

**ORIGINAL**

**IN THE SUPREME COURT OF OHIO**

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

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**PLAINTIFF-APPELLEE'S MOTION FOR ATTORNEY'S FEES**

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MECCON, INC. AND RONALD R. BASSAK*

<b>FILED</b>
AUG 20 2010
CLERK OF COURT SUPREME COURT OF OHIO

## I. INTRODUCTION

Pursuant to Ohio Revised Code Section 2335.39(B)(1), Plaintiff-Appellee Meccon, Inc. ("Meccon"), respectfully moves this Honorable Court for an order awarding Meccon its attorney fees against Defendant-Appellant the University of Akron (the "State" and "University") in connection with this Court's decision in *Meccon, Inc. v. Univ. of Akron*, Slip Opinion No. 2010-Ohio-3297, decided on July 21, 2010. As fully discussed below, Meccon is the prevailing eligible party on the question before the Court in this action. The University's position in initiating the conduct that gave rise to the litigation was not substantially justified, and has resulted in Meccon incurring significant attorneys' fees. This motion is filed within thirty-days of this Court's Opinion, and Meccon requests that this Court grant its motion and award Meccon its attorney fees and expenses incurred to date in the amount of \$148,148.07.

## II. PROCEDURAL BACKGROUND

On June 3, 2008, the University received bids for the heating, ventilation, and air conditioning ("HVAC") contract for the University of Akron Football Stadium project (the "Project"). Shortly thereafter, on July 31, 2008, Meccon, the second low bidder for the HVAC contract, learned for the first time that despite mandatory language in R.C. 9.31 the University permitted S.A. Comunale Co., Inc. ("S.A. Comunale"), the apparent low-bidder for the HVAC contract, to withdraw its bid for multiple contracts and then wrongfully award S.A. Comunale the same HVAC contract it previously withdrew at a higher stand-alone price.<sup>1</sup>

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<sup>1</sup> Ohio's mistake-in-bid law is contained in R.C. 9.31 and unequivocally states that "*No bid may be withdrawn under this section when the result would be the awarding of the contract on another bid of the same bidder.*" *Id.* (emphasis added).

Alleging a violation of Ohio's competitive bidding laws, Mecon 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.

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, Mecon's request for declaratory relief and monetary damages was not appropriate and the trial court therefore lacked subject matter jurisdiction.

Mecon 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 Mecon 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 Mecon's Motion for Temporary Restraining Order as moot.

The next day, on August 22, 2008, Mecon fully and timely complied with the procedural requirements to institute its appeal. On appeal, the Tenth District reversed the trial court's decision and remanded the matter for further proceedings, recognizing 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." *Mecon, Inc. v. Univ. of Akron*, 182 Ohio App.3d 85, ¶ 8, 2009-Ohio-1700.

The University filed its notice of appeal of the Tenth District's judgment on May 22, 2009, and this Court accepted the appeal for review on August 26, 2009. In its decision this Court held that "[t]he issue of whether bid-preparation costs could be recovered by a wrongfully rejected bidder was not answered in *Cementech*,"<sup>2</sup> as argued by the University, and that a "bidder may recover reasonable bid-preparation costs as damages if that bidder promptly sought, but was denied, injunctive relief and it is later determined that the bidder was wrongfully rejected and injunctive relief is no longer available" (*Cementech* at syllabus), thereby affirming the judgment of the court of appeals and remanding the matter to the Court of Claims for further proceedings.

As the prevailing eligible party in this action, Mecon seeks an award of its attorneys' fees.

### III. LAW AND ARGUMENT

As the prevailing eligible party in this dispute with the University, Mecon has a statutory right to an award of attorneys fees. Section 2335.39 of the Ohio Revised Code provides in pertinent part that:

...in 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, upon filing a motion in accordance with this division, to compensation for fees incurred by that party in connection with the action or appeal...

R.C. 2335.39(B)(1). It further provides that the prevailing party must file a motion for fees "with the court within thirty days after the court enters final judgment in the action or appeal" and "shall do all of the following:

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<sup>2</sup> *Cementech, Inc. v. Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991, 849 N.E.2d 24.

- (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."

R.C. 2335.39(B)(1)(a-e).

"With respect to a motion filed under this section, the [University] has the burden of proving that its position in initiating the matter in controversy was substantially justified[.]" *Id.* Because the University cannot meet that burden, and for the reasons further explained below, Mecon is entitled to an award compensating it for attorneys fees incurred in connection with this dispute.

**(a) Identification of Mecon as an Eligible Party.**

Plaintiff-Appellee Mecon, Inc. is identified as the party requesting the award of attorney's fees in this matter. Revised Code Section 2335.39 is Ohio's version of the Federal Equal Access to Justice Act (5 U.S.C. 504(a)(2)), which "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. R.C. 2335.39 also serves to allow small businesses and individuals with modest means, to litigate against the state and not be concerned about incurring substantial legal fees to do so.

Among other things, under Rev. Code Section 2335.39(A)(2)(c) an eligible party "means a party to an action or appeal involving the state, other than" \* \* \* "[a] ... corporation ...that had, a net worth exceeding five million dollars at the time the action or appeal was filed..." R.C. 2335.39(A)(2)(c). Meccon is an Ohio corporation which specializes in the construction, reconstruction, and design of heating, ventilating and air conditioning systems on both public and private construction contracts in Ohio. (See Affidavit of Ronald R. Bassak ("Bassak Aff.") at ¶ 3, attached hereto as Exhibit 1.) Meccon's principal place of business is located in Akron, Summit County, Ohio. Bassak Aff. at ¶ 4. On August 6, 2008, Meccon filed this action against the University, and retained attorneys from the law firm of Thompson Hine LLP in Columbus, Ohio to represent it throughout these proceedings. Bassak Aff. at ¶ 5. At the time this action was filed in the Court of Claims, and at all times during these proceedings, Meccon's net worth never exceeded five million dollars. Bassak Aff. at ¶ 6. Accordingly, Meccon is an eligible party as that term is defined under Rev. Code Section 2335.39.

**(b) Meccon is the Prevailing Eligible Party Entitled to an Award of Attorneys' Fees.**

A "prevailing eligible party" is defined as a "party that prevails in an action or appeal involving state." R.C. 2335.39(A)(5). This Court has further defined a "prevailing eligible party" as "[a] party who appeals an order or judgment and prevails to the extent that he obtains a new trial, or a modification of the judgment[.]" *Parker v. I&F Insulation Company, Inc.*, 89 Ohio St. 3d 261, 265, 2000 Ohio 151, 730 N.E.2d 972; adopting the Tenth District Court of Appeals definition in *Korn v. State Med. Bd.* (1991), 71 Ohio App. 3d 483, 487, 594 N.E.2d 720.) Moreover, "there is nothing in [R.C. 2335.39] that requires a finding that a prevailing party on an appeal is limited to one who succeeds in having a "complete victory," which

presumably means having the entire matter determined in his favor without a remand[.]" *Korn* at 487, 594 N.E.2d at 723.

For the University to have been the prevailing party upon the appeal of the appellate court's decision, there would have been a reversal of the Tenth District's opinion and reinstatement of the trial court's decision. That is not the case.

In light of Mecon's participation in this action and appeal involving the State, and the opinion from this Court affirming the judgment of the Court of Appeals which denied the University's motion to dismiss and remanded the case for further proceedings, it is Mecon, and not the University, that satisfies these definitions. Thus, Mecon is the "prevailing eligible party" entitled to an award of attorneys' fees from the State.

**(c) The University's Position was not Substantially Justified.**

In accordance with Ohio Rev. Code Section 2335.39(B)(1)(c), the University's initiation of this matter in controversy was not substantially justified. While Mecon filed its complaint in this action on August 6, 2008, the operative initiating act for purposes of this motion is not the filing of the action by Mecon, but the University's conduct that gave rise to the litigation and the University's subsequent motion practice.

In *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St. 3d 1, 2002 Ohio 6716, 780 N.E.2d 998, this Court clarified Rev. Code Section 2335.39 stating that attorney's fee awards are permitted "where the state initiates either the *conduct* that gave rise to the litigation *or* initiates the litigation caused by the controversy." *State ex rel. R.T.G.* at 14. "Clearly the purpose of R.C. 2335.39 is to protect citizens from unjustified state action. If fees under R.C. 2335.39 were permitted only where the state initiated the legal action, [then] the protection that R.C. 2335.39

[provides] would not be available ... [to plaintiffs] compelled to initiate legal action to get relief from the state." *Id.* Such is the case here.

It is also recognized that bad faith or malice need not be found in order for the Court to determine that the state's position was not "substantially justified." *Collyer v. Broadview Development Center* (1992), 81 Ohio App. 3d 445, 449, 611 N.E.2d 390. Ultimately, the burden of establishing that its position in the legal proceedings was substantially justified is on the University. *State ex rel. R.T.G., Inc.*, supra, at ¶ 69. Based on the facts, the University cannot meet its burden.

In this case, it was the University who initiated the conduct that led to this litigation and the subsequent appeals after the University directly violated Ohio's competitive bidding statutes, specifically R.C. 9.31, and the University's own bid documents. As a result of this conduct, Mecon was forced to file this action against the University to preserve its rights and the integrity of Ohio's competitive bidding process. The complaint filed by Mecon sought equitable relief, including declaratory judgment, temporary, preliminary and permanent injunction, and monetary damages related to Mecon's bid preparation costs, as well as such other further relief as the court deemed proper. The relief sought by Mecon was not only consistent with numerous Ohio appellate and trial courts permitting bidders to pursue monetary damages in the Court of Claims<sup>3</sup>, but was also consistent with this Court's opinion in *Cementech, Inc. v. Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991, 849 N.E.2d 107 where the trial court's decision awarding monetary damages to the protesting bidder was specifically upheld. Furthermore, the same lawyers who represent the University herein, were also intimately

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<sup>3</sup> See, *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312, 712 N.E.2d 1258; *Mechanical Contractors Assn. of Cincinnati, Inc. v. Univ. of Cincinnati* (2001), 141 Ohio App.3d 333, 750 N.E.2d 1217; *Mechanical Contractors Assn. of Cincinnati, Inc. v. Univ. of Cincinnati*, 152 Ohio App.3d 466, 2003-Ohio-1837, 788 N.E.2d 670.

involved in the previously footnoted appellate cases, all of which permitted disappointed bidders to pursue monetary damages against the State in the Court of Claims.

In *Tiemann v. Univ. of Cincinnati*, supra, the issue was whether the Court of Claims had exclusive, original jurisdiction over injunctive and declaratory claims brought by a protesting bidder. After the trial court found in favor of the disappointed bidder, the University's counsel herein argued on appeal on behalf of the University of Cincinnati that the trial court lacked subject matter jurisdiction to hear the claims for relief because no monetary damages had been alleged. In fact, counsel specifically 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 July 25, 1997 in *Tiemann*, Ohio Court of Claims, Case No. 97-07781, at page 8, attached hereto as Exhibit 2. The Tenth District upheld the determination that jurisdiction was proper in the Court of Claims, even where specific money damages had not been pleaded.

Following *Tiemann*, the University's counsel was again involved in the follow-on cases in the Court of Claims involving the same construction project at issue in *Tiemann*, the same bid protests and the recovery of monetary damages in the form of bid preparation costs and attorney's fees: *Mechanical Contractors Assn. of Cincinnati, Inc. v. Univ. of Cincinnati* (2001) ("*Mechanical Contractors I*"), supra; and, *Mechanical Contractors Assn. of Cincinnati, Inc. v. Univ. of Cincinnati* (2003) ("*Mechanical Contractors II*"), supra, where the Court specifically held that a prevailing party is entitled to compensation for attorney's fees arising out of a disappointed bidder case. In fact, the Tenth District held as follows as it relates to an award of fees pursuant to R.C. 2335.39:

\* \* \* [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 ¶¶ 41 – 42.

In both *Mechanical Contractors I* and *Mechanical Contractors II*, the State did not argue that the Court of Claims lacked subject matter jurisdiction presumably because of the Court's prior determination that jurisdiction was indeed proper in the Court of Claims. That notwithstanding, the University herein ignored this prior ruling and argued that there was no jurisdiction here, despite the fact that its counsel was involved in the prior litigation where that had already been determined.

Finally, and perhaps demonstrating how substantially *un*-justified the University's position is, is the fact that the State in another case, *Barr v. Jones*, 160 Ohio App.3d 320, 2005-Ohio-1488, had previously taken the exact opposite position that it took in this appeal 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*, the State sought to invoke the subject matter jurisdiction of the Court of Claims by moving to dismiss an appellant's case originally filed in the Court of Common Pleas 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). Apparently when it suits their needs, the State argues for jurisdiction by virtue of a prayer for monetary damages and when it does not, it ignores prior precedent and argues that jurisdiction does not exist.

The fact that the University pursued a position which it knew had no legal support, the fact that the University's counsel had previously used Mecon's exact argument as an offensive position to forum shop and avoid having its cases heard on the merits before the Court of Common Pleas, and the fact that the Tenth District has already ruled that jurisdiction in a similar bid protest case is appropriate in the Court of Claims establishes that the University's conduct in this action and appeal was not substantially justified.

Further, the University's conduct was not substantially justified because its decision to file a motion to dismiss and appeal was nothing more than a ruse to postpone Mecon's ability to be heard. Because of the time-sensitive nature of bid disputes, depriving Mecon's ability to be heard on the merits early on resulted in a less meaningful remedy and permitted the University to complete its project without interference from the Court.

Thus, the University's conduct in violating Ohio's competitive bidding laws, pursuing a position through its motion practice that it knew from the start had no support, and ultimately depriving Mecon from having its case heard on the merits, the University acted in a manner that was not substantially justified.

**(d) Mecon seeks the Award of Fees in the Amount of \$148,148.07.**

Mecon seeks to recover \$148,148.07 in attorneys' fees made by it in connection with this action, consisting of \$141,312.50 in hourly billings plus expenses totaling \$6,835.57.

Ohio Revised Code § 2335.39(A)(3) defines "fees" subject to recovery as "reasonable attorney's fees, in an amount not to exceed seventy-five dollars per hour or a higher hourly fee as approved by the court." The General Assembly set the seventy-five dollar per hour presumption in 1984 in Am. Sub. S.B. 102, and it has not been adjusted since then. Thus, the determination of reasonable attorney's fees essentially is at the sound discretion of this Court.

**(e) Itemization of Fees.**

As of August 19, 2010, Thompson Hine LLP has billed Mecon hourly fees in the amount of \$141,312.50 for its representation of Mecon in this action plus \$6,835.57 for actual expenses incurred. (See Affidavit of Peter D. Welin, partner with Thompson Hine LLP, attached hereto as Exhibit 3.) As required under R.C. 2335.39(B)(1)(e), each attorney's and paralegal's billing rate and the hours they worked are itemized in the statement attached hereto as Attachment A to Exhibit 3, and the expenses charged Mecon are similarly itemized in the statement attached as Attachment B to Exhibit 3.<sup>4</sup>

This action has labored for more than two years, much because of the University's attempt to expand this Court's limited holding in *Cementech* in an unsuccessful effort to forever prevent another successful bid protest against a state institution in the State of Ohio. This action has involved significant briefing involving the University's efforts to dismiss the action in an attempt to avoid resolution of Mecon's claims by a state court. For these reasons and those set forth herein establish that the fees incurred by Mecon were reasonable.

**IV. CONCLUSION**

For the foregoing reasons, and as provided in Ohio Revised Code § 2335.39, Plaintiff-Appellee Mecon, Inc. respectfully requests that this Honorable Court grant this Motion and enter an order awarding Mecon \$148,148.07 in attorneys' fees and expenses from Defendant-Appellant The University of Akron.

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<sup>4</sup> At the Court's request, itemized billing statements can be made available for review subject to appropriate protections of the attorney client privilege.

Respectfully submitted,



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*Counsel for Plaintiff-Appellees Meccon, Inc.  
and Ronald R. Bassak*

### CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Plaintiff-Appellees' Motion for Attorney's Fees was served via regular U.S. Mail, postage prepaid, this 20th day of August, 2010, upon the following:

Richard Cordray  
Attorney General of Ohio  
Benjamin C. Mizer  
Solicitor General  
Alexandra T. Schimmer  
Chief Deputy Solicitor General  
William C. Becker

Assistant Attorneys General  
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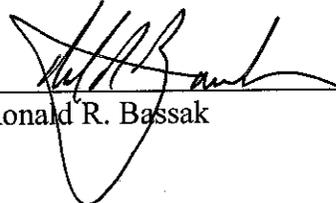


Andrew R. Fredelake

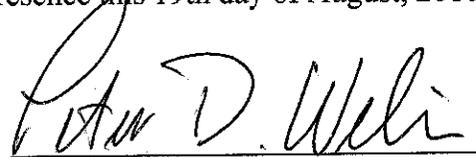


6. At the time this action was filed in the Court of Claims, and at all times during these proceedings Meccon's net worth never exceeded five million dollars. A true and accurate copy of Meccon's financial statement from the years 2008 – 2009 is attached hereto as Exhibit A.

Signed under the Penalties and Pains of Perjury this 19<sup>th</sup> day of August, 2010.

  
\_\_\_\_\_  
Ronald R. Bassak

SWORN TO BEFORE ME and subscribed in my presence this 19th day of August, 2010.

  
\_\_\_\_\_  
Notary Public



**PETER D. WELIN, ATTORNEY AT LAW**  
NOTARY PUBLIC, STATE OF OHIO  
My commission has no expiration date.  
Section 147.03 R.C.

**REVIEWED FINANCIAL STATEMENTS AND OTHER  
DATA**

**MECCON, INC., AKRON, OHIO**

**December 31, 2009 and 2008**

**EXHIBIT  
A**

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# Arvay and Associates, CPA

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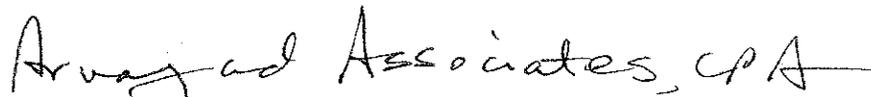
## INDEPENDENT ACCOUNTANT'S REVIEW REPORT

Shareholder  
Mecon, Inc.  
Akron, Ohio

We have reviewed the accompanying balance sheets of Mecon, Inc. as of December 31, 2009 and 2008 and the related statements of income, retained earnings and cash flows for the years then ended, in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants. All information included in these financial statements is the representation of the management of Mecon, Inc.

A review consists principally of inquiries of Company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

Based on our review, we are not aware of any material modifications that should be made to the accompanying financial statements in order for them to be in conformity with generally accepted accounting principles.



Arvay and Associates, CPA  
Akron, Ohio  
March 19, 2010

**BALANCE SHEETS****MECCON, INC.**

December 31, 2009 and 2008

	<u>ASSETS</u>	<u>2009</u>	<u>2008</u>
<b>CURRENT ASSETS</b>			
Cash and cash equivalents		\$562,808	\$517,379
Marketable securities		164,250	0
Accounts receivable			
Trade		1,761,541	2,604,967
Retainage		684,017	580,828
Costs and estimated earnings in excess of billings on contracts in process		963,574	264,647
Inventories			
Supplies		102,500	70,500
Small tools		18,000	18,000
Prepaid expenses		2,705	12,840
<b>TOTAL CURRENT ASSETS</b>		<b>4,259,395</b>	<b>4,069,161</b>
<b>OTHER ASSETS</b>			
Deposits		1,000	1,000
		1,000	1,000
<b>PROPERTY and EQUIPMENT</b>			
Leasehold improvements		168,549	146,406
Machinery and equipment		228,114	198,150
Furniture and fixtures		55,988	40,234
Vehicles		232,394	200,262
		685,045	585,052
Less accumulated depreciation and amortization		367,517	336,155
		317,528	248,897
		<b>\$4,577,923</b>	<b>\$4,319,058</b>

The accompanying notes are an integral part of the financial statements.

See independent accountant's review report.

**BALANCE SHEETS****MECCON, INC.**

December 31, 2009 and 2008

<b><u>LIABILITIES and STOCKHOLDERS' EQUITY</u></b>		
	<b>2009</b>	<b>2008</b>
<b>CURRENT LIABILITIES</b>		
Notes payable - current	\$23,521	\$0
Accounts payable		
Trade	1,010,245	1,535,685
Retainage	320,823	314,778
Taxes withheld from employees	15,682	12,973
Miscellaneous employee deductions	6,707	5,433
Billings in excess of costs and estimated earnings on contracts in process	700,358	593,765
Accrued expenses		
Payroll	66,315	60,161
Union benefits	61,514	41,377
Industrial insurance	30,274	26,098
Retirement	11,428	11,597
Taxes	21,441	21,278
<b>TOTAL CURRENT LIABILITIES</b>	<b>2,268,308</b>	<b>2,623,145</b>
<b>STOCKHOLDERS' EQUITY</b>		
Common stock		
Class A, voting, no par value; authorized and issued 160 shares including 10 shares in treasury	9,975	9,975
Class B, nonvoting, no par value; authorized and issued 440 shares including 320 shares in treasury	27,425	27,425
Retained earnings	2,398,517	1,793,498
	2,435,917	1,830,898
Accumulated other comprehensive income	8,683	0
Treasury shares at cost	(134,985)	(134,985)
	2,309,615	1,695,913
	<b>\$4,577,923</b>	<b>\$4,319,058</b>

The accompanying notes are an integral part of the financial statements.

See independent accountant's review report.

**STATEMENTS OF INCOME**

**MECCON, INC.**

For the years ended December 31, 2009 and 2008

	2009	2008
<b>SALES</b>	\$14,107,301	\$12,579,574
<b>COST OF SALES</b>	11,940,215	10,758,589
<b>GROSS PROFIT</b>	2,167,086	1,820,985
<b>ADMINISTRATIVE EXPENSES</b>	786,351	696,944
<b>OPERATING INCOME</b>	1,380,735	1,124,041
<b>OTHER INCOME ( EXPENSE)</b>		
Interest income	2,847	7,061
Interest expense	(126)	(1,680)
	2,721	5,381
<b>INCOME BEFORE FEDERAL INCOME TAXES</b>	1,383,456	1,129,422
<b>CITY INCOME TAXES</b>		
Current year expense	25,183	27,776
<b>NET INCOME</b>	<b>\$1,358,273</b>	<b>\$1,101,646</b>

The accompanying notes are an integral part of the financial statements.

See independent accountant's review report.

**STATEMENTS OF RETAINED EARNINGS**

**MECCON, INC.**

For the years ended December 31, 2009 and 2008

	<u>2009</u>	<u>2008</u>
<b>BALANCE, BEGINNING OF YEAR</b>	\$1,793,498	\$1,322,959
Net income for the year	1,358,273	1,101,646
Shareholder distributions	(753,254)	(631,107)
<b>BALANCE, END OF YEAR</b>	<b>\$2,398,517</b>	<b>\$1,793,498</b>

The accompanying notes are an integral part of the financial statements.

See independent accountant's review report.

**STATEMENTS OF CASH FLOWS****MECCON, INC.**

For the years ended December 31, 2009 and 2008

	2009	2008
<b>CASH FLOWS FROM OPERATING ACTIVITIES</b>		
Net income	\$1,358,273	\$1,101,646
Noncash items included in income		
Depreciation and amortization	66,270	63,661
Changes in assets and liabilities		
Accounts receivable	740,237	(1,596,702)
Net costs and estimated earnings in excess of billings on contracts in process	(592,334)	441,003
Inventories	(32,000)	(3,500)
Prepaid expenses	10,135	21,053
Accounts payable	(515,412)	712,678
Accrued expenses	30,461	43,408
<b>CASH PROVIDED BY OPERATING ACTIVITIES</b>	<b>1,065,630</b>	<b>783,247</b>
<b>CASH FLOWS FROM INVESTING ACTIVITIES</b>		
Purchase of marketable securities	(155,567)	0
Trade-in of automobiles	3,306	0
Purchases of property and equipment	(138,207)	(88,162)
<b>CASH USED FOR INVESTING ACTIVITIES</b>	<b>(290,468)</b>	<b>(88,162)</b>
<b>CASH FLOWS FROM FINANCING ACTIVITIES</b>		
Shareholder Distributions	(753,254)	(631,107)
Proceeds from notes payable	25,598	0
Repayment of notes payable	(2,077)	(54,844)
<b>CASH USED IN FINANCING ACTIVITIES</b>	<b>(729,733)</b>	<b>(685,951)</b>
<b>INCREASE (DECREASE) IN CASH</b>	<b>45,429</b>	<b>9,134</b>
<b>CASH AND CASH EQUIVALENTS, BEGINNING OF YEAR</b>	<b>517,379</b>	<b>508,245</b>
<b>CASH AND CASH EQUIVALENTS, END OF YEAR</b>	<b>\$562,808</b>	<b>\$517,379</b>

The accompanying notes are an integral part of the financial statements.  
See independent accountant's review report.

## NOTES TO FINANCIAL STATEMENTS

### MECCON, INC.

#### Note 1 NATURE OF BUSINESS AND SIGNIFICANT ACCOUNTING POLICIES

##### Nature of Business

The Company is a mechanical contractor located in Akron, Ohio. The Company grants credit to customers, substantially all of who are located in Northeast Ohio.

The financial statements reflect the application of certain accounting policies described in this note.

##### Estimates

The preparation of the financial statements in conformity with generally accepted accounting principles requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities and disclosures of contingent assets and liabilities as of the date of the financial statements and the reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

##### Revenue and Cost Recognition

Revenues and costs from long-term contracts are recognized using the percentage-of-completion method measured by the ratio that total costs incurred bear to total estimated costs.

Revenues from short-term contracts are recorded upon substantial completion of each contract.

Contract costs (cost of sales) include all direct material and labor costs and those indirect costs related to contract performance, such as indirect labor, supplies, tools, repairs and depreciation cost. Selling, general, and administrative costs are charged to expense as incurred. Provisions for estimated losses on uncompleted contracts are made in the period in which such losses are determined. Changes in job performance, conditions and estimated profitability may result in revisions to costs and income and are recognized in the period in which the revisions are determined.

The asset, "Costs and estimated earnings in excess of billings on contracts in process," represents revenues recognized in excess of amounts billed. The liability, "Billings in excess of costs and estimated earnings on contracts in process," represents billings in excess of revenues recognized.

##### Cash and Cash Equivalents

For purposes of financial statement presentation, the Company considers all highly liquid debt instruments purchased with a maturity of three months or less to be cash equivalents.

##### Concentrations of Credit Risk

Financial instruments that potentially subject the Company to concentrations of credit risk consist principally of temporary cash investments. The Company places its temporary cash investments with financial institutions and, although at times during the year they had invested amounts in the excess of federal insurance limits, management does not feel that the Company is exposed to any substantial credit risk.

## NOTES TO FINANCIAL STATEMENTS (CONTINUED)

### MECCON, INC.

#### Note 1 NATURE OF BUSINESS AND SIGNIFICANT ACCOUNTING POLICIES (CONTINUED)

##### Trade Accounts Receivable

Trade accounts receivable is recorded at the amount the Company expects to collect on balances outstanding at year-end.

##### Inventories

Supply and small tools inventories are stated at the lower of cost (first-in, first-out) or market.

##### Property and Equipment

Property and equipment are stated at cost less accumulated depreciation and amortization. Expenditures for maintenance and repairs are charged to operations as incurred, while expenditures for additions and improvements are generally capitalized.

The provisions for financial statement depreciation and amortization are generally based on accelerated depreciation methods over the estimated useful lives of the assets. For Federal income tax purposes, the Company uses statutory lives and rates.

##### Income Taxes

As of January 1, 2004, Meccon, Inc. has elected to be taxed under the provisions of Subchapter S of the Internal Revenue Code. Under those provisions, the Company does not pay federal corporate income taxes on its taxable income. Instead, the shareholder is liable for individual federal income taxes on his respective shares of Meccon, Inc.

#### Note 2 MARKETABLE SECURITIES

Investments in marketable securities at December 31, 2009 are as follows:

	Cost	Unrealized Gain	Fair Value
Available for sale:			
Stocks	\$74,451	\$6,555	\$81,006
Mututal funds	81,116	2,128	83,244
	<u>\$155,567</u>	<u>\$8,683</u>	<u>\$164,250</u>

The change in net unrealized gains on marketable securities in the amount of \$8,683 have been charged to other comprehensive income for the year ended December 31, 2009. This charge is reflected in the Stockholders' Equity portion of the Balance Sheet.

**NOTES TO FINANCIAL STATEMENTS (CONTINUED)**

**MECCON, INC.**

**Note 3 ACCOUNTS RECEIVABLE**

	<b>2009</b>	<b>2008</b>
Accounts receivable		
Completed contracts	\$ 199,050	\$ 565,537
Contracts in Progress	1,562,491	2,039,430
	<u>\$ 1,761,541</u>	<u>\$ 2,604,967</u>

**Note 4 LINE OF CREDIT**

The Company's operating line of credit with a local bank is \$400,000 with a variable interest rate at the 30 day LIBOR plus 2.00%, secured by the assets of the Company. In addition, the Company has an equipment line of credit with a local bank for \$100,000 with a variable interest rate of First Merit 5 year Cost of Funds rate plus 2.50%, secured by said purchased equipment. The outstanding balance on the lines of credit at December 31, 2009 and 2008 was \$0. Interest paid on the lines of credit was \$0 for 2009 and 2008, respectively.

**Note 5 COSTS AND ESTIMATED EARNINGS ON CONTRACTS IN PROCESS**

The following summarizes costs, estimated earnings and billings on contracts in process at December 31:

	<b>2009</b>	<b>2008</b>
Costs incurred on uncompleted contracts	\$ 11,703,795	\$ 9,975,299
Estimated earnings	1,492,311	1,148,687
	<u>13,196,106</u>	<u>11,123,986</u>
Billings on uncompleted contracts	(12,932,890)	(11,453,104)
	<u>\$ 263,216</u>	<u>\$ (329,118)</u>

Presented in the accompanying balance sheets as:

Costs and estimated earnings in excess of billings on contracts in process	\$ 963,574	\$ 264,647
Billings in excess of costs and estimated earnings on contracts in process	(700,358)	(593,765)
	<u>\$ 263,216</u>	<u>\$ (329,118)</u>

## NOTES TO FINANCIAL STATEMENTS (CONTINUED)

### MECCON, INC.

#### Note 6 RETIREMENT PLANS AND CONTINGENCY

The Company contributes to union-sponsored multi-employer retirement plans in accordance with negotiated labor contracts. The retirement plans cover all of the Company's union employees. Contributions are based on varying rates for the hours worked by the employees. The plans are not administered by the Company and, accordingly, the actuarial present value of plan benefits and net assets available for benefits cannot be reliably determined. Contributions amounted to \$300,874 and \$190,916 for 2009 and 2008, respectively.

Governmental regulations impose certain requirements relative to multi-employer plans. In the event of plan termination or employer withdrawal, an employer may be liable for a portion of the plan's unfunded vested benefits. The Company has not received information from the plan's administrators to determine its share of unfunded vested benefits. The Company does not anticipate withdrawal from the plans, nor is the Company aware of any expected plan termination.

Effective January 1, 2007, the Company adopted a Simple IRA Pension Plan. For each plan year the employer will contribute to each eligible employee's account an amount equal to the employee's salary reduction contributions up to a maximum of 3% of the employee's compensation for the year. A contributing participant may elect to have his or her compensation reduced each pay period by an amount not in excess of the maximum amount set by the Secretary of the Treasury, currently \$11,500 annually. All employees are eligible to become a participant in the plan, except employees covered by a collective bargaining agreement or an employee who has received less than \$5,000 of compensation during the year. Expense related to the plan was \$11,428 and \$11,597 for 2009 and 2008, respectively.

#### Note 7 RELATED PARTY TRANSACTIONS

The Company leases its corporate offices and warehouse from the shareholder under a five-year operating lease expiring December 31, 2012. Annual rental expense for 2009 and 2008 amounted to \$96,400 and \$98,000, respectively.

The following is a schedule of future minimum lease payments required under the above operating lease as of December 31, 2009:

<u>Year Ending</u> <u>December 31</u>	<u>Amount</u>
2010	\$100,800
2011	105,600
2012	110,400

In addition, the Company is a guarantor on the mortgage loans of one wholly owned corporation of the shareholder. Those loan balances are \$397,425 and \$443,438 at December 31, 2009 and 2008, respectively.

## NOTES TO FINANCIAL STATEMENTS (CONTINUED)

### MECCON, INC.

#### Note 8 CONCENTRATION OF CREDIT RISK

At December 31, 2009, the Company had outstanding trade receivables from two customers in the amount of \$1,142,583, representing approximately 47% of total trade receivables.

#### Note 9 EMPLOYMENT AGREEMENT

During 2007, the Company entered into an employment agreement with a key employee. The agreement provides for a base salary, benefits and a profit sharing arrangement. For 2009 and 2008, an accrual has been recorded in the amount of \$52,500, which is the maximum amount of the profit sharing arrangement based on the profit of the Company at year end.

#### Note 10 NOTES PAYABLE

Notes payable consists of the following at December 31, 2009

Bank note payable, \$2,203 per month, including Interest at 5.99% for 12 months, beginning January 6, 2010, secured by vehicle	<u>\$23,521</u>
--	-----------------

This note is classified as current on the balance sheet.

#### Note 11 BACKLOG

The amount of revenue the entity expects to realize from work to be performed on uncompleted contracts in progress and from contractual agreements on which work had not yet begun was \$8,730,805 at December 31, 2009.

In addition, between January 1, 2010 and February 25, 2010, Meccon, Inc. entered into additional construction contracts with revenues of \$690,319.

**OTHER DATA**

# Arvay and Associates, CPA

A Certified Public Accounting & Not-for-Profit Consulting Firm  
Member: American Society of CPA's & Ohio Society of CPA's

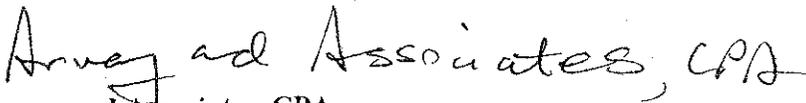
700 Mentor Road, Akron, Ohio 44303-1655  
Tele. (330) 865-9334, Fax (330) 247-1703, E-mail: Amavaycpa@aol.com

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## INDEPENDENT ACCOUNTANT'S REVIEW REPORT ON OTHER DATA

Shareholder  
Mecon, Inc.  
Akron, Ohio

Our review was made for the purpose of expressing limited assurance that there are no material modifications that should be made to the basic financial statements in order for them to be in conformity with generally accepted accounting principles. The other data that follows is presented for purposes of additional analysis and is not a required part of the basic financial statements. Such information has been subjected to the inquiry and analytical procedures applied in the reviews of the basic financial statements, and we did not become aware of any material modifications that should be made to such information.

  
Arvay and Associates, CPA  
Akron, Ohio  
March 19, 2010

SCHEDULES OF COST OF SALES

MECCON, INC.

For the years ended December 31, 2009 and 2008

	<u>2009</u>	<u>2008</u>
Materials	\$2,710,289	\$2,530,455
Labor	1,059,966	690,469
Subcontract	6,753,471	6,417,080
Miscellaneous job costs	15,689	64,920
Union benefits	537,415	335,091
Payroll taxes	143,098	105,204
Plan and bid deposits	0	600
Bonds	147,889	136,377
License and permits	9,245	27,143
Utilities	22,508	22,136
Building rent	96,400	98,000
Vehicle expense	49,600	58,837
Depreciation and amortization	66,270	63,661
Telephone	17,594	15,169
Small tools and supplies	131,364	61,263
Insurance		
General	56,887	46,019
Industrial	62,409	37,703
Equipment rental	36,732	27,538
Repairs and maintenance	23,389	20,924
	<u>\$11,940,215</u>	<u>\$10,758,589</u>

See independent accountant's review report on other data.

**SCHEDULES OF ADMINISTRATIVE EXPENSES**

**MECCON, INC.**

**For the years ended December 31, 2009 and 2008**

	<b>2009</b>	<b>2008</b>
Officer salary	\$81,120	\$82,680
Office salaries	185,594	163,788
Estimator salary	153,062	144,232
Retirement expense	11,428	11,597
Employee benefits	50,302	68,546
Advertising	2,892	0
Meals and entertainment	31,064	26,227
Legal and accounting	101,849	63,416
Contributions	51,337	37,300
Computer service	3,480	3,893
Dues and subscriptions	7,437	7,562
Educational expense	7,622	368
Officer's life insurance	835	835
Office supplies and postage	53,955	48,539
Security	1,174	2,477
Taxes	31,785	24,536
Miscellaneous	11,415	10,948
	<b>\$786,351</b>	<b>\$696,944</b>

See independent accountant's review report on other data.

December 31, 2009

Project	Contract Amount	Estimated Total Cost	To Date		Recognized in Prior Years		December 31, 2009		Total Cost and Gross Profit to Date	Billings to 12-31-09	Costs and Estimated Earnings in Excess of Billings	Billings in Excess of Costs and Estimated Earnings
			Sales	Cost of Sales	Sales	Cost of Sales	Sales	Cost of Sales				
USPS COLUMBUS AREA - LSAP	\$250,338	\$211,068	\$250,338	\$211,068	\$250,338	\$211,068	\$0	\$0	\$250,338	\$232,873	\$17,465	\$0
USPS KENTUCKY AREA	347,390	294,458	347,390	294,458	347,390	294,458	0	0	347,390	343,130	4,260	0
SEIBERLING FEDERAL BUILDING	2,293,907	1,850,147	2,040,470	1,645,745	610,531	524,991	1,429,939	1,120,754	2,040,470	1,489,738	570,732	0
U OF A WAYNE COLLEGE	770,581	710,035	768,832	708,425	280,968	259,775	487,684	448,650	768,832	752,178	16,654	0
USPS MANSFIELD HVAC UPGRADE	1,411,545	1,249,264	1,408,736	1,246,780	898,411	793,380	510,325	453,400	1,408,736	1,403,345	5,391	0
SUMMIT CENTER RENOVATION	524,721	525,866	524,721	525,866	154,584	146,436	370,137	380,430	524,721	517,550	7,171	0
LEGGETT CLC	1,309,878	1,265,447	1,244,594	1,202,376	15,250	14,141	1,229,334	1,188,235	1,244,594	1,270,890	0	26,296
FAIRMOUNT PUMPING STATION	248,236	227,759	240,580	220,744	0	0	240,590	220,744	240,590	241,600	0	1,010
SUMMIT CO EVIDENCE VAULT	81,444	77,061	81,374	76,995	1,858	1,724	79,516	75,271	81,374	79,470	1,904	0
USPS MASSILLON LIGHTING	188,631	141,946	188,631	141,946	0	0	188,631	141,946	188,631	191,279	0	2,848
USPS MASSILLON HVAC	471,900	343,003	471,296	342,567	0	0	471,296	342,567	471,296	450,639	20,657	0
KSU WHITE HALL	137,067	114,686	133,270	111,509	0	0	133,270	111,509	133,270	131,949	1,321	0
LORAIN COMMUNITY COLLEGE	2,029,771	1,880,930	1,297,793	1,202,624	0	0	1,297,793	1,202,624	1,297,793	1,598,298	0	300,505
GEORGE WASHINGTON CARVER	409,650	340,520	171,365	142,448	0	0	171,365	142,448	171,365	196,006	0	24,541
GREEN SPRINGS ELEMENTARY	197,500	173,187	121,599	106,629	0	0	121,599	106,629	121,599	75,109	46,490	0
STARK STATE "H" BUILDING	475,369	444,277	470,931	440,128	0	0	470,931	440,128	470,931	425,576	45,355	0
LORAIN CCC ATC BUILDING	406,414	380,265	378,398	354,051	0	0	378,398	354,051	378,398	383,964	0	5,566
USPS WOOSTER	359,444	315,423	329,294	288,966	0	0	329,294	288,966	329,294	339,625	0	10,331
USPS AKRON LIGHTING UPGRADE	513,096	478,722	508,647	474,572	0	0	508,647	474,572	508,647	438,169	70,478	0
NEOUCOM STEAM TO HOT WATER	309,537	291,330	299,537	281,918	0	0	299,537	281,918	299,537	303,516	0	3,979
FAITH LUTHERAN CHURCH	146,824	120,192	142,752	116,858	0	0	142,752	116,858	142,752	146,824	0	4,072
KSU STARK E WING VESTIBULES	34,838	28,073	34,218	27,573	0	0	34,218	27,573	34,218	26,145	8,073	0
USPS CLEVELAND LIGHTING	688,420	642,738	277,327	258,926	0	0	277,327	258,926	277,327	311,728	0	34,401
U OF A CBA ROOF & EXT WALL	71,276	60,411	70,691	59,915	0	0	70,691	59,915	70,691	68,990	1,701	0
USPS COLUMBUS BROWN OUT	114,090	97,536	79,863	68,275	0	0	79,863	68,275	79,863	81,183	0	1,320

December 31, 2009

Project	Contract Amount	Estimated Total Cost	To Date		Recognized in Prior Years		December 31, 2009		Total Cost and Gross Profit to Date	Billings to 12-31-09	Costs and Estimated Earnings in Excess of Billings	Billings in Excess of Costs and Estimated Earnings
			Sales	Cost of Sales	Sales	Cost of Sales	Sales	Cost of Sales				
PIONEER CAREER & TECH CENTER	69,707	73,517	63,613	67,423	0	0	63,613	67,423	(3,810)	45,351	18,262	0
BARBERTON MIDDLE SCHOOL	2,286,800	1,919,965	50,925	42,745	0	0	50,925	42,745	8,180	58,000	0	7,075
U OF A POLYMER PROCESSING	1,692,913	1,502,555	333,199	301,063	0	0	333,199	301,063	32,136	439,261	0	106,062
USPS PIQUA	387,139	304,636	266,742	209,897	0	0	266,742	209,897	56,845	303,963	0	37,221
USPS SPRINGFIELD LOBBY RENOV	76,601	67,242	73,999	64,958	0	0	73,999	64,958	9,041	76,601	0	2,602
USPS STEUBENVILLE HVAC	415,964	328,609	205,397	162,261	0	0	205,397	162,261	43,136	290,875	0	85,478
DAYTON FEDERAL BUILDING	1,313,000	1,009,711	22,014	16,919	0	0	22,014	16,919	5,095	0	22,014	0
COMINION E OHIO WILBETH BOILER	106,630	98,812	82,197	76,170	0	0	82,197	76,170	6,027	106,630	0	24,433
US OF A EGY CTR MULTISTAGE PUMP	12,676	13,418	12,676	13,418	0	0	12,676	13,418	(742)	0	12,676	0
AMHA ALLEN DICKSON	54,000	42,405	990	778	0	0	990	778	212	0	990	0
US ARMY CORPS - 88TH RRC	275,500	231,684	4,716	3,967	0	0	4,716	3,967	749	0	4,716	0
U OF A OLSEN RES BFLOW PREV	15,842	22,067	15,842	22,067	0	0	15,842	22,067	(6,225)	0	15,842	0
U OF A REC CTR HEAT EXCHANGER	20,310	19,058	14,183	13,309	0	0	14,183	13,309	874	0	14,183	0
POWHATAN POINT ROOF	60,900	58,800	40,280	38,891	0	0	40,280	38,891	1,389	57,855	0	17,575
U OF A OLIN HALL A/C	12,732	13,281	12,732	13,261	0	0	12,732	13,261	(529)	0	12,732	0
US ATTORNEYS OFFICE	12,120	9,660	374	298	0	0	374	298	76	0	374	0
U OF A OCASEK NAT LEAK	1,811	1,698	1,811	1,698	0	0	1,811	1,698	113	0	1,811	0
TUSLAW MIDDLE SCHOOL	131,600	121,606	69,437	64,164	0	0	69,437	64,164	5,273	74,580	0	5,143
OHIO BUILDING 1ST FLOOR	14,600	13,828	14,131	13,384	0	0	14,131	13,384	747	0	14,131	0
USPS CLEVELAND HVAC - FKC	1,324	1,100	290	241	0	0	290	241	49	0	290	0
U OF A ENERGY NAT GAS GOT TAP	1,863	1,123	1,863	1,123	0	0	1,863	1,123	760	0	1,863	0
U OF A MARY GLADWYN SIM SPACE	29,800	26,507	19,162	17,045	0	0	19,162	17,045	2,117	0	19,162	0
U OF A POLSKY FORENSIC LAB	55,500	51,319	5,997	5,545	0	0	5,997	5,545	452	0	5,997	0
ACH CRITICAL LAB	44,200	41,591	859	808	0	0	859	808	51	0	859	0
	\$20,855,419	\$18,239,516	\$13,196,105	\$11,703,795	\$2,559,340	\$2,245,973	\$10,636,766	\$9,457,822	\$1,178,944	\$13,932,890	\$983,574	\$700,358

See independent accountant's review report on other data.

**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,

BETTY D. MONTGOMERY  
Attorney General of Ohio

*W.C. Becker*

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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

EXHIBIT  
2

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).

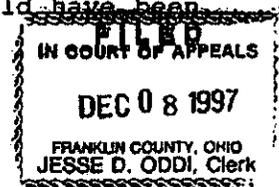
R.C. 2743.03(A), which defines the jurisdiction of the Court of Claims, provides two bases for the jurisdiction of the Court of Claims over claims for injunctive and declaratory relief:

"(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.

B. Declaratory Judgment Actions

Further, since it is the general contractor which is accepting the bids from contractors that wish to build The University Center, it is the general contractor which should be enjoined. Ohio Revised Code Section 2721.12 requires that all persons who have or claim any interest in a declaratory action shall be made parties to that action. This requirement of Revised Code Section 2721.12 that all persons to be affected by a declaratory judgment need to be joined as parties is a substantive jurisdictional requirement. Bretton Ridge Home Owner's Club v. DeAngelis (1988), 51 Ohio Appeals 3d 183. Accordingly, this action should be dismissed out of the Court of Claims and brought in the Common Pleas Court where the general contractor can be named as a party. An action against the general contract could only be brought in Common Pleas Court.

III. STANDING

This case is brought by a taxpayer, three trade associations and three contractors.

Plaintiffs have alleged no statutory basis for their standing.

In the absence of statutory authority, a taxpayer lacks legal capacity to institute an action to enjoin the expenditure of public funds unless he has

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



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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.



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WILLIAM C. BECKER  
Assistant Attorney General

chieman.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.

2008-08817

Case No. \_\_\_\_\_

Judge JUDGE J. CRAIG WRIGHT

FILED  
COURT OF CLAIMS  
OF OHIO  
2008 AUG -6 AM 11:01

**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.

IN THE SUPREME COURT OF OHIO

MECCON, INC., et al.,

Plaintiff-Appellee,

vs.

UNIVERSITY OF AKRON,

Defendant-Appellant.

Case No. 2009-0950

On Appeal from the  
Franklin County Court of Appeals,  
Tenth Appellate District

Court of Appeals Case  
No. 08AP-727

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AFFIDAVIT OF PETER D. WELIN IN SUPPORT OF  
PLAINTIFF-APPELLEE'S MOTION FOR ATTORNEY'S FEES

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I, Peter D. Welin, Esq., after being first duly sworn, hereby depose and state upon my oath as follows:

1. I am Peter D. Welin, an attorney admitted to practice law in the State of Ohio and a partner in the law firm of Thompson Hine LLP ("Thompson Hine") in Columbus, Ohio. I am the lead attorney representing Plaintiff-Appellee Meccon, Inc. ("Meccon") in this case and appeal before the Supreme Court of Ohio in the case *Meccon, Inc. v. University of Akron*, Case No. 2009-0950, and am personally familiar with the factual and legal issues that surround the dispute and of the statements made herein.

2. Thompson Hine was retained in 2008 by Meccon to represent it in a dispute with the University of Akron over a bid dispute involving the University of Akron Football Stadium Project.

3. Thompson Hine has represented Meccon throughout this action, and has had several attorneys and support personnel working on this action throughout its duration.

EXHIBIT

3

4. I am submitting this affidavit in support of Meccon's Motion for Attorney's Fees in the above-referenced matter.

5. Through July 31, 2010, as shown on Attachment 1, Thompson Hine has billed Meccon \$141,312.50 in attorney's fees for work directly related to this action. That sum is the product of a total of 510.25 hours billed in connection with this action. Since 2008, the hourly rates of Thompson Hine attorneys and paralegals billing time has ranged from \$105 per hour to \$515 per hour.

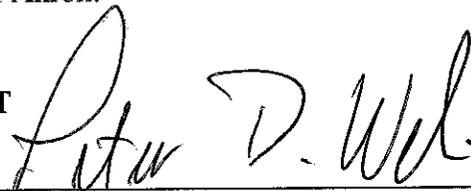
6. Additionally, as shown on Attachment 2, Thompson Hine has billed Meccon \$6,835.57 in legal expenses incurred in this action.

7. I have been practicing law for 22 years and am the vice chair of Thompson Hine's Construction practice group. I am "AV" rated by Martindale-Hubbel, rated "Band 1" by Chambers USA, *America's Leading Business Lawyers*, and have been selected for inclusion in *Super Lawyers* by *Ohio Super Lawyer* magazine for the last 6 years. I am also a co-author of two legal texts entitled *Ohio Public Contract Law and Construction Claims*, 1994, and *Ohio Construction Law Manual*, 2009. My hourly rate is amongst the average customarily charged rate by lawyers in Ohio who have similar skills and experience practicing construction law in Ohio.

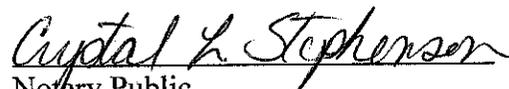
8. Thompson Hine's Construction practice group is the largest in Ohio and one of the most experienced in the United States. The group is currently rated "Band 1" by Chambers USA, *America's Leading Business Lawyers*, and nationally recognized for its ability to handle cases such as this case. The hourly rates charged for our attorneys and staff are amongst the average customarily charged rates by firms in Ohio who have similar skills and experience practicing construction law in Ohio.

9. I have considered each of the factors described in Rule 1.5(a) of the Ohio Rules of Professional Conduct and in my review and submittal of the attached itemizations, it is my professional opinion that the hours spent and the hourly rate is reasonable, and the work performed was necessary to achieve a successful outcome in this appeal. In light of the results obtained and the circumstances of these efforts as laid out in more detail in the accompanying motion, I submit that the amount of attorney's fees reflected on the attached is reasonable and should be paid by Defendant-Appellant University of Akron.

**FURTHER AFFIANT SAYETH NAUGHT**

  
Peter D. Welin

SWORN TO BEFORE ME and subscribed in my presence this 19th day of August, 2010.

  
Notary Public



Crystal L. Stephenson  
Notary Public - State of Ohio  
My Commission Expires June 6, 2014

### ATTACHMENT A

Billing Attorney/Paralegal	Year	Hours	Rate	Billed Amount
Peter D. Welin - Partner	2008	47.00	\$ 400.00	\$ 18,800.00
	2009	47.25	\$ 415.00	\$ 19,608.75
	2010	18.50	\$ 425.00	\$ 7,702.50
Michael W. Currie - Partner	2008	4.50	\$ 475.00	\$ 2,137.50
	2009	0.75	\$ 515.00	\$ 386.25
O. Judson Scheaf III - Partner	2008	6.50	\$ 375.00	\$ 2,437.50
Andrew R. Fredelake - Associate	2008	94.50	\$ 210.00	\$ 19,845.00
	2009	98.25	\$ 230.00	\$ 22,597.50
	2010	16.00	\$ 230.00	\$ 3,680.00
Audra J. Zarlenga - Associate	2008	4.50	\$ 270.00	\$ 1,215.00
	2009	58.50	\$ 295.00	\$ 17,257.50
	2010	20.00	\$ 295.00	\$ 5,900.00
Daniel J. Bucci - Associate	2008	9.00	\$ 215.00	\$ 1,935.00
Gabe J. Roehrenbeck - Associate	2008	4.00	\$ 220.00	\$ 880.00
Samir Dahman - Associate	2008	1.75	\$ 195.00	\$ 341.25
Julieann Gonzi Dreher - Associate	2008	0.50	\$ 195.00	\$ 97.50
Michael L. Dillard - Associate	2008	1.25	\$ 185.00	\$ 231.25
	2009	31.50	\$ 200.00	\$ 6,300.00
John Kopf - Associate	2008	2.25	\$ 250.00	\$ 562.50
Robert S. Lewis - Associate	2009	12.00	\$ 280.00	\$ 3,360.00
	2010	4.00	\$ 280.00	\$ 1,120.00
Jason R. Harley - Associate	2009	17.75	\$ 200.00	\$ 3,550.00
Beth Dannaher Paralegal	2008	4.25	\$ 190.00	\$ 807.50
	2009	1.75	\$ 200.00	\$ 350.00
Erin Moorman - Document Clerk	2008	2.00	\$ 105.00	\$ 210.00
<b>TOTAL</b>		<b>508.25</b>		<b>\$ 141,312.50</b>

**ATTACHMENT B**

<b>Year</b>	<b>Amount</b>
2008	\$ 2,550.12
2009	\$ 3,153.01
2010	\$ 1,132.44
<b>Total</b>	<b>\$ 6,835.57</b>