

ORIGINAL

In the
Supreme Court of Ohio

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

REPLY BRIEF OF APPELLANT
THE UNIVERSITY OF AKRON

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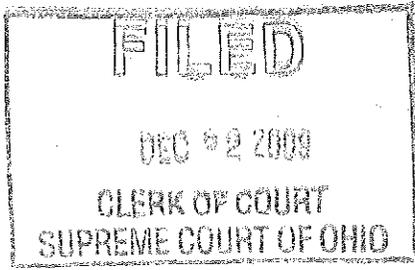


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INTRODUCTION

The Tenth District's decision in this case contravened this Court's clear statement in *Cementech, Inc. v. City of Fairlawn*, 109 Ohio St. 3d 475, 2006-Ohio-2991, which limited disappointed bidders to injunctive relief in public-bidding violation cases. Plaintiffs-Appellees Meccon, Inc. and Ronald Bassak (collectively, "Meccon") now commit the same error by brushing *Cementech* aside and asking this Court to authorize the award of money damages—including bid-preparation costs—when no statutory or legal basis exists for such damages. Meccon makes three arguments, none of which withstands scrutiny.

First, Meccon claims that the University raises a red herring—this Court's decision in *Cementech*—and that the *real* issue is whether the Tenth District correctly determined that the Court of Claims had jurisdiction over the dispute. But these two issues are integrally linked. While the ultimate issue is whether the Court of Claims has jurisdiction over Meccon's suit, that question hinges on whether a disappointed bidder can recover money damages in public-bidding violation cases (in which case, jurisdiction in the Court of Claims is proper), or whether a rejected bidder's only remedy is injunctive relief (in which case, the Court of Claims lacks jurisdiction). Because *Cementech* bars a disappointed bidder from seeking anything but injunctive relief, the Court of Claims lacks jurisdiction over the parties' dispute. Meccon's arguments to the contrary rest on a handful of cases from the lower appellate courts that pre-date *Cementech* (and are therefore irrelevant) and on its request that this Court devise a policy for money damages, even though the General Assembly has not seen fit to do so. Those entreaties should be rejected. This Court has already spoken on this issue, and it found that "a rejected bidder is limited to injunctive relief." *Cementech*, 2006-Ohio-2991 at ¶ 10. Accordingly, the Court of Claims lacks jurisdiction.

Second, Meccon contends that *Cementech* only foreclosed a disappointed bidder's claim for "lost profits," and that bid-preparation costs should be recoverable under theories of promissory estoppel and implied contract. As a preliminary matter, however, Meccon never pled claims for promissory estoppel or breach of implied contract in its Verified Complaint. See Verified Complaint, Plaintiffs-Appellees' Merit Brief ("Meccon Br.") App. at 20. For that reason alone, Meccon has no grounds for asserting those theories now. In any event, Meccon's reliance on anomalous case law from other jurisdictions does not change the fact that Ohio does not allow promissory estoppel or implied contract claims against the State in public-bidding violation cases. And given that much of the authority Meccon cites is from States with statutes that allow the recovery of such costs, it is significant that Ohio's General Assembly has *not* seen fit to authorize the award of bid-preparation costs, and this Court should decline Meccon's request to craft such legislation from the bench.

Third, Meccon repeats the policy concerns cited by the Tenth District. Specifically, Meccon points to the Tenth District's statement that allowing the recovery of money damages would deter government entities from violating the State's public-bidding laws. See *Meccon, Inc. v. Univ. of Akron* ("App. Op.") (10th Dist.), 182 Ohio App. 3d 85, 2009-Ohio-1700, ¶¶ 24-26. But both Meccon and the Tenth District are wrong because *Cementech* already addressed—and rejected—this theory explicitly, stating that the construction delays that arise in the face of suits for injunctive relief are "sufficient deterrent[s] to a municipality's violation of competitive-bidding laws." 2006-Ohio-2991 at ¶ 11. This is true because when an injunction is granted, it halts work on a project for an undetermined period, and, where violations occurred, a government entity will have to re-bid the project. In a world where time is money, such delays certainly serve as a sufficient "stick" to keep the State in compliance with statutory requirements.

In fact, as *Cementech* noted, Mecon’s proposed rule would harm the public more than the State, because taxpayers ultimately bear the brunt of the costs of government projects. *Id.* at ¶¶ 12-13.

In sum, regardless of whether this Court interprets its statement in *Cementech* that “a rejected bidder is limited to injunctive relief,” *id.* at ¶ 10, as a holding, the *reasoning* underlying the pronouncement undeniably applies to this case. In finding that Mecon stated a cognizable claim for money damages—including bid-preparation costs and, potentially, attorneys’ fees—and by extension, finding that jurisdiction was proper in the Court of Claims, the Tenth District improperly ignored and undermined *Cementech*, and its decision should be reversed.

ARGUMENT

A. *Cementech* bars the Court of Claims' jurisdiction over this dispute.

Mecon's argument that the University seeks to re-argue *Cementech* rather than consider the true jurisdictional dispute at the heart of this case, Mecon Br. at 1, fails to recognize that *Cementech* lies at the core of this jurisdictional dispute. This Court's clear directive in *Cementech* that "a rejected bidder is limited to injunctive relief," 2006-Ohio-2991 at ¶ 10, precludes a claim for money damages and thereby forecloses jurisdiction in the Court of Claims.

1. *Cementech's* statement that a rejected bidder is limited to injunctive relief warrants reversal of the Tenth District's decision.

Mecon's interpretation of the Court of Claims Act, which governs the Court of Claims' jurisdiction, is muddled and wrong. The statute is straightforward, and it makes clear that the Court of Claims lacks jurisdiction over Mecon's claims for declaratory and injunctive relief because Mecon lacks a viable claim for money damages.

Through the Court of Claims Act, R.C. Chapter 2743, the General Assembly established the Court of Claims to adjudicate claims against the State that were previously barred by the doctrine of sovereign immunity. R.C. 2743.03(A)(1). The Court of Claims' jurisdiction is defined and limited by statute. See R.C. 2743.02(A); R.C. 2743.03(A). And because these statutory provisions waive the State's immunity from suit, they must be "strictly construed." *Nobles v. Wolf* (1990), 54 Ohio St. 3d 75, 80 (noting that the State's "immunity is to be narrowly construed by the courts and should be applied only to the class of persons or things which is the object of legislative attention"); see also *Royce v. Smith* (1981), 68 Ohio St. 2d 106, 115 ("Statutes waiving the state's sovereign immunity are in derogation of the common law and must be strictly construed.") (citations omitted).

The Act sets out two bases for the Court of Claims' original and exclusive jurisdiction. R.C. 2743.03(A); see *Upjohn Co. v. Ohio Dep't of Human Servs.* (10th Dist. 1991), 77 Ohio App. 3d 827, 833-34. Mecon's lawsuit fails to satisfy either of the jurisdictional requirements. First, Mecon's claims do not satisfy the conditions of R.C. 2743.03(A)(1), which gives the Court of Claims "exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in [R.C.] 2743.02." Section 2743.02(A)(1) expressly states that the Court of Claims Act does not apply "[t]o the extent that the state has previously consented to be sued." There is no question that the State consented to actions for declaratory and injunctive relief in the court of common pleas before the adoption of the Court of Claims Act. See *Racing Guild of Ohio v. Ohio State Racing Comm'n* (1986), 28 Ohio St. 3d 317, 320 nn. 2, 3 (citing a list of examples of actions for declaratory or injunctive relief proceeding against the State in courts of common pleas both before and after the enactment of the Court of Claims Act). Accordingly, under the plain language of R.C. 2743.02(A)(1), the Court of Claims lacks jurisdiction over a complaint, like Mecon's, where the only potentially viable claims are for declaratory and injunctive relief. Those claims belong in a court of common pleas.

Mecon's claims also do not fall under R.C. 2743.03(A)(2), which gives the Court of Claims jurisdiction over claims for "declaratory judgment, injunctive relief, or other equitable relief against the state that arise[] out of the same circumstances," giving rise to a plaintiff's civil action permitted by the State's waiver of sovereign immunity. In other words, under R.C. 2743.03(A)(2), a plaintiff can sue for declaratory, injunctive or other equitable relief in the Court of Claims, but only if he has also stated a viable claim for money damages. See *Upjohn*, 77 Ohio App. 3d at 834 ("Given our determination that plaintiffs' money damages claim is not permitted by the state's waiver of immunity, . . . the Court of Claims lacks jurisdiction over plaintiffs'

claims for injunctive and declaratory relief arising out of defendant's [actions]."). It follows that, because *Cementech* bars Mecon's civil action—its request for money damages—the Court of Claims also lacks jurisdiction over Mecon's ancillary claims for injunctive, and declaratory relief.

Mecon mistakenly relies on *Friedman v. Johnson* (1985), 18 Ohio St. 3d 85, 87-88, to argue that only the exceptions to the Court of Claims' exclusive jurisdiction should be "strict and narrow," and that the Act should be read liberally to allow its claim. Mecon Br. at 8 (citing *Friedman*, 18 Ohio St. 3d at 88). *Friedman* is factually distinguishable and inapposite. As a threshold matter, in *Friedman*, this Court determined that the plaintiffs had a viable claim for money damages in addition to their claims for declaratory and injunctive relief, thus conferring jurisdiction on the Court of Claims under R.C. 2743.03(A)(2). *Id.* at 87. By contrast, R.C. 2743.03(A)(2) does not apply here because Mecon sought declaratory and injunctive relief, but—given *Cementech's* statement that a disappointed bidder is limited to injunctive relief—Mecon has no viable claim for money damages. Moreover, this Court subsequently limited its decision in *Friedman*, expressly rejecting as "unnecessary, unfortunate dictum" the statement that claims for injunctive relief against the State are properly heard by the Court of Claims. *Racing Guild*, 28 Ohio St. 3d at 320 n.4.

Further, Mecon's reliance on *Friedman's* statement that the exceptions to the Court of Claims' jurisdiction should be viewed as "strict and narrow," 18 Ohio St. 3d at 88, neglects to recognize that, even under close scrutiny, Mecon's case plainly fits within those exceptions. *Cementech* forecloses Mecon's claim for money damages, leaving Mecon only with claims for declaratory and injunctive relief. Accordingly, jurisdiction is not proper either under R.C. 2743.03(A)(1) (because Mecon's claims for declaratory and injunctive relief are the type over

which the State had consented to be sued in the courts of common pleas prior to the adoption of the Court of Claims Act), or R.C. 2743.03(A)(2) (because claims for declaratory and injunctive relief cannot be heard in the Court of Claims unless they are accompanied by a viable claim for money damages).

Finally, Meccon improperly relies on the Tenth District's decisions in three related cases arising out of a construction project undertaken by the University of Cincinnati—*Tiemann v. University of Cincinnati* (10th Dist. 1998), 127 Ohio App. 3d 312, *Mechanical Contractors Association of Cincinnati, Inc. v. University of Cincinnati* (“*Mechanical Contractors I*”) (10th Dist. 2001), 141 Ohio App. 3d 333, and *Mechanical Contractors Association of Cincinnati, Inc. v. University of Cincinnati* (“*Mechanical Contractors II*”) (10th Dist.), 152 Ohio App. 3d 466, 2003-Ohio-1837. In *Tiemann*, the Tenth District determined that a party requesting “injunctive, declaratory, and other necessary and proper relief,” made a claim for money damages sufficient to confer jurisdiction on the Court of Claims. 127 Ohio App. 3d at 318. In *Mechanical Contractors I*, the Tenth District reversed and remanded plaintiffs’ claim to the trial court, explaining that because injunctive relief would award plaintiffs only a “hollow victory,” an award of money damages would be appropriate. 141 Ohio App. 3d at 343. And in *Mechanical Contractors II*, the Tenth District opined that “monetary damages may potentially be available as a remedy where injunctive relief no longer provides a practical remedy to disappointed bidders,” though “the most appropriate and effective relief available in such situations is for bidders to seek early injunctive relief to enforce the competitive bidding laws.” 2003-Ohio-1837 at ¶ 48. Notably, the Tenth District expressly limited its final decision to award plaintiffs their bid-preparation costs to the facts at issue—“injunctive relief was concededly ineffectual here due to the unique facts and procedural complexities of this case,” *id.* But even more important, all of

these cases were decided *before* this Court, in *Cementech*, limited a disappointed bidder to injunctive relief. Therefore, Mecon's assertion that the Tenth District "analyzed the issues before it in light of Ohio's binding precedent controlling competitive bidding laws," Mecon Br. at 12, is wrong because, through *Cementech*, the binding precedent changed.

2. A claim for attorneys' fees does not confer jurisdiction in the Court of Claims.

Mecon also fails in its attempt to argue that a request for attorneys' fees could be used to confer jurisdiction on the Court of Claims. In a footnote, the Tenth District observed that if Mecon prevailed at trial, it could move for attorneys' fees at the close of the case under R.C. 2335.39, Ohio's fee-shifting statute. App. Op. at ¶ 15 n.1. But the Tenth District was wrong here, just as it was wrong in the other cases on which Mecon relies. Mecon Br. at 15 (citing *State ex. rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 2002-Ohio-6717, ¶ 73 (awarding attorneys' fees where the State was not substantially justified in failing to initiate appropriation proceedings in a regulatory takings case); *Mechanical Contractors II*, 2003-Ohio-1837 at ¶ 42 (*pre-Cementech* public-bidding violation case finding plaintiffs eligible for attorneys' fees under R.C. 2335.39)).

Attorneys' fees under R.C. 2335.39 are not available on a claim for declaratory relief against the State. Ohio law makes clear that attorneys' fees are unavailable in the context of a declaratory judgment action unless a separate statute "explicitly authorizes" the recovery of those fees for that type of a declaratory action. R.C. 2721.16(A)(1)(a). But Ohio's fee-shifting statute, R.C. 2335.39, does not do so. Therefore, Mecon cannot recover its attorneys' fees under R.C. 2335.39 in its declaratory judgment action.

But even if attorneys' fees were available under R.C. 2335.39 (and they are not), they do not trigger jurisdiction in the Court of Claims, because this Court has recognized that such fees

are *costs*, not damages. See *Christe v. GMS Mgmt. Co., Inc.* (2000), 88 Ohio St. 3d 376, 378 (explaining that if the General Assembly had intended that statutorily authorized attorneys' fees be treated as costs rather than "damages," it would have said so). Indeed, if the potential to recover fees under R.C. 2335.39 were alone sufficient to trigger the Court of Claims jurisdiction, then *every suit seeking only injunctive or declaratory relief could be brought in the Court of Claims*. That approach would swallow the rule set forth in R.C. 2743.03 expressly limiting the actions to be heard in that court.

Mecon's reliance on *Barr v. Jones*, 160 Ohio App. 3d 320, 2005-Ohio-1488, is also mistaken. Mecon Br. at 16. In *Barr*, the State sought to invoke the jurisdiction of the Court of Claims 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). *Barr* involved a claim for *pre-complaint* attorneys' fees, which are distinguishable from attorneys' fees incurred in the course of litigation, which are the typical "attorneys' fees" parties seek at the end of litigation, as in this case. *Id.* Pre-litigation fees are a different beast entirely and are similar to a situation in which a party seeks indemnification from the State *after* it already incurred the costs of litigation—though such costs represent the amount the party already paid to his attorney, they are distinct from traditional attorneys' fees. *Cullen v. Ohio Dep't of Rehab. & Corr.* (10th Dist. 1998), 125 Ohio App. 3d 758, 764-65 (noting that "a claim for indemnification is a claim for money damages" over which the Court of Claims has exclusive jurisdiction, "even when ancillary relief such as an injunction or declaratory relief is sought"). Thus, the University's position on this issue has been, and continues to be, consistent that attorneys' fees are *not* damages (as it should be given this Court's clear directive).

B. No legal basis exists for awarding Meccon its bid-preparation costs.

Meccon concedes that no Ohio statute authorizes the recovery of bid-preparation costs in public-bidding cases. Nevertheless, Meccon contends that it is entitled to its bid-preparation costs under theories of promissory estoppel and implied contract. Meccon Br. at 21-22. Meccon is wrong. As a preliminary matter, Meccon never pled claims for promissory estoppel or breach of implied contract in its Verified Complaint. See Verified Complaint, Meccon Br. App. at 20. For that reason alone, Meccon's promissory estoppel and implied contract arguments are irrelevant. But in any event, those theories have no legal merit. Meccon's reliance on pre-*Cementech* decisions and cases from other jurisdictions falls short in light of clear Ohio law rejecting promissory estoppel and implied contract theories in this context.

1. Meccon is not entitled to damages based on a theory of promissory estoppel.

Promissory estoppel does not support the recovery of bid-preparation costs in Ohio. Under Ohio law, “[i]t is well settled that . . . the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function.” *Hortman v. City of Miamisburg*, 110 Ohio St. 3d 194, 2006-Ohio-4251, ¶ 25 (quoting *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St. 3d 143, 145-46); see also *Sun Ref. & Mktg. Co. v. Brennan* (1987), 31 Ohio St. 3d 306, 308; *Griffith v. J.C. Penney Co., Inc.* (1986), 24 Ohio St. 3d 112, 113. Moreover, to succeed on such a claim, a party “must have relied on conduct of an adversary in such a manner as to change his position for the worse and that reliance must have been reasonable in that the party claiming estoppel did not know and could not have known that its adversary’s conduct was misleading.” *Shampton v. City of Springboro*, 98 Ohio St. 3d 457, 2003-Ohio-1913, ¶ 34 (citations omitted). Meccon’s claim fails because its submission of a bid did not change its position “for the worse” where bid-preparation costs are merely costs of “doing business” that

are not even recoverable for contractors who *are* awarded a contract. More important, however, the University made no unambiguous promise to bidders that would be actionable under such a theory and even expressly reserved the right to reject *all* bids should it find them unsatisfactory. In other words, no bidder was guaranteed to secure a contract.

Mecon's attempt to distinguish *Hortman* fails. Mecon hinges its argument on the fact that *Hortman* involved a dispute between a private party and a political subdivision rather than a State entity (such as the University), and attempts to differentiate it from situations in which a government is held harmless for mistakes made by its employees. Mecon Br. at 24. But *Hortman* reaffirmed this Court's previous holdings that "as a general rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function." 2006-Ohio-4251 at ¶ 25 (citation omitted). There is no dispute that a University's solicitation and consideration of bids is a governmental function.

The *Hortman* rule makes good sense. Otherwise—for instance, if the dissent's position in *Hortman* were adopted—every case in which a State entity is alleged to have violated a statute could include a claim for promissory estoppel (that is, a claim that the plaintiff expected the State entity to follow the law, but that the law was not followed). But no Ohio authority supports watering down the promissory estoppel principle into such a catch-all claim, and indeed, Mecon fails to cite any authority from this Court suggesting that promissory estoppel is synonymous with the mere alleged failure to follow a statute.

Mecon's reliance on the Tenth District's pre-*Cementech* decision in *Mechanical Contractors II* is also misplaced. There, the Tenth District found viable a claim for promissory estoppel in the context of the parties' public-bidding violation dispute, noting that a bidder would "have been reasonable" to rely on the University's representation that it was bound by, and

would adhere to, the State's public-bidding laws. *Mechanical Contractors II*, 2002-Ohio-3506 at ¶¶ 10-11. However, not only does the Tenth District's pre-*Cementech* decision not bind this Court, but also, given *Cementech*'s clear statement that disappointed bidders are limited to injunctive relief, 2006-Ohio-2991, ¶ 10, a promissory estoppel claim will not lie.

2. Mecon is not entitled to damages based on a theory of implied contract.

Mecon's position that it may recover its bid-preparation costs on an implied contract theory fares no better. The law on this issue is clear—a mere solicitation of bids does not give rise to a contractual agreement—be it express or implied—between parties. *University Merit Br.* at 12; see, e.g., *Cleveland Constr., Inc. v. City of Cincinnati*, 118 Ohio St. 3d, 2008-Ohio-2337, ¶ 7 (“a property interest in a public contract is created in two situations: one, when a bidder is actually awarded a contract and then deprived of it; and two, when a governmental entity has limited discretion in awarding the contract yet abuses that discretion”); see also 1-2 Corbin on Contracts § 2.3 (2009). Moreover, in cases such as this, where the government entity reserves the right to reject all bids, no bidder may claim a right in the contract until it has been awarded to him. See *Cleveland Constr., Inc.*, 2008-Ohio-2337 at ¶¶ 8-17; see also 1 Williston on Contracts § 4-13 (4th ed. 2007). In short, a contract is created only through the public entity's action of awarding the contract, not through the solicitation of a bid or the submission of a bid by a potential contractor. *University Merit Br.* at 11-12.

The isolated and anomalous New Mexico case Mecon cites does not change that fact. See *Mecon Br.* at 25-26 (citing *Planning & Design Solutions v. City of Santa Fe*. (N.M. 1994), 885 P. 2d 628, 636). *Cementech* expressly rejected all of the policy rationales on which the New Mexico court relied to allow the disappointed bidder to recover damages on an implied contract claim—namely, the need to deter government entities from violating State statutes, and the need

to uphold bidder confidence in government contracting procedures. See 2006-Ohio-2991 at ¶¶ 11-12.

a. Even if promissory estoppel were a viable theory (and it is not), the University did not violate R.C. 9.31.

Even if promissory estoppel were a viable theory (and it is not), Meccon's claim fails. Meccon asserts that the University violated R.C. 9.31 when it awarded the HVAC and fire contracts to S.A. Comunale after S.A. Comunale withdrew its plumbing bid and its combined bid. The question whether the University violated R.C. 9.31 is, of course, not before this Court. But much of Meccon's brief simply postulates that the University violated a public-bidding statute and appeals to the purported injustice that would ensue if the alleged violation goes unpunished. But those appeals are for naught, and this Court should not make law—and certainly not the incorrect law urged by Meccon—based on a hollow claim.

Meccon's position plainly misinterprets the relevant portion of R.C. 9.31, which states that “[n]o 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). In other words, R.C. 9.31 is an anti-manipulation provision: It prevents a bidder from strategically withdrawing one bid in order to be awarded another. But that is not what happened here, and it is not even what Meccon alleges happened. S.A. Comunale's withdrawn bids—its stand-alone plumbing bid and its bid for the combined plumbing, fire protection, and HVAC work—did not “*result*” in—that is, it did not cause—the University's decision to award it the separate fire protection and HVAC contracts (two contracts for which Meccon did not even submit a bid). S.A. Comunale was awarded those contracts for the independent reason that it was the lowest bidder. The withdrawn bids did not cause the University to select S.A. Comunale for the fire protection and HVAC contracts—indeed, Meccon alleges no such thing. Therefore, there was no violation of R.C. 9.31.

The only court to consider the likelihood that Meccon would succeed on the merits of its claim under R.C. 9.31 agreed with this assessment. When Meccon appealed the Court of Claims' dismissal to the Tenth District, the court reviewed the merits of Meccon's claim for an injunction pending appeal, and determined that Meccon failed to "demonstrat[e] the requisite elements for injunctive relief." Journal Entry, *Meccon v. Univ. of Akron* (10th Dist. Sept. 2, 2008), No. 08AP-727.

C. This Court has expressly rejected all of the public policy concerns on which Meccon relies.

Finally, Meccon's attempts to root its arguments in public policy fail. A rule that provides unsuccessful bidders with an equitable remedy alone is consistent with the public policies that this Court, in *Cementech*, identified as underlying the public-bidding statutes.

1. This Court declined to adopt Meccon's public policy arguments in *Cementech*.

Meccon's invitation for this Court to adopt the Tenth District's public policy rationales is baseless and nothing short of an invitation to overrule *Cementech*, which already rejected these public policy theories.

Meccon echoes the Tenth District's argument that allowing a disappointed bidder to recover bid-preparation costs enhances the integrity of the competitive-bidding process by deterring public entities from violating the State's public-bidding statutes, which in turn will maintain contractors' confidence in the fairness of the system and ensure a large pool of qualified bidders for public contracts. App. Op. at ¶ 24. In support of its argument, Meccon cites extensively to the Tenth District's pre-*Cementech* decision in *Mechanical Contractors I*. Meccon Br. at 17-19 (quoting *Mechanical Contractors I*, 141 Ohio App. 3d at 342-43). Meccon asserts that without money damages, a public entity would be able to violate competitive-bidding laws "without fear of meaningful reprisal, which might deter such violations in the future," while

leaving bidders without any recourse to recoup their losses. *Id.* at 18. But the Tenth District’s policy arguments in both *Mechanical Contractors I* and this case were already considered and rejected by this Court in *Cementech*, and the Tenth District is bound by that decision.

In *Cementech*, this Court evaluated the parties’ public policy arguments and determined that injunctive relief provided the best remedy to satisfy the purpose of the public-bidding laws—“to protect the taxpayer, prevent excessive costs and corrupt practices, and provide open and honest competition in bidding for public contracts.” 2006-Ohio-2991 at ¶ 9 (citing *Danes Clarkco Landfill Co. v. Clark County Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d 590, 602, 1995-Ohio-301). The reasoning of the Court’s determination extends beyond claims for lost profits such as the one at issue in *Cementech*. Though the University does not dispute that awards of money damages would protect bidders, such protection necessarily comes at a significant cost to the public, which would be forced to bear a project’s higher price tag. *Id.* Therefore, this Court explained, “[i]t is clear that in the context of competitive bidding for public contracts, injunctive relief provides a remedy that prevents excessive costs and corrupt practices, as well as protects the integrity of the bidding process, the public, and the bidders.” *Id.* at ¶ 11. This is no doubt true in theory as well as in practice. If a disappointed bidder timely seeks and obtains injunctive relief, all three parties will benefit: the government entity will be made aware of any possible error and have an opportunity to correct it; the contractor will be able to stop the project’s progress until the dispute is resolved; and the taxpayers’ coffers will go towards compensating the best bidder for the job.

2. The Tenth District decision will open the floodgates to litigation by disappointed bidders seeking more than nominal damages.

Mecon maintains that its claim for bid-preparation costs is nominal, not punitive, and will not require significant taxpayer funds. As a preliminary matter, there is little credibility in

Meccon's attempt to eschew a punitive theory late in its brief, given its earlier and repeated insistence that bid-preparation costs are necessary as a "meaningful reprisal"—that is, *punishment*—to deter violations in the future. Meccon Br. at 1, 13, 18 (quoting *Mechanical Contractors I*, 141 Ohio App. 3d at 342-43). Moreover, Meccon's position that "bid-preparation costs are generally not that significant," Meccon Br. at 33, has no grounding in fact. The reality is that regardless of what Meccon's bid-preparation costs might be in this case (and no evidence supports the Tenth District's determination that they are "de minim[is]," App. Op. at ¶ 24), its proposed rule would cause the public to incur massive costs in all government contracts going forward.

Every prospective bidder on a government contract incurs costs to prepare its bid. And as the size of a project increases, the amount of time and money that prospective contractors spend preparing their bids inevitably grows. In fact, the primary case Meccon cites in support of its implied contract claim, *Planning & Design Solutions*, expressly notes that "the preparation of a bid on a multi-million dollar project would involve numerous foreseeable expenditures on the part of the bidder including travel, graphic and textual reproduction, labor, shipping and mailing, electronic communication, consulting services, secretarial services, and other professional services." 885 P. 2d at 635. For instance, a large project such as The Ohio State University's new James Medical Center, which is currently estimated to include \$1 billion of construction by 2014, involved hundreds of bidders, who spent significant money and time to complete their bid packages in accordance with the required specifications. See Bob Hecker, *Growth Factor: A proposed multimillion dollar expansion of the OSUCCC-James will bring together patient care, research and education in one facility*, available at <http://www.jamesline.com/viewer/Pages>

[/index.aspx?P=411](#) (Aug. 22, 2008). Meccon's proposed rule would allow each prospective contractor to seek the return of his bid-preparation costs if he is not awarded the contract. Such a rule would have no limit and would award money damages to bidders who would never have secured contracts, even if the process were conducted flawlessly. And regardless of the viability of a disappointed bidder's claim that a government entity abused its discretion, any disappointed bidder would have license to hamstring the State in litigation in the Court of Claims, perhaps even strong-arming settlement, with no regard for the actual source of its requested relief—the taxpayers. Thus, the Tenth District's decision threatens to open "Pandora's box" in the realm of competitive bidding—benefitting bidders at great expense to the public.

Meccon cannot—and does not—attempt to counter this Court's clear statement that punitive damages against State entities, like the University, are barred absent explicit statutory authority. R.C. 2744.05(A); see *Drain v. Kosydar* (1978), 54 Ohio St. 2d 49, 55-56. "The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct." *Arbino v. Johnson & Johnson*, 116 Ohio St. 3d 468, 2007-Ohio-6948, ¶ 97. But Meccon's assertion that an award of bid-preparation costs would not be "punitive" because it would amount only to Meccon's "actual loss" cannot past muster. Meccon's attempt to define its bid-preparation costs as reliance damages fails where, as shown above, Meccon had no right to relief under statutory or state-law claims. Reliance damages are classic contract damages. But no contract existed between the University and Meccon here, and in any event, bid-preparation costs are, by definition, *pre-contract* expenses and therefore could not constitute reliance damages at all.

Finally, the University agrees with Meccon's position that "the General Assembly is 'the ultimate arbiter of public policy,'" Meccon Br. at 32 (citation omitted). In fact, that is precisely

the University's point. The General Assembly knows how to fashion a remedy for bid-preparation costs, and it could have included such a remedy in the statutory scheme, as it did in requiring a withdrawing bidder to pay the costs in connection with the resubmission of bids if its withdrawal causes the entity to incur those costs. See R.C. 9.31. The General Assembly's decision *not* to do so, however, can be interpreted as an express decision to limit disappointed bidders to injunctive relief only. See *State ex rel. Enos v. Stone* (1915), 92 Ohio St. 63, 66-67.

The same rule applies to counter Mecon's assertions that it has a viable claim for bid-preparation costs under theories of promissory estoppel and implied contract, or in an action to recover attorneys' fees. Mecon asserts that "a majority of jurisdictions award bid preparation costs under a variety of theories," including under theories of promissory and implied contract. Mecon Br. at 26. Mecon is wrong. See James L. Isham, *Public Contracts: low bidder's monetary relief against state or local agency for nonaward of contract*, 65 A.L.R. 4th 93, at *2a ("[T]he majority of courts have held that damages may not be recovered for rejection of a bid in violation of a statute which requires award of public contracts to 'lowest responsible bidder,' the second lowest responsible bidder, or the 'lowest and best bidder,' since allowing damages in such cases would be contrary to the public interest the statutes were intended to protect."). Moreover, Mecon fails to recognize that many of the jurisdictions that do allow the recovery of bid-preparation costs do so through *statute* only.¹ Had Ohio's General Assembly wanted to follow suit, it could have done so—but has not.

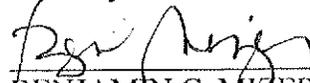
¹ The following state statutes allow a disappointed bidder with a viable claim against a government entity to recover certain specified money damages: Alaska Stat. § 36.30.585(c) (allowing recovery of bid-preparation costs); Ark. Code Ann. § 19-11-244(g) (same); S.C. Code Ann. § 11-35-4310(4) (same); Colo. Rev. Stat. § 24-109-104 (allowing recovery of bid-preparation costs and barring recovery of attorneys' fees); Hawaii Rev. Stat. § 103D-701(g) (same); La. Rev. Stat. Ann. § 39:1671(G) (same); Minn. Stat. § 471.345, subd. 14 (same); D.C. Code Ann. § 2-309.08(e)(2) (same); Md. Code Ann., State Fin. & Proc. § 15-221.1 (allowing

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the University's opening brief, this Court should reverse the judgment below and affirm the dismissal of this action from the Court of Claims for lack of jurisdiction based on Meccon's failure to state a claim for money damages.

Respectfully submitted,

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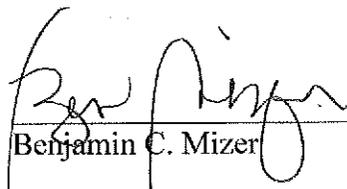
recovery of the reasonable costs of filing and pursuing a protest, not including attorneys' fees); Utah Code Ann. § 63G-6-803(1) (allowing recovery of bid-preparation and appeals costs to successful protestor and taxing unsuccessful protestor).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Appellant The University of Akron was served this 22nd day of December, 2009, upon the following counsel:

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