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I. INTRODUCTION

Defendant-Appellant the University of Akron's ("Appellant" and "University") appeal is nothing more than another attempt by a state institution to forever prevent another successful bid protest in the State of Ohio. As much as the University is intent on arguing *Cementech v. City of Fairlawn* (2006), 109 Ohio St.3d 475, 2006-Ohio-2991 (which is not the case before this Court), this appeal presents one simple question: Did the Tenth District Court of Appeals ("Appellate Court" or "Tenth District") properly reverse the trial court's dismissal when it reached the conclusion that if an action includes a claim for "money damages against the state coupled with a request for declaratory and injunctive relief, the appropriate forum is the Court of Claims?" The answer is a resounding yes, and Appellant's fascination with expanding this Court's limited holding in *Cementech* is without question premature for the scope of this Court's review.

As the Tenth District (the only court with jurisdiction to hear Court of Claims appeals) has already stated in a remarkably similar attempt by the University of Cincinnati to bypass Ohio's competitive bidding laws:

[W]e are troubled by the reality that the limited relief granted results in a public entity's potential ability to violate laws intended to benefit the public without fear of any meaningful reprisal which might deter such violations in the future. In addition, we are mindful of the fact that the plaintiffs who pursue such litigation and prevail in attaining a declaratory judgment favorable to all taxpayers might have no recourse in recouping financial losses incurred in the process.

* * *

The plaintiffs have unceasingly attempted to compel the university to comply with the law and, based upon this record, have had good reason to anticipate that they might eventually, at the very least, recoup in the form of damages a portion of the extraordinary efforts and funds expended. Ultimately, if this court sustains the damages holding, these plaintiffs win only a very expensive, hollow victory in the form of a retrospective, virtually inconsequential wrist-slap to the university and a prospective

cautionary declaration. The latter should certainly benefit the public; however, if plaintiffs are not granted more than a hollow victory, an understandable chilling effect would ensue upon *future similarly situated would-be plaintiffs*.

Mechanical Contractors Assn. of Cincinnati, Inc. v. Univ. of Cincinnati (2001), 141 Ohio App.3d 333, 343, 750 N.E.2d 1217 (emphasis added). That was the Tenth District's holding when the same attorneys representing the State in that case attempted unsuccessfully to accomplish exactly what the University is seeking to accomplish in this appeal.

Without question, Mecon is the *similarly situated would-be plaintiff* that was contemplated by the Tenth District Court of Appeals. Like the contractor-plaintiffs in *Mechanical Contractors*, this case was filed by Mecon because the University intentionally ignored the clear language of Ohio's mistake-in-bid-law in order to award a contract to its favored contractor. Then, once the case was filed, the University has desperately attempted to avoid having this case heard on the merits. The University's problem though is that the language in Ohio's mistake-in-bid-law cannot be any more clear:

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 – Appendix 1)¹. The application of this language to the facts of this case leads to the inescapable conclusion that a bidder could not withdraw its combined bid for HVAC, fire protection and plumbing work and still be awarded any of those three contracts on an individual basis. However, that is exactly what happened here; and, so far the University has successfully, but *wrongfully*, managed to avoid liability and prevent Mecon from having its day in court.

If this Court were to reverse the Court of Appeals, not only will a wronged bidder (in this case Mecon) be limited to a single, unreviewable opportunity for relief, but the only "check" on whether a public entity violated Ohio's competitive bidding laws will be by a trial court that

¹ References to the Appendix are hereinafter referred to as "Appx."

decides the matter based on the heightened standard of proof required to obtain injunctive relief. Perhaps more even more troubling is that if a trial court were to incorrectly deny an injunction, a wronged bidder's claims will never be reviewed and violations of Ohio's competitive bidding laws, intentional or otherwise, will forever go unchecked.

Without question, this is dangerous precedent, and a reversal of the Appellate Court's decision will provide public entities with a roadmap to insure that the merits of any bid dispute will forever evade judicial review.

II. STATEMENT OF CASE AND FACTS

This case arises from the University's decision to award three separate prime contracts on the University of Akron Football Stadium project (the "Project") in violation of Ohio's competitive bidding statutes and the University's own bid documents.

On June 3, 2008, Mecon submitted a bid for the heating, ventilation, and air conditioning ("HVAC") contract on the Project. *Mecon, Inc. v. Univ. of Akron*, 182 Ohio App.3d 85, ¶ 2, 2009-Ohio-1700. Another contractor, S.A. Comunale Co., Inc. ("S.A. Comunale"), submitted four separate bids for the Project. *Id.* The four bids submitted by S.A. Comunale consisted of three separate bids, one each for the standalone HVAC, plumbing, and fire protection contracts, and a fourth bid for the combined package that included the three aforementioned standalone contracts. *Id.* S.A. Comunale was the low bidder on the combined bid package and on each of its standalone bids. *Id.* at ¶ 3. At the bid opening, it was revealed that S.A. Comunale's combined bid was more than \$1.2 million lower than the next lowest bid.

Id. After S.A. Comunale realized this large disparity, it withdrew its combined bid and its standalone plumbing bid as permitted under Ohio's mistake-in-bid law. *Id.* at ¶ 4.²

Ohio's mistake-in-bid law is contained at R.C. 9.31. It provides in part:

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.

(R.C. 9.31 - Appx. 1). R.C. 9.31 also unequivocally states that "*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.*" *Id.* (emphasis added).³

On Thursday, July 31, 2008, Meccon, the second low bidder for the HVAC contract, learned for the first time that despite this mandatory language that prohibited S.A. Comunale from being awarded any other contract on the Project once it withdrew its mistaken bid, the University permitted S.A. Comunale to withdraw its combined bid and then wrongfully awarded it, in direct violation of R.C. 9.31, the same HVAC and fire protection contracts at the higher stand-alone price.⁴

² When this case is finally heard on the merits, the issue of whether S.A. Comunale was permitted to withdraw its bid will become a question as it has never demonstrated that its bid mistake was simply a clerical mistake as required by the statute.

³ 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 the same contract on another one of its bids.

⁴ The University also improperly awarded the plumbing contract to S.A. Comunale after permitting it to rebid that contract in contravention of the statute. When this case is heard on the merits, the disappointed plumbing bidder will join this action, having already filed its appearance in the presently stayed action.

Four business days later, on August 6, 2008, Meccon timely filed a complaint against the University in the Ohio Court of Claims alleging, *inter alia*, that the University had violated both Ohio's competitive bidding laws and its own Instructions To Bidders. Meccon sought equitable relief, including declaratory judgment, temporary, preliminary and permanent injunction, **and monetary damages** related to Meccon's bid preparation costs, as well as such other further relief as the Court deemed proper.⁵

Two days later, on August 8, 2008, before the trial court could even address the merits of the case and hold an evidentiary hearing on the temporary restraining order, the University filed and argued a motion to dismiss on the basis that the trial court lacked subject-matter jurisdiction for claims seeking injunctive relief. The University's single argument was that a disappointed bidder's sole remedy was injunctive relief, and as a result, Meccon's request for declaratory relief and monetary damages was not appropriate and the trial court therefore lacked subject matter jurisdiction.

Meccon was permitted to only orally oppose that motion, noting that the Court of Claims indeed had jurisdiction over equitable claims where, as here, that relief was ancillary to claims for monetary damages or other relief. Despite recognizing that Meccon did assert a claim for monetary relief in its complaint, the trial court granted the University's Motion to Dismiss and filed a Judgment Entry on August 21, 2008 dismissing the case and denying Meccon's Motion for Temporary Restraining Order as moot.

⁵ In addition, Meccon filed a Motion for Temporary Restraining Order requesting that the trial court enjoin the University from: (i) awarding the plumbing, fire protection, and HVAC contracts for the Project to S.A. Comunale; (ii) executing the prime contracts with S.A. Comunale for the Project; (iii) authorizing S.A. Comunale to perform any work on the Project; and (iv) otherwise making any payment to S.A. Comunale for work performed on the Project under void and illegal contracts.

The next day, on August 22, 2008, Mecon fully and timely complied with the procedural requirements to institute its appeal and to seek a stay pending the appeal and subsequent trial on the merits. On August 26, 2009, the Appellate Court denied Mecon's motion for injunctive relief pending appeal on the basis that Mecon did not demonstrate the requisite elements for injunctive relief.

Despite having denied Mecon's request for injunctive relief, after more thorough briefing the Appellate Court reversed the trial court's decision and remanded the matter for further proceedings. *Mecon* at ¶ 30. In its opinion, the Tenth District recognized that Mecon's Complaint undisputedly requested bid preparation costs and other additional costs and damages and correctly concluded that if an action includes "money damages against the state coupled with a request for declaratory and injunctive relief, the appropriate forum is the Court of Claims." *Id.* at ¶ 8.

The University filed its Notice of Appeal on May 22, 2009, and this Court accepted the appeal for review on August 26, 2009.

III. LEGAL ARGUMENT

A. The Tenth District Correctly Held That The Ohio Court Of Claims Has Jurisdiction To Hear Claims Brought Against The State For Both Legal And Equitable Relief

1. Applicable Standard Of Review

On appeal before the Tenth District was the limited question as to whether the Complaint filed by Mecon presented any legally cognizable claims and was thus properly before the the Court of Claims. When ruling on a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction, the trial court must determine "whether *any* cause of action cognizable by the forum has been raised in the complaint." *State ex rel. Bush v. Spurlock* (1989), 42 Ohio St.3d 77, 80, 537 N.E.2d 641 (emphasis added). "An appellate court reviewing a trial court's judgment

regarding a motion to dismiss for lack of subject matter jurisdiction must determine, as a matter of law, whether the trial court erred by holding that the claim did not state any action cognizable in that court." *Milhoan v. E. Local Sch. Dist. Bd. of Educ.*, 157 Ohio App. 3d 716, 718, 2004-Ohio-3243. Thus, the Ohio Supreme Court reviews the Appellate Court's decision *de novo*, pursuant to which all allegations contained in the complaint are accepted as true. *Perrysburg Township v. City of Rossford*, 103 Ohio St.3d 79, ¶ 5, 2004-Ohio-4362, 814 N.E.2d 44.

It is undisputed that Meccon's Complaint included claims for declaratory judgment, injunctive relief, and monetary damages in the form of bid preparation costs and any additional costs and damages it incurred as a result of the University's violation of Ohio's competitive bidding laws. *Meccon* at ¶ 8. Thus, the only issue before the Court of Appeals was whether Meccon's complaint for bid preparation costs and any other additional costs including attorney's fees presented a legally cognizable claim for money damages, and whether it was consistent with the Tenth District's and other appellate courts' prior holdings in the public bidding arena.

2. The Tenth District's Decision Accurately Held That Jurisdiction Was Proper In The Court Of Claims

i. Jurisdiction Pursuant To The Court Of Claims Act

In 1975, the Ohio Legislature enacted the Ohio Court of Claims Act (Ohio Revised Code Chapter 2743, *et seq.*), waiving the State's immunity from liability and consenting to being sued in the Court of Claims. Under R.C. 2743.03(A)(1), the Ohio Court of Claims was established to provide "*exclusive*, original jurisdiction of all civil actions against the state..." (R.C. 2743.03(A)(1) - Appx. 2) (emphasis added). Moreover, the Court of Claims has "*exclusive*, original jurisdiction to hear and determine" claims brought in a civil action that also include claims for "declaratory judgment, injunctive relief, *or other equitable relief.*" (R.C. 2743.03(A)(2) - Appx. 2) (emphasis added).

The Act contains no language limiting its jurisdiction to suits in which *only* monetary damages are requested. In fact, the only recognized limit of the Court of Claims' "exclusive, original jurisdiction of all civil actions against the state, including full equity powers * * * " are relative to "those actions that could have been brought against the state prior to the adoption of R.C. Chapter 2743." *American Federation of State, etc. v. Blue Cross of Cent. Ohio* (1979), 64 Ohio App.2d 262, 268, 18 O.O.3d 227, 414 N.E.2d 435; citing *Moritz v. Troop* (1975), 44 Ohio St.2d 90, 73 O.O.2d 349, 338 N.E.2d 526. Indeed, this Court has interpreted the Act to be a "remedial law, and R.C. 1.11 requires that such laws 'and all proceedings under them * * * be liberally construed in order to *promote their object and assist the parties in obtaining justice.*' " (R.C. 1.11 – Appx. 4) (emphasis added); *Moritz* at 92. In fact, "* * * exceptions to [the Court of Claims'] exclusive jurisdiction should be *strict and narrow.*" *Friedman v. Johnson* (1985), 18 Ohio St.3d 85, 88, 18 OBR 122, 480 N.E.2d 82 (emphasis added).

In furtherance of this principal, this Court in *Friedman v. Johnson* dismissed a case that was filed in the Court of Common Pleas for declaratory judgment and injunctive relief against state agencies.

The issue presented in this appeal is whether the trial court below has subject matter jurisdiction over this case. Since we find that the adjudication of this complaint is within the exclusive, original jurisdiction of the Court of Claims, we must reverse the court of appeals and dismiss the case for want of jurisdiction.

* * *

[H]ad appellees sued solely for declaratory relief the court of common pleas would have jurisdiction. * * * However, appellees attached a prayer for injunctive relief as well and, further, the cause has been remanded for a determination of *damages*. Standing alone, each of the latter two requests is within the exclusive, original jurisdiction of the Court of Claims.

Id. at 87. As a basis for the Court's decision, it further stated:

The Court of Claims was created to become the sole trial-level adjudicator of claims against the state, with the narrow exception that specific types of suits that the state subjected itself prior to 1975 could be tried elsewhere as if the defendant was a private party. To permit the court of common pleas to have jurisdiction over claims such as the one herein would contravene this purpose. For example, any party wishing to avoid the Court of Claims, for whatever reason, would simply have to attach a prayer for declaratory relief onto his request for monetary damages or injunctive relief. This type of "forum-shopping" is not what was envisioned when the Court of Claims was established; rather, the exceptions to its exclusive jurisdiction should be strict and narrow.

Id. at 88.

ii. Bid Protests Involving The State Are Properly Determined By The Ohio Court Of Claims

Since this Court's decision in *Friedman v. Johnson*, no fewer than three separate, three judge panels of the Tenth District have determined that bid protests involving the State are proper before the Court of Claims.⁶ *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312, 712 N.E.2d 1258 (holding that the Court of Claims has subject matter jurisdiction of a bid protest involving the University of Cincinnati, and a disappointed bidder is entitled to bid preparation costs even when it alleges only that it is entitled to 'other further relief'); *Mechanical Contractors Assn. of Cincinnati, Inc. v. Univ. of Cincinnati* (2001), 141 Ohio App.3d 333, 343, 750 N.E.2d 1217 (holding that money damages are available to a disappointed bidder to deter a public entity from violating Ohio's competitive bidding laws) (hereinafter referred to as *Mechanical Contractors I*); *Mechanical Contractors Assn. of Cincinnati, Inc. v. Univ. of Cincinnati*, 152 Ohio App.3d 466, 477, 2003-Ohio-1837, 788 N.E.2d 670 (holding that a disappointed bidder who successfully prosecutes a bid protest is entitled to an award of

⁶ As stated earlier, the Tenth District is the only Court of Appeals that hears appeals from the Court of Claims (R.C. 2743.20).

attorney's fees as compensation and awarding other monetary damages in the form of the plaintiffs' filing fee) (hereinafter referred to as *Mechanical Contractors II*).

In *Tiemann*, the issue addressed was whether the Court of Claims had exclusive, original jurisdiction over injunctive and declaratory claims brought by a protesting bidder. In that case, the plaintiffs brought claims in the Court of Claims to enjoin the University of Cincinnati from bidding certain illegal contracts that were in violation of Ohio's competitive bidding laws. On appeal after a trial finding in favor of plaintiffs, the University of Cincinnati argued that the trial court lacked subject matter jurisdiction to hear the plaintiffs' declaratory judgment and injunctive relief claims because no money damages had been alleged.⁷ Despite the fact that plaintiffs specifically stated in their complaint that "no monetary damages were sought," the Appellate Court found that jurisdiction was indeed proper because plaintiffs' complaint alleged some form of money damage. *Id.* at 318. Citing *Friedman v. Johnson*, the Tenth District properly held that the Court of Claims had jurisdiction because the plaintiffs, as has Meccon herein, sought declaratory, injunctive, and "**any further relief.**" *Tiemann* at 319 (emphasis added). Arguably "any further relief" could include monetary damages. *Id.*

Mechanical Contractors I and *II* are the two other Tenth District decisions issued in a related case filed after *Tiemann* was dismissed on other grounds. Both decisions are discussed in more detail herein. Suffice it to say here that in both cases, the Tenth District determined that jurisdiction was indeed proper in the Court of Claims

⁷ It is interesting to note that in the trial court in *Tiemann*, counsel for the University of Cincinnati, the same lawyer who now represents the University herein, argued that the Court of Claims "would have jurisdiction to hear an action for declaratory and injunctive relief if it was combined with an action for money damages against the state..." See, Defendant's Motion to Dismiss filed by William C. Becker, July 25, 1997 in *Tiemann*, Ohio Court of Claims, Case No. 97-07781 attached hereto as Appx. 5. Now it seems that counsel has abandoned that prior position since it will be directly contrary to the University of Akron's present position.

iii. Other Cases Recognize The Exclusive Original Jurisdiction Of The Court Of Claims For The Claims Asserted By Mecon

Such was also the case in a fourth case decided by the Tenth District although it was not a bid protest case. In *American Federation of State v. Blue Cross of Cent. Ohio* (1979), 64 Ohio App.2d 262, 18 O.O3d 227, 414 N.E.2d 435, the Court held that "[i]n a declaratory judgment action in the Court of Claims, the plaintiffs' failure to expressly pray for a money judgment is not a defect in their complaint for which the complaint should be dismissed." *Id.* at syllabus.

In fact, the basis for retaining jurisdiction in the Court of Claims in *Tiemann* and *American Federation* is the very same argument previously asserted by the State in order to avoid having its cases heard on the merits before courts of common pleas. In *Barr v. Jones*, 160 Ohio App.3d 320, 2005-Ohio-1488, the State moved to dismiss a complaint filed in the Stark County Court of Common Pleas. The basis of the State's motion was that R.C. 2743 "vests the Court of Claims with exclusive original jurisdiction over suits for damages against the State and its agencies." *Id.* at ¶ 9. The State also argued that plaintiff's "prayer for attorney's fees incurred before filing of the complaint constitutes a claim for money damages." *Id.* at ¶ 10. On these grounds, the Appellate Court affirmed the State's motion.

Also, in *McIntosh v. Univ. of Cincinnati* (1985), 24 Ohio App.3d 116, 493 N.E.2d 321, the State moved to dismiss a case filed in the Hamilton County Court of Common Pleas on the basis that the University was an instrumentality of the State and thus jurisdiction was only proper in the Court of Claims. Affirming the trial court's decision, the Court concluded "that the court properly dismissed the University from the case because the Court of Claims has exclusive, original jurisdiction over claims filed against the state." *Id.* at 118.

iv. Meccon's Complaint Expressly Seeks Monetary Damages

Unlike the plaintiffs in *Tiemann*, who specifically stated in their complaint that "no monetary damages were sought," Meccon did assert claims for monetary damages. Count Three of Meccon's Complaint is entitled "Damages" and Meccon alleges therein that it "incurred expenses in preparing its bid and may incur additional costs and damages" due to the failure of the University to award the contract to Meccon. (Verified Complaint at ¶ 45 – Appx. 28). Meccon further alleged that as a direct and proximate result of the University's unlawful actions, Meccon "has been damaged in an amount that is not possible to calculate at this time." (*Id.* at ¶ 46 – Appx. 28). Finally, in its prayer for relief, Meccon requested that the Court award it "damages as determined by the Court" and "such other necessary and proper relief" as the Court may deem proper. (*Id.* at p. 10 – Appx. 29). The trial court simply ignored what Meccon pled and ignored Ohio jurisprudence regarding the deference to be given to non-moving parties in a ruling on a motion to dismiss.

In its decision, the Tenth District analyzed the issues before it in light of Ohio's binding precedent controlling competitive public bidding laws, and inasmuch as the Court of Claims has exclusive jurisdiction over the State of Ohio, Meccon has properly invoked the subject matter jurisdiction of the Court of Claims

3. Attorneys Fees And Other Monetary Damages Coupled With Requests For Equitable Relief Provide A Basis For Invoking Subject Matter Jurisdiction In The Ohio Court of Claims

Blinded by its desire to forever prevent Meccon's case from being heard on the merits, the University completely ignores the fact that monetary damages (*i.e.*, bid preparation costs; attorney's fees; and, filing fees) and lost profit damages are two mutually exclusive remedies; and even goes so far as to suggest it is "irrelevant" that this Court's decision in *Cementech v. City*

of *Fairlawn* used the term "lost-profit damages," as opposed to "other money damages." (University's Merit Brief at 8).

In *Mechanical Contractors I* and *II*, *supra*, the companion cases to *Tiemann*, *supra* (which upheld subject matter jurisdiction of the Court of Claims to hear bid disputes against the State), the plaintiffs pursued an injunction of the illegal bidding activity conducted by the University of Cincinnati and recovered other money damages after their journey through the court system.

After the Tenth District Court of Appeals in *Tiemann*, *supra*, originally dismissed the case based upon a lack of standing argument, the case was refiled once the plaintiffs actually bid on the project.⁸ Eventually, the case wound its way twice through the Tenth District Court of Appeals.

One of the first issues addressed by the Tenth District in *Mechanical Contractors I* was the issue of money damages available to a disappointed bidder. While recognizing the policy reasons behind not allowing *lost profit* damages to a disappointed bidder, the Court stated:

At first blush, the above rationale upon which monetary damages are denied is logical and pragmatic. However, we are troubled by the reality that the limited relief granted results in a public entity's potential ability to violate laws intended to benefit the public without fear of any meaningful reprisal which might deter such violations in the future. In addition, we are mindful of the fact that the plaintiffs who pursue such litigation and prevail in attaining a declaratory judgment favorable to all taxpayers might have no recourse in recouping financial losses incurred in the process.

Mechanical Contractors I at 343.

⁸ Interestingly, the lack of subject matter jurisdiction was not argued by the State when the case was refiled presumably since the State had already lost that argument.

Holding that money damages were recoverable, the Appellate Court reversed the trial court's decision and remanded the case for a determination of the nature and extent of damages to be awarded. The Appellate Court also stated:

The plaintiffs have unceasingly attempted to compel the university to comply with the law and, based upon this record, *have had good reason to anticipate that they might eventually, at the very least, recoup in the form of damages a portion of the extraordinary efforts and funds expended.* Ultimately, if this court sustains the damages holding [that damages were not available], these plaintiffs win only a very expensive, hollow victory in the form of a retrospective, virtually inconsequential wrist-slap to the university and a prospective cautionary declaration. The latter should certainly benefit the public; however, if plaintiffs are not granted more than a hollow victory, an understandable chilling effect would ensue upon future *similarly-situated would-be plaintiffs.*

Id. at 343 (emphasis added).

Following the remand to the Court of Claims, in *Mechanical Contractors II*, the next issue before another panel of the Court was whether bid preparation costs and attorneys' fees were recoverable money damages. The *Mechanical Contractors II* Court acknowledged the general rule that bid preparation costs may be recovered as damages under a promissory estoppel theory yet held that because the plaintiffs had not established their promissory estoppel claim they were not entitled to such an award. *Id.* at ¶¶ 23-32. Regarding the issue of attorneys fees as damages, the Court held that a prevailing party is entitled to compensation for attorney's fees arising out of a disappointed bidder case. The Court analyzed R.C. 2335.39 and this Court's interpretation of that statute in *R.T.G., Inc. v. State of Ohio*, 98 Ohio St.3d 1, 14, 2002-Ohio-6716, 780 N.E.2d 998. *Id.* at ¶¶ 41 – 42.

R.C. 2335.39 provides the basis under which a party prevailing in an action involving the State may recover its attorneys fees. "It was passed to censure frivolous government action that coerces a party to resort to the courts to protect his or her rights. It serves to 'encourage

relatively impecunious private parties to challenge unreasonable or oppressive governmental behavior by relieving such parties of the fear of incurring large litigation expenses." *Cincinnati City Sch. Dist. Bd. of Educ. v. State Bd. of Educ.*, 122 Ohio St.3d 557, 561, 2009-Ohio-3628.

Specifically, R.C. 2335.39 reads in part: "* * * [i]n a civil action, or appeal of a judgment in a civil action, to which the state is a party, * * * the prevailing eligible party is entitled, * * * to *compensation for fees* incurred by that party in connection with the action or appeal." (R.C. 2335.39(B)(1) – Appx. 38) (emphasis added). R.C. 2335.39 goes on further to state that "compensation for fees" may be paid from any funds available to the State, however if funds are not available, then compensation is treated as if it were a judgment under the Court of Claims Act and be paid in accordance with R.C. 2743.19 of the Act. (R.C. 2335.39(C) – Appx. 39). Being treated as a judgment is the same thing as being characterized as damages.

Further relying on this Court's interpretation of R.C. 2335.39 and in *R.T.G., Inc. v. State of Ohio*, 98 Ohio St.3d 1, 14, 2002-Ohio-6716 (holding that R.C. 2335.39 permitted attorney's fees "where the state did not follow statutory mandates"), the *Mechanical Contractors II* Court stated:

* * * [I]n this case, the university did not follow statutory mandates regarding competitive bidding on public works projects, which conduct gave rise to the instant litigation by plaintiffs.

* * *

As the prevailing parties in this civil action involving the university, plaintiffs arguably would have been entitled under R.C. 2335.39 to compensation for attorneys fees plaintiffs incurred in connection with this action.

Mechanical Contractors II at ¶ 42.⁹ Thus, based upon the equitable theory of promissory estoppel, the statutory remedy contained in R.C. 2335.39 and this Court's precedent, it is without question that an award of bid preparation costs and attorney's fees are allowable money damages that may be recovered by a plaintiff in an action against the State involving the illegal award of a public contract, thereby invoking subject matter jurisdiction exclusive to the Ohio Court of Claims.

Ignoring the Tenth District's decision in *Mechanical Contractors II*, the University attacks Mecon's ability, as the prevailing party, to recover other money damages such as attorney's fees pursuant to R.C. 2335.39 on the basis that attorney's fees are costs and not recoverable "damages" sufficient to trigger Court of Claims jurisdiction.

First, attorneys' fees under R.C. 2335.39 are not simply "costs" as alleged by the University. In fact, R.C. 2335.39 defines attorney's fees as "compensation" for fees, something the legislature determined to be separate and distinguishable from costs. Specifically, R.C. 2335.39 reads in part that: "[c]ompensation [for attorneys' fees], * * * is in addition to any other costs and expenses* * * " (R.C. 2335.39(B)(1) - Appx. 38).

Second, what is ironic about the University's argument is that the State has previously taken the opposite position when it sought to dismiss a case in the Court of Common Pleas in favor of obtaining jurisdiction in the Court of Claims. In *Barr v. Jones, supra* the State sought to invoke the subject matter jurisdiction of the Court of Claims by moving to dismiss appellant's case on the basis that "*a prayer for attorney fees incurred before the filing of the complaint constitutes a claim for money damages.*" *Id.* at ¶ 10 (emphasis added).

⁹ While the Appellate Court determined that plaintiffs were entitled to seek an award of attorney's fees, plaintiffs' appeal for attorney's fees was denied for failure to file a proper motion as required under R.C. 2335.39. *Id.*

In its decision, the Tenth District correctly held that Meccon's claim for attorney's fees is an allowable and recoverable form of damages under R.C. 2335.39 if, as was the case here, it was properly pled. Inasmuch as the only place an award of money damages in the form of attorneys fees could be made is in the Court of Claims, jurisdiction is proper in the Ohio Court of Claims.

4. The Sole Remedy Of Injunctive Relief Does Not Provide An Adequate, Efficient, And Complete Remedy In A Disappointed Bidder Case

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. The University argues in circular logic that Meccon, as a matter of law, cannot recover its bid preparation costs as damages in a bid protest case since injunctive relief was available. In *Mechanical Contractors I*, the Tenth District rejected such logic.¹⁰ There, the University of Cincinnati also argued that it did not have to follow Ohio's competitive bidding requirements for the subject public project and relief to the disappointed bidder should be limited only to injunctive relief. The Appellate Court wholeheartedly disagreed. The Appellate Court's analysis is both instructive and provides guidance on *why* injunctive relief -- alone as the sole remedy for protecting both the public and bidder's interests -- is wholly inadequate. As stated earlier, the Appellate Court artfully stated the following:

In denying all damages, the [trial court] summarily held that "[b]ased upon the evidence presented, * * * plaintiffs are not entitled to any relief beyond" the injunctive relief earlier granted. The court cited, without discussion, two cases: *Hardrives Paving & Constr., Inc. v. Niles* (1994), 99 Ohio App.3d 243, 247; and, an Eighth Appellate District case, *Cavanaugh Bldg. Corp. v. Cuyahoga Cty. Bd. of Commrs.* (Jan. 27, 2000), Cuyahoga App. No. 75607.

¹⁰ Appellants conveniently omit reference to this controlling precedent.

In *Hardrives Paving & Constr.*, the Eleventh Appellate District held:

"Injunctive relief should not ordinarily be granted unless irreparable injury will result. * * * Stated otherwise, "[a]n injunction is proper only where there is no adequate remedy at law." *Fodor v. First Natl. Supermarkets* (1992), 63 Ohio St.3d 489, 491 * * *. It would appear that if monetary damages for lost profits were an available remedy, damages would provide an adequate remedy at law and injunction would not be appropriate. Thus, the fact that injunctive relief is available generally indicates that a monetary award is not available for lost profits.

Furthermore, other policy considerations militate against allowing monetary damages. *The intent of competitive bidding is to protect both the public and the bidders themselves.* See *Cedar Bay Constr.*, 50 Ohio St.3d at 21* * *. 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." *Id.* at 247-248.

At first blush, the above rationale upon which monetary damages are denied is logical and pragmatic. However, *we are troubled by the reality that the limited relief granted results in a public entity's potential ability to violate laws intended to benefit the public without fear of any meaningful reprisal which might deter such violations in the future.* In addition, we are mindful of the fact that the plaintiffs who pursue such litigation and prevail in attaining a declaratory judgment favorable to all taxpayers *might have no recourse in recouping financial losses incurred in the process.*

The minimal case law addressing this dilemma suggests that the remedies of injunction and declaratory judgment on the one hand, and money damages on the other, *are necessarily mutually exclusive.* Under the circumstances of this case, we cannot sustain the trial court's holding that, as a matter of law, these plaintiffs are entitled to no further relief than injunction.

This litigation has been ongoing for years. The plaintiffs have unceasingly attempted to compel the university to comply with the law and, based upon this record, have had good reason to anticipate that they might eventually, at the very least, recoup in the form of damages a portion of the extraordinary efforts and funds expended. *Ultimately, if this court sustains the damages*

holding, these plaintiffs win only a very expensive, hollow victory in the form of a retrospective, virtually inconsequential wrist-slap to the university and a prospective cautionary declaration. The latter should certainly benefit the public; however, if plaintiffs are not granted more than a hollow victory, an understandable chilling effect would ensue upon future similarly situated would-be plaintiffs.

Mechanical Contractors I at 342 - 343 (emphasis added). While Mecon believes it is entitled to more than a hollow victory in the form of nominal bid preparation costs as its money damages, it has voluntarily limited its prayer for relief in its Complaint to only bid preparation costs and attorney's fees, coupled with a request for declaratory and injunctive relief. The University, however, wants to limit Mecon to no remedy, let alone a nominal one. Unfortunately, limiting a disappointed bidder's damages *to less than its nominal bid preparation costs* would provide more than a "chilling effect" to future similarly situated would-be plaintiffs. If Mecon successfully proves that the University violated the mandatory requirements set forth in R.C. 9.31, as it believes it will, no purpose will be served by not allowing Mecon an opportunity to recover its bid preparation costs and attorney's fees. Not allowing the recovery of these damages would provide the University and any other public entity an unbridled license to conduct future illegal competitive bidding practices with no repercussion. This Court should resist the University's invitation to allow this to happen.

5. The Tenth District's Decision Does Not Conflict With This Court's Holding In *Cementech*

Whether the University wants to admit it or not, the entire basis for its appeal is a single case where the precise limited question certified to this Court for determination was:

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

Cementech at ¶ 8 (emphasis added). Nowhere in the entire *Cementech* decision does it state a disappointed bidder is not entitled to other monetary damages. In fact, the opposite is true.

Cementech involved a bidder's protest of the rejection of its bid on a municipal construction contract. Plaintiff Cementech, Inc. alleged that the City violated competitive bidding laws and filed suit requesting that the Court enjoin the City from taking any action or awarding the contract to any other bidder. The trial court denied Cementech's request for injunctive relief and later granted the City's motion for summary judgment. On appeal, the Appellate Court reversed the trial court's judgment and remanded the case for a hearing on the merits. *Id.* at ¶¶ 3, 4.

On remand, the trial court ruled that Cementech could recover its bid preparation costs but nothing more should it prevail on its claims for alleged violations of the competitive bidding process, finding among other things that the prospect of liability for bid preparation costs would serve as a reasonable and necessary deterrent to a municipality's noncompliance with competitive bidding laws. *Id.* at ¶ 5. A trial then ensued and a jury found in favor of Cementech and awarded bid preparation costs. Cementech then appealed the trial court's order that had limited the damages it could seek to only bid preparations costs. *Id.* at ¶ 6. The Ninth District reversed the decision that lost profit damages could not be recovered. *Id.*

In addressing the *single issue* certified to it by the Appellate Court, this 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. This 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.

Id. at ¶¶ 9, 10 (emphasis added). The Supreme Court then reversed the judgment that had reversed the trial court's decision limiting Cementech to only recover its bid preparation costs as damages.

This Court's decision *in allowing the award of bid preparation costs to stand* in *Cementech* is consistent with case law on whether bid preparation costs are appropriate in these matters. For example, in *Cincinnati Electronics Corp. v. Kleppe* (C.A.6, 1975), 509 F.2d 1080, the court, applying Ohio law, 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.

Furthermore, this Court's decision is in line with other jurisdictions. "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. Because the Appellate Court's decision is consistent with this Court's and Ohio's binding precedent, the Appellate Court's decision should be affirmed and this case remanded back to the Court of Claims for a trial on the merits.

6. A Legal Basis Exists For Awarding Mecon Its Bid Preparation Costs Where The University Represented That It Would Comply With, But Then Violated, Ohio's Competitive Bidding Law

Competitive bidding in Ohio is largely governed by statute. As the University points out, however, no Ohio statute specifically authorizes the recovery of bid preparation costs for a bidder in public bidding cases. (University's Merit Brief at 13). However, there are no standardized administrative bidding procedures for bid protests against the various public owners

in Ohio. Moreover, none of Ohio's competitive bidding provisions address whether the lowest responsible bidder that is wrongfully denied a contract has a cause of action for any monetary damages, or is limited to injunctive relief as its sole remedy.

The Tenth District is the only Court that reviews disappointed bidder decisions made by the Court of Claims. As discussed herein the Tenth District has held that bid preparation costs are recoverable under the equitable theory of promissory estoppel, especially when it is alleged (like here) that the University failed to comply with the statutory bidding requirements contained in R.C. 9.31.¹¹ In *Mechanical Contractors Assn. of Cincinnati, Inc. v. Univ. of Cincinnati*, 119 Ohio Misc.2d 109, 2002-Ohio-3506, the Court of Claims recognized the viability of a claim for promissory estoppel in the bid protest context when it stated:

Promissory estoppel is an equitable doctrine that is designed to prevent harm which results from reasonable and detrimental reliance upon improper representations. An essential element of an action predicated upon promissory estoppel is the detrimental reliance of the promisee upon false representations of the promisor. *Karnes v. Doctors Hosp.* (1990), 51 Ohio St.3d 139.

Defendant argues that plaintiffs cannot recover damages on a theory of promissory estoppel because defendant did not represent in any of its bid documentation that it would comply with the public bidding requirements of R.C. Chapter 153. However, that argument lacks merit. Since defendant is a state university, it should have been complying with the provisions of R.C. Chapter 153 from the beginning of the construction project. The court finds that it would be reasonable for a bidder on the project to have relied on the representation that defendant, a state university, would be bound by the public works regulations contained in R.C. Chapter 153. Therefore, the court finds that if plaintiffs prove that they would have been awarded a subcontract if R.C. Chapter 153 had been followed, they may state a claim for damages under the

¹¹ It is noteworthy that not only was the University legally obligated to comply with R.C. 9.31, the University represented in its bid documents that it would comply with these statutory bid procedures. Certainly, Meccon could have reasonably relied on the University following these stated competitive bid procedures for this Project.

equitable theory of promissory estoppel. However, those damages must be limited to the cost of the bid preparations.

* * *

Id. at ¶¶ 10 - 11. In the present case, the University never disputes that it was obligated to comply with R.C. 9.31. Rather, the University ignores the Tenth District precedential holdings, and instead, takes the broad-sweeping position that promissory estoppel is never available in Ohio against the State or other governmental agencies. (University's Merit Brief at 13). The University is wrong.

i. The University's Reliance On *Hortman v. City of Miamisburg* Is Misplaced

In support of its theory that promissory estoppel principles are not available in Ohio in actions against the State, the University relies upon *Hortman v. City of Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251. The majority in *Hortman* found that a private citizen could not sue a political subdivision under a promissory estoppel theory where the city promised him that they would not cut down a tree on his property while widening a road. The Court reasoned that the widening of a road was a governmental function and that promissory estoppel was not available against the City when acting in its governmental capacity. As Justice Pfeifer noted in his dissent in *Hortman*, however, the cases that hold that estoppel principles do not apply to the State fall into two categories: "the acquiescing agency and the confused clerk." In "confused clerk" cases, "this court has held that the government is not estopped if erroneous filing-deadline information is given to parties by governmental functionaries." *Id.* In "acquiescing agency" cases, "this court has held that a state agency may not be estopped from enforcing rules that it had loosely enforced in the past." *Id.* However, this case presents a wholly distinguishable set of facts and circumstances.

Appellant, when soliciting bids for the construction of the Project, *explicitly* represented in its bid documents that it would abide by R.C. 9.31. In fact, the University parroted the language of R.C. 9.31 in its Instructions To Bidders and represented to the public and all bidding contractors that it would comply with such statute during the bidding process. The University expressly promised it would abide by the bidding laws duly enacted by the Legislature. Moreover, Appellant was bound by Ohio law to act in accordance with them. In the context of estoppel claims against the State, "[i]t is one thing to hold the state harmless for the mistakes of its employees; it is quite another to hold the state need not abide by its own promises." *Id.* at ¶ 30 (Pfeifer, J., dissenting). *Hortman* simply did not involve the State's failure to comply with the Ohio bidding law that it expressly represented it was mandated to follow. Moreover, *Hortman* applies to political subdivisions other than the State who, as explained above, has waived its immunity in civil actions by statutorily submitting itself to the Ohio Court of Claim's jurisdiction pursuant to R.C. 2743 *et seq.* *Celebrezze v. Telecommunications, Inc.* (Oh. Ct. Cl. 1990), 62 Ohio Misc. 2d 405, 435, 601 N.E.2d 234 (holding that estoppel *can be asserted* in an Ohio Court of Claims lawsuit where the state agency allegedly fails to comply with Ohio competitive bidding laws).¹²

Moreover, promissory estoppel claims against political subdivisions are regularly considered and awarded, particularly where the "promise" relied on is consistent with the statutory mandates governing the agency's authority. *See, e.g., Ohio Ass'n of Pub. Sch.*

¹² In fact, the refusal to allow the ordinary application of the estoppel defense is observably similar to the "king can do no wrong" doctrine. By R.C. 2743.02, the state has formally renounced the mere fact of sovereignty as a defense and has consented to be sued and have its liability determined "in accordance with the same rules of law applicable to suits between private parties." The affirmative defense of estoppel is a well-known rule of law that is often utilized in suits between private parties and nowhere in the Court of Claims Act has the General Assembly excepted the state from its operation. *Celebrezze*, 62 Ohio Misc. 2d at 435.

Employees v. Sch. Employees Ret. Sys. Bd., 10th Dist. No. 04AP-136, 2004-Ohio-7101, at ¶50 (noting cases that have applied promissory estoppel when the promise of the state agent was consistent with statutory authority); *Mech. Contractors II, supra* (noting that bid-preparation damages based on promissory estoppel theory could be awarded). Meccon relied to its detriment on the University's promise to comply with R.C. 9.31 and its own Instructions To Bidders. Promissory estoppel can and should be used to further certain public policies, *i.e.*, like making sure public owners comply with Ohio's competitive bidding laws, by creating a damages remedy, *i.e.*, bid preparation costs, for a public entity's statutory violation.

ii. Meccon Is Entitled To Bid Preparation Costs Based On An Implied Contract Theory

In the alternative, Meccon's claim for bid preparation costs arguably centers on an implied contract theory. *Planning Design Solutions v. City of Santa Fe* (1994), 118 N.M. 707, 885 P.2d 628, presents a case with facts that are nearly identical to the current dispute. In *Planning Design*, the city of Santa Fe improperly chose a bidder with local ties and the disappointed and otherwise lowest and most responsive bidder filed suit for bid preparation costs. The New Mexico Supreme Court determined that the city, by requesting proposals, "entered into an implied or informal contract that it would fairly consider each bid in accordance with all applicable statutes." *Id.* at 714 (internal quotations removed). Had the city made a different guarantee, the disappointed bidder's expenditures would have been different, and "[i]t might have chosen not to bid at all." *Id.* at 715.

In noting the differences between promissory estoppel and implied contract, the court held that "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.* Moreover, the court determined that a claim for bid preparation costs was more akin to a breach of an implied

contract. *Id.* (noting that "[t]he distinction between a promise and an implied or informal contract may be academic in some situations and is certainly not carefully drawn by all courts"). In concluding, the court stated that "[w]e therefore join other jurisdictions that in similar situations have awarded to the disappointed bidder the expenses incurred in preparing and submitting a bid." *Id.*

The University expressly represented and promised to comply with R.C. 9.31, one of Ohio's bedrock competitive bidding statutes, and that Meccon could make an implied contract claim based upon this guarantee. Appellant incorrectly cites *Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Servs.*, 113 Ohio St.3d 226, 2007-Ohio-1687, for the assertion that this Court has declined to find implied promises in public construction disputes. *Dugan & Meyers* is inapplicable to the question facing this Court. The case dealt with whether or not Ohio would extend the *Spearin* doctrine from job site condition cases to cases involving delay due to plan changes. *Id.* at ¶ 28. Unlike in this case, the public owner in *Dugan & Meyers* arguably abided by all the competitive bidding laws, and the dispute did not arise until near the end of the construction phase of the project. Moreover, there was an existing contract between the public owner and the private construction company. In *Dugan & Meyers*, this Court simply held that an implied warranty cannot prevail over an express contractual provision. *Id.* at ¶ 37. In this case, there is no express contractual provision to prevail over the implied contractual obligation made by the University.

iii. The Majority Of Jurisdictions Award Bid Preparation Costs Under A Variety of Theories

The University 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. 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 only the doctrine of promissory estoppel. Rather, the Tenth District referenced *Kajima/Ray Wilson v. Los Angeles Cty. Metro. Transp. Auth.* (2000), 23 Cal. 4th 305, 315, 1 P.3d 63, which identified the **majority** of jurisdictions that allow either **by statute or case law** (including theories of promissory estoppel and implied contract) 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 mis-awarded public contracts by the most interested parties, and deters public entity misconduct.

Id. at 318.

So regardless of the theory that the Court determines is applicable to enable Meccon to recover bid preparation costs, the public "has both economic and moral interests in assuring that government entities strictly adhere to the Code as well as their own published regulations." *Planning Design*, 118 N.M. at 716. Whether it is the principles of promissory estoppel or an implied contractual theory, the principles of equity require this Court to hold public owners accountable to the state and local laws that were designed to keep them honest. Additionally, as the Court in *Mechanical Contractors II* astutely recognized,

[c]ourts that have awarded monetary relief to disappointed bidders often do so because injunctive relief is no longer available as an effective form of relief, as where work on the contract had already started or is complete by the time the court decides the case.

Id. at ¶24. Such is exactly the case here and Mecon simply asks this Court to follow the majority of jurisdictions across the country that require public owners to play by their own rules.¹³

IV. NUMEROUS PUBLIC POLICY REASONS SUPPORT AFFIRMANCE OF THE TENTH DISTRICT'S DECISION

A. The Tenth District Articulated Sufficient Public Policy Reasons To Support Its Decision That Jurisdiction Was Appropriate In The Court Of Claims

Under its *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, attorney's 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. *Mecon* 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 and attorney's fees remain as their claim for money damages in the Court of Claims. *Mecon* at ¶ 15.

¹³ A majority of states that have considered the issue, either by statute or by the principles of common law, have determined that bid preparation costs are recoverable. *Kajima v. Los Angeles Cty. Metropolitan Transportation Auth.*, 23 Cal. 4th 305, 1 P.3d 63 (Cal. 2000) (noting that Alaska, Arkansas, Colorado, Hawaii, Louisiana, Maryland, Minnesota, South Carolina, Utah, and the District of Columbia all statutorily allow bid preparation costs, while the Federal Court of Claims, New Mexico, Georgia, Minnesota, Tennessee, Idaho, Florida, and California allow bid preparation costs through case law).

The Tenth District 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. *Meccon*, 2009-Ohio-1700, at ¶¶ 22-26. Without some ramifications for their illegal acts, there is little deterrent to a public entity that 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 Meccon's case for further proceedings.

It is within this backdrop that the University filed this appeal as a ruse to further postpone Meccon'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 Meccon from having its case decided on the merits before the Project is completed and it is too late for Meccon to be afforded any meaningful relief. The University is astutely aware of the fact that the longer it can delay Meccon's ability to be heard on the merits, the less meaningful relief Meccon can receive since once construction of a public project has commenced, injunctive relief is no longer available pursuant to the "mootness doctrine."¹⁴ *See*

¹⁴ Back in 2008 and *before construction commenced or contracts were executed*, Meccon 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, Meccon 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 Meccon to recover its bid preparation costs and attorney's fees. In fact, the law is clear that a contract made in derogation of the law is not merely voidable but void *ab initio*. *See, Buchanan Bridge Co. v. Campbell* (1899), 60 Ohio St. 406, 54 N.E. 372; and *Pincelli v. Ohio Bridge Company* (1966), 5 Ohio St.2d 41, 213 N.E.2d 356.

TP Mechanical Contractors, Inc. v. Franklin County Bd. of Comm'rs 10th Dist. No. 089AP-108, 2008-Ohio-6824, at ¶ 21 (holding that where an appeal involves construction, 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). It is in this situation that courts most often award monetary relief in the form of bid preparation costs to disappointed bidders.¹⁵

B. Meccon Merely Seeks A Chance To Be Heard In The Court That Has Exclusive Jurisdiction Over The University

Meccon simply asks that it be permitted to prosecute its claims against the University in the court that the University has, via statute (*i.e.*, the Ohio Court of Claims Act), exclusively consented to be sued in on civil actions. The Ohio Constitution provides that:

All courts shall be open and every person, for injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

(Ohio Const., § 16, Art. I - Appx. 41). This right "protects against laws that completely foreclose a cause of action for injured plaintiffs or otherwise eliminate the ability to receive a meaningful remedy." *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, at ¶ 96. Moreover, when a person is injured and they seek a remedy, the Ohio Constitution requires that an opportunity be granted at a "*meaningful time* and in a *meaningful manner*." *Groch v. G.M.C.*, 117 Ohio St. 3d 192, 2008-Ohio-546, at ¶ 52 (emphases added). Decisions that "effectively close[] the courthouse" are in contravention with this section of the Ohio Constitution because this section "requires that the plaintiffs have a reasonable period of time to enter the courthouse to seek compensation." *Brenneman v. R.M.I. Co.* (1994), 70 Ohio St.3d

¹⁵ Bid preparation costs was not an issue raised by the plaintiff in *TP Mechanical* and was therefore not addressed by the Tenth District. *Meccon*, at ¶ 23.

460, 466, 1944-Ohio-322, 639 N.E.2d 425. Mecon has not been afforded an opportunity in a meaningful time or meaningful manner to seek meaningful compensation against the University.

While it is true that in the context of competitive bidding for public contracts, injunctive relief provides a remedy to bidders that *may* prevent excessive costs and corrupt practices, as well as protect the integrity of the bidding process, the public, and the bidders, but it also *may not*. There is no guarantee that trial courts won't make mistakes, like the Court of Claims did here on the question of jurisdiction. 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? Or the situation where an elected judge is reluctant to second-guess another public official or make the unpopular decision to stay or stall a high-profile public works project? 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, as explained above, 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 attorney's fees strikes some balance in deterring government entities from violating the bidding process with impunity.

Moreover, the General Assembly is "the ultimate arbiter of public policy." *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, at ¶ 21. If the Court were to conclusively hold that Mecon has no remedy at law to recover nominal bid preparation costs in contravention to the holdings in countless other courts over the years, the doors to the court system will be shut. Mecon will be foreclosed from bringing a cause of action for a meaningful remedy. Therefore, this Court would become the ultimate arbiter of public policy, something that is within the realm of the General Assembly. In order to preserve Mecon's constitutional right to open courts and open justice, it must be permitted to pursue reasonable bid preparation costs, attorney's fees, and declaratory relief in the Court of Claims -- particularly where the University violated Ohio's competitive bidding laws.

C. **Bid Preparation Costs Are Nominal Direct Costs, Not Punitive Damages, And Will Not Result In Significant Use Of Tax Payer Funds**

The University seeks to improperly broaden the holding in *Cementech* in order to severely restrict the legal and equitable relief long afforded to disappointed bidders in Ohio. Mecon merely seeks to hold the University accountable for showing favoritism and awarding S.A. Comunale contracts in direct violation of R.C. 9.31 -- a result the University has been able to dodge for more than a year now. Mecon seeks 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. While public owners, like the University, 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. Throughout history, this Court has held that the intent of competitive bidding is to protect *both* the public and the bidders. *Cedar Bay Construction, Inc. v. Fremont*, 50 Ohio St.3d, 19, 552 N.E.2d 202 (1990).

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. (University's Merit Brief at 15 - 16). 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.

The disappointed, and otherwise lowest and most responsive bidder, can readily compile and detail the costs associated with bid preparation. Direct and compensatory damages are determined by actual loss and are intended to make whole a party whole because of harm done by another party. *Fantozzi v. Sandusky Cement Products Co.* (1992), 64 Ohio St. 3d 601, 612, 597 N.E.2d 474 (noting that "[c]ompensatory damages are defined as those which measure actual loss, and are allowed as amends thereof"). Alternatively, punitive damages "go beyond the actual damages suffered in the case" and are assessed for punishment and not compensation. *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948 (noting that punitive damages are not compensation for injury; instead, they are private fines levied by civil juries to punish reprehensible conduct). In seeking bid preparation costs, Mecon does not seek to punish the University with an award of damages in excess of its actual costs, rather Mecon seeks to be compensated for the costs associated with preparing its bid that was unlawfully rejected.

It is noteworthy that pursuant to R.C. 9.31 and R.C. 153.54, a public owner like the University is permitted to recover *its* bid (and/or re-bid) preparation costs (e.g., advertising, printing, and mailing costs) if a bid is withdrawn or if a bidder fails to enter into a contract with that public owner. Under the eyes of the law, it is not deemed "punitive" for the public owner to

recover bid costs from a bidder in certain situations, but yet the University hollowly contends that it is somehow "punitive" for a bidder like Mecon to recover those same bid costs from a public owner who violates Ohio law. That is hardly equitable or reasonable.

V. CONCLUSION

The vast amount of case law including binding precedent from this Court supports the Appellate Court's decision that the Court of Claims has subject matter jurisdiction over Mecon's Complaint and this case. A disappointed bidder is not limited to injunctive relief, but is entitled to a meaningful remedy when it is determined that a public entity violated Ohio's competitive bidding laws and injunctive relief, which was wrongfully denied, is no longer available. For these reasons and those set forth above, this Court, given the public policies involved, should affirm the Appellate Court's decision remanding this case back to the Court of Claims for a trial on the merits, and decline the University's invitation to severely limit a disappointed bidder's available remedies to injunctive relief alone by disallowing the recovery of bid preparation costs.

Respectfully submitted,



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and Ronald R. Bassak*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Plaintiff-Appellees' Merit Brief was served via regular U.S. Mail, postage prepaid, this 3rd day of December, 2009, upon the following:

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APPENDIX

Appx. Pg.

R.C. 9.31.....1

R.C. 2743.03.....2

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Motion To Dismiss in *Tiemann v. University of Cincinnati*.....5

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R.C. 2335.39.....38

Ohio Const., § 16, Art. I.....41

9.31 Erroneous bids.

A bidder for a contract with the state or any political subdivision, district, institution, or other agency thereof, excluding therefrom the Ohio department of transportation, for the construction, demolition, alteration, repair, or reconstruction of any public building, structure, highway, or other improvement 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.

No bidder who is permitted to withdraw a bid shall for compensation supply any material or labor to, or perform any subcontract or other work agreement for, the person to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted, without the approval of the contracting authority. The person to whom the contract was awarded and the withdrawing bidder are jointly liable to the contracting authority in an amount equal to any compensation paid to or for the benefit of the withdrawing bidder without such approval, in addition to the penalty provided in section 2913.31 of the Revised Code.

If a bid is withdrawn under authority of this section, the contracting authority may award the contract to the next lowest bidder or reject all bids and resubmit the project for bidding. In the event the contracting authority resubmits the project for bidding the withdrawing bidder shall pay the costs, in connection with the resubmission, of printing new contract documents, required advertising, and printing and mailing notices to prospective bidders, if the contracting authority finds that such costs would not have been incurred but for such withdrawal.

The contracting authority, if it intends to contest the right of a bidder to withdraw a bid, shall hold a hearing thereon within ten days after the opening of such bids and issue any order allowing or denying the claim of such right within five days after such hearing is concluded. The contracting authority shall give to the withdrawing bidder timely and reasonable notice of the time and place of any such hearing. The contracting authority shall make a stenographic record of all testimony, other evidence, and rulings on the admissibility of evidence presented at the hearing. Such order may be appealed under section 119.12 of the Revised Code. The bidder shall pay the costs of the hearing.

In the event the contracting authority denies the claim for withdrawal and the bidder elects to appeal or otherwise refuses to perform, the contracting authority may reject all bids or award to the next lowest bidder.

Effective Date: 08-01-1980

2743.03 Court of claims.

(A)(1) There is hereby created a court of claims. The court of claims is a court of record and has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code, exclusive jurisdiction of the causes of action of all parties in civil actions that are removed to the court of claims, and jurisdiction to hear appeals from the decisions of the court of claims commissioners. The court shall have full equity powers in all actions within its jurisdiction and may entertain and determine all counterclaims, cross-claims, and third-party claims.

(2) 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.

(3) In addition to its exclusive, original jurisdiction as conferred by division (A)(1) and (2) of this section, the court of claims has exclusive, original jurisdiction as described in division (F) of section 2743.02 , division (B) of section 3335.03, and division (C) of section 5903.02 of the Revised Code.

(B) The court of claims shall sit in Franklin county, its hearings shall be public, and it shall consist of incumbent justices or judges of the supreme court, courts of appeals, or courts of common pleas, or retired justices or judges eligible for active duty pursuant to division (C) of Section 6 of Article IV, Ohio Constitution, sitting by temporary assignment of the chief justice of the supreme court. The chief justice may direct the court to sit in any county for cases on removal upon a showing of substantial hardship and whenever justice dictates.

(C)(1) A civil action against the state shall be heard and determined by a single judge. Upon application by the claimant or the state, the chief justice of the supreme court may assign a panel of three judges to hear and determine a civil action presenting novel or complex issues of law or fact. Concurrence of two members of the panel is necessary for any judgment or order.

(2) Whenever the chief justice of the supreme court believes an equitable resolution of a case will be expedited, the chief justice may appoint referees in accordance with Civil Rule 53 to hear the case.

(3) When any dispute under division (B) of section 153.12 of the Revised Code is brought to the court of claims, upon request of either party to the dispute, the chief justice of the supreme court shall appoint a single referee or a panel of three referees. The referees need not be attorneys, but shall be persons knowledgeable about construction contract law, a member of the construction industry panel of the American arbitration association, or an individual or individuals deemed qualified by the chief justice to serve. No person shall serve as a referee if that person has been employed by an affected state agency or a contractor or subcontractor involved in the dispute at any time in the preceding five years. Proceedings governing referees shall be in accordance with Civil Rule 53, except as modified by this division. The referee or panel of referees shall submit its report, which shall include a recommendation and finding of fact, to the judge assigned to the case by the chief justice, within thirty days of the conclusion of the hearings. Referees appointed pursuant to this division shall be compensated on a per diem basis at the same rate as is paid to judges of the court and also shall be paid their expenses. If a single referee is appointed or a panel of three referees is appointed, then, with respect to one referee of the panel, the compensation and expenses of the referee shall not be taxed as part of the costs in the case but shall be included in the budget of the court. If a panel of three referees is appointed, the compensation and expenses of the two remaining referees shall be taxed as costs of the case.

Appx. 2

All costs of a case shall be apportioned among the parties. The court may not require that any party deposit with the

court cash, bonds, or other security in excess of two hundred dollars to guarantee payment of costs without the prior approval in each case of the chief justice.

(4) An appeal from a decision of the court of claims commissioners shall be heard and determined by one judge of the court of claims.

(D) The Rules of Civil Procedure shall govern practice and procedure in all actions in the court of claims, except insofar as inconsistent with this chapter. The supreme court may promulgate rules governing practice and procedure in actions in the court as provided in Section 5 of Article IV, Ohio Constitution.

(E)(1) A party who files a counterclaim against the state or makes the state a third-party defendant in an action commenced in any court, other than the court of claims, shall file a petition for removal in the court of claims. The petition shall state the basis for removal, be accompanied by a copy of all process, pleadings, and other papers served upon the petitioner, and shall be signed in accordance with Civil Rule 11. A petition for removal based on a counterclaim shall be filed within twenty-eight days after service of the counterclaim of the petitioner. A petition for removal based on third-party practice shall be filed within twenty-eight days after the filing of the third-party complaint of the petitioner.

(2) Within seven days after filing a petition for removal, the petitioner shall give written notice to the parties, and shall file a copy of the petition with the clerk of the court in which the action was brought originally. The filing effects the removal of the action to the court of claims, and the clerk of the court where the action was brought shall forward all papers in the case to the court of claims. The court of claims shall adjudicate all civil actions removed. The court may remand a civil action to the court in which it originated upon a finding that the removal petition does not justify removal, or upon a finding that the state is no longer a party.

(3) Bonds, undertakings, or security and injunctions, attachments, sequestrations, or other orders issued prior to removal remain in effect until dissolved or modified by the court of claims.

Effective Date: 09-26-1988; 2008 SB289 08-22-2008

1.11 Remedial laws liberally construed.

Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice. The rule of the common law that statutes in derogation of the common law must be strictly construed has no application to remedial laws; but this section does not require a liberal construction of laws affecting personal liberty, relating to amercement, or of a penal nature.

Effective Date: 10-01-1953

FILED
25 JUL 25 1997
COURT OF CLAIMS OF OHIO

IN THE COURT OF CLAIMS OF OHIO

ROBERT W. TIEMANN, et al., :
Plaintiffs, :
v. : Case No. 97-07781
UNIVERSITY OF CINCINNATI, :
Defendant. :

DEFENDANT'S MOTION TO DISMISS

Now comes Defendant, The University of Cincinnati, which moves to dismiss Plaintiff's Complaint for the reasons set forth in the accompanying Memorandum In Support.

Respectfully submitted,
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

A. The Case

At the July 16th, 1997 conference on Plaintiff's Complaint for a preliminary injunction, this Court put this case on a fast track and ordered the jurisdictional issues in this case be briefed before an answer would otherwise be due.

With the filing of this Motion, Defendant is simultaneously filing a motion for oral hearing on this Motion to Dismiss so that the jurisdictional issues in this case can be decided before the hearing on Plaintiff's Motion for a Preliminary Injunction presently set for August 20 and 21st.

B. Facts

As indicated by the exhibits attached to Plaintiff's Complaint, the University Center is being developed on land that the University acquired for the purpose and then leased to Fifth Third Leasing Company for a term of approximately 27 years (Complaint, Ex. A--the "Ground Lease".) The Ground Lease provides in Section 5 that Fifth Third Leasing will construct the University Center project by means of a Development Agreement (Complaint, Exhibit C--the "Development Agreement") between Fifth Third Leasing and Walsh, Higgins & Company, a developer selected by the University through an elaborate and very public selection process conducted between

July, 1995 and December, 1996.

At the same time as the Ground Lease was executed, the University entered into a second 27 year lease with Fifth Third Leasing (Complaint, Ex. B--the "Leaseback") in which the University agreed to lease back the project after it has been constructed and to pay rent for the balance of the term. The rent payments represent the cost of constructing the project, plus interest, amortized over the 27 years. Thus, at the end of the process, the project will be fully paid for, the Ground Lease and Leaseback will expire, and the University will be the owner in fee of the Project.

To construct the project, Walsh, Higgins, the developer, has entered into a general contractor agreement with Walsh Construction Company, a Walsh, Higgins subsidiary. Walsh Construction, in turn, will (and already has to some extent) publicly advertise for subcontractors to perform various stages of the construction as it proceeds. Plaintiffs (or their members, in the case of the trade association plaintiffs) are entitled to bid for this subcontract work in accordance with procedures developed by Walsh, Higgins and Walsh Construction, and there is no reason to suppose that some of their number will not end up performing work on the project. The University has also contracted with Marriott Hotel Services, Inc. to manage the conference center portion of the project when it is completed. Marriott has begun

preliminary marketing planning to obtain convention business after the conference center is open.

Financing for the project has already been secured by the sale of \$80,110,000 face amount of Certificates of Participation ("COPs") in the Leaseback rental payments. To accomplish the financing, Fifth Third Leasing assigned its interests in the Ground Lease, Leaseback and Development Agreement to Fifth Third Bank (the "Bank") under a Trust Indenture, and the Bank issued COPs representing proportionate shares in the Leaseback rents and sold them to an underwriter for distribution to public investors. The underwriting was closed on December 4, 1996 in another very public transaction. The COP sale proceeds that the Bank received from the underwriters are held by it under the Trust Indenture and will be disbursed to pay for construction as the project is completed.

The project is fully self-financed by the University, which will meet the rent payments due under the Leaseback from a combination of conference center earnings, garage fee receipts and internal funding for office tower occupancy by various staff support functions inside the University. No state-appropriated construction funds have been used in the project.

Although self-financed projects of the type described above are not possible for other State entities, such lease

and leaseback projects are expressly authorized by ORC 3345.12(Q).

The University built a similar office tower project in 1991, using the sale and leaseback technique authorized by ORC 3345.12(Q), and was sued by substantially the same plaintiffs and on the same grounds in the Common Pleas Court of Hamilton County. That litigation was settled. Among other things, the settlement agreement provided that the University would give the plaintiffs in that action prior notice of its intentions if it should ever again within a stated period of time propose to use the project development techniques that are at issue in this case. Such a notice was mailed to the plaintiffs on June 23, 1995. (Exhibit to Affidavit of Sidney Weil, attached at 1).

Although plaintiffs have had knowledge of the University's plans for more than two years, and could, if they were so disposed, have followed the progress of the planning by attending public meetings of the University's Board of Trustees, by reading newspaper accounts of the proposed project and advertisements for sale of the COPs, and by observing developments at the site that are clearly visible from public streets, they did not institute this litigation until June 30, 1997.

At the present time, the following work has already been completed:

- The site has been acquired.
- Existing facilities on the site have been demolished and cleared.
- Sewer and roadwork has been undertaken.
- Hazardous materials have been abated from the site.
- Approximately 2/3rds of the plans have been developed.
- The construction manager has completed its estimates, preliminary scheduling and mobilization.
- Financing has been secured.

The above work is estimated to have cost The University of Cincinnati over \$17,000,000.00. (See Affidavit of Raymond Renner, attached at 2).

The above facts prove that Plaintiffs are not entitled to an injunction against completion of the project. However, as a preliminary matter, it is necessary to determine whether this Court has jurisdiction to hear this complaint. As will be seen, it does not.

II. JURISDICTION

A. The Court of Claims

Plaintiff's Complaint seeks no money damages. Plaintiffs seek a preliminary injunction to prevent this project from continuing and a declaratory judgment that the University must follow the competitive bidding requirements of Chapter 153 of

the Ohio Revised Code.

A lawsuit for injunctive and declaratory relief alone, with no claim for money damages, must be brought in the Court of Common Pleas. Upjohn Company v. Ohio Dept. of Human Services (1991), 77 Ohio App. 3d 827 (Franklin County Court of Appeals).

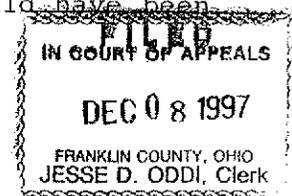
R.C. 2743.03(A), which defines the jurisdiction of the Court of Claims, provides two bases for the jurisdiction of the Court of Claims over claims for injunctive and declaratory relief:

"(1) ***The Court of Claims is a court of record and has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in section 2743.02 of the Revised Code***.

"(2) 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.***"

Id. at 833-34.

As to the first basis for jurisdiction of the Court of Claims, since the Court's jurisdiction is limited to hearing those matters which had been immune from suit prior to the enactment of the Court of Claims Act, the Court of Claims lacks jurisdiction over those actions which could have been



brought against the state prior to the qualified abolition of the state's immunity. Id. at 834. The state had consented to be sued for declaratory and injunctive actions prior to the enactment of the Court of Claims Act. See Burger Brewing Company v. Ohio Liquor Control Commission (1973), 34 Ohio St. 2d 93 and Racing Guild of Ohio v. State Racing Commission (1986), 28 Ohio St. 3d 317.

Because the state had consented to suit upon such claims before adoption of the Court of Claims Act, plaintiffs' claims for declaratory and injunctive relief are not claims permitted by the state's waiver of immunity. Berke v. Ohio Dept. of Pub. Welfare (1976), 52 Ohio App. 2d 271, 272, 6 O.O. 3d 280, 280, 369 N.E. 2d 1056, 1057; see, also, Fish v. Ohio Dept. of Transp. (Sept. 29, 1988), Franklin App. No. 88AP-355, 1988 WL 102002. Accordingly, plaintiffs' claims for declaratory and injunctive relief are not within the jurisdiction of the Court of Claims pursuant to R.C. 2743.03(A)(1).

Upjohn at 834.

Under the second basis for Court of Claims' jurisdiction, Revised Code Section 2743.03(A)(2), this court would have the jurisdiction to hear an action for declaratory and injunctive relief if it was combined with an action for money damages against the state from which the state was not immune. Id. In this case, plaintiffs have asked for no money damages and therefore have failed to trigger the jurisdiction of the Court of Claims. Accordingly, Plaintiffs' complaint must be dismissed out of the Court of Claims for lack of jurisdiction.

some special interest therein by reason of which his own property rights are placed in jeopardy.

State, ex rel. Masterson v. Ohio State Racing Commission
(1954), 162 Ohio St. 366 (syllabus).

It is equally fundamental that at common law and apart from statute, a taxpayer can not bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are put in jeopardy. In other words, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally.

Id. at 368.

Plaintiff Tiemann as a taxpayer in this case has alleged no special interest that his own property rights are put in jeopardy by the building of the University Center. Indeed, Plaintiff has failed to allege any damages at all and even if he had, his damages would be no different than the damages to any other taxpayer. Thus, Plaintiff Tiemann does not have standing to bring this suit. See also Racing Guild of Ohio, Local 304 v. Ohio State Racing Commission (1986), 28 Ohio St. 3d 317 explaining, approving, and following Masterson.

In an action brought by a contractor's association challenging a political subdivisions non-competitively bid, non-prevailing wage project, the Ohio Supreme Court has held that a contractor's association, to have standing, "must

establish that its members have suffered actual injury". Ohio Contractor's Association v. Bicking (1994), 71 Ohio St. 3d 318. "[T]he injury must be concrete and not simply abstract or suspected." Id. at 320.

We hold that a contractor's association lacks standing to pursue a cause of action in a representative capacity where its members fail to bid on the project in question.

Id. at 320-21.

Thus, in this case where the contractor's association has not submitted a bid and in fact alleged no actual injury, the contractor's association must be dismissed from this lawsuit as lacking standing.

The same analysis is applicable to the plaintiff-contractors. The Tenth District Court of Appeals has held in an action against the Ohio Department of Transportation seeking declaratory and injunctive relief (an action filed in the Franklin County Court of Common Pleas) from the performance of a construction contract containing an allegedly invalid bid, the following have standing to bring such a suit.

(a) a contractors association whose members either are qualified to bid with the department and who did bid on such construction projects, or whose members sought to obtain work as subcontractors on such projects;

(b) contractors qualified to bid on department projects who purchased plans

and who did bid as prime contractors;

(c) contractors qualified to bid on department projects who purchased plans and sought to obtain contracts as subcontractors;

(d) taxpayers of the state of Ohio who are specially affected by the bid conditions.

State, ex rel. Connors v. Ohio Dept. of Transportation (1982),
8 Ohio App. 3d 44 (syllabus).

Since the Plaintiff contractor associations and contractors have not bid on the University Center or sought to obtain work as subcontractors, the contractor associations and contractors lack standing to bring this suit with the result that it must be dismissed.

IV. LACHES

All but one of the Plaintiffs in this case were notified over two years before this lawsuit was filed that The University of Cincinnati was going to develop the University Center.

It is unconscionable and subject to the defense of laches for these Plaintiffs to have waited over two years after all the aforementioned work had been completed at a cost in excess of 17 million dollars before seeking to enjoin this project.

The elements of the laches defense are:
(1) conduct on the part of the defendant giving rise to the situation of which

complaint is made and for which the complainant seeks a remedy; (2) delay in asserting the complainant's rights, the complainant having had knowledge or notice of defendant's conduct and having been afforded an opportunity to institute a suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and (4) injury or prejudice to the defendant in the event relief is accorded to the complainant. Smith v. Smith (1950), 168 Ohio St. 447, 455, 7 O.O. 2d 276, 280, 1656 N.E. 2d 113, 119.

From the attached affidavit of Sidney Weil, this Court can see that all but 1 of the 7 Plaintiffs in this case were notified over two years ago of the development of the University Center. The form of the suit brought by Plaintiffs could have been brought at that time. Defendant does not concede that this lawsuit can be brought at this time but is merely pointing out that nothing happened in this more than two years that Plaintiffs sat on this notice other than the University of Cincinnati incurred significant money and time as they went forward to build the University Center project. Given that two years passed since the majority of Plaintiffs in this suit were notified of the development of the University Center, the University was reasonable in believing that Plaintiffs were not going to initiate the lawsuit that the University is now confronted with. The University will lose over 17 million dollars if this project is stopped and that number is going up each and every day.

The Supreme Court has held that in an action to enjoin the construction of a large (\$800,000) public improvements project where plaintiffs had been aware for more than two years of the project that the plaintiffs lawsuit seeking to enjoin the project would be denied under the doctrine of laches. Munn v. Horvitz (1964), 175 Ohio St. 521.

In this case where Plaintiff waited over two years after being notified of this construction project before filing suit and where the University of Cincinnati has expended over \$17,000,000.00 in constructing this project, Plaintiffs are the ones that should be enjoined from pursuing this lawsuit under the doctrine of laches.

V. CONCLUSION

The Court has set this case for a preliminary injunction hearing on August 20 and August 21.

Before the Court goes on to hear the merits of the case, it should determine whether it has jurisdiction.

Given that there is no claim for money damages and all that is being sought in this case is a preliminary injunction and declaratory relief, this Court lacks jurisdiction to hear this case. See Upjohn Company v. Ohio Dept. of Human Services (1991), 77 Ohio App. 3d 827 (Franklin County Court of Appeals).

Further, there are disqualifying jurisdictional issues with regard to the standing and laches of the Plaintiffs bringing this lawsuit.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio



WILLIAM C. BECKER
Registration No. 0013476
Assistant Attorney General
Senior Attorney
Court of Claims Defense Section
65 East State Street, Suite 1630
Columbus, OH 43215-4220
(614) 466-7447
COUNSEL FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Defendant's Motion To Dismiss, was sent by regular U.S. mail, postage prepaid, this 25 day of July, 1997, to Luther L. Liggett, Jr., Esq., Bricker & Eckler, 100 South Third Street, Columbus, OH 43215-4291, Counsel for Plaintiffs.



WILLIAM C. BECKER
Assistant Attorney General

thieman.mtd

IN THE OHIO COURT OF CLAIMS

MECCON, INC.
529 Grant Street, Suite 100
Akron, Ohio 44311,

and

Ronald R. Bassak
4989 West Bath Road
Akron, Ohio 44333,

Plaintiffs,

v.

THE UNIVERSITY OF AKRON
c/o Office of the Vice President and
General Counsel
302 Buchtel Commons
Akron, Ohio 44325,

Defendant.

Case No. 2008-08817

Judge JUDGE J. CRAIG WRIGHT

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**VERIFIED COMPLAINT FOR TEMPORARY RESTRAINING ORDER,
PRELIMINARY AND PERMANENT INJUNCTION, AND OTHER RELIEF**

For its verified complaint against Defendant University of Akron (the "University"), Plaintiffs Meccon, Inc. ("Meccon") and Ronald R. Bassak ("Mr. Bassak") hereby allege and state as follows:

PARTIES AND VENUE

1. Meccon is an Ohio corporation with its principal place of business located in Akron, Summit County, Ohio, at the address identified in the caption above.

2. Meccon is a specialty contractor specializing in, among other things, the construction, reconstruction, and design of heating, ventilating and air conditioning systems on both public and private construction contracts.

3. Mr. Bassak is an Ohio taxpayer residing in Summit County, Ohio.

4. The University is a public university and political subdivision of the State of Ohio charged with specific duties set forth by statute, and is the Owner of the project known as the University of Akron—Football Stadium, Project No. 06022 (hereinafter referred to as the “Project”).

5. The events that give rise to this verified complaint occurred in connection with the University’s decision to award plumbing, fire protection and HVAC contracts for the Project in violation of Ohio’s competitive bidding statutes and the University’s own Instructions To Bidders set forth in the bid documents.

6. Venue is proper in this Court pursuant to R.C. § 2743.03 and Section 1.1 of the Instructions To Bidders issued by the University. Section 1.1 states that “the rights of any Bidder ... shall be governed by the laws of the State of Ohio and only Ohio courts shall have jurisdiction over any action or proceeding related to the Bid or any subsequent Contract.”

7. An actual controversy exists regarding the legal rights and relationships between the parties in this action.

GENERAL ALLEGATIONS

8. Meccon’s claims arise from the illegal conduct of the University in connection with the bidding and award of construction contracts for the plumbing, fire protection, and HVAC bid packages (bid packages 19, 20, and 21) for the Project.

9. The Project is a publicly-funded project which is subject to Ohio’s competitive bidding statutes, requiring, *inter alia*, that the contract be awarded to “the lowest responsive and responsible bidder”.

10. Mecon asserts claims in this action against the University to enjoin them from, among other things, awarding or executing the plumbing, fire protection, and HVAC contracts in violation of Ohio's competitive bidding statutes and the University's own advertised instruction to bidders.

11. The University's intent to award the plumbing, fire protection, and HVAC contracts to S.A. Comunale Co., Inc. ("S.A. Comunale") is in violation of Mecon's rights and benefits and would result in an excess cost to the taxpayers of Ohio.

STATEMENT OF FACTS

12. In or around April 2008, the University issued an invitation to bidders, soliciting contractors to submit bids for numerous packages for the Project, including specifically bid packages 19, 20, and 21 (plumbing, fire protection, and HVAC, respectively).

13. The invitation to bidders solicited proposals for base bids and multiple alternates for each package. In addition, bidders were permitted to submit combination bids for any combination of the solicited bid packages.

14. According to the invitation to bidders, bids were due and to be opened on May 13, 2008, at 2:00 p.m. A subsequent addendum extended the bid date to June 3, 2008, at 2:00 p.m.

15. All bids for the Project were opened publicly on June 3, 2008.

16. Mecon was one of seven bidders who submitted a bid for the standalone HVAC contract.

17. Mecon's bid included a base bid totaling \$3,638,000.00 and pricing for four possible alternates. Mecon's bid was fully responsive, answered all of the required bid components, and complied in all material respects to the requirements of the Instructions To

Bidders. A true and accurate copy of the bid tabulation is attached hereto and incorporated herein as Exhibit A.

18. S.A. Comunale, another contractor who submitted bids for the Project, submitted four bids on the Project, three separate bids for the standalone plumbing, fire protection, and HVAC contracts totaling a collective \$6,077,452.00, and a fourth combined bid (for the plumbing, fire protection, and HVAC contracts) in the amount of \$6,049,000.00.

19. It was apparent when the bids were opened that S.A. Comunale's combined bid for the plumbing, fire protection, and HVAC contracts (totaling \$6,049,000.00) was the lowest bid for those respective packages.

20. It was also apparent that S.A. Comunale's combined bid was in excess of \$1.2 million lower than the next lowest combination of submitted bids.

21. Meecon was the next lowest bidder for the HVAC contract.

22. Upon information and belief, S.A. Comunale, presumably because of the large disparity in its bid from the next lowest combination of bids, withdrew its combined bid for the plumbing, fire protection, and HVAC contracts, as well as its bid for the standalone plumbing contract, which was also significantly lower than the next lowest standalone plumbing contract.

23. According to Ohio law, and specifically Ohio R.C. § 9.31, a bidder "may withdraw its 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...". However, "*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." (Emphasis added). A copy of R.C. § 9.31 is attached hereto as Exhibit B.

24. R.C. § 9.31 also states that the contracting authority [i.e., the University] is limited to two possible options should a contractor withdraw its bid post-bid opening, either "award the contract to the next lowest bidder, or reject all bids and resubmit the project for bidding."

25. In addition to the statutory requirement of R.C. § 9.31, in the bid documents drafted by the University and provided to all contractors, it sets forth in the Instructions To Bidders a procedure for a contractor's ability to withdraw its bid after the bids have been opened.

26. Specifically, in almost identical language as R.C. 9.31, Section 4.2.1 of the Instructions To Bidders provides that a bidder "may withdraw a Bid from consideration after the bid opening if the bid amount was substantially lower than the amounts of other Bids, providing the Bid was submitted in good faith, and the reason for the bid amount 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 amount." A copy of Section 4.2 of the Instructions To Bidders is attached hereto as Exhibit C.

27. In addition, the Instructions To Bidders goes on further to state in Section 4.2.1.2 that "[n]o Bid may be withdrawn under subparagraph 4.2.1 which would result in awarding the Contract on another bid to the same Bidder." (Emphasis added).

28. Finally, the Instructions To Bidders provides that should a "Bidder withdraw its bid under subparagraph 4.2.1, the Contracting Authority [i.e., the University] has two options

pursuant to Section 4.2.2: (1) it “may award the Contract to the next lowest responsive and responsible Bidder”; or (2) it may “reject all Bids and advertise for other Bids.”

29. Despite the clear and unambiguous language contained in R.C. § 9.31 and Section 4.2.1.2, the University did not award the contracts to the next lowest responsive and responsible bidders (i.e., Meccon), nor did it reject all bids and readvertise. Instead, the University announced its intent to award the standalone HVAC and fire protection contracts to S.A. Comunale, the very same contracts S.A. Comunale withdrew.

30. The University’s decision to award the HVAC and fire protection contracts results in the University spending significantly more money than it otherwise would have spent had S.A. Comunale not withdrawn its combined bid. Likewise, S.A. Comunale has been awarded the same contracts for a greater amount than it otherwise would have received had it been held to its combined bid.

31. In addition, the University announced that it would issue a rebid for the standalone plumbing package on June 17, 2008.

32. Prior to the June 17, 2008 rebid, Meccon, on June 13, 2008, sent a written notice to the University notifying it of Meccon’s objection to the University’s decision and the fact that the University was in clear violation of Article 4, Section 4.2.1.2 of the Instructions To Bidders. A true and accurate copy of Meccon’s June 13, 2008 letter is attached hereto and incorporated herein as Exhibit D.

33. Without providing a response, the University subsequently rebid the plumbing package on June 17, 2008, in which S.A. Comunale was once again the low bidder for the same contract it previously withdrew pursuant to Section 4.2.1.

34. Although dated July 30, 2008, Plaintiffs did not receive a response to its June 13, 2008 bid protest letter until Tuesday, August 5, 2008.

35. On July 26, 2008, the University issued a letter to Meccon, informing it that the University was awarding the separate plumbing, fire protection, and HVAC contracts to S.A. Comunale. A true and accurate copy of the University's letter is attached hereto and incorporated herein as Exhibit E.

COUNT ONE
Declaratory Judgment

36. Plaintiffs incorporate the preceding paragraphs of this Complaint as if fully rewritten herein.

37. A real and justiciable controversy now exists between the parties regarding whether the University has acted improperly, unlawfully, arbitrarily and capriciously, in violation of R.C. § 9.31, in violation of Section 4.2 of the Instructions To Bidders and in violation of the good faith obligation to comply with the terms and conditions of its published bid documents.

38. Plaintiffs have no adequate remedy at law, and as such, request that this Court issue a declaratory judgment, as follows:

- (i) The University's determination that S.A. Comunale's bids were the "lowest responsive and responsible" bids constitutes an abuse of discretion;
- (ii) The University's decision to award the plumbing, fire protection, and HVAC contracts for the Project to S.A. Comunale is unlawful;
- (iii) The University unlawfully violated R.C. § 9.31;
- (iv) The University unlawfully violated Article 4, Section 4.2.1.2 of the Instructions To Bidders;

- (v) The contract between the University and S.A. Comunale for the Project will be void;
- (vi) It is unlawful for the University to pay any money to S.A. Comunale for work performed on the Project;
- (vii) Meccon's bid for the HVAC package is the "lowest responsive and responsible" bid; and
- (viii) The HVAC contract for the Project should be awarded to Meccon pursuant to R.C. § 9.31 and Section 4.2.2 of the Instructions To Bidders.

COUNT TWO
Injunctive Relief

39. Plaintiffs incorporate the preceding paragraphs of this Complaint as if fully re-written herein.

40. The University's actions in deciding to award the plumbing, fire protection, and HVAC contracts for the Project to S.A. Comunale are unconstitutional, void and unenforceable for the reasons detailed above.

41. Plaintiffs are without an adequate remedy at law and will suffer irreparable harm if the University's actions are allowed to stand.

42. By virtue of the foregoing, Plaintiffs have demonstrated a likelihood of success on the merits and that a balancing of equities favors the issuance of an injunction against the University.

43. Plaintiffs respectfully request that this Court issue a temporary restraining order and a preliminary and permanent mandatory injunction, as follows:

- (i) enjoining the University from awarding the plumbing, fire protection, and HVAC contracts for the Project to S.A. Comunale;

- (ii) enjoining the University from executing a contract(s) with S.A. Comunale for the Project;
- (iii) enjoining the University from authorizing S.A. Comunale to perform any work on the Project; and
- (iv) enjoining the University from making any payment to S.A. Comunale for work performed on the Project.

Plaintiffs further request that this Court require that the HVAC contract for the Project be awarded to Mecccon.

COUNT THREE

Damages

44. Plaintiffs incorporate the preceding paragraphs of this Complaint as if fully re-written herein.

45. Mecccon incurred expenses in preparing its bid for the Project, and may incur additional costs and damages due to the University's failure to award or untimely award the contract for the Project to it.

46. As a direct and proximate result of the University's unlawful actions, Mecccon has been damaged in an amount that is not possible to calculate at this time.

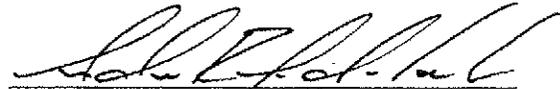
WHEREFORE, Mecccon, Inc. respectfully requests the following relief:

- A. As to Count One, a declaration that: (i) the University's determination that S.A. Comunale's bids were the "lowest responsive and responsible" bids constitutes an abuse of discretion; (ii) the University's decision to award the plumbing, fire protection, and HVAC contracts for the Project to S.A. Comunale is unlawful; (iii) the University unlawfully violated R.C. § 9.31; (iv) the University unlawfully violated Article 4, Section 4.2.1.2 of the Instructions To Bidders; (v) the contract between the University and S.A. Comunale for the Project will be void; (vi) it is unlawful for the University to pay any money to S.A. Comunale for work performed on the Project; (vii) Mecccon's bid for the HVAC package is the "lowest responsive and

responsible" bid; and (viii) in accordance with R.C. § 9.31 and Section 4.2.2 of the Instructions To Bidders, the HVAC contract for the Project should be awarded to Meccon.

- B. As to Count Two, a temporary restraining order and a preliminary and permanent mandatory injunction, as follows: (i) enjoining the University from awarding the plumbing, fire protection, and HVAC contracts for the Project to S.A. Comunale; (ii) enjoining the University from executing a contract(s) with S.A. Comunale for the Project; (iii) enjoining the University from authorizing S.A. Comunale to perform any work on the Project; and (iv) enjoining the University from making any payment to S.A. Comunale for work performed on the Project. Meccon further requests that this Court require that the HVAC contract for the Project be awarded to Meccon.
- C. As to Count Three, damages as determined by the Court.
- D. Such other necessary and proper relief, both legal and equitable, as this Court deems just and proper.

Respectfully submitted,



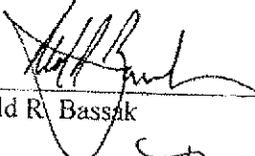
Michael W. Currie (0013100)
Gabe J. Roehrenbeck (0078231)
Andrew R. Fredelake (0081396)
THOMPSON HINE LLP
41 South High Street, Suite 1700
Columbus, Ohio 43215-3435
614.469.3200; fax: 614.469.3361
Attorneys for Plaintiffs

587054

VERIFICATION

STATE OF OHIO)
)
COUNTY OF SUMMIT) SS:

I, Ronald R. Bassak on behalf of Meccon, Inc., after being first duly cautioned and sworn according to law, state that I have read the foregoing Verified Complaint for Temporary Restraining Order, Preliminary and Permanent Injunction, and Other Relief (the " Verified Complaint"), and state that I have direct knowledge of all of the events described in the Verified Complaint, and that the statements contained in the Verified Complaint are true and accurate to the best of my knowledge, information and belief.



Ronald R. Bassak

Sworn to before me and subscribed in my presence this 5th day of August, 2008.



Notary Public



KIMBERLY L. EDWARDS
Resident Summit County
Notary Public, State of Ohio
My Commission Expires 04-27-09

9.31 Erroneous bids.

A bidder for a contract with the state or any political subdivision, district, institution, or other agency thereof, excluding therefrom the Ohio department of transportation, for the construction, demolition, alteration, repair, or reconstruction of any public building, structure, highway, or other improvement 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.

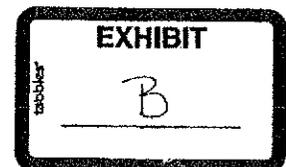
No bidder who is permitted to withdraw a bid shall for compensation supply any material or labor to, or perform any subcontract or other work agreement for, the person to whom the contract is awarded or otherwise benefit, directly or indirectly, from the performance of the project for which the withdrawn bid was submitted, without the approval of the contracting authority. The person to whom the contract was awarded and the withdrawing bidder are jointly liable to the contracting authority in an amount equal to any compensation paid to or for the benefit of the withdrawing bidder without such approval, in addition to the penalty provided in section 2913.31 of the Revised Code.

If a bid is withdrawn under authority of this section, the contracting authority may award the contract to the next lowest bidder or reject all bids and resubmit the project for bidding. In the event the contracting authority resubmits the project for bidding the withdrawing bidder shall pay the costs, in connection with the resubmission, of printing new contract documents, required advertising, and printing and mailing notices to prospective bidders, if the contracting authority finds that such costs would not have been incurred but for such withdrawal.

The contracting authority, if it intends to contest the right of a bidder to withdraw a bid, shall hold a hearing thereon within ten days after the opening of such bids and issue any order allowing or denying the claim of such right within five days after such hearing is concluded. The contracting authority shall give to the withdrawing bidder timely and reasonable notice of the time and place of any such hearing. The contracting authority shall make a stenographic record of all testimony, other evidence, and rulings on the admissibility of evidence presented at the hearing. Such order may be appealed under section 119.12 of the Revised Code. The bidder shall pay the costs of the hearing.

In the event the contracting authority denies the claim for withdrawal and the bidder elects to appeal or otherwise refuses to perform, the contracting authority may reject all bids or award to the next lowest bidder.

Effective Date: 08-01-1980



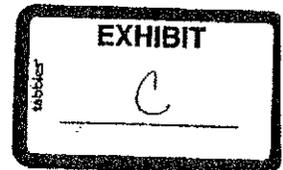
3.6.4 Upon receipt of a timely protest, the Contracting Authority shall meet with the protesting Bidder to hear its objections. O.R.C. Chapter 119 administrative hearing requirements are not applicable to the bid protest meeting.

- .1 No Contract award shall become final until after the Contracting Authority has met with all Bidders who have timely filed protests and the award of the Contract is affirmed by the Contracting Authority.
- .2 If all protests are rejected, the Contract shall be awarded to the lowest responsive and responsible Bidder, or all Bids shall be rejected.

3.7 Notice of Intent to Award

- 3.7.1 The Contracting Authority shall notify the apparent successful Bidder that upon satisfactory compliance with all conditions precedent for execution of the Contract, within the time specified, the Bidder shall be awarded the Contract.
- 3.7.2 The Contracting Authority reserves the right to rescind any Notice of Intent to Award if the Contracting Authority determines it issued the Notice of Intent to Award in error, or if the conditions precedent for execution of Contract set forth in Article 6 are not met.

ARTICLE 4 - WITHDRAWAL OF BID



4.1 Withdrawal prior to Bid Opening

- 4.1.1 A Bidder may withdraw a Bid after the Contracting Authority receives the Bid, provided the Bidder makes a request in writing and the Contracting Authority receives the request prior to the time of the bid opening, as determined by the Contracting Authority.

4.2 Withdrawal after Bid Opening

- 4.2.1 The Bid shall remain valid and open for acceptance for a period of 60 days after the bid opening; provided, however, a Bidder may withdraw a Bid from consideration after the bid opening if the bid amount was substantially lower than the amounts of other Bids, providing the Bid was submitted in good faith, and the reason for the bid amount 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 amount.
 - .1 Notice of a request to withdraw a Bid shall be made in writing filed with the Contracting Authority within 2 business days after the bid opening. The Contracting Authority reserves the right to request the Bidder to submit evidence substantiating the Bidder's request to withdraw the Bid.
 - .2 No Bid may be withdrawn under subparagraph 4.2.1 which would result in awarding the Contract on another Bid to the same Bidder.
- 4.2.2 If a Bidder withdraws its Bid under subparagraph 4.2.1, the Contracting Authority may award the Contract to the next lowest responsive and responsible Bidder, or reject all Bids and advertise for other Bids. In the event the Contracting Authority advertises for other Bids, the withdrawing Bidder shall pay the costs, in connection with the re-bidding, of printing new Contract Documents, required advertising, and printing and mailing of notices to prospective Bidders, if

the Contracting Authority finds that these costs would not have been incurred but for the withdrawal.

4.2.3 A Bidder may withdraw the Bidder's Bid at any time after the 60 day period described in subparagraph 4.2.1 by giving written notice to the Contracting Authority.

4.3 Refusal to Accept Withdrawal

4.3.1 If the Contracting Authority contests the right of a Bidder to withdraw a Bid pursuant to subparagraph 4.2.1, a hearing shall be held within 10 days after the bid opening and the Contracting Authority shall issue an order allowing or denying the claim of this right within 5 days after the hearing is concluded. The Contracting Authority shall give the withdrawing Bidder timely notice of the time and place of the hearing.

- .1 The Contracting Authority shall make a stenographic record of all testimony, other evidence, and rulings on the admissibility of evidence presented at the hearing. The Bidder shall pay the costs of the hearing.
- .2 Pursuant to O.R.C. Section 119.12, the Bidder may appeal the order of the Contracting Authority required by subparagraph 4.3.1.

4.4 Refusal to Perform

4.4.1 In the event the Contracting Authority denies the request for withdrawal and the Bidder refuses to perform the Contract, the Contracting Authority may reject all Bids or award the Contract to the next lowest responsive and responsible Bidder.

4.5 Effect of Withdrawal

4.5.1 A Bidder, who is permitted to withdraw a Bid under subparagraph 4.2.1, shall not supply material or labor to, or perform a subcontract or other work for, the Person to whom the Contract is awarded; or otherwise benefit, directly or indirectly, from the performance of the Project for which the withdrawn Bid was submitted; without the Contracting Authority's prior written consent.

ARTICLE 5 - BID GUARANTY AND CONTRACT BOND

5.1 Bid Guaranty

5.1.1 The Bidder shall submit a Bid Guaranty with the Bidder's Bid, payable to the Contracting Authority, in the form of either:

- .1 The signed Bid Guaranty and Contract Bond contained in the Contract Documents for the amount of the Base Bid plus all additive Alternates; or
- .2 A certified check, cashier's check, or letter of credit, for 10 percent of the Base Bid, plus all additive Alternates. A letter of credit shall expressly provide that it is revocable only by the Contracting Authority.

5.1.2 The Bid Guaranty shall be in form and substance satisfactory to the Contracting Authority and shall serve as an assurance that upon acceptance of the Bid, the Bidder shall comply with all conditions precedent for Contract execution, within the time specified by the Contracting Authority.

MECCON, INC.

CONTRACTORS -- OHIO LICENSE #12715
529 Grant Street, Suite # 100
Akron, Ohio 44311
Phone: (330) 253-6188 * Fax: (330) 253-9295
E-mail: office@mecconinc.com
We are an Equal Opportunity Employer

June 13, 2008

University of Akron
Capital Planning and Facilities Management
Lincoln Building -- Third Floor
Akron, OH 44325-0405

Attn: Mr. Ted Curtis

Re: Multiplex Project -- Football Stadium
Project No. 06022

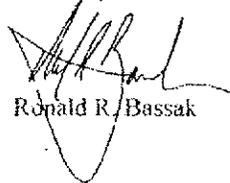
Gentlemen:

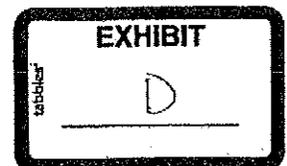
We are protesting your decision to award the HVAC and Fire Protection work for the above referenced project to the S.A. Commuale Company.

After our review and discussions with the State of Ohio Attorney General's Office, we find their bid to be in violation of Article 4, Withdrawal of Bid, Section 4.2.1.2. The withdrawal of their combination bid for Plumbing, HVAC and Fire Protection would result in the award of the individual HVAC and Fire Protection bids to be at a higher price than in their combination price. This is precisely the reason for Article 4 Section 4.2.1.2.

Please call if you have any questions.

Sincerely,


Ronald R. Bassak



The University of Akron

July 26, 2008

Mecon, Inc.
529 Grant Street, #100
Akron, OH 44311

Dear Mr. Bassak:

On behalf of The University of Akron, I would like to thank you for responding to our Legal Notice for the Multiplex Project-Football Stadium (Bid Event C) - Project #06022

After a thorough review of the bids received, it has been determined that the bids submitted and (alternates as applicable/not listed) submitted by:

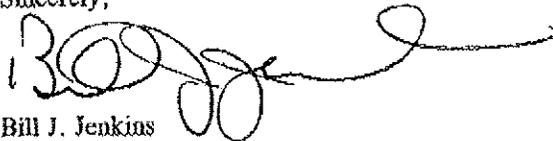
- EPI of Cleveland, Inc. - (Miscellaneous Metal)
- Thomarios/The Apostolos Group, Inc. - (General Trades & Painting)
- Messina Floor Covering, LLC - (Floor Covering)
- Marous Brothers Construction, Inc. - (Drywall, Acoustic Ceilings)
- United Glass & Panel Systems, Inc. - (Glass & Glazing, Stadium Windows)
- West Third Street Construction, LLC - (Site Concrete, Masonry)
- Cardinal Maintenance & Service Co., Inc. - (Roofing)
- S A Comunale Co., Inc. - (Fire Protection, HVAC & Plumbing)
- Lake Erie Electrical-Loomis Division - (Electric)

best meets the needs of The University of Akron.

Enclosed is your Bid Guaranty and Contract Bond and Power of Attorney. Once again, I would like to thank you and your organization for devoting your valuable time and energy to this process.

If you should have any questions about this award, please feel free to call me at (330) 972-7340

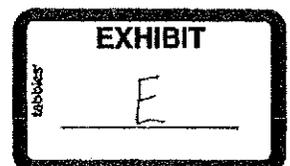
Sincerely,



Bill J. Jenkins
Assistant Director, Purchasing

BJ/vc
Enclosures

Department of Purchasing
Akron, OH 44325-9001
330-972-7340 • 330-972-5564 Fax • www.uakron.edu/busfn/purchasing



2335.39 Compensation for fees incurred by prevailing party in connection with action or appeal.

(A) As used in this section:

(1) "Court" means any court of record.

(2) "Eligible party" means a party to an action or appeal involving the state, other than the following:

(a) The state;

(b) An individual whose net worth exceeded one million dollars at the time the action or appeal was filed;

(c) A sole owner of an unincorporated business that had, or a partnership, corporation, association, or organization that had, a net worth exceeding five million dollars at the time the action or appeal was filed, except that an organization that is described in subsection 501(c)(3) and is tax exempt under subsection 501(a) of the Internal Revenue Code shall not be excluded as an eligible party under this division because of its net worth;

(d) A sole owner of an unincorporated business that employed, or a partnership, corporation, association, or organization that employed, more than five hundred persons at the time the action or appeal was filed.

(3) "Fees" means reasonable attorney's fees, in an amount not to exceed seventy-five dollars per hour or a higher hourly fee approved by the court.

(4) "Internal Revenue Code" means the "Internal Revenue Code of 1954," 68A Stat. 3, 26 U.S.C. 1, as amended.

(5) "Prevailing eligible party" means an eligible party that prevails in an action or appeal involving the state.

(6) "State" has the same meaning as in section 2743.01 of the Revised Code.

(B)(1) Except as provided in divisions (B)(2) and (F) of this section, in a civil action, or appeal of a judgment in a civil action, to which the state is a party, or in an appeal of an adjudication order of an agency pursuant to section 119.12 of the Revised Code, the prevailing eligible party is entitled, upon filing a motion in accordance with this division, to compensation for fees incurred by that party in connection with the action or appeal. Compensation, when payable to a prevailing eligible party under this section, is in addition to any other costs and expenses that may be awarded to that party by the court pursuant to law or rule.

A prevailing eligible party that desires an award of compensation for fees shall file a motion requesting the award with the court within thirty days after the court enters final judgment in the action or appeal. The motion shall do all of the following:

(a) Identify the party;

(b) Indicate that the party is the prevailing eligible party and is entitled to receive an award of compensation for fees;

(c) Include a statement that the state's position in initiating the matter in controversy was not substantially justified;

(d) Indicate the amount sought as an award;

(e) Itemize all fees sought in the requested award. The itemization shall include a statement from any attorney who represented the prevailing eligible party, that indicates the fees charged, the actual time expended, and the rate at which the fees were calculated.

(2) Upon the filing of a motion under this section, the court shall review the request for the award of compensation for fees and determine whether the position of the state in initiating the matter in controversy was substantially justified, whether special circumstances make an award unjust, and whether the prevailing eligible party engaged in conduct during the course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy. The court shall issue an order, in writing, on the motion of the prevailing eligible party, which order shall include a statement indicating whether an award has been granted, the findings and conclusions underlying it, the reasons or bases for the findings and conclusions, and, if an award has been granted, its amount. The order shall be included in the record of the action or appeal, and the clerk of the court shall mail a certified copy of it to the state and the prevailing eligible party.

With respect to a motion under this section, the state has the burden of proving that its position in initiating the matter in controversy was substantially justified, that special circumstances make an award unjust, or that the prevailing eligible party engaged in conduct during the course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy.

A court considering a motion under this section may deny an award entirely, or reduce the amount of an award that otherwise would be payable, to a prevailing eligible party only as follows:

(a) If the court determines that the state has sustained its burden of proof that its position in initiating the matter in controversy was substantially justified or that special circumstances make an award unjust, the motion shall be denied;

(b) If the court determines that the state has sustained its burden of proof that the prevailing eligible party engaged in conduct during the course of the action or appeal that unduly and unreasonably protracted the final resolution of the matter in controversy, the court may reduce the amount of an award, or deny an award, to that party to the extent of that conduct.

An order of a court considering a motion under this section is appealable as in other cases, by a prevailing eligible party that is denied an award or receives a reduced award. If the case is an appeal of the adjudication order of an agency pursuant to section 119.12 of the Revised Code, the agency may appeal an order granting an award. The order of the court may be modified by the appellate court only if it finds that the grant or the failure to grant an award, or the calculation of the amount of an award, involved an abuse of discretion.

(C) Compensation for fees awarded to a prevailing eligible party under this section may be paid by the specific branch of the state government or the state department, board, office, commission, agency, institution, or other instrumentality over which the party prevailed in the action or appeal from any funds available to it for payment of such compensation. If compensation is not paid from such funds or such funds are not available, upon the filing of the court's order in favor of the prevailing eligible party with the clerk of the court of claims, the order shall be treated as if it were a judgment under Chapter 2743. of the Revised Code and be payable in accordance with the procedures specified in section 2743.19 of the Revised Code, except that interest shall not be paid in relation to the award.

(D) If compensation for fees is awarded under this section to a prevailing eligible party that is appealing an agency adjudication order pursuant to section 119.12 of the Revised Code, it shall include the fees incurred in the appeal and, if requested in the motion, the fees incurred by the party in the adjudication hearing conducted under Chapter 119. of the Revised Code. A motion containing such a request shall itemize, in the manner described in division (B)(1)(e) of section 119.092 of the Revised Code, the fees, as defined in that section, that are sought in an award.

(E) Each court that orders during any fiscal year compensation for fees to be paid to a prevailing eligible party pursuant to this section shall prepare a report for that year. The report shall be completed no later than the first day of October of the fiscal year following the fiscal year covered by the report, and copies of it shall be filed with the general assembly. It shall contain the following information:

Appx. 39

(1) The total amount and total number of awards of compensation for fees required to be paid to prevailing eligible

parties;

(2) The amount and nature of each individual award ordered;

(3) Any other information that may aid the general assembly in evaluating the scope and impact of awards of compensation for fees.

(F) The provisions of this section do not apply in any of the following:

(1) Appropriation proceedings under Chapter 163. of the Revised Code;

(2) Civil actions or appeals of civil actions that involve torts;

(3) An appeal pursuant to section 119.12 of the Revised Code that involves any of the following:

(a) An adjudication order entered after a hearing described in division (F) of section 119.092 of the Revised Code;

(b) A prevailing eligible party represented in the appeal by an attorney who was paid pursuant to an appropriation by the federal or state government or a local government;

(c) An administrative appeal decision made under section 5101.35 of the Revised Code.

Effective Date: 09-26-2003

ARTICLE I: BILL OF RIGHTS

ing the place to be searched and the person and things to be seized.

(1851)

NO IMPRISONMENT FOR DEBT.

§15 No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.

(1851)

REDRESS FOR INJURY; DUE PROCESS.

§16 All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

(1851, am. 1912)

NO HEREDITARY PRIVILEGES.

§17 No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State.

(1851)

SUSPENSION OF LAWS.

§18 No power of suspending laws shall ever be exercised, except by the General Assembly.

(1851)

EMINENT DOMAIN.

§19 Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

(1851)

DAMAGES FOR WRONGFUL DEATH.

§19a The amount of damages recoverable by civil action in the courts for death caused by the wrongful act, neglect, or default of another, shall not be limited by law.

(1912)

PROTECT PRIVATE PROPERTY RIGHTS IN GROUND WATER, LAKES AND OTHER WATERCOURSES.

§ 19b. (A) The protection of the rights of Ohio's property owners, the protection of Ohio's natural resources, and the maintenance of the stability of Ohio's economy require the recognition and protection of property interests in ground water, lakes, and watercourses.

(B) The preservation of private property interests recognized under divisions (C) and (D) of this section shall be held inviolate, but subservient to the public welfare as provided in Section 19 of Article I of the Constitution.

(C) A property owner has a property interest in the reasonable use of the ground water underlying the property owner's land.

(D) An owner of riparian land has a property interest in the reasonable use of the water in a lake or watercourse located on or flowing through the owner's riparian land.

(E) Ground water underlying privately owned land and nonnavigable waters located on or flowing through privately owned land shall not be held in trust by any governmental body. The state, and a political subdivision to the extent authorized by state law, may provide for the regulation of such waters. An owner of land voluntarily may convey to a governmental body the owner's property interest held in the ground water underlying the land or nonnavigable waters located on or flowing through the land.

(F) Nothing in this section affects the application of the public trust doctrine as it applies to Lake Erie or the navigable waters of the state.

(G) Nothing in Section 1e of Article II, Section 36 of Article II, Article VIII, Section 1 of Article X, Section 3 of Article XVIII, or Section 7 of Article XVIII of the Constitution shall impair or limit the rights established in this section.

(2008)

POWERS RESERVED TO THE PEOPLE.

§20 This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers, not herein delegated, remain with the people.

(1851)