

In the  
Supreme Court of Ohio

MECCON, INC., et al.,	:	Case No. 2009-0950
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals
	:	Tenth Appellate District
THE UNIVERSITY OF AKRON,	:	
	:	Court of Appeals Case
Defendant-Appellant.	:	No. 08AP-727
	:	

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**MEMORANDUM IN RESPONSE TO DEFENDANT-APPELLANT  
THE UNIVERSITY OF AKRON'S MEMORANDUM IN  
SUPPORT OF JURISDICTION PURSUANT TO OHIO SCT. R. III, SECTION 2**

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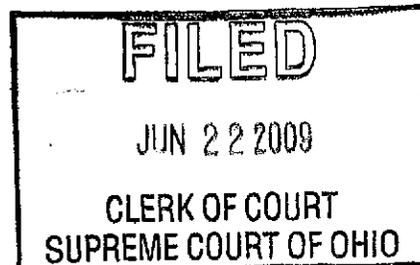
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## **I. INTRODUCTION AND RELEVANT HISTORY**

Contrary to what is suggested by Defendant-Appellant the University of Akron (“University”), this case does not involve “an appeals court [that] has upended one of this Court’s most important public bidding cases.” (Appellant’s Memorandum at Introduction). Rather, it involves the University’s decision to wrongfully award three contracts to a contractor on the University of Akron Football Stadium Project (the “Project”) in direct violation of Ohio’s competitive bidding statutes, the language in its own bid documents, and the University’s ongoing attempts to block Plaintiff-Appellee Mecon, Inc.’s (“Mecon”) right to its day in court.

Nor is this a case of public or great general interest. What this discretionary appeal amounts to is an attempt by the University to delay any decision on the merits so it can complete the Project without delay, even though it is completing it with a contractor who has been illegally awarded three construction contracts. If the University can complete the Project later this summer before a decision on the merits ever is rendered, it does not care what the law says about a disappointed bidder’s rights because it will have its project, it will be using it to generate revenue, and whether it awarded contracts illegally or not will not impact its operations. This Court must deny this discretionary appeal so that Mecon is not denied its right to stop the University’s illegal actions.

### **A. The University’s Illegal Award of Contracts.**

Ohio Revised Code Section 9.31, known as the mistake-in-bid law and entitled “Withdrawing Bids Made In Error,” clearly provides:

a bidder for a contract with the state ... for construction ... may *withdraw* his bid from consideration if the price bid was substantially lower than the other bids, providing the bid was submitted in good faith, and the reason for the price bid being substantially lower was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, or material

made directly in the compilation of the bid. Notice of a claim of right to withdraw such bid must be made in writing filed with the contracting authority within two business days after the conclusion of the bid opening procedure.

***No bid may be withdrawn under this section when the result would be the awarding of the contract on another bid of the same bidder.***

(R.C. 9.31) (emphasis added).<sup>1</sup>

Here, Mecon submitted a bid for the heating, ventilation, and air conditioning (“HVAC”) contract.<sup>2</sup> *Mecon*, 2009-Ohio-1700, at ¶ 2. Another contractor, S.A. Comunale, submitted four bids for the Project, including 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. *Id.* When bids were open, S.A. Comunale was the low bidder for each of the stand-alone plumbing, fire protection, and HVAC contracts. *Id.* at ¶ 3. Mecon’s bid for the stand-alone HVAC package was the second lowest. S.A. Comunale’s combined bid was more than \$1.2 million lower than the next lowest bid. *Id.* After it discovered the large disparity in its low bids from the next lowest bidders, S.A. Comunale ***withdrew its combined bid and stand-alone plumbing bid.*** *Id.* at ¶ 4. Despite the language in its own bid documents 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 still awarded the stand-alone HVAC

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<sup>1</sup> In addition to the statutory requirement of R.C. 9.31, the bid documents drafted by the University and provided to all contractors set forth in the Instructions To Bidders a virtually ***identical*** procedure as R.C. 9.31 allowing contractors to withdraw their bid after bids have been opened, but if a bid was withdrawn, the same bidder could not be awarded a contract on another one of its bids. (Verified Complaint at ¶ 26; Section 4.2 of the Instructions to Bidders (emphasis added).)

<sup>2</sup> Because the University is not disputing the facts as stated in the Tenth District’s ruling in *Mecon, Inc. v. University of Akron* (10<sup>th</sup> Dist.), 2009-Ohio-1700, Mecon will refer to them as stated therein.

and fire protection contracts to S.A. Comunale, *i.e.*, the “same bidder” who now benefitted after withdrawing two of its mistaken bids. R.C. 9.31. *Id.*

Under long-standing Ohio law, such contracts are void *ab initio* because in illegally awarding them to S.A. Comunale, the University violated what R.C. 9.31 expressly sought to protect against.<sup>3</sup> No greater abuse of discretion exists on the part of a public owner than violating Ohio statutory law designed to protect fairness within the competitive bidding process, including *not* rewarding a bidder with two contracts after it withdrew other bids submitted for the same Project.

#### **B. The Court Of Claims’ Jurisdictional Mistake.**

In response, Mecon promptly filed suit in the Court of Claims, seeking a declaratory judgment on the illegality of the contracts between S.A. Comunale and the University, a temporary restraining order (“TRO”), preliminary and permanent injunction relief, monetary damages for its bid preparation costs, attorneys’ fees, and other such damages and relief resulting from the University’s failure to award the HVAC contract to Mecon. *Id.* at ¶ 5. Before the Court of Claims could hold an evidentiary hearing on the TRO, however, the University filed a motion to dismiss for lack of subject matter jurisdiction, arguing in error, that disappointed bidders were limited to injunctive relief exclusively. *Id.* at ¶ 6.

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<sup>3</sup> See *Buchanan Bridge Co. v. Campbell*, (1899), 60 Ohio St. 406, 54 N.E. 372; *Pincelli v. Ohio Bridge Company* (1966), 5 Ohio St.2d 41, 213 N.E.2d 356; *Shampton v. City of Springboro* (2003), 98 Ohio St.3d 457, 462, 2003 Ohio 1913; 786 N.E.2d 883, 880; *Ohio Asphalt Paving v. Ohio Dept. of Indus. Relations* (1992), 63 Ohio St.3d 512, 581 N.E.2d 35; *Lathrop v. City of Toledo* (1966), 5 Ohio St.2d 165, 214 N.E.2d 408; *McCloud & Geigle v. Columbus*, (1896), 54 Ohio St. 439, 453; *Asphalt Material and Construction v. Knox County*, (unreported Feb. 23, 1982) Case No. 81-CA-22, 5<sup>th</sup> App. Dist.; See also *State of Ohio, ex rel. Miller v. Board of County Commissioners* (April 27, 1978), 8th Dist. No. 36979, unreported (holding that because the bidding was not competitive, the contract was void).

Without Mecon being afforded an opportunity to respond in writing, the Court of Claims mistakenly granted the University's motion, finding that Mecon'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 474, 2006-Ohio-2991. *Id.* Despite the fact that the Court of Claims recognized in its Entry of Dismissal that Mecon had in fact asserted a claim for monetary relief in its Complaint in the form of bid preparation costs, as well as ancillary equitable claims, it improperly held that Mecon's claim was for equitable relief only -- thus depriving the Court of Claims of subject matter jurisdiction. *Id.* Mecon's motion for a TRO was then denied, its Complaint dismissed, and all remaining claims were denied as moot. Mecon immediately appealed and had to endure even more delays. *Id.*

**C. The Tenth District Reversed And Remanded For Further Proceedings On The Merits.**

Under a *de novo* standard of review, the Tenth District rectified the jurisdictional mistake made by the Court of Claims, and properly concluded that if a disappointed bidder action is for money damages (*e.g.*, bid preparation costs, attorneys' fees, and/or other bid protest costs) against the state *coupled with* a request for declaratory and injunctive relief, as was sought in Mecon's Complaint, then the appropriate forum is the Court of Claims. *Id.* at ¶ 8 (emphasis added). Also, the Tenth District confirmed that the *Cementech* holding was "When a municipality violates competitive-bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages." *Mecon*, 2009-Ohio-1700, at ¶¶ 8-11. The Tenth District noted, importantly, that the trial court in *Cementech* also awarded the disappointed bidder its bid preparation costs – a decision that was not disturbed by this Court. *Id.* at ¶ 11. And 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. *Id.* at ¶ 15.

The Tenth District also concluded that there are good policy reasons to favor the recovery of bid preparation costs in disappointed bidder cases, and allowing recovery of bid preparation costs actually serves to enhance the integrity of the competitive bidding process. *Mecon*, 2009-Ohio-1700, at ¶¶ 22-26. Without some ramifications for their illegal acts, there is little deterrent to a public entity who fails to follow competitive bidding statutes. *Id.* Bidders will become reluctant to bid on public projects when they suspect that competitive bidding will not be conducted fairly, and ultimately this refusal to bid will harm the public as the pool of qualified bidders will shrink. *Id.* Accordingly, the Tenth District reversed the Court of Claims and remanded Mecon's case for further proceedings.

It is within this backdrop that the University filed this appeal as a ruse to further postpone Mecon's ability to be heard. Because of the time-sensitive nature of disappointed bidder cases in the context of public works construction projects, the University continues its efforts to deprive Mecon from having its case be decided on the merits before the Project is completed and it is too late for Mecon to be afforded any meaningful relief. Back in 2008 and *before construction commenced or contracts were executed*, Mecon was entitled to have the Court of Claims declare that the University's decision to award to S.A. Comunale was improper in light of the express prohibitions contained in R.C. 9.31. Moreover, Mecon was entitled to have such contracts declared illegal and void, along with an Order prohibiting the University from awarding and executing them, prohibiting performance by and payment to S. A. Comunale, and as an additional remedy that is entirely consistent with the overall relief requested, to permit Mecon to recover its bid preparation costs and attorneys' fees.

Because this case is not of public or great general interest, and because Ohio law has long allowed disappointed bidders to pursue alternative monetary and equitable remedies (particularly where lower courts make mistakes that deprive bidders of adequate equitable relief), the University's petition for a discretionary appeal should be denied.

## II. THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST

### A. **The Tenth District's Decision Does Not Conflict With *Cementech* Or Any Other Ohio Cases.**

The University contends that “[t]his 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* . . . which held that a rejected bidder’s only remedy is injunctive relief.” (Appellant’s Memorandum at p. 3). The Tenth District reversed the decision by the Court of Claims dismissing Meccon’s case for lack of subject matter jurisdiction. *Meccon, Inc. v. University of Akron*, 2009 Ohio 1700. In doing so, it held that Meccon’s claim for bid preparation costs and attorney fees presented a legally cognizable claim for money damages. *Id.* at ¶¶ 26, 30. Because that decision *is consistent* with this Court’s and other appellate courts’ prior holdings regarding public bidding projects, the Court should deny the University’s petition for a discretionary appeal and allow Meccon’s case to be decided on its merits.

In drafting its decision, the Tenth District analyzed the issues before it in light of Ohio’s binding precedent controlling competitive public bidding laws. *See, e.g., Cementech v. City of Fairlawn* (2006), 109 Ohio St. 3d. 475; *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312; *Mechanical Contractors Assn. of Cincinnati v. Univ. of Cincinnati* (2003), 152 Ohio App.3d 466. It then dutifully applied those mandates. *See Meccon*, 2009 Ohio 1700. Despite the clear precedent cited by the Tenth District on the issue of whether bid preparation costs may be

recovered in cases involving illegally awarded public contracts, the University petitioned the Court to accept a discretionary appeal. (*See Appellant's Memorandum.*)

In its petition, the University relies primarily on a plain misreading of the Court's holding in *Cementech*. (*Appellant's Memorandum*, pp. 9-11.) In doing so, it attempts to create a conflict where none exists. (*See Appellant's Memorandum*, p. 8.) In *Cementech*, the Court was faced with conflicting appellate decisions regarding the availability of lost profits in situations where municipalities violate competitive bidding laws. 109 Ohio St. 3d at 476-77. In resolving this narrowly framed conflict, the Court concisely stated, "***we hold that when a municipality violates competitive-bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages.***" *Id.* at 478 (emphasis added). This Court never addressed bid preparation costs in its *Cementech* analysis.

Neither party in the matter presently before the Court disputes the availability of lost profits as damages for a rejected bidder. Correspondingly, the Tenth District's decision in *Meccon* did not render an opinion on the issue of lost profits. 2009 Ohio 1700. Therefore, the Tenth District did not contravene the Court's relatively recent and explicit holding in *Cementech*, and no direct conflict exists. Accordingly, this case cannot be considered to be of great general interest because there is no direct conflict between the Tenth District's decision in *Meccon* and the Court's explicit holding in *Cementech*. Furthermore, this case cannot be considered to be of great general interest because the Tenth District's decision in *Meccon* does not present this Court with a conflict between appellate districts.

**B. The Tenth District's Decision Is Of Importance To The University And Meccon – But Not The Public At Large.**

To Meccon and the University, this case and the Tenth District's decision are of great importance. On one hand, the University may finally be held accountable for showing favoritism

and awarding S.A. Comunale contracts in direct violation of R.C. 9.31 – a result it has been able to dodge for almost a year now. Additionally, Meccon may finally receive some justice for not being awarded the HVAC contract on the Project – despite having been entitled as the lowest and best bidder in light of S.A. Comunale’s withdrawn bids.

On the other hand, this dispute is also of importance to those public owners, like the University, who seek to improperly broaden the holding in *Cementech* in order to severely restrict the legal and equitable relief long afforded to disappointed bidders in Ohio. While public owners certainly would like to have unbridled discretion in their award decisions, violating statutory law during what is supposed to be a fair and impartial competitive bidding process simply cannot be tolerated. Nevertheless, there is a long history of disappointed bidder cases in Ohio, and will certainly be more in the future, so there is nothing unique about this case that warrants accepting a discretionary appeal.

The University spends pages outlining how it and other public owners could potentially be exposed to huge amounts of monetary damages given the Tenth District’s decision, and how bid preparation costs are tantamount to “punitive damages” that are forbidden as a penalty against the government. (Appellant’s Memorandum at pp. 5-8). The reality, however, is that bid preparation costs are generally not that significant. Moreover, they are costs actually incurred by the bidder as a result of an unfair bidding process, so they are direct compensatory damages as opposed to punitive damages.

Lastly, the University’s entire premise that fairness in the bidding process would best be served if disappointed bidders had *only one remedy available to them*, i.e., injunctive relief, is faulty and unacceptable as a public policy. Because we live in a world where there is human error, bidders cannot always rely on trial courts to always reach the right decision; thus, our

appellate system is designed to serve as a check and balance for those risks. What about the situation where the disappointed bidder requests injunctive relief, but the trial court improperly denies that relief, or as here, improperly never allows such requested relief to be decided because of a jurisdictional mistake? Because our appellate system is slow in comparison to the pace of construction projects, it is possible that by the time it is determined that the government had abused its discretion or violated bidding law, the construction project would be underway or completed. In that instance, injunctive relief would more likely be denied and the bidder would be left with no adequate relief, in fact, no remedy at all. This concept effectively creates a shelter from which public entities can dole out projects to its favorites and then delay bidding appeals until construction commences and is completed. In this situation, awarding bid preparation costs and attorneys' fees strikes some balance in deterring government entities from violating the bidding process with impunity.

### **III. BRIEF STATEMENT IN SUPPORT OF MECCON'S POSITION REGARDING THE PROPOSITION OF LAW RAISED IN APPELLANT'S MEMORANDUM**

#### **A. *Cementech* Has No Application To This Case.**

Although the Tenth District's opinion is entirely consistent with this Court's precedents and does not present the Court with a direct conflict, the University insists that this Court should entertain the following proposition of law:

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

(*Appellant's Memorandum*, p. 8.) An *Amici Curiae* Memorandum also was filed by the Ohio Municipal League, the County Commissioners Association of Ohio, and the Ohio Township Association (the "Public Owners Associations") that proposes a similar proposition of law:

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. (Amici Curiae)

(*Amici's Memorandum in Support of Jurisdiction*, p. 4.)<sup>4</sup>

In *Mecon*, the Tenth District limited its decision to holding that, as originally filed, Mecon's case was properly before the Ohio Court of Claims because a claim for bid preparation costs presented a legally cognizable claim for money damages. 2009 Ohio 1700. In its proposition of law, the University proposes that "[m]oney damages are not available to disappointed bidders in public bidding violation cases." This proposition, however, is a specious attempt to enact a sweeping change to current precedents by reaching beyond the scope of both the Tenth District's decision in *Mecon* and the Court's holding in *Cementech*. Therefore, its petition for an appeal should be denied.

The University's sweeping proposition runs contrary to the Court's holding in *Cementech* and disregards the ultimate outcome in *Cementech*. In *Cementech*, the Court addressed a single issue. In addressing the single question certified to it by the appellate court, the Court narrowly held that, as between a disappointed bidder's claims for lost profits and injunctive relief, the disappointed bidder would be limited to its claim for injunctive relief. The Court stated as follows:

The intent of competitive bidding is to protect the taxpayer, prevent excessive costs and corrupt practices, and provide open and honest competitive bidding for public contracts. [citations omitted] While 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 cost of lost profits to a rejected bidder. Thus the purposes of competitive bidding clearly militate against allowing *lost profit damages* to rejected bidders.

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<sup>4</sup> For the sake of efficiency, Mecon will address both propositions of law articulated by the University and the Public Owners Associations at the same time.

Rather, a rejected bidder is limited to injunctive relief.

*Cementech*, 109 Ohio St. 3d. at 477 (emphasis added).

To support its proposed proposition of law, the University attempts to skew the Court's statement, "rather, a rejected bidder is limited to injunctive relief," by presenting the same out of context and as a solitary statement of law. However, this would misrepresent the Court's well-defined holding and ignore reality. In reality, this Court in *Cementech* did not remand the case to the trial court for further proceedings; rather, the Court effectively allowed the disappointed bidder to recover and retain its *monetary jury award for bid preparation costs as damages in that case*. Because this Court actually let stand the decision that awarded Cementech its bid preparation costs, the University's argument is negated. Furthermore, the Court's holding in *Cementech* regarding the recovery of lost profits by disappointed bidders repaired a clear fissure among the appellate districts.

This Court's decision in *Cementech* to allow the award of bid preparation costs to stand is consistent with case law on whether bid preparation costs are appropriate in these matters. For example, in *Cincinnati Electronics Corp. v. Kleppe*, 509 F.2d 1080 (6th Cir. 1975), the Court held that where it is established that a government contract has been illegally awarded, the only recognizable loss that any unsuccessful bidder sustains is the cost of preparation of his bid. Further, as one commentator has noted:

It is now well established in *virtually all jurisdictions* that an unsuccessful bidder's remedy at law for wrongful denial of a contract award is the recovery of damages, which usually is limited to *bid preparation costs and attorneys fees* from the public agency.

Bruner & O'Connor, *Bruner & O'Connor on Construction Law*, 2002 West Group, §2:148.<sup>5</sup> Indeed, if a court does not allow for the recovery of bid preparation costs, it removes one of the primary and only deterrents in place to ensure the efficacy of and purpose behind the competitive bidding process. Accordingly, the University's appeal should be denied.

**B. Bid Preparation Costs Coupled With Requests For Equitable Relief Provide A Basis For Court of Claims Jurisdiction.**

The University conveniently ignores the Tenth District's holding that if a disappointed bidder action is for money damages (*e.g.*, bid preparation costs and attorneys' fees) against the state *coupled with* a request for declaratory and injunctive relief, as was sought in Mecon's Complaint, then the appropriate forum is the Court of Claims. *Mecon*, 2009-Ohio-1700, at ¶ 8 (emphasis added). It omits reference to established precedent, such as *Tiemann v. University of Cincinnati* (1998), 127 Ohio App.3d 312, 712 N.E.2d 1258, which held the Court of Claims has jurisdiction over an action for declaratory and injunctive relief arising out of a civil action against the state predicated upon the actions or inactions of a state agency pursuant to R.C. 2743.03(A)(2), including where appellees have brought such a suit in the Court of Claims asking for declaratory, injunctive and "any further" relief. Moreover, the University ignores that claims brought for declaratory or injunctive relief may be brought before the Court of Claims "if (1) they arise out of the same circumstance as plaintiffs' claim for money damages, and (2) plaintiffs' claim for money damages is permitted by the state's waiver of immunity." *Upjohn Company v. Ohio Dept. Of Human Services* (1991), 77 Ohio App.3d 827, 834; R.C. 2743.03(A)(2).

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<sup>5</sup> For a comprehensive list of jurisdictions that allow disappointed bidders to recover bid preparation costs, please see Footnote 3 to Mecon's Memorandum in Opposition To Appellee's Motion to Dismiss that was filed with the Tenth District on February 11, 2009.

Instead, the University summarily states without any legal authority that “bid preparation costs . . . are particularly inappropriate and unlawful under Ohio law” and therefore should not provide a basis for subject matter jurisdiction. (Appellant’s Memorandum at p. 13). In doing so, it attempts to distinguish the Tenth District’s observation that other jurisdictions have similarly distinguished recovery of bid preparation costs from recovery of lost profits. *Meccon*, 2009-Ohio-1700, at ¶ 25. The University contends that “all” those courts grounded their conclusions in promissory estoppel principles, which do not apply against the government under Ohio law. (Appellant’s Memorandum at p. 14). This statement is misleading at best. Contrary to the University’s contention, the right to recover bid preparation costs in the majority of jurisdictions does not arise from the doctrine of promissory estoppel. Rather, the Tenth District referenced *Kajima/Ray Wilson v. Los Angeles Cty. Metro. Transp. Auth.* (Cal. 2000), 1 P.3d 63, 69, which identified the *majority* of jurisdictions that allow either *by statute* or case law for recovery of bid preparation costs *and in some cases bid protest costs*, but consistent with *Cementech*, not lost profits. (*Kajima* at Footnotes 5 and 6; *Meccon*, 2009-Ohio-1700, at ¶ 25). The Tenth District quoted from *Kajima*, stating, in agreement with the majority of jurisdictions:

“These jurisdictions generally reason that while the competitive bidding states are enacted for the public’s benefit, not 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.”

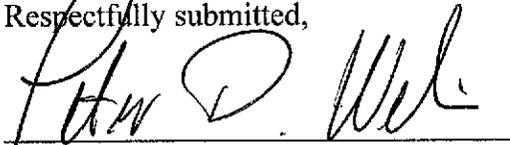
*Id.* Moreover, the University attacks the Tenth District’s reference to *Meccon*’s ability as the prevailing party to recover other money damages, such as attorneys’ fees pursuant to R.C. 2335.39, because it claims that attorneys’ fees are costs, not recoverable “damages” sufficient to trigger Court of Claims jurisdiction. (Appellant’s Memorandum at pp. 14-15). What this argument ignores, however, is that in addition to possibly recovering attorneys’ fees under R.C.

2335.39, the Court of Claims may also assess attorneys' fees against the University based upon the declaratory judgment action asserted by Mecon pursuant to R.C. 2721, et seq. *See Motorists Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157. Moreover, the University neglects to acknowledge *Mechanical Contractors Association of Cincinnati, Inc. v. University of Cincinnati* (2003), 152 Ohio App.3d 466, 477, 2003 Ohio 1837, ¶42, which held that the possibility of the prevailing party's compensation for attorneys' fees arising out of a disappointed bidder case against another university in the Court of Claims *was sufficient* to invoke subject matter jurisdiction.

#### IV. CONCLUSION

For the reasons set forth above, the University's petition for discretionary appeal should be denied, and Mecon's case should be allowed to promptly proceed on remand for a full hearing on the merits.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

This is to certify that a true copy of the foregoing document has been served upon the following, via regular U.S. Mail, this 22nd day of June, 2009:

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