

ORIGINAL

IN THE SUPREME COURT OF OHIO

MECCON, INC., et al.

Plaintiffs - Appellees,

v.

THE UNIVERSITY OF AKRON

Defendant – Appellant.

Case No. 09-0950

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

Court of Appeals
Case No. 08API-08-727

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE THE OHIO MUNICIPAL LEAGUE, THE COUNTY COMMISSIONERS ASSOCIATION OF OHIO, AND THE OHIO TOWNSHIP ASSOCIATION

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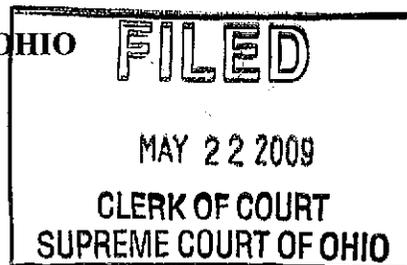
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**INTRODUCTION: THIS CASE INVOLVES A
MATTER OF GREAT GENERAL INTEREST**

The Ohio Municipal League, the County Commissioners Association of Ohio, and the Ohio Township Association (“Amici Curiae”), as amici curiae on behalf of the University of Akron, urge this Court to accept jurisdiction over this case in order to reverse the decision in *Meccon, Inc. v. University of Akron*, 2009-Ohio-1700. This court has an opportunity to clarify a point of law which was not formally decided in *Cementech v. City of Fairlawn*, 109 Ohio St.3d 475, 849 N.E.2d 24, 2006-Ohio-2991, but is of great concern to the state and its local governments. Specifically, in the *Cementech* case, the matter came to this court after an award of damages for bid preparation costs had been awarded to the contractor – but that issue was not before the court. In stating that “a rejected bidder is limited to injunctive relief” *Cementech, supra*, at ¶10, this court implied that no money damages are available to a rejected bidder in a public bidding dispute. This case provides an opportunity to explicitly clarify this point of law, and eliminate confusion which has resulted from the unique procedural posture in *Cementech*.

In its decision below, the Tenth District Court of Appeals erroneously concluded that bid preparation costs can be recovered by an unsuccessful bidder. Citing *Cementech, supra*, the Tenth District noted: “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.’” *Id.* at ¶19. While the lower court’s jurisprudence on the issue of binding precedent was correct, and *Cementech* did not answer the question of whether bid-preparation costs were available to a rejected bidder because of the procedural posture of that case, its analysis of the underlying issue was not correct.

The Tenth District attempted to distinguish recovery of bid-preparation costs from recovery of lost profits and concluded “[a]llowing recovery of bid-preparation costs will serve to enhance the integrity of the competitive-bidding process.” *Id.* at ¶24. The Tenth District then held that Meccon’s claim for bid-preparation costs was a legally cognizable claim and the Court of Claims has subject-matter jurisdiction over the competitive-bidding dispute between Meccon and the University of Akron.

In the *Meccon* decision, the Tenth District permitted the recovery of bid preparation recovery costs and ignored the declaration in *Cementech* that a “rejected bidder is limited to injunctive relief.” *Id.* at ¶10. The Tenth District’s decision is also inconsistent with the public policy reasons declared by this Court in *Cementech*. These public policy reasons include preventing excessive costs and corrupt practices and protecting the integrity of the bidding process, the public and the bidders. See *Id.* at ¶11.

Amici Curiae accept that there must be a remedy for an improper award of a public contract which violates public biddings laws. That remedy is, as this Court declared in *Cementech*, limited solely to injunctive relief. Injunctive relief ensures that the proper procedures for publicly bid contracts are followed and unnecessary expenses are not assumed by the taxpayers. If a contract is improperly awarded, the interests of the taxpayers and rejected bidders are aligned: they both benefit from an injunction which prevents the contract from being performed based upon an improper award.

In addition to the incorrect result in *Meccon*, there is a significant risk that other courts looking at this issue will reach a different result. Just four months prior to the *Meccon* decision, the Tenth District had hinted in dicta that the recovery of bid preparation costs might not be

permitted under *Cementech*. *TP Mechanical Contractors, Inc. v. Franklin County Board of Commissioners*, 2008-Ohio-6824, ¶22. (The court noted that other jurisdictions have identified statutory and common law grounds for recovery of bid preparation costs; the court then contrasted the *Cementech* holding that a “rejected bidder cannot recover its lost profits as damages.”)

The underlying ambiguity of the issue, raised by *Cementech*'s procedural posture, the Tenth District's failure to follow the policy teachings of *Cementech* and the Tenth District's differing analyses of this issue, make it likely that other courts will resolve the issue in an inconsistent manner. This case provides an opportunity for this court clarify the issue of the availability of bid preparation costs as a remedy for alleged public bidding violations.

The Ohio Municipal League, the County Commissioners Association of Ohio and the Ohio Township Association all agree that this case is worthy of the time and attention of this Court, and urge this court to accept jurisdiction over it.

STATEMENT OF AMICUS INTEREST

The Ohio Municipal League is a non-profit Ohio corporation composed of a membership of more than 750 Ohio cities and villages. The County Commissioners Association of Ohio represents Ohio's 87 Boards of County Commissioners and the Summit County Executive and Council. The Ohio Township Association is a non-profit organization dedicated to the preservation and promotion of township government that represents 1,308 townships and 5,238 elected officials.

Amici Curiae have an interest in ensuring that this Court's declaration limiting the remedy in the case of an improperly awarded public contract to injunctive relief is upheld as this exclusive remedy is in the best interests of the competitive bidding process, the public, and the bidders.

Amici Curiae, by this brief, respectfully seek to advise the Court of the urgency of and implications of the *Meccon* decision and the review warranted by this Court.

STATEMENT OF THE CASE AND FACTS

The Amici hereby adopt, in its entirety, and incorporate by reference, the statement of the case and facts contained within the Memorandum in Support of Jurisdiction of the University of Akron.

ARGUMENT

Proposition of Law No. 1: A rejected bidder for a public contract has no right to recover bid preparation costs as money damages; injunctive relief is the sole remedy available for an improperly awarded public contract. (*Cementech v. City of Fairlawn*, 109 Ohio St.3d 475, 849 N.E.2d 24, 2006-Ohio-2991, construed and followed).

The Principles of *Cementech*

In *Cementech*, this Court held a rejected bidder cannot recover lost profits as damages and declared injunctive relief the sole remedy available to rejected bidders stating "a rejected bidder is limited to injunctive relief." *Id.* at ¶10. This Court's declaration was clear. Injunctive relief is the sole remedy available to rejected bidders. This Court did not state that injunctive relief is one of many remedies available to rejected bidders. The use of the phrase "limited to" restricts a rejected bidder's recovery to injunctive relief.

The Tenth District Court of Appeals concluded that because the issue of recovery of bid-preparation costs was not properly a part of the case on appeal, that this 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 the issue.” Id. at ¶22.

In *Cementech*, however, this Court concluded: “[i]t is clear 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. This Court saw no reason to provide additional remedies to rejected bidders and, in fact, noted “[a]n injunction is an extraordinary remedy in equity where there is no adequate remedy at law.” Id. at ¶10.

This statement is another declaration of this Court that injunctive relief is the sole remedy available to rejected bidders as “the fact that injunctive relief is available generally indicates that a monetary award is not available ***.” *Hardrives Paving and Construction, Inc. v. City of Niles* (1994), 99 Ohio App.3d 243 at 247, 650 N.E.2d 482. Bid preparation costs are monetary damages and, therefore, if bid preparation costs are available there is an adequate remedy at law. As “an injunction is an equitable remedy and will not lie where there is an adequate remedy at law”, a rejected bidder cannot be permitted to seek injunctive relief, as authorized by this Court, and monetary damages. *Haig v. Ohio State Board of Education* (1992), 62 Ohio St.3d 507, 510, 584 N.E.2d 704, 71 Ed. Law Rep. 1113 citing *Gannon v. Perk* (1976), 46 Ohio St.3d 301, 308-309, 75 O.O.2d 358, 348 N.E.2d 342.

A careful reading of *Cementech*, and the common understanding of when injunctive relief is available, compels a conclusion that neither bid-preparation costs nor any other monetary damages are available to a rejected bidder. Injunctive relief is the sole remedy available to rejected bidders when it is alleged that a public body has violated public bidding laws.

The Purposes of Public Bidding

The purposes behind public bidding have been consistently articulated by Ohio's courts. Public bidding is intended to avoid favoritism and fraud for the protection of taxpayers and bidders. *Cedar Bay Construction, Inc. v. City of Freemont* (1990), 50 Ohio St.3d 19, 21 552 N.E.2d 202, 204; *Chillicothe Bd. of Edn. v. Sever-Williams Co.* (1970), 22 Ohio St.2d 107, 115, 51 O.O.2d 173, 178, 258 N.E.2d 605, 610. As this Court has recognized, public bidding has the dual benefit of protecting taxpayers and bidders: “[w]e acknowledge that among the purposes of competitive bidding legislation are the protection of the taxpayer; prevention of excessive costs and corrupt practices; and the assurance of open and honest competition in bidding for public contracts so as to save the public harmless, as well as bidders themselves, from any kind of favoritism, fraud or collusion. (Citations omitted.)” *Danis Clarkco Landfill Co. v. Clark County Solid Waste Management Dist.*, 73 Ohio St. 3d 590, 602, 1995 Ohio 301, 653 N.E.2d 646, 656.

In *Cementech*, this Court concluded: “[w]hile allowing lost-profit damages in municipal-contract cases would protect bidders from corrupt practices, it would also harm the taxpayers by forcing them to bear the extra costs of lost profits to rejected bidders. Thus, the purposes of competitive bidding clearly militate against lost-profit damages to rejected bidders.” *Id.* at ¶9.

Although this conclusion pertained to lost-profit damages and not bid preparation costs, the public policy analysis are the same as both are monetary damages. It is wrong to require

taxpayers to pay for bid preparation costs as such a requirement results in additional costs to the taxpayers. This requirement does not protect the taxpayers.

It also creates an additional burden for both public entities and bidders. Public entities would need to budget for bid preparation costs, consider the costs bidders may incur in providing certain information requested in bid specifications and seek to limit their potential exposure by re-bidding projects as opposed to awarding a contract to the next lowest bidder. All of these burdens are contrary to the public interest and the purposes of competitive bidding. Bidders would find it necessary to track bid preparation expenses associated with each submitted bid and experience delays with contract awards as public entities re-bid more projects.

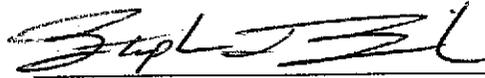
Injunctive relief, however, protects both the taxpayers and the bidders. As this Court concluded in *Cementech*: “[i]t is clear that in the context of competitive bidding for public contracts, injunctive relief provides a remedy that prevents excessive costs and corrupt practices, as well as protects 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. This conclusion regarding the appropriateness and adequacy of injunctive relief is applicable to the rejected bidder in *Meccon*.

CONCLUSION

As this Court declared in *Cementech*, the sole remedy available to rejected bidders is injunctive relief. Injunctive relief ensures that the proper procedures for publicly bid contracts are followed and unnecessary expenses are not assumed by the taxpayers. This case presents a case of great general interest to public entities throughout Ohio that engage in public bidding.

The exercise of jurisdiction over this case is respectfully requested.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *Memorandum in Support of Jurisdiction of Amici Curiae the Ohio Municipal League, the County Commissioners Association of Ohio, and the Ohio Township Association* has been sent via regular U.S. mail, postage pre-paid this 22 day of May, 2009 to:

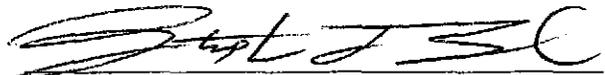
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