

IN THE SUPREME COURT OF OHIO

ORIGINAL

MECCON, INC., et al.	:	Case No. 2009-0950
	:	
Plaintiffs - Appellees,	:	On Appeal from the
	:	Tenth District Court of Appeals
v.	:	Franklin County, Ohio
	:	
THE UNIVERSITY OF AKRON	:	Court of Appeals
	:	Case No. 08API-08-727
Defendant – Appellant.	:	
	:	
	:	

BRIEF OF AMICI CURIAE THE OHIO MUNICIPAL LEAGUE, THE COUNTY COMMISSIONERS ASSOCIATION OF OHIO, AND THE OHIO TOWNSHIP ASSOCIATION IN SUPPORT OF APPELLANT, THE UNIVERSITY OF AKRON

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INTRODUCTION

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 reverse the decision in *Meccon, Inc. v. University of Akron*, 182 Ohio App.3d 85, 911 N.E.2d 933, 2009-Ohio-1700.

In April of 2008, the University of Akron invited bids for the construction of a new football stadium. After bid receipt, bid review, contract award, contract execution, and initial contract performance, Meccon, Inc. (“Meccon”), a disappointed bidder, filed an action alleging competitive bidding violations and seeking a temporary restraining order, a declaratory judgment, preliminary and permanent injunctive relief, bid preparation costs, and other damages arising from the failure to award the contract to Meccon.

The Court of Claims, citing this Court’s declaration in *Cementech v. Fairlawn*, 109 Ohio St.3d 475, 849 N.E.2d 24, 2006-Ohio-2991, determined that a “rejected bidder is limited to injunctive relief” and concluded that bid preparation costs and other monetary damages are not available to a disappointed bidder. The Court of Claims then granted the University of Akron’s motion to dismiss for lack of subject-matter jurisdiction. Meccon appealed that decision to the Tenth District.

On appeal, the Tenth District Court of Appeals distinguished recovery of bid preparation costs from recovery of lost profits, and concluded that bid preparation costs can be recovered by an unsuccessful bidder. The Tenth District relied on the fact that *Cementech* did not expressly address the award of bid preparation costs, but merely held that lost profits were not available to a disappointed bidder if the public contract was not properly awarded. The Tenth District also

relied on a Supreme Court of California decision that had awarded bid preparation costs based on theories of promissory estoppel and implied contract.

These analyses are erroneous. A holding, such as that in *Cementech*, that injunctive relief is available to prevent the improper award of a public contract, inherently precludes an award of money damages as the absence of a remedy at law is a predicate to the equitable relief. Additionally, well established Ohio law precludes causes of action for money damages against political subdivisions and the state predicated on the theories of promissory estoppel or implied contract.

This Court, consistent with the decision in *Cementech* and for the reasons stated herein, should reverse the Tenth District and hold that a rejected bidder's relief is restricted to injunctive relief if a public contract is improperly awarded.

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.

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 Merit Brief 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).

In *Cementech*, this Court held that a rejected bidder cannot recover lost profits as damages and declared injunctive relief was 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, 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.” *Meccon, supra*, 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." *Cementech*, 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. (Emphasis added.)

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.

No Statutory Right

In *Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000), 23 Cal.4th 305, 1 P.3d 63, 96 Cal.Rptr.2d 747, a case relied on by the Tenth District, the Supreme Court of California stated that a "majority of jurisdictions *** allow either **by statute** or case law recovery of bid preparation and in some cases bid protest costs." (Emphasis added.)

Id. at 319. A review of the Supreme Court of California’s analysis of the states that allow for the recovery of bid preparation costs reveals that a majority of the jurisdictions authorize the recovery of bid preparation costs **by statute**.¹ The statutes allowing recovery of bid preparation costs also limit the recovery to “reasonable” costs or “actual costs reasonably incurred.” standards debated and adopted by the legislature of each state.

The Ohio General Assembly has not enacted legislation enabling rejected bidders to seek and recover bid preparation costs when a public contract is improperly awarded. Consequently, Ohio is not a jurisdiction wherein bid preparation costs are authorized by statute.

No Promissory Estoppel or Implied Contract.

Several jurisdictions, including the Supreme Court of California in *Kajima/Ray Wilson*, *supra*, have allowed for the recovery of bid preparation costs as a matter of common law. In doing so, these courts have concluded that a rejected bidder is entitled to bid preparation costs under a promissory estoppel theory or implied contract theory.

Kajima/Ray Wilson, *supra*, concluded “when a public entity solicits bids, it represents, consistent with the statutory mandate, that if the contract is awarded, it will be awarded to the lowest responsible bidder. In reliance on this representation or requirement, a bidder incurs costs (here Kajima spent \$44,869) preparing and submitting a bid. If its bid is the lowest, and it is a responsible bidder, but the contract is awarded to a higher bidder, the elements of a promissory estoppel cause of action appear to be established.” *Id.* at 315. The court then held

¹ The Supreme Court of California’s analysis also includes cites to two decisions by the United States Court of Claims. *Heyer Products Company, Inc. v. United States* (1956), 135 Cl.Cl. 63, 140 F. Supp. 409, involved a bid protest under the Armed Service Procurement Act of 1947 and *Keco Industries, Inc. v. United States* (1970), 192 Cl.Cl. 773, 428 F.2d 1233, involved a bid protest under the Armed Services Procurement Regulations. The Administrative Dispute Resolution Act of 1996 authorizes United States Court of Claims in bid protest actions to “award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.”

that a rejected bidder has a cause of action against a public agency under a promissory estoppel theory. *Id.* at Syllabus 4a, 4b, 4c.

The Tenth District's focus on the *Kajima/Ray Wilson* case in its attempt to distinguish recovery of bid preparation costs from recovery of lost profits was erroneous. This Court has consistently held that "the doctrines of equitable estoppel and promissory estoppel are inapplicable against a political subdivision when the political subdivision is engaged in a governmental function." *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 852 N.E.2d 716, 721. *Sekerak v. Fairhill Mental Health Center* (1986), 25 Ohio St.3d 38, 495 N.E.2d 14, *State ex rel. Chevalier v. Brown* (1985), 17 Ohio St.3d 61, 477 N.E.2d 623.

Competitive bidding of public improvements is mandated by Ohio law and, therefore, the process of competitive bidding is a governmental function not subject to promissory estoppel. Therefore, Mecon, a rejected bidder, has no cause of action against the University of Akron under a theory of promissory estoppel.

In *Planning and Design Solutions v. City of Santa Fe* (1994), 118 N.M. 707, 885 P.2d 628, a case cited by the *Kajima/Ray Wilson* court, the Supreme Court of New Mexico concluded that the City Council's introduction of a new proposal evaluation factor not included in the proposal and subsequent award to the fourth-ranked bidder "was arbitrary and capricious." *Id.* at 713. The Supreme Court of New Mexico then concluded that the lowest bidder relied on a guarantee that any award would be based only on the criteria published in the proposal and, therefore, "though no formal contract was ever concluded between the parties, the City's conduct was a breach of an implied contract for which damages will lie." *Id.* at 715.

In Ohio, however, this Court has held that no bidder has a right to a contract with a political subdivision until the contract is executed as "it is quite clear that the real substantial

object to be attained is the making of the written contract. It is only the contract authorized by the statute, all that precedes is but preliminary to the efficient object, viz., the written contract. Until that is executed the city is not bound.” *State ex rel. Cleveland Trinidad Paving Co. v. Board of Public Service of Columbus* (1909), 81 Ohio St. 218, 90 N.E. 389.

Implied contract theory is not recognized in Ohio, and bidders should take note of this Court’s advice in *Cleveland Trinidad*: “It may be added that persons dealing with municipal corporations must at their peril take notice of all grants of power and of all limitations of authority on the part of municipal agents.” *Id.* at 392. Preparing a bid is part of the cost of seeking to do business with a political subdivision, and bidders are responsible for their own business costs.

Given the development of the Ohio common law in this field, as discussed above, it is respectfully suggested that the importation of California common law, and the statutory law of other states, is not an appropriate jurisprudential approach to this case. Rather, the development of the law of Ohio on the subject establishes that injunctive relief is the means by which public contracting laws are to be enforced. *Cementech, supra*, at ¶11.

Awarding Bid Preparation Costs Defeats 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 Fremont* (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 is 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 rejecting all bids and 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

Based upon the foregoing, the Amici respectfully request this Court to reverse the judgment of the Tenth District Court of Appeals. Injunctive relief is, and should be, the only remedy available to a disappointed bidder who asserts that a public contract is improperly awarded.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing *Brief 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 27th day of October, 2009 to:

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