedent, not dicta. This Court has adopted the U.S. Supreme Court's general principle that statements “go[ing] beyond the case” “ought not to control the judgment in a subsequent suit,” because “the question actually before the court is investigated with care, and considered in its full extent.” *State v. Butler* (1969), 19 Ohio St.2d 55, 61 (quoting *Cohens v. Virginia* (1821), 19 U.S. (6 Wheat.) 264, 399). In other words, dicta lack controlling weight because, as statements on issues not before the court, they are not informed by the same rigorous analysis as the holding.

But here, the sufficiency of injunctive relief was not only a question “actually before the court,” but it was thoroughly investigated and considered. First, this Court determined that injunctive relief “prevents excessive costs and corrupt practices, as well as protects the integrity of the bidding process, the public, and bidders.” *Cementech*, 2006-Ohio-2991, at ¶ 11. This Court then concluded that “the injunctive process and the resulting delays serve as a sufficient deterrent to a municipality's violation for competitive-bidding laws.” *Id.* Next, the Court found that injunctive relief could accomplish all those objectives without punishing Ohio's taxpayers, as money damages would. *Id.* at ¶ 12. And lastly, because the appellate court in *Cementech* (just like the Tenth District here) used a punitive theory to justify its money damages award, this Court explicitly rejected such a remedy, noting that it only serves to punish the taxpayers and that “[t]his court has long prohibited the assessment of punitive damages against a municipal corporation, except when specifically permitted by statute, for that very reason.” *Id.* at ¶ 12. Given that the exact same rule applies to penalty-based awards against State entities, see *Drain*,

54 Ohio St.2d at 55-56, it follows that this Court meant that injunctive relief is the *sole* available remedy, and not simply the preferred remedy in relation to the narrow category of lost profits.

Simply put, this Court's determination that injunctions are the sole remedy for disappointed bidders was not an "isolated statement" on "an issue that was not before the court," *Meccon*, 2009-Ohio-1700, at ¶ 13, but rather a thoroughly examined decision binding on future cases—including this one.

**B. Regardless of *Cementech's* holding, injunctive relief is the only proper remedy for disappointed bidders in public contract cases.**

Regardless of whether or not *Cementech* definitively answered the question, injunctive relief is the only proper remedy for disappointed bidders in public bidding violation cases.

First, regardless of the scope of *Cementech's* holding, the *reasoning* in that case applies with equal force to bar all types of money damages, including bid preparation costs. For instance, the *Cementech* Court stated that injunctive relief is a sufficient deterrent to competitive bidding violations, such that lost-profit damages are inappropriate and unnecessary. *Cementech*, 2006-Ohio-2991, ¶ 11. That same reasoning applies to other types of money damages, including bid preparation costs. Those damages serve no purpose not already satisfied by an injunction. The *Cementech* Court also concluded that lost profit damages unfairly punish taxpayers, whom the public bidding statutes are meant to protect. *Id.* at ¶ 12. That conclusion applies equally to other types of money damages. Moreover, the *Cementech* Court found that money damages awarded as a penalty violate Ohio law, since punitive damages against public entities are prohibited absent specific statutory authorization. *Id.* That is just as true here, where the Tenth District based its decision on a penalty theory and where Ohio law bars punitive damages against State entities absent explicit statutory authority. *Drain*, 54 Ohio St.2d at 55-56.

Second, there is no legal basis for awarding money damages to disappointed bidders in public bidding cases. As discussed above, no public bidding statute authorizes a cause of action for damages for disappointed bidders; no cause of action for money damages exists under any sort of contract theory; and because bidders have no property interest in a public contract, *Cleveland Constr.*, 118 Ohio St.3d. 283, 2008-Ohio-2337, no cause of action for money damages exists under a theory of tort or due process. See also *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n* (1990), 54 Ohio St. 3d 1 (absent privity, there is no cause of action for purely economic damages). Moreover, Meccon never alleged any of the foregoing causes of action. Nor do the Tenth District's "public policy" justifications amount to causes of action, and in any event, as detailed above, pp.6-8, those public policy reasons are both legally and logically flawed. And given the limited jurisdiction of the Court of Claims, it is particularly important for this Court to ensure that a concrete and cognizable cause of action for money damages exists before the State can be sued there. The flawed and wispy theories offered by the Tenth District do not meet that standard, particularly in the face of *Cementech*.

Third, only an injunction, and not money damages, respects the purpose of the competitive bidding laws, which is to protect taxpayers, prevent excessive costs and corruption, and promote fair competition in public bidding. *Cementech*, 2006-Ohio-2991, ¶ 9; *Cedar Bay Constr.*, 50 Ohio St.3d at 21. A timely action for injunctive relief can correct any award error or allow re-bidding before any party incurs significant costs. By contrast, punishing government entities through money damages simply punishes taxpayers, who are the very people the public bidding laws are meant to protect.

Finally, only injunctive relief affords the proper deference to a public entity's significant discretion in award decisions. In reviewing an award decision, courts presume that the public

entity has properly and lawfully performed its duties, and an injunction is proper only if the plaintiff shows by “clear and convincing evidence” that the award is an abuse of discretion and results in some tangible harm to the public or the plaintiff. See *Cedar Bay Constr.*, 50 Ohio St. at 21 (quotation and citation omitted). Injunctive relief thereby affords appropriate deference to a public entity’s discretionary judgment. By contrast, a damages remedy for a disappointed bidder would undercut that deference by lowering the standard of proof. This would even permit the irrational result whereby a disappointed bidder might fail to prove that an award decision should be enjoined, but where the disappointed bidder would still be entitled to money damages under some lesser standard of proof. In fact, bidders might simply choose that path from the start. That is, knowing that they do not have a strong case for an injunction, bidders on a given contract might choose to wait for the injunctive period to pass (i.e. the period in which any defects could actually be corrected) but then try to point out lesser deficiencies in the process in order to collect money damages. Nothing in the public bidding laws countenances such an unfruitful result or such exploitation of taxpayer funds.

In short, only injunctive relief is a proper remedy in light of the reasoning in *Cementech*, and it is the only remedy that protects both disappointed bidders and taxpayers.

**C. Bid preparation costs are an improper remedy and attorneys’ fees do not provide a basis for Court of Claims jurisdiction.**

Bid preparation costs—which are the primary focus of this case—are particularly inappropriate and unlawful under Ohio law. As a practical matter, bid preparation costs are incurred by *all* who choose to participate in the competitive bidding process. But the bidding process does not contemplate multiple payments for public contracts, and therefore bid preparation costs should not be an available remedy for a disappointed bidder.

To be sure, as the Tenth District observed, some courts in other States have allowed disappointed bidders to recover bid preparation costs, even as they have rejected lost profits as a remedy. *Meccon*, 2009-Ohio-1700, at ¶ 25. Those courts have grounded their conclusion in promissory estoppel principles, on the theory that the public entity “promised” to conduct a fair process, and that the bidder prepared its bid in reasonable reliance on that implied promise. *Kajima/Ray Wilson v. Los Angeles Cty. Metro. Transp. Auth.* (Cal. 2000), 1 P.3d 63, 69 (cited by the Tenth District below). But under Ohio law, “[i]t is well settled that . . . the principle of estoppel does not apply against the state or its agencies in the exercise of a government function.” *Hortman v. City of Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, at ¶ 29 (quoting *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145-46). Therefore, the decisions from other States permitting bid preparation costs are inapplicable here. Furthermore, this Court has declined to find implied promises in public construction disputes, and so that theory is also inapplicable. See, e.g., *Dugan & Meyers Constr. Co. v. Ohio Dep’t Admin. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687 (rejecting contractor’s argument that State impliedly warrants the accuracy of construction plans).

The Tenth District also made passing reference to the potential for attorneys’ fees under Ohio’s fee-shifting statute, R.C. 2335.39. *Meccon*, 2009-Ohio-1700, at ¶ 15 n.1, ¶ 26. But attorneys’ fees under R.C. 2335.39 are irrelevant to the Court of Claims’ jurisdiction, because only money *damages* trigger that court’s jurisdiction, and attorneys fees are not a form of damages—they are simply “costs” that can be awarded, in certain circumstances, upon a prevailing party’s motion at the end of a case. *Christe v. Gms Mgmt. Co.* (2000), 88 Ohio St.3d 376, 378 (“[A]ttorney fees are in the nature of costs. . . . Certainly, the legislature could have stated [in a statute] that attorneys fees are recoverable *damages*. However, in the absence of

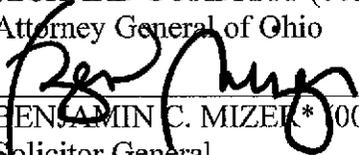
such express language, we are unwilling to depart from our long-standing practice of treating statutorily authorized attorney fees as *costs*.”) (emphasis added). Indeed, if the potential for attorney fees under R.C. 2335.39 were alone sufficient to trigger Court of Claims jurisdiction, then *every* suit that seeks only injunctive or declaratory relief could be brought in the Court of Claims, thereby swallowing the rule that prohibits those actions in that court. In short, a potential claim for attorneys fees under R.C. 2335.39 is not sufficient to confer jurisdiction in the Court of Claims absent a cognizable claim for money damages—which Mecon has not alleged.

### CONCLUSION

For the foregoing reasons, this Court should reverse the Tenth District’s decision and affirm the dismissal of this action from the Court of Claims for lack of jurisdiction based on Mecon’s failure to state a legal basis for money damages.

Respectfully submitted,

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**EXHIBIT 1**

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

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Mecon, Inc. et al.,  
Plaintiffs-Appellants,  
v.  
University of Akron,  
Defendant-Appellee.

ATTORNEY GENERAL'S OFFICE  
COURT OF APPEALS

No. 08AP-727  
(C.P.C. No. 2008-08817)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on April 9, 2009, the first assignment of error is sustained, the second assignment of error is overruled as moot and the motion to dismiss is denied. It is the judgment and order of this court that the decision of the Ohio Court of Claims is reversed and this matter is remanded for further proceedings. Costs are to be assessed against appellee.

TYACK, J., FRENCH, P.J., & McGRATH, J.

By: *Gary Tyack*  
Judge G. Gary Tyack

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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COURT OF APPEALS  
FRANKLIN CO. OHIO

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RECEIVED CLERK OF COURTS

Meccon, Inc. et al.,  
:  
Plaintiffs-Appellants,  
:  
v.  
:  
University of Akron,  
:  
Defendant-Appellee.  
:

APR 13 2009  
ATTORNEY GENERAL'S OFFICE  
COURT OF CLAIMS DEFENSE

No. 08AP-727  
(C.P.C. No. 2008-08817)  
(REGULAR CALENDAR)

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O P I N I O N

Rendered on April 9, 2009

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*Thompson Hine LLP, Peter D. Welin and Andrew R. Fredelake, for appellants.*

*Richard Cordray, Attorney General, William C. Becker and Lisa J. Conomy, for appellee.*

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APPEAL from the Ohio Court of Claims

TYACK, J.

{1} This is an appeal from the Ohio Court of Claims. At issue is whether the Court of Claims has subject matter jurisdiction over a competitive bidding dispute between plaintiffs-appellants, Meccon, Inc. and Ronald R. Bassak ("Meccon"), and defendant-appellee, University of Akron.

{2} In April 2008, the University of Akron invited bids for the University of Akron's Football Stadium Project. Ohio's public bidding laws require that contracts be

awarded to the lowest responsive and responsible bidder. R.C. 153.08; 9.312. Mecon submitted a bid for the heating, ventilation, and air conditioning ("HVAC") contract. Another contractor, S.A. Comunale, submitted four bids for the project: three separate bids for the stand-alone prime plumbing, fire protection, and HVAC contracts, and a fourth combined bid for a package of the individual contracts.

{¶3} When the bids were opened, S.A. Comunale was the low bidder for each of the stand-alone plumbing, fire protection, and HVAC contracts. Mecon's bid for the stand-alone HVAC package was the second lowest bid. Additionally, S.A. Comunale's combined bid was more than \$1.2 million lower than the next lowest bid.

{¶4} After it discovered the large disparity in its low bids from the next lowest bidders, S.A. Comunale withdrew its combined bid, and withdrew its stand-alone plumbing bid. Despite language in the bid documents themselves and statutory language that prohibits withdrawal of a bid "when the result would be the awarding of the contract on another bid of the same bidder," the University of Akron awarded the stand-alone HVAC and fire protection contracts to S.A. Comunale. R.C. 9.31.

{¶5} On August 6, 2008, Mecon filed suit in the Court of Claims, seeking a temporary restraining order, a declaratory judgment, preliminary and permanent injunctive relief, damages for its bid preparation costs, and other such damages and relief resulting from the University of Akron's failure to award the HVAC contract to Mecon.

{¶6} Before the court could hold an evidentiary hearing on the temporary restraining order ("TRO"), the University of Akron filed a motion to dismiss for lack of subject matter jurisdiction. The university argued that an Ohio Supreme Court case

limited disappointed bidders to injunctive relief only. The Court of Claims granted the motion finding that Meccon's claim for bid preparation costs and other money damages was not cognizable due to the decision in *Cementech, Inc. v. Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991. Without a legally cognizable claim for money damages, the complaint was for equitable relief only. Therefore, the Court of Claims decided that it lacked subject matter jurisdiction. The Court of Claims then denied the motion for a TRO, dismissed the claim, and denied all remaining motions as moot. This appeal followed with Meccon assigning as error the following:

1. The Trial Court erred when it dismissed Appellants' case for lack of Subject-Matter Jurisdiction.
2. The Trial Court erred when it failed to rule on Appellants' Motion for Temporary Restraining Order.

{¶7} We review an appeal of a dismissal for lack of subject matter jurisdiction under a de novo standard of review. *Reynoldsburg City School Dist. Bd. of Edn. v. Licking Hts. Loc. School Dist.*, 10th Dist. No. 08AP-415, 2008-Ohio-5969. The question we must decide is whether any cause of action cognizable by the forum has been raised in the complaint. *Id.* Here, the issue turns on whether Meccon's complaint states a legally cognizable claim for money damages, for without a claim for money damages, the Court of Claims lacks subject matter jurisdiction.

{¶8} It is undisputed that Meccon's complaint requests bid preparation costs and any additional costs and damages incurred due to the failure of the University of Akron to award the HVAC contract to Meccon. This court has concluded that if an action in the Court of Claims is one for money damages against the state coupled with a request for

declaratory and injunctive relief, the appropriate forum is the Court of Claims. *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312, 318. In *Tiemann*, the plaintiffs sought to enjoin the university from proceeding with a construction project that by-passed Ohio's public works and bidding requirements. The plaintiffs stated in their complaint that their suit was without a claim for monetary damages, but this court found that the Court of Claims did have jurisdiction because the complaint asked for declaratory, injunctive, and "any further" relief. *Id.* at 319.

{¶9} Some years later, the Ohio Supreme Court decided *Cementech*. *Cementech* came before the Ohio Supreme Court as a certified conflict. The issue before the court was as follows:

~~Does the availability of injunctive relief, if timely filed but denied, preclude an award of lost profits in a municipal contract case?~~

*Cementech, Inc. v. Fairlawn*, 106 Ohio St.3d 1479, 2005-Ohio-3978.

{¶10} In the ensuing opinion the Ohio Supreme Court held that:

When a municipality violates competitive-bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages.

*Cementech, Inc. v. Fairlawn*, 109 Ohio St.3d 475, syllabus.

{¶11} At the trial level, the trial court had awarded *Cementech* its bid preparation costs, and that award was not appealed. Consequently, the issue of whether a rejected bidder could recover its bid preparation costs was not squarely before the Ohio Supreme Court. However, in resolving the certified conflict and holding that a rejected bidder

cannot recover its lost profits as damages, the Ohio Supreme Court went further and stated, "a rejected bidder is limited to injunctive relief." *Id.* at ¶10.

¶12} The Ohio Supreme Court then discussed the rationale for injunctive relief as follows:

It is clear that in the context of competitive bidding for public contracts, injunctive relief provides a remedy that prevents excessive costs and corrupt practices, as well as protects the integrity of the bidding process, the public, and the bidders. Moreover, the injunctive process and the resulting delays serve as a sufficient deterrent to a municipality's violation of competitive-bidding laws.

*Id.* at ¶11.

¶13} Mecon characterizes the Ohio Supreme Court's statement limiting relief as dicta beyond the scope of the syllabus and the narrow issue that was before the court.

Mecon argues that this court should not interpret *Cementech* in such a way that an isolated statement on an issue that was not before the court would preclude recovery of bid preparation costs.

¶14} The University of Akron takes the position that the language and meaning of *Cementech* is clear, and that the *only* relief available to a disappointed bidder is an injunction.

¶15} Here, because *Cementech* precludes recovery for lost profits by an unsuccessful bidder, only Mecon's claim for its bid preparation expenses, remains as a claim for money damages in the Court of Claims.<sup>1</sup> If bid preparation expenses are not

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<sup>1</sup> It is possible that a claim for attorney fees might be available under R.C. 2335.39 if Mecon were a prevailing party. *Mechanical Contractors Assn. of Cincinnati v. Univ. of Cincinnati*, 152 Ohio App.3d 466, 2003-Ohio-1837, ¶42.

allowed as damages in this type of action, then the action must be dismissed for lack of subject matter jurisdiction.

{¶16} The cases certified as being in conflict with the appellate decision in *Cementech* disallowed recovery for lost profits, but neither case discussed bid preparation costs as an element of damages. The statement that an unsuccessful bidder is limited to injunctive relief is nearly identical in *Cementech*, and *Cavanaugh Bldg. Corp. v. Bd. of Cuyahoga Cty. Comm.* (Jan. 27, 2000), 8th Dist. No. 75607.

{¶17} In the other case cited as being in conflict with *Cementech*, the Court of Appeals for Trumbull County cited policy considerations that militate in favor of injunctive relief. The court stated:

~~Thus, if we were to allow appellant to receive monetary damages, only the bidders would be protected because the public would have to pay the contract price of the successful bidder plus the lost profits of an aggrieved bidder. However, if injunction is the sole remedy, both the public and the bidders themselves are protected. Accordingly, we conclude that injunction is the only remedy available. \*\*\*~~

*Hardrives Paving and Constr., Inc. v. Niles* (1994), 99 Ohio App.3d. 243, 247-248. (Emphasis added.) Again, the language in this case is quite similar to that used by the Ohio Supreme Court in *Cementech*.

{¶18} Despite the fact that the issue of recovery of bid preparation costs was not part of the certified question, the Ohio Attorney General argued that damages for bid preparations should not be an available remedy to a disappointed bidder going against a public entity. In his brief before the Ohio Supreme Court, the Attorney General stated as follows:

The Attorney General recognizes that the question of whether damages in the form of bid-preparation costs is awardable to a disappointed bidder was not presented to the Court in either the discretionary appeal or the certified conflict case here. However, it is appropriate to consider whether this measure of damages is proper, incident to deciding the correct form of relief for a disappointed bidder in a competitive bidding case. Accordingly, even though a decision on this point will not necessarily affect the trial court's judgment against Fairlawn for \$3,725.54 in bid-preparation costs, the Attorney General urges the Court to address this issue as part of its overall analysis of what remedies are available to disappointed bidders. Or, in the alternative, the Attorney General urges the Court to expressly note in its decision that the permissibility of awarding bid-preparation costs as damages is not decided (or endorsed) by this case.

*Cementech*, Attorney General's Brief as Amicus Curiae, at fn. 4.

~~{¶19}~~ As noted above, the Ohio Supreme Court declined to speak to this issue directly. Instead, the court stated in its syllabus that "[w]hen a municipality violates competitive-bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages." *Cementech*, 109 Ohio St.3d 475.

{¶20} However, "[t]he law stated in a Supreme Court opinion is contained within its syllabus (if one is provided), and its text, including footnotes." S.Ct.R.Rep.Op. 1(B)(1). Thus, we find that the statement that "a rejected bidder is limited to injunctive relief," contained in the body of the opinion is a statement of law intended by the court. *Cementech*, at ¶10.

{¶21} On the other hand, S.Ct.Prac.R. IV(3)(B), dealing with certified conflict cases, states in pertinent part that:

In their merit briefs, the parties shall brief only the issues identified in the the order of the Supreme Court as issues to be considered on appeal \* \* \*.

{¶22} Since the issue of bid preparation costs was not a factor in any of the cases certified for conflict, and because the Ohio Supreme Court limited its discussion to the issue of the availability of lost profits versus injunction, the issue of whether bid preparation costs can be recovered was not before the court. Therefore, it is our understanding that the Ohio Supreme Court has yet to rule on this issue.

{¶23} The Ohio Supreme Court's discussion focused on the strong policy considerations in favor of injunctive relief, but these policy considerations make little sense in cases such as this where the only relief sought is for declaratory and injunctive relief and bid preparation costs. In *TP Mechanical Contractors, Inc. v. Franklin Cty. Bd. of Comms.*, 10th Dist. No. 08AP-108, 2008-Ohio-6824, ¶22, this court specifically did not consider whether a contractor would be precluded from bringing an action for other types of relief such as bid preparation costs.

{¶24} There are good public policy reasons favoring such recovery. First, without some penalty, there is little deterrent to a public entity who fails to follow the competitive bidding statutes. Second, contractors may be reluctant to bid on public projects when they suspect the competitive bidding will not be conducted fairly. Ultimately, refusal to bid harms the public as the pool of qualified bidders shrinks. Any harm to the public from these types of damages is de minimus when compared to the harm to the public from recovery of lost profits. Allowing recovery of bid preparation costs will serve to enhance the integrity of the competitive bidding process.

{¶25} Other jurisdictions have similarly distinguished recovery of bid preparation costs from recovery of lost profits. In *Kajima/Ray Wilson v. Los Angeles Co. Metro. Transp. Auth.* (2000), 23 Cal.4th 305, 319, the Supreme Court of California stated that a "majority of jurisdictions" allow recovery of bid preparation costs either by statute or case law. See opinions cited at *id.*, note 6. "These jurisdictions generally reason that while the competitive bidding statutes are enacted for the public's benefit, not the aggrandizement of the individual bidder, allowing recovery of bid preparation costs encourages proper challenges to misawarded public contracts by the most interested parties, and deters public entity misconduct." *Id.* We agree.

{¶26} For these reasons, we conclude that the Ohio Court of Claims does have subject-matter jurisdiction over Meccon's claims for bid preparation costs and attorney fees. The first assignment of error is sustained.

{¶27} In its second assignment of error, Meccon argues that the trial court erred in failing to rule on Meccon's motion for a TRO. Understandably, the trial court did not rule on the motion when it determined that it lacked subject matter over the case. Since we are remanding the case, the second assignment of error is overruled as moot.

{¶28} At oral argument, the court requested the parties to address the issue of whether this case is moot in light of this court's holding in *TP Mechanical Contractors*. The university subsequently filed a motion to dismiss this appeal, and Meccon responded. In that case, this court concluded that in appeals involving construction, if the appellant fails to obtain a stay of execution of a trial court's ruling or an injunction pending appeal, and construction commences, the appeal is rendered moot. *Id.* at ¶20.

{129} That case explicitly left open the issue of the availability of other forms of relief. Because we have decided the first assignment of error in a way that makes certain damages available regardless of the need for an injunction, the case is not moot, and the motion to dismiss is denied.

{130} Based on the foregoing, we sustain the first assignment of error, overrule as moot the second assignment of error, deny the motion to dismiss, reverse the judgment of the Ohio Court of Claims, and remand the matter for further proceedings in accordance with this opinion.

*Motion to dismiss denied;  
judgment reversed and remanded.*

FRENCH, P.J., and McGRATH, J., concur.

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COURT OF CLAIMS  
OF OHIO

# Court of Claims of Ohio

The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
www.cco.state.oh.us

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MECCON, INC., et al.

Plaintiffs

v.

THE UNIVERSITY OF AKRON

Defendant

Case No. 2008-08817

Judge J. Craig Wright

ENTRY OF DISMISSAL

On August 6, 2008, plaintiffs filed a verified complaint and a motion for a temporary restraining order. On August 8, 2008, the court held a hearing upon the motion.

In the complaint, plaintiffs allege that defendant wrongfully awarded a contract for a public improvement project in violation both of the published procedures governing competitive bidding processes and relevant provisions of the Ohio Revised Code. Plaintiff, Meccon, Inc., as a frustrated bidder, seeks an order restraining defendant from executing the proposed contract.

Under R.C. 2743.03(A)(2) the equitable jurisdiction of the Court of Claims is limited as follows:

"If the claimant in a civil action as described in division (A)(1) of this section also files a claim for a declaratory judgment, injunctive relief, or other equitable relief against the state that arises out of the same circumstances that gave rise to the civil action described in division (A)(1) of this section, the court of claims has exclusive, original jurisdiction to hear and determine that claim in that civil action. *This division does not affect, and shall not be construed as affecting, the original jurisdiction of another court of this state to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief.*" (Emphasis added.)

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ENTRY

Pursuant to R.C. 2743.02(A)(1), the state waived its sovereign immunity and consented to be sued in accordance with the provisions of that section, which provides in pertinent part:

"The state hereby waives its immunity from liability \* \* \* and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties \* \* \*. *To the extent that the state has previously consented to be sued, this chapter has no applicability.*" (Emphasis added.)

Plaintiffs' complaint seeks injunctive relief. Indeed, the only monetary relief sought by plaintiffs is the recovery of expenses associated with preparing and submitting its bid. The Supreme Court of Ohio has held that when a municipality violates competitive-bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages. *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991, ¶14. In so holding, the court stated "a rejected bidder is limited to injunctive relief." *Id.* at ¶10.

Under *Cementech*, supra, plaintiffs' complaint fails to state a claim for monetary relief. Thus, the court of common pleas may properly exercise jurisdiction over plaintiffs' remaining claims inasmuch as they are purely equitable in nature. Because the court of common pleas is vested with jurisdiction over actions against the state in which the sole relief is equitable in nature, the Court of Claims act has no applicability. *Santos v. Ohio Bur. of Workers' Comp.*, 101 Ohio St.3d 74, 2004-Ohio-28 at ¶9.

Civ.R. 12(H)(3) provides that "[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." For the foregoing reasons, plaintiffs' motion for a temporary restraining order is

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ENTRY

DENIED and plaintiffs' complaint is DISMISSED due to the lack of subject matter jurisdiction. All other pending motions are DENIED as moot. Court costs are assessed against plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.



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J. CRAIG WRIGHT  
Judge

cc:

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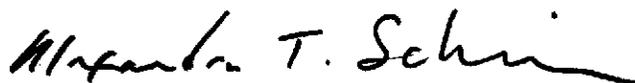
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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Defendant-Appellant The University of Akron was served by U.S. mail this 22nd day of May, 2009, upon the following counsel:

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