

In the
Supreme Court of Ohio

ORIGINAL

MECCON, INC., et al.,
Plaintiff-Appellee,
v.
THE UNIVERSITY OF AKRON,
Defendant-Appellant.

: Case No. 2009-0950
:
: On Appeal from the
: Franklin County
: Court of Appeals,
: Tenth Appellate District
:
: Court of Appeals Case
: No. 08AP-727
:

**MERIT BRIEF OF APPELLANT
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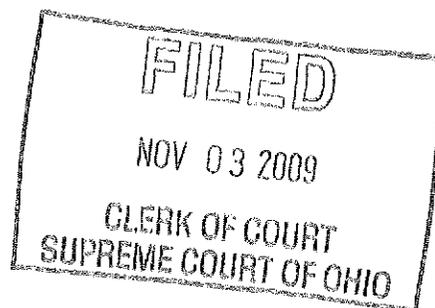


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INTRODUCTION

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, in public bidding cases, "a rejected bidder is limited to injunctive relief"—that is, no money damages are allowed. *Id.* at ¶ 10. This Court held that injunctive relief provides a complete remedy to disappointed bidders by preventing excessive costs and corrupt bidding practices and protecting the integrity of the bidding process, the public, and the bidders. *Id.* at ¶ 11. Moreover, this Court found that punishing government entities through money damages only serves to punish the very people the competitive bidding laws are meant to protect—the taxpayers. *Id.* at ¶¶ 8, 12.

In its decision below, the Tenth District Court of Appeals read *Cementech* narrowly, as prohibiting only an award of lost profits. According to the court, "it is our understanding that the Ohio Supreme Court has yet to rule on [the] issue" of whether *other* types of money damages are recoverable. *Meccon, Inc. v. Univ. of Akron* (10th Dist.), 2009-Ohio-1700, ¶ 22 (Appx., Ex. 2). As a result, the Tenth District relegated *Cementech*'s holding regarding injunctive relief to mere dicta, opening the door for courts to consider a range of money damages—including bid-preparation costs—in public contract cases. For the following reasons, that decision is wrong and warrants reversal.

First, the appellate court's decision conflicts directly with the binding precedent of *Cementech*, which held that "a rejected bidder is limited to injunctive relief" in cases alleging public bidding violations. *Id.* at ¶ 10.

Second, even if *Cementech* did not definitively answer the question whether a disappointed bidder may be awarded damages, injunctive relief is the only proper remedy for disappointed bidders in public bidding cases. That is, 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. This Court determined in *Cementech* that: (1) lost-profit damages are an improper and unnecessary remedy because injunctive relief is a sufficient deterrent to competitive bidding violations; (2) lost profits ultimately serve only to punish taxpayers, whom the public bidding statutes are meant to protect; and (3) money damages awarded as a penalty against a governmental entity (as was the case here) violate Ohio law, since punitive damages against public entities are prohibited absent explicit statutory authority. *Cementech*, 2006-Ohio-2991, at ¶¶ 11, 12. Those principles apply equally to all other types of money damages, including bid-preparation costs.

Third, there is no legal basis (indeed, the Tenth District did not cite one) for awarding money damages to disappointed bidders in public bidding cases. No public bidding statute authorizes a cause of action for damages for disappointed bidders. There is no cause of action for money damages under any sort of contract theory. And because bidders have no property interest in a public contract, no cause of action for money damages exists under a theory of either tort or due process.

Fourth, to the extent the Tenth District offered any basis for recognizing the availability of money damages in public bidding cases, it cited only certain “public policy reasons.” *Meccon*, 2009-Ohio-1700, at ¶ 24. But those public policy reasons do not withstand scrutiny. In fact, they directly conflict with this Court’s prior pronouncements.

Fifth, awarding money damages to a disappointed bidder contravenes the purposes of the competitive bidding laws and undercuts the deference owed to a public entity’s significant discretion in awarding its contracts.

Injunctive relief is the only proper remedy in public bidding violation cases. The Tenth District's decision should be reversed.

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, alleging 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, the Court of Claims lacks jurisdiction).

Because the case never proceeded beyond the University's motion to dismiss for lack of jurisdiction, its facts are undeveloped. But the case's procedural history is relevant to this appeal, particularly Mecon's untimely and ineffective attempts to seek a grant of injunctive relief, which have since driven it to pursue its claim for money damages.

A. Mecon sued the University in the Court of Claims for bidding law violations after the University awarded contracts to another bidder.

In April 2008, the University invited bids for its new football stadium project. The University sought bidders on the following contracts, among others: (1) the heating, ventilation, and air conditioning ("HVAC") contract; (2) the prime plumbing contract; and (3) the fire protection contract. Mecon bid only on the HVAC contract. In the end, the University awarded all three contracts to S.A. Communale—the lowest bidder. The University and S.A. Communale executed all three contracts by the end of June 2008, and the Ohio Attorney General gave his approval.

On August 6, 2008, after the contracts were signed and construction was underway—and more than two months after the bids were opened—Mecon sued the University in the Court of Claims, alleging competitive bidding law violations with respect to the three contracts awarded to S.A. Communale. Because Mecon bid only on the HVAC contract, it has no standing to sue for the plumbing and fire contracts. Nevertheless, Mecon sought a temporary restraining order (“TRO”), a declaratory judgment, preliminary and permanent injunctive relief, bid-preparation costs, and “additional costs and damages” with respect to all three contracts. Mecon 8/8/2008 Compl. ¶ 45.

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

Before the court could hold an evidentiary hearing on Mecon’s motion for a TRO, the University moved to dismiss the case for lack of subject matter jurisdiction. The University contended that Mecon’s claims for money damages were improper because this Court’s 2006 ruling in *Cementech* authorized only injunctive relief for a disappointed bidder. The Court of Claims agreed, and dismissed the case for lack of jurisdiction because Mecon lacked any cognizable claim for money damages. See Court of Claims Entry of Dismissal (Appx., Ex. 3). Having determined that it lacked jurisdiction, the Court of Claims also denied Mecon’s motion for a TRO. *Id.*

On August 11, 2008, after the Court of Claims’ dismissal, Mecon filed the same action in the Summit County Court of Common Pleas, this time seeking only declaratory and injunctive relief, and no money damages. Mecon failed to make even a preliminary case for injunctive relief in that court, however, and it voluntarily dismissed that action a few days later.

Mecon then went to the Tenth District Court of Appeals to seek an injunction pending its appeal of the Court of Claims’ dismissal. On August 26, 2008, the Tenth District denied

Mecon's request for an injunction pending appeal, finding that Mecon failed to demonstrate the requisite elements for injunctive relief under *Cementech*.

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

Mecon appealed the decision of the Court of Claims, asserting that the court erred in both dismissing the case for lack of subject matter jurisdiction and denying Mecon's motion for a TRO.

The Tenth District reversed the Court of Claims' dismissal, finding that Mecon stated a cognizable claim for money damages—including bid-preparation costs—and that, therefore, jurisdiction was proper in the Court of Claims. *Mecon*, 2009-Ohio-1700, at ¶ 30.

The Tenth District noted that it was “undisputed that Mecon's complaint requests bid preparation costs and any additional costs and damages” arising from its bidding violation claims. *Id.* at ¶ 8. The Tenth District concluded that only the question of lost-profit damages was before this Court in *Cementech*, and that “the Ohio Supreme Court has yet to rule” on whether disappointed bidders may seek *other* types of money damages, such as bid-preparation costs. *Id.* at ¶¶ 22-23.

The Tenth District pointed to no statutory or legal basis for money damages, but rather concluded that “[t]here are good public policy reasons” favoring the recovery of money damages, such as bid-preparation costs. *Id.* at ¶ 24. The court relied primarily on punitive and deterrent theories, stating that “without some penalty, there is little deterrent for a public entity who fails to follow the competitive bidding statutes” and that “contractors may be reluctant to bid on public projects when they suspect the competitive bidding will not be conducted fairly.” *Id.* The court also opined that “[a]ny 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.” *Id.*

In a footnote, the Tenth District also implied that if Mecon prevailed, jurisdiction in the Court of Claims might be proper under R.C. 2335.39, Ohio's fee-shifting statute. That law allows certain prevailing parties, in certain circumstances, to recover attorneys' fees arising from actions against the State. *Id.* at ¶ 15 n.1 ("It is possible that a claim for attorney fees might be available under R.C. 2335.39 if Mecon were a prevailing party."). In short, the Tenth District intimated that the specter of attorneys' fees under R.C. 2335.39 was sufficient to state a claim for money damages.

Although the court of appeals sustained Mecon's first assignment of error, it overruled Mecon's second assignment of error, regarding its TRO motion, noting that "[u]nderstandably, the trial court did not rule on the motion when it determined that it lacked subject matter jurisdiction over the case." *Id.* at ¶ 27.

Finally, at oral argument, the Tenth District asked the parties to address whether the case was moot in light of the Tenth District's holding in *TP Mech. Contractors, Inc. v. Franklin County Bd. of Comm'rs* (10th Dist.), 2008-Ohio-6824. There, the Tenth District held that where an appeal involves construction, and the disappointed bidder fails to obtain a stay of execution of the trial court's ruling or an injunction pending appeal before construction commences, the appeal is rendered moot. See *id.* at ¶¶ 20-21. Based on this inquiry, the University moved to dismiss Mecon's appeal as moot. But the Tenth District concluded that *TP Mech. Contractors* was inapposite, stating that "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." *Mecon*, 2009-Ohio-1700, at ¶ 29.

In sum, having found that Meccon stated a cognizable claim for money damages, the Tenth District reversed the Court of Claims' dismissal and remanded the case for further proceedings. *Id.* at ¶ 30.

This timely appeal by the University followed.

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 directly conflicts with *Cementech's* holding that a rejected bidder is limited to injunctive relief in public bidding cases. 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 a bidder's 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.

The Tenth District erred in concluding that *Cementech* never resolved whether injunctive relief is the only available remedy in public bidding violation cases. This Court in *Cementech* could not have been clearer: “[A] rejected bidder is limited to injunctive relief” in those cases. *Cementech*, 2006-Ohio-2991, at ¶ 10. The Court's statement is binding precedent, not dicta. Unlike binding precedent, dicta are expressions from the Court either on issues “not before the court” or “unnecessary to [the] holding.” *State ex rel. Polcyn v. Burkhart* (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. Thus the Court's answer is not dicta; rather, it is 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.), 2005-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 County Comm’rs* (8th Dist.), 2000 Ohio App. Lexis 241, at *11. It is irrelevant that these decisions involved awards of 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 “[t]he 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, 290). 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.

Here, however, the sufficiency of injunctive relief was a question “actually before the court,” and it was rigorously 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 the 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 of 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 rejected explicitly 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.* Given that the exact same rule applies to penalty-based awards against State entities, see *Drain v. Kosydar* (1978), 54 Ohio St.2d 49, 55-56, it follows that this Court meant for injunctive relief to be the *sole* available remedy, and not simply the preferred remedy in relation to the lone category of lost profits.

Indeed, until now, *Cementech*’s pronouncement on injunctive relief has been treated as binding precedent (which it is), and before this case, no Ohio court defied *Cementech* by suggesting that disappointed bidders can, in fact, recover money damages in public contract cases. Simply put, this Court’s determination in *Cementech* 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 that is binding on future cases—including this one.

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

Regardless of whether *Cementech*'s pronouncement about injunctive relief is binding precedent, the Court's *reasoning* applies with equal force to bar all types of money damages, including bid-preparation costs. Yet the Tenth District failed even to account for the Court's reasoning in *Cementech*.

This Court determined in *Cementech* that: (1) lost-profit damages are an improper and unnecessary remedy because injunctive relief is a sufficient deterrent to competitive bidding violations, *Cementech*, 2006-Ohio-2991, at ¶ 11; (2) lost profits ultimately serve only to punish taxpayers, whom the public bidding statutes are meant to protect, *id.* at ¶ 12; and (3) money damages awarded in a punitive vein violate Ohio law because punitive damages against public entities are prohibited absent explicit statutory authority, *id.* Those principles apply equally to bar all other types of money damages, including bid-preparation costs.

First, because the *Cementech* Court soundly rejected the deterrent value of lost-profit damages—unquestionably the largest amount of damages available for recovery in a public bidding case—in favor of an award of injunctive relief, it is illogical to suggest that the Court intended to leave the door open for awards of smaller damages. Having held that, as compared to the *maximum* type of damages available (lost profits), an injunction affords complete relief in public bidding violation cases, it would contravene *Cementech*'s reasoning for the Court to suggest now that *lesser* money damages are available in addition to injunctive relief.

Second, to the extent that the *Cementech* Court posited that lost-profit damages unfairly punish taxpayers, the Tenth District ignored the obvious fact that the same reasoning applies equally to all other types of money damages—bid-preparation costs included. In short, because

any form of money damages would be taken from the State’s coffers fed by taxpayer dollars, “punishing government entities” through money damages “punishes the very persons competitive bidding is intended to protect—the taxpayers.” *Id.* at ¶ 12.

Finally, in *Cementech*, this Court found that money damages awarded as a penalty violate Ohio law because punitive damages against a municipal corporation—which was the public entity in *Cementech*—are prohibited absent specific statutory authorization. *Id.* The reasoning is equally applicable here, where the Tenth District based its decision on a penalty theory, *Meccon*, 2009-Ohio-1700, at ¶ 24, and where Ohio law bars punitive damages against State entities, like the University, absent explicit statutory authority. *Drain*, 54 Ohio St.2d at 55-56.

In short, regardless of whether *Cementech*’s pronouncement about injunctive relief was binding precedent (though there is no question that it was), the Court’s *reasoning* in *Cementech* is controlling, and it applies with equal force to bar all types of money damages, including bid-preparation costs.

C. There is no legal basis for awarding money damages, including bid-preparation costs, in public bidding cases.

No party, including *Meccon*, is entitled to damages absent a legal basis for the award. The remedy must be rooted in a cognizable cause of action. But there is no legal basis for awarding money damages to disappointed bidders in public bidding cases—and notably, the Tenth District’s decision cited none.

A disappointed bidder’s potential relief in a public bidding violation case is best understood in reference to the source of the bidder’s standing to bring such an action. An unsuccessful bidder to a public contract has available only a very limited form of standing. As this Court has long recognized, one cannot invoke the jurisdiction of a court unless he is entitled to have that court determine the merits of the issues presented. *Ohio Contractors Ass’n v. Bicking*, 71 Ohio

St.3d 318, 320, 1994-Ohio-183 (citing *Warth v. Seldin* (1975), 422 U.S. 490, 498). In the realm of public contracting—indeed, in the realm of black-letter contract law more broadly—it is well settled that a contract is created only through the public entity’s action of *awarding* the contract, not through the submission of a bid by a potential contractor. See 1-2 Corbin on Contracts § 2.3 (2009) (“[A]n invitation for bids is not an offer to contract and the best bidder cannot enforce as such even if the public entity is legally disabled from accepting the bid of anyone else.”); 1 Williston on Contracts § 4-13 (4th ed. 2007) (“[A]n ordinary advertisement for bids or tenders is not itself an offer but the bid or tender is an offer which creates no right until accepted.”); see also *Cleveland Constr., Inc. v. City of Cincinnati*, 118 Ohio St.3d 283, 2008-Ohio-2337, ¶ 7. In other words, a bid—even the lowest responsible one, submitted in response to a bid invitation—is only an offer. Until the public entity accepts that offer, however, it does not give rise to a contract between the parties. 1 Williston on Contracts § 4-13 (even where government entity is charged with determining the lowest responsible bidder, “a contract is not ordinarily formed until the lowest bid is in fact accepted”); 1B-10 McBride & Wachtel, *Government Contracts: Law, Admin. & Proc.* § 10.10 (2009) (same). Moreover, where (as here) the public entity reserves the right to reject all bids, no bidder can claim any property rights in the contract until it is awarded to him. 1 Williston on Contracts § 4-13; see also *Cleveland Constr., Inc.*, 2008-Ohio-2337, at ¶¶ 8-17.

In short, to the extent that an unsuccessful bidder like Mecon has standing to bring a claim against a public entity for a public bidding law violation, such standing is derived from a source *other than* the bid submitted in response to the bid invitation. That source lies in the bidding statutes themselves, which are enforceable through declaratory judgment actions. But no public bidding statute gives disappointed bidders a cause of action for money damages. Moreover, as

discussed above, no cause of action for money damages exists under any sort of contract theory. Indeed, a disappointed bidder is precisely one that was *not* awarded a contract. And because bidders have no property interest in a public contract, there is also no cause of action for money damages under a theory of tort or due process. *Cleveland Constr., Inc.*, 2008-Ohio-2337, at ¶ 7.

This remedial void makes any form of money damages—but *especially* bid-preparation costs—improper. That is, there is no justification for awarding bid-preparation costs as a remedy when the mere submission of a bid does not even give rise to *standing*, and, moreover, where no public bidding statute or cognizable cause of action (such as a contract or tort claim) authorizes a cause of action for money damages.

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 States, however, allow recovery of bid-preparation costs either by statute or under a theory of promissory estoppel—neither of which justifies such awards in Ohio.

First, no Ohio statute authorizes the recovery of bid-preparation costs in public bidding cases. Second, promissory estoppel is not available in Ohio against the State or other government entities, especially as a basis for damages. That is, courts from other States that have grounded their award of bid-preparation costs in promissory estoppel principles have done so 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. This was the reasoning of the California Supreme Court in *Kajima/Ray Wilson v. Los Angeles County Metro. Transp. Auth.* (Cal. 2000), 1 P.3d 63, 69, on which the Tenth District relied. But under Ohio law, “[i]t is well settled that . . . the principle of estoppel does not apply against a state or its agencies in the

exercise of a governmental function.” *Hortman v. City of Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, ¶ 25 (quoting *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 145-46); *Sun Ref. & Mktg. Co. v. Brennan* (1987), 31 Ohio St.3d 306, 308; *Griffith v. J.C. Penney Co.* (1986), 24 Ohio St.3d 112, 113.

Even if promissory estoppel could run against the government, it would not apply here because the University made no unambiguous promise to bidders that would be actionable under such a theory. And to the extent Mecon claims that the University made a generic implied promise to follow the law regarding competitive bidding, that claim is also meritless. This Court has declined to find implied promises in public construction disputes. See, e.g., *Dugan & Meyers Constr. Co. v. Ohio Dep’t of Admin. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, ¶¶ 35-37 (rejecting contractor’s argument that State impliedly warrants the accuracy of construction plans). Moreover, such an implied representation is insufficient to give rise to the expectation that bid-preparation costs will be recoverable, since no bidder *ever* has a reasonable expectation that his bid-preparation costs will be reimbursed, regardless of whether that bidder succeeds in obtaining the contract. By definition, bid-preparation costs are *pre-contractual* costs, and, therefore, not a part of the ultimate contract price that a successful bidder can expect to be awarded. Thus, such bid-preparation costs are simply part of the company’s cost of doing business. For these reasons, the decisions from other States permitting an award of preparation costs, on which the Tenth District mistakenly relied, do not apply.

In sum, despite Mecon’s efforts to argue otherwise, no legal basis supports the award of money damages in public bidding violation cases.

D. The “public policy reasons” cited by the Tenth District in support of awarding money damages do not withstand scrutiny and directly conflict with this Court’s prior pronouncements.

The Tenth District failed to identify any legal basis for awarding money damages in public bidding cases. Rather, the court stated that “public policy reasons” justified the award of money damages, including bid-preparation costs. *Meccon*, 2009-Ohio-1700, at ¶ 24. But the court’s “public policy” rationales do not withstand scrutiny. Indeed, they directly conflict with this Court’s pronouncements in *Cementech* and other cases.

The Tenth District cited the punitive and deterrent value of money damages as its foremost policy ground. The court stated that “without some penalty, there is little deterrent to a public entity who fails to follow the competitive bidding statutes.” *Id.* But the court’s reliance on this punitive theory is wrong, because Ohio’s law does not allow an award of punitive damages against State entities absent specific statutory authority. See R.C. 2744.05(A) (no punitive damages allowed against political subdivisions); see also *Drain*, 54 Ohio St.2d at 55-56 (no punitive damages against State entities absent explicit statutory authority); *Spires v. City of Lancaster* (1986), 28 Ohio St.3d 76, 79 (no punitive damages against municipal corporations absent explicit statutory authority).

Contrary to the Tenth District’s conclusion, such a “penalty” is not supported by public policy. 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, once again, contrary to the Tenth District’s conclusion—no such “penalty” is even needed as a “deterrent,” because 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; being denied money damages, therefore, should come as no surprise. In particular, being denied bid-preparation costs should not deter a prospective bidder, since no bidder *ever* has a reasonable expectation that the government will reimburse its bid-preparation costs regardless of whether it succeeds in obtaining the contract. As the Tenth District recognized, bidders and the public benefit most from a fair and equitable bidding process. Only injunctive relief can ensure that outcome.

Regarding its final public policy ground, 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 of lost profits.” *Id.* Having before it no evidence of the amount of the alleged damages, the Tenth District’s statement was based on its own speculation and the court’s reasoning fails on multiple levels. First, given that *Cementech* rejected the deterrent and punitive value of lost-profit damages (arguably, the most substantial type of damages) in favor of an award of injunctive relief, it is impossible that *lesser* types of money damages would serve a *greater* punitive or deterrent purpose. Second, certain costs, such as bid-preparation costs, are incurred by *every*

bidder on a public contract, and those damages would quickly become substantial, or even overwhelming, when multiplied by the number of bidders. The statutory bidding process simply does not contemplate multiple payments for public contracts. Third, as discussed more fully below, the core purposes of the public bidding laws are to ensure the best price for solicited work and to protect taxpayers from paying extra costs for a public project. Awarding any type of money damages contravenes those purposes by “punish[ing] the very persons competitive bidding is intended to protect—the taxpayers.” *Cementech*, 2006-Ohio-2991, at ¶ 12. Finally, the harm from such money damages is far from “de minimus” when considered in the broader context of public contracting. By reading *Cementech* as barring lost profits only, the Tenth District opened the door for the award of various types of money damages—not just bid-preparation costs—and the decision’s ramifications are substantial.

In short, the Tenth District’s “public policy” justifications for an award of money damages have no legal basis, and, what is more, they have already been rejected by this Court.

E. Awarding money damages to a disappointed bidder contravenes the purpose of the competitive bidding laws and undercuts the deference owed to a public entity’s significant discretion in awarding contracts.

As this Court has repeatedly recognized, the purpose of the competitive bidding laws is multi-dimensional. The laws are intended to “protect the taxpayer, prevent excessive costs and corrupt practices, and provide open and honest competition in bidding for public contracts.” *Cementech*, 109 Ohio St.3d at ¶ 9 (citing *Danis Clarkeo Landfill Co. v. Clark County Solid Waste Mgmt. Dist.*, 73 Ohio St.3d 590, 602, 1995-Ohio-301). In short, the laws are intended to protect both bidders *and* the public. Accordingly, any relief available to disappointed bidders must protect both the bidders’ *and* the taxpayers’ *common interest* in promoting honest and open competition in bidding on public contracts.

However, as the *Cementech* Court recognized, it is highly problematic to award money damages in these cases because they serve a disappointed bidder's interest, but only at the expense of the public's interest in avoiding extra costs for public projects. See *Cementech*, 2006-Ohio-2991, at ¶ 12. As the Court stated, although allowing money damages "would protect bidders from corrupt practices, it also would harm the taxpayers by forcing them to bear the extra cost" of money damages to rejected bidders. *Id.* at ¶ 9. Accordingly, the Court concluded that "the purposes of competitive bidding clearly militate against" allowing money damages to rejected bidders. *Id.*

As this Court recognized, only injunctive relief constitutes a complete—and completely fair—remedy, because only injunctive relief promotes *all* of the interests served by the competitive bidding laws: "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." *Id.* at ¶ 11. A timely action for injunctive relief can correct any award error, or allow re-bidding before any party incurs significant costs. Moreover, an injunction protects the public from paying more than the best price for the solicited work. By contrast, "punishing government entities" through the award of money damages "punishes the very persons competitive bidding is intended to protect—the taxpayers." *Id.* at ¶ 12. In addition, money damages prevent public entities from knowing, in advance of awarding a contract, what the costs of the ultimate project will be. If a disappointed bidder could eschew a claim for injunctive relief and assert a claim for damages—or if the disappointed bidder were simply unsuccessful in its pursuit of an injunction—there is no way to know with certainty what the ultimate costs of a project are until the limitations period for a

damages claim passes. That predicament is thoroughly unworkable for both public entities and the taxpayers they serve.

The Tenth District lost its way by failing to observe that, regardless of the binding nature of *Cementech*'s pronouncement regarding injunctive relief, this Court's reasoning in *Cementech* applies with equal force to bar the award of all types of money damages, including bid-preparation costs. *Any* form of money damages affects the State's coffers and thereby contravenes the purposes of the competitive bidding laws by pitting the disappointed bidder's own economic interest against the taxpayers' interest in avoiding extra costs for public projects. Only injunctive relief to prevent execution of an improperly awarded contract serves the interest of the public and the disappointed bidder, ensuring an honest and fair process. This Court has already endorsed that principle, and there is no reason to retreat from it here.

Moreover, only injunctive relief affords the proper deference to a public entity's significant discretion in awarding contracts. In reviewing an award, courts presume that the public entity has 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., Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 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 to a "preponderance of the evidence." Taken to its logical conclusion, such a rule would permit the irrational result whereby a disappointed bidder might fail to prove that an award should be enjoined, while still being entitled to money damages under some less onerous standard of proof. In fact, bidders might choose that path from the start—knowing that they do not have a strong

case for an injunction to halt the execution of a contract, a bidder may wait for the injunctive period (that is, the period in which any defects could actually be corrected) to pass before trying to point out lesser deficiencies in the process to collect money damages.¹ Nothing in the public bidding laws countenances such an unfair result or such an impact on taxpayer funds.

F. Attorneys' fees under R.C. 2335.39 do not provide a basis for jurisdiction in the Court of Claims.

In a footnote, the Tenth District further suggested that jurisdiction in the Court of Claims could be proper because a prevailing party might be entitled to attorneys' fees under R.C. 2335.39. *Id.* at ¶ 15 n.1 (“It is possible that a claim for attorney fees might be available under R.C. 2335.39 if Meccon were a prevailing party.”). That provision is Ohio’s fee-shifting statute, which, in certain circumstances, allows a prevailing party to recover attorneys’ fees arising from actions against the state. The Tenth District seems to suggest that, even in the absence of a cognizable claim for bid-preparation costs or other money damages, the specter of attorneys’ fees under R.C. 2335.39 is sufficient to trigger jurisdiction in the Court of Claims. That is wrong.

First, attorneys’ fees under R.C. 2335.39 are not even available on a claim for declaratory relief against the State. Section 2721.16 of the Ohio Revised Code limits a court’s authority to award attorneys’ fees on a claim for declaratory relief to situations where another statute “explicitly authorizes a court of record to award attorney’s fees on a claim for declaratory relief under this chapter [R.C. Chapter 2721].” In other words, attorneys’ fees are unavailable in a

¹ Indeed, this very scenario occurred following the Tenth District’s decision in this case. Taking full advantage of the opportunity to avoid the application of *Cementech*, Meccon immediately filed an amended complaint in the Court of Claims to add a new plaintiff to its action. The new plaintiff, Reliance Mechanical, LLC, (“Reliance”) submitted a bid for the plumbing work but never objected to the University’s award of the plumbing contract to S.A. Communale. In fact, Reliance was silent for almost *an entire year* after the contract was awarded before joining Meccon’s amended complaint. In the interim, the construction project was completed—indeed, the University held the first football game in its new stadium this fall. Meanwhile, Reliance never voiced an objection to the contract award and did not even attempt to enjoin the contract at issue until joining Meccon’s amended complaint. Like Meccon, Reliance now claims entitlement to bid-preparation costs, as well as injunctive and declaratory relief.

declaratory judgment action unless a separate statute “explicitly authorizes” the recovery of attorneys’ fees for that type of declaratory action. Ohio’s fee-shifting statute, R.C. 2335.39, does not “explicitly authorize” fees on “claim[s] for declaratory relief under [R.C. 2721].” R.C. 2721.16. Attorneys’ fees under R.C. 2335.39 are unavailable in these types of declaratory judgment actions. Accordingly, the entire premise of the Tenth District’s footnote is flawed.

Second, even if attorneys’ fees under R.C. 2335.39 were available in declaratory judgment actions against the State—which they are not—these fees are irrelevant to the Court of Claims’ jurisdiction. Only money *damages* trigger jurisdiction in the Court of Claims, and attorneys’ fees under R.C. 2335.39 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 close of a case. *Christe v. GMS Mgmt. Co., Inc.* (2000), 88 Ohio St.3d 376, 378 (“[A]ttorney fees are in the nature of costs Certainly, the legislature could have expressly stated [in a statute] that attorney 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 to recover attorneys’ fees under R.C. 2335.39 alone were sufficient to trigger Court of Claims jurisdiction, then *every* suit seeking only injunctive or declaratory relief could be brought in the Court of Claims, thereby swallowing the rule expressly limiting the actions to be heard in that court.

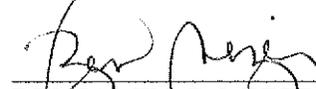
In short, absent a cognizable claim for money damages, a potential claim for attorneys’ fees under R.C. 2335.39 is insufficient to confer jurisdiction in the Court of Claims.

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 Meccon's failure to state a claim for money damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

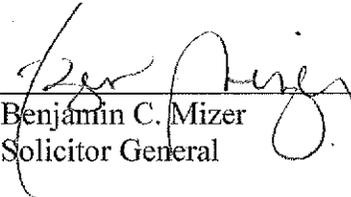
I certify that a copy of the foregoing Merit Brief of Appellant The University of Akron was served by regular U.S. mail this 3rd day of November, 2009, upon the following counsel:

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Benjamin C. Mizer
Solicitor General

ORIGINAL

In the
Supreme Court of Ohio

MECCON, INC., et al.,	:	Case No. 09-0950
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
THE UNIVERSITY OF AKRON,	:	
	:	Court of Appeals Case
Defcdant-Appellant.	:	No. 08AP-727
	:	

**NOTICE OF APPEAL OF DEFENDANT-APPELLANT
THE UNIVERSITY OF AKRON**

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FILED
 MAY 22 2009
 CLERK OF COURT
 SUPREME COURT OF OHIO

EXHIBIT 1

**NOTICE OF APPEAL OF DEFENDANT-APPELLANT
THE UNIVERSITY OF AKRON**

Defendant-Appellant, the University of Akron, hereby gives notice pursuant to Ohio Supreme Court Rule II, Section 1(A)(3) of its discretionary appeal to the Supreme Court of Ohio from the opinion and judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in *Meccon, Inc. v. University of Akron*, Case No. 08AP-727 on April 9, 2009. Date-stamped copies of the Tenth District's Judgment Entry and Opinion are attached as Exhibit 1 and 2, respectively, to Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal 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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[Cite as *Meccon, Inc. v. Univ. of Akron*, 2009-Ohio-1700.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Meccon, Inc. et al.,	:	
	:	
Plaintiffs-Appellants,	:	
	:	
v.	:	No. 08AP-727
	:	(C.P.C. No. 2008-08817)
University of Akron,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

O P I N I O N

Rendered on April 9, 2009

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.

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 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 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 Mecon 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 Mecon'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 Mecon'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 Mecon. 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.¹ If bid preparation expenses are not

¹ 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 Commrs.*, 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 Mecon's claims for bid preparation costs and attorney fees. The first assignment of error is sustained.

{¶27} In its second assignment of error, Mecon argues that the trial court erred in failing to rule on Mecon'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 Mecon 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.

{¶29} 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.

{¶30} 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

2008 AUG 21 AM 10: 05

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.)

EXHIBIT 3

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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]henever 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.



J. CRAIG WRIGHT
Judge

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