

IN THE SUPREME COURT OF OHIO

MODERN OFFICE METHODS, INC.)

Plaintiff-Appellant,)

-v-)

THE OHIO STATE UNIVERSITY)

Defendant-Appellee.)

No. 12-1626

10th Dist No.: 11-AP-01012

MEMORANDUM IN SUPPORT OF JURISDICTION OF
PLAINTIFF-APPELLANT MODERN OFFICE METHODS, INC.

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FILED
SEP 24 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Table of Contents

STATEMENT OF THE CASE AND FACTS	3
(a) MOM was the best bidder when the original evaluation criteria were considered.	4
(b) OSU abandoned its evaluation criteria when evaluating the proposals.....	4
(c) The contract OSU entered with ComDoc is substantially more lucrative to the vendor than the RFP permitted	4
(d) A member of the evaluation committee had improper contact with a ComDoc manager during the RFP process.	4
(e) A ComDoc executive offered remunerations to a second member of the evaluation committee during the RFP process.	4
(f) ComDoc was improperly credited with Xerox’s OSU experience.....	4
1. The 2002 Program.....	4
2. ComDoc Improperly Added to 2002 Program.....	4
3. The 2011 Request for Proposal.....	5
(a) <i>Requirements of the RFP</i>	6
(b) <i>The Minor Differences Between the Three Options</i>	6
(c) <i>Addendum 2 made clear that the initial term was limited to 36 months, the program would not be mandated, and there would not be monthly minimums</i>	7
4. OSU’s Evaluation of the Proposals.....	8
5. Inappropriate contact between Gill-Parks and Matthews	8
6. ComDoc Awarded Contract that Drastically Differs from the RFP	9
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	9
Proposition of Law: The Court of Claims possesses exclusive subject matter jurisdiction over any RFP case against the State of Ohio that seeks monetary damages on the face of the Complaint.....	9

1. A breach of contract claim is a claim for monetary damages.....	11
2. A request for bid preparation fees is a claim for monetary damages.....	12
CONCLUSION	14

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST

The Court of Claims possesses *exclusive* subject matter jurisdiction over any case against the State of Ohio in which any form of monetary damages are sought. Jurisdiction remains exclusively in the Court of Claims where injunctive relief is sought along side or alternatively to monetary damages. In this case, this basic jurisdictional tenant of the court of claims has been eviscerated. This harms the interest of all litigants in cases involving monetary and injunctive claims against the State because it is no longer clear in which forum they should file suit. It also harms the interest of the State of Ohio because it reduces the jurisdictional limits of its favored forum.

In *Meccon, Inc. v. Univ. of Akron*, 126 Ohio St.3d 231, 2010-Ohio-3297, this Court reversed a Court of Claims dismissal of a claim for bid preparation costs in connection with a capital improvement RFP. This Court explained that bid preparation costs are monetary damages and a claim therefore must be brought in the Court of Claims. In this case, the very same trial judge from *Meccon* dismissed Appellant's complaint *sua sponte*¹ for lack of subject matter jurisdiction even though the complaint requested monetary damages for bid preparation costs (just like in *Meccon*) *and* monetary damages for breach of an existing contract.

Rather than correcting this *sua sponte* travesty, the Court of Appeals essentially converted the *sua sponte* dismissal it into a *sua sponte* motion for summary judgment. The Court of Appeals found that the Court of Claims *lost* jurisdiction over the case when a TRO hearing was concluded by an agreement to rush discover, conduct over a dozen depositions, and hold a preliminary injunction hearing two weeks later. The Court of Appeals cited no authority

¹ OSU had filed a motion to dismiss a few days prior to the *sua sponte* dismissal. Appellant's response date to the motion to dismiss had not run. More importantly, the OSU motion did not argue lack of subject matter jurisdiction.

for its holding that the Court of Claims, once properly vested with jurisdiction, could lose it. The Court of Appeals misapplied *Meccon*'s holding that injunctive relief must be timely sought in order to be entitled to bid preparation costs to hold that jurisdiction, once had, vanishes if the Court determines without weighing any evidence that the plaintiff did not pursue the injunctive relief quickly enough.² It also artificially limited *Meccon* to read that bid preparation costs are available only in capital improvement cases.³

The legal principle at issue here is stark, and important for the State of Ohio and for all entities who do business therewith. The lower courts have decided to grotesquely limit this Court's very recent *Meccon* holding. Going forward, the State is harmed by the jurisdictional reach of the Court of Claims being improperly restricted—and thus easily avoided. Parties contracting with the State of Ohio are harmed because the blurring of the previously bright line jurisdictional limits of the Court of Claims renders it nearly impossible to decide the proper venue for an RFP claim. This Court has been harmed because the Court of Claims very quickly acted to cast aside *Meccon*. The interest of the law of the State of Ohio would be served by this Court clarifying the jurisdictional boundaries of the Court of Claims in non-capital improvement RFP cases.

When the correct legal standard is applied to this case, it is clear that this case is squarely within the magnetic jurisdiction of the Court of Claims. Appellant responded to an RFP for a service contract with OSU. Appellant was the incumbent and had supplied OSU with copier

² The Court of Appeals was wrong on the facts here. This suit was filed in the last days of September 2011. The trial court dismissed it in October, 2011 days before the scheduled preliminary injunction hearing. The contract was not scheduled to begin until January 2012 and was a service contract that could easily be rolled back. (e.g., the removal of Appellant's copier equipment could be halted and any that had been replaced could have been restored.

³ *Meccon* actually held that in capital improvement cases, sometimes only bid preparation costs are available as a remedy. The Court of Appeals misplaced the term "only."

services for over two decades prior to the RFP. OSU departed from its RFP, which it has admitted in depositions that Appellant won to award a contract that was materially different than the terms of the RFP to a competing vendor. Appellant sued in the Court of Claims seeking monetary damages for breach of its previous contract with OSU (the one being replaced through the RFP) for the loss of revenue from OSU using an unapproved vendor under that contract (the vendor that later “won” the RFP). Appellant also sought injunctive relief and monetary damages vis-à-vis the RFP. Specifically for injunctive relief, Appellant requested to be awarded the RFP, or alternatively for the resulting contract to be annulled and require OSU to begin the RFP anew. Appellant requested bid preparation costs as a combined or alternative relief. For example, Appellant could be entitled to bid preparation costs if the trial court voided the new contract, but did not declare Appellant the winner of the previous RFP. Additionally, Appellant could be entitled to bid preparation costs if this case is remanded and a result is not achieved until after the “winning” contract runs its course.

What should be clear as a matter of law is that a trial court is not empowered to dismiss a case *sua sponte* for lack of subject matter jurisdiction when the face of the complaint meets the jurisdictional requirements of the Court. The Court, and the State of Ohio, will have ample time to test the merits during the course of the litigation. Equally clear, the court of claims is not divested of original jurisdiction once jurisdiction has vested.

STATEMENT OF THE CASE AND FACTS

Appellant Modern Office Methods (“MOM”) is a family-run Ohio business in the field of office equipment sales and leasing. MOM has leased equipment to OSU for 20 years. As of August 2011, MOM leased approximately 750 copiers to OSU – over half of the entire OSU copier fleet.

MOM responded to the 2011 RFP to replace the 2002 contract. MOM was declared to have not won the RFP. In this case, MOM alleges that:

- (a) MOM was the best bidder when the original evaluation criteria were considered.
- (b) OSU abandoned its evaluation criteria when evaluating the proposals.
- (c) The contract OSU entered with ComDoc is substantially more lucrative to the vendor than the RFP permitted
- (d) A member of the evaluation committee had improper contact with a ComDoc manager during the RFP process.
- (e) A ComDoc executive offered remunerations to a second member of the evaluation committee during the RFP process.
- (f) ComDoc was improperly credited with Xerox's OSU experience.

1. The 2002 Program

Under the 2002 program, the selected vendors would lease equipment to OSU departments through an OSU department named Uniprint. Uniprint would charge a markup on the leases. The 2002 RFP stated that any unsuccessful bidder to that RFP could not sell around the contract. However, non-bidders were permitted to compete with the selected vendors by selling directly to OSU departments without paying the Uniprint markup. Thus, some OSU departments, such as the College of Dentistry, elected to contract with vendors that did not participate in the Uniprint program.

2. ComDoc Improperly Added to 2002 Program

In April 2010, while the 2002 program remained in place, Uniprint's Director Debbie Gill-Parks inquired whether ComDoc, an entity at which her long time acquaintance Bill Matthews worked, could be added as a vendor under the 2002 program. Gill-Parks affirmatively took this step on her own. The stated reason for the request was that ComDoc had recently been acquired by Global Imaging Systems, which in turn was a subsidiary of Xerox Corporation.

Thus, the question was whether OSU's purchase order with Xerox permitted a subsidiary of a subsidiary to independently sell non-Xerox equipment to OSU. Xerox and Global informed OSU that the Xerox purchase order did not extend to ComDoc and Xerox opposed ComDoc being permitted to lease on campus because "it was against the rules of engagement for ComDoc to sell equipment on a Xerox account . . . the rules of engagement between Xerox and Global." Gill-Parks ignored Xerox's protest and allowed ComDoc to sell through Uniprint anyway because "OSU Purchasing said it was okay, so it is okay."

ComDoc leased approximately 5 copiers to OSU in 2010. None of the ComDoc copiers were Xerox machines, further demonstrating that Gill-Park's decision to allow ComDoc to participate in the Uniprint program was in violation of the 2002 RFP and the Xerox purchase order.

Despite the fact that ComDoc leased a very small number of copiers to OSU, ComDoc obtained an office in the Uniprint building and assigned Bill Mathews to work there. Mathews was in the Uniprint building 3 to 5 days a week, which surprised Uniprint employees because Mathews did not have a reason to be on campus that much. It was this proximity to Gill-Parks that facilitated Mathews' improper contacts discussed below.

3. The 2011 Request for Proposal

On January 29, 2011, OSU issued Request for Proposal 11-51659106AA-JEM (the "RFP"). The RFP requested proposals for the lease and maintenance of up to approximately 1108 multi-functional devices ("MFDs") capable of printing, copying, scanning, and faxing—up to 364 of which must be capable of printing in color—and the maintenance of up to an additional 4800 MFDs and 331 facsimiles. (Exhibit A to the Verified Complaint). The RFP provided three options under which a proposer could respond. The proposer could respond to any or all of the options.

(a) *Requirements of the RFP*

The RFP required that all B&W and Color MFDs (including hardware, maintenance and all supplies except paper) be priced on a cost-per-copy basis. Print management services were also priced on a cost-per-copy basis. Each option required that the following add-ons be represented on a cost-per-copy basis: paper size capacity up to 11"x17", stand, stapler/basic finisher, postscript capability, large capacity paper tray. Each option required the proposer to assume that no OSU unit or department would be required to contract with the selected proposer, and each OSU unit and department could negotiate with other vendors to provide the proposed equipment and services—i.e., the absence of exclusivity. All options required that the proposer supply equipment within 10 days of order.

The electronic forms OSU provided upon which to submit pricing proposals would accept exclusively cost-per-copy data. Each option required the proposer to assume the contract would be for a 36 month term, and that each lease would expire at the end of that term, regardless of when placed, i.e., that the leases would be co-terminus.

(b) *The Minor Differences Between the Three Options*

The three options offered under the RFP varied in very minor ways. Under Option 1, multiple proposers would be selected as approved vendors, with certain specified services would be provided by Uniprint (an OSU department). Option 1 was designed to replicate the 2002 program. Under Option 2, a single proposer would be selected, with UniPrint again providing the specified services. This was the only change between options 1 and 2. Option 3 was identical to Option 2 except the approved vendor would not use UniPrint. The fact that OSU would request separate bids for three nearly identical options that differ by only one component shows how drastically different the MOU is from the RFP.

- (c) *Addendum 2 made clear that the initial term was limited to 36 months, the program would not be mandated, and there would not be monthly minimums*

In an addendum to the RFP, OSU stated “All devices will be placed and serviced for the 36 month award period,” that “The university will replace equipment as it comes to term . . . 490 devices by 6/30/11, 387 devices by 6/30/12, 457 devices by 6/30/13 and 113 devices by 6/30/14.” Thus, under the RFP, the successful proposer’s units would be slowly phased in throughout the entire duration of the contract—some units might have been in place for only a few weeks at the very end of the contract.

In Addendum 2, OSU made clear that “University departments would [not] be required to participate in any portion of the program under any of the bid scenarios.” Addendum 2 also made clear that under the RFP “all of the university’s devices are co-terminus.” Addendum 2 reaffirmed OSU’s commitment *not* to utilize monthly minimums.

“Q. 10 With no minimum volumes required, what is to stop a department from, for example, purchasing a Segment 6 MFP and running 1,000 copies per month for 36 months? A. It is UniPrint’s responsibility under Option 1 & 2, bidder’s responsibility under Option 3 through the consultative approach and historical usage of the department to right size equipment. Exceptions may occur.”

Thus, the addendums issued by the University clarified questions bidders might have as to the requirements of the proposal and expressly established that: the leases would be co-terminus, meaning leases on all equipment would expire at the same time the contract expired, regardless of when the lease was placed; that university departments would not be required to participate in the ultimate contract, therefore the contract could not make the winner the exclusive provider of services on campus; and, that bids should be based on a cost-per-copy basis, not on a monthly minimum basis. The addendums did not change any terms of the RFP, but clarified and emphasized specific components of interest to the university and bidders.

4. OSU's Evaluation of the Proposals

Proposals under the RFP were due on February 18, 2011. As required by RFP procedures, the RFP contained an Evaluation Process. The evaluation criteria were to be "pricing, bidder qualifications, program enhancements and service requirements." The evaluation criteria assigned relative weights to be given to each criterion. The weights assigned to the categories differed by option. Option 3 was to be scored: Pricing 40%; Bidder Qualifications 10%; Program Enhancements 10%; and Service Requirements 40%.

After the evaluation was completed, OSU determined that MOM was the best bidder for Option 3. "Modern Office Methods was not the lowest bid, but was the best bid or the best overall bid." An OSU official testified, "[MOM] scored a higher rating based upon the weighted averages that were applied."

After the evaluation of the proposals, MOM was the "overall best bidder." Under the RFP guidelines, OSU should have negotiated with MOM. It didn't. Instead, it issued Addendum 1A, a detailed spreadsheet on which the vendors were required to insert their previously submitted pricing on a machine by machine basis. After receiving the detailed pricing quotes, OSU began an ad hoc decision making process, which resulted in the abandonment of the evaluation criteria. Once the RFP evaluation process came unhinged from the Evaluation Criteria, OSU ignored the fact that it had determined MOM was the "overall best bidder" and elected to eliminate MOM from consideration.

5. Inappropriate contact between Gill-Parks and Matthews

Gill-Parks and Matthews have a 30-year relationship dating from the time they both worked at Xerox. In 2010, Gill-Park ignored Xerox's objections and permitted Matthews to lease non-Xerox equipment to OSU departments—including Uniprint itself—through ComDoc supposedly under Xerox's purchase order that authorized only the lease of Xerox equipment

from Xerox directly. Gill-Park then permitted Mathews to establish a ComDoc office in the Uniprint Building, ostensibly to serve as a sales and maintenance contact for the mere five machines ComDoc had leased to OSU. ComDoc maintained this office even though there were no new leases permitted during the entire time the RFP was in place.

Mathews reported to the Uniprint building on a nearly daily basis even though the OSU work he had would not keep him busy. Mathews would have had no cause to speak to Gill-Parks about the machines he had placed under the 2002 program. At least three OSU employees witnessed Mathews and Gill-Parks hold multiple meetings in Gill-Parks office—occasionally behind closed doors, during the RFP process—when Gill-Parks was supposedly serving as a neutral evaluator of the proposals and was prohibited from contact with vendors. Uniprint employees were concerned about the meetings at the time “probably because of the appearance.”

6. ComDoc Awarded Contract that Drastically Differs from the RFP

Following OSU's negotiations with ComDoc, ComDoc and OSU entered into an MOU, purportedly based on ComDoc's RFP bid, but with several substantial changes. Namely, the MOU afforded ComDoc a longer contractual term than provided by the RFP; the MOU did not require co-terminus leases as required by the RFP; the MOU ensured monthly base minimums, instead of the strict cost-per-click price established in the MOU; and the MOU established that ComDoc would be the sole supplier of services for all OSU, even though the RFP and addendums expressly stated that the contract under the RFP would not be exclusive. Additionally, OSU blended aspects of Options 2 and 3, essentially creating a transition period into Option 3.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law: The Court of Claims possesses exclusive subject matter jurisdiction over any RFP case against the State of Ohio that seeks monetary damages on the face of the Complaint.

An appellate court should “review an appeal of a dismissal for lack of subject matter jurisdiction under a de novo standard of review. The question [the court] must decide is whether any cause of action cognizable by the forum has been raised in the complaint. Here, the issue turns on whether [the] complaint states a legally cognizable claim for money damages, for without a claim for money damages, the Court of Claims lacks subject matter jurisdiction.” *Meccon, Inc. v. Univ. of Akron* (10th Dist. App.), 182 Ohio App. 3d 85, 2009 Ohio 1700, 911 N.E.2d 933, ¶ 7.

Under R.C. 2743.03, the Court of Claims “has exclusive, original jurisdiction of all civil actions against the state.” A limitation being the Court of Claims does not have original jurisdiction of “civil action[s] in which the *sole* relief the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief.” R.C. 2743.03(A)(2) (emphasis added). In some cases, a plaintiff seeks both damages and equitable relief. In those instances, the Court of Claims has exclusive jurisdiction because the Revised Code grants the Court of Claims “full equity powers in all actions within its jurisdiction.” R.C. 2743.03(A)(1).

Thus, under § 2743.03, where a claimant requests monetary relief, even accompanied by a request for injunctive relief, the Court of Claims has original and exclusive jurisdiction to hear both the claims requesting monetary relief and those requesting injunctive relief. *Ballengee v. Ohio Dept’t of Rehabilitation & Correction* (1996), 79 Ohio Misc. 2d 69, 670 N.E.2d 1383, 1386 (“attaching a prayer for monetary relief places the action properly before the Court of Claims”). The Court of Claims is the sole forum for claims against the State when money damages are involved, even if the party seeking money damages also seeks some form of equitable relief from the state. *Morning View Care Ctr. v. Ohio Dep’t of Job & Family Svcs.*, 10th Dist. App. No.

04AP-57, 2004 Ohio 6073, at ¶23, citing *Boggs v. State* (1983), 8 Ohio St. 3d 15, 455 N.E.2d 1286 and *Friedman v. Johnson* (1985), 18 Ohio St. 3d 85, 480 N.E.2d 82.

Because MOM has sought both monetary damages and equitable relief, the Court of Claims has exclusive jurisdiction to hear MOM's claims and issue the appropriate relief. Therefore, the *sua sponte* dismissal for lack of subject matter jurisdiction was not proper.

1. A breach of contract claim is a claim for monetary damages.

In its Complaint, MOM alleged "ComDoc was provided a contract to place several units with OSU under OSU P.O. 516591AA08 in 2010 despite ComDoc not having been an approved vendor in the OSU CPC Program and without a competitive bid. Multiple pre-existing vendors were available to provide the identical equipment supplied by ComDoc." [Complaint at ¶ 36.] Count II alleged a breach of contract and sought damages for lost revenues due to any ComDoc machine leased to OSU in violation of the 2002 contract, including those placed ***both before and after*** the new ComDoc contract was in place. MOM, therefore, will lose a significant revenue stream that would exist had OSU not improperly entered into the MOU with Comdoc. *Id.* at ¶¶85-86. Thus, due to OSU's actions, MOM suffered monetary damages and specifically requested "[d]amages against OSU in excess of \$25,000 on Count II." MOM also requested "All such further relief as this Court deems just and equitable."

Breach of contract claims are properly and exclusively within the jurisdiction of the Court of Claims. *State ex rel. Ferguson v. Shoemaker* (1975), 45 Ohio App. 83, 96 ("A direct action on a contract with the state, seeking monetary relief from the state, must be commenced and prosecuted in the Court of Claims and cannot be brought in the Court of Common Pleas.") MOM asserted a breach of contract claim and sought monetary damages therefor.

Additionally, MOM requested "All such further relief as this Court deems just and equitable." This language has been held to be a request for monetary damages sufficient to

trigger exclusive jurisdiction in the Court of Claims. *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312, 318, 712 N.E.2d 1258. Even when a party does not affirmatively plead monetary damages, but is entitled to claim monetary damages, the Court of Claims retains exclusive jurisdiction and should not dismiss a plaintiff's complaint. *A.F.S.C.M.E. v. Blue Cross* (1979), 64 Ohio App. 2d 262, 267, 414 N.E.2d 435 ("Plaintiffs failure to expressly pray for monetary damages is not a defect in their complaint for which the complaint should be dismissed.") This rule is designed to prevent forum shopping in an effort to avoid the Court of Claims jurisdiction. The ruling below eviscerates this precedent.

MOM stated a claim for breach of contract, and sought damages for the lost revenues. The only court that may hear the complaint is the Court of Claims. Accordingly, the dismissal for lack of subject matter jurisdiction was improper.

2. A request for bid preparation fees is a claim for monetary damages.

MOM requested that the 2011 RFP award be voided, and that OSU be ordered to reissue the RFP. MOM also requested "Damages in the amount of MOM's proposal preparations costs."

The appellate and trial courts relied heavily on *Meccon, Inc. v. Univ. of Akron*, 126 Ohio St. 3d 231, 2010-Ohio-3297. *Meccon* is a leading case on the issue of bid preparation costs. Both courts, however, misapplied it. *Meccon* is an RFP case actively pending before the same trial judge. The error here is nearly identical to the error there.

Meccon involves a public-improvements contract where the rejected bidder sought to be named a winning bidder. Before holding an evidentiary hearing on the TRO motion, the trial court dismissed the complaint for lack of subject matter jurisdiction. The trial court found that injunctive relief was available, and concluded the request for bid preparation costs was inappropriate. Accordingly, it concluded it lacked subject matter jurisdiction. The 10th District reversed and held that the rejected bidder still had a damages claim to recover its bid preparation

costs if the bidder promptly sought, but was denied, injunctive relief, and that jurisdiction was exclusive in the Court of Claims.

This matter does not involve a public improvement contract, but nothing in the *Meccon* opinion limits its holding – that a rejected bidder must pursue a claim for bid preparation costs in the Court of Claims - to only public improvement contracts and not to a service contract. MOM seeks a rebid of the RFP. The monetary and equitable relief MOM seeks are complimentary. MOM wants to be refunded the cost of responding to the first RFP and to have the opportunity to compete on a level playing field with all bidders on a new RFP. MOM may not win the rebid, but will still incur the costs of preparing its original bid and its rebid. If MOM is never offered the opportunity to rebid, it will still have incurred costs to submit its original bid. Moreover, even where damage claims are mutually exclusive, a plaintiff is not required to chose between them when filing a complaint. Civ. R. 8(A). “Relief in the alternative or of several different types may be demanded.”

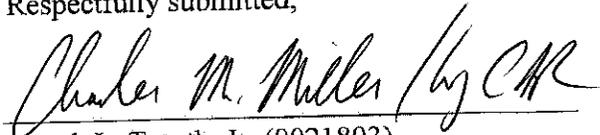
The *Meccon* syllabus reads: “When a rejected bidder establishes that a public authority violated state competitive-bidding laws in awarding a public-improvement contract, that bidder may recover reasonable bid-preparation costs as damages if that bidder promptly sought, but was denied, injunctive relief and it is later determined that the bidder was wrongfully rejected and injunctive relief is no longer available.” *Meccon, Inc. v. Univ. of Akron*, 126 Ohio St. 3d 231, 2010 Ohio 3297, 933 N.E.2d 231, Syllabus. The Supreme Court unquestionably held that bid preparation costs are an economic remedy available to an unsuccessful bidder *and* that the potential availability of those damages triggers exclusive jurisdiction in the Court of Claims. This holding is applicable to all public RFP cases.

For public improvement contracts, *Meccon* recognized that after construction begins injunctive relief is no longer available, making the monetary damages the exclusive remedy. *Meccon* held neither that bid preparation costs are available only in public improvement cases, nor that injunctions are never available in any public RFP contract after commencement of the contract. The 10th Circuit suggested that bid preparation damages detailed in *Meccon* were not available to MOM in this instance because MOM did not promptly seek injunctive relief. In fact, the opposite is true – MOM did promptly seek a TRO, but later, in lieu of the TRO, agreed with appellees that a quick trial on the merits would be an appropriate substitution for the TRO. MOM, therefore, withdrew its request for a TRO. Before the trial on the merits, the trial court *sua sponte* dismissed the action. Whether or not this the Court of Claims had jurisdiction over the matter should have been judged that the time MOM filed the Complaint, which indisputably contained a request for prompt injunctive relief (the TRO), thereby granting MOM the ability to pursue bid preparation costs under *Meccon*.

CONCLUSION

MOM's Complaint establishes a live monetary damages claim. MOM seeks reimbursement of the cost of bidding the initial RFP. In addition to the cost of bidding the initial RFP, MOM seeks to have the RFP rebid. Thus, in relation to MOM's claim that OSU violated competitive sealed bidding procedures, MOM seeks both monetary damages (the bid preparation costs) and injunctive relief (a rebid of the RFP). Therefore, MOM properly invoked the jurisdiction of the Court of Claims for its claims related to OSU's violation of competitive sealed bidding procedures. This Court should accept this case to undue the damage done to *Meccon, Inc. v. Univ. of Akron*, 126 Ohio St.3d 231, 2010-Ohio-3297.

Respectfully submitted,

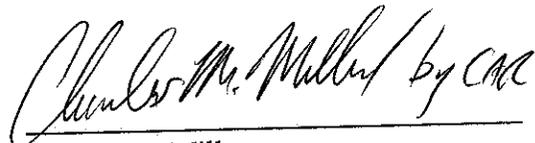


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following parties by ordinary mail this 24th day of September, 2012.

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Charles M. Miller

EXHIBIT A

FILED
COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2012 AUG -9 PM 1:52
CLERK OF COURTS

Modern Office Methods, Inc., :
 :
Plaintiff-Appellant, :
 :
v. :
 :
The Ohio State University, :
 :
Defendant-Appellee. :

No. 11AP-1012
(C.C. No. 2011-11424)

(ACCELERATED CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on June 12, 2012, appellant's assignments of error are overruled and it is the judgment and order of this court that the judgment of the Court of Claims of Ohio is affirmed.

CONNOR, J., BROWN, P.J., and BRYANT, J.

By Connor
Judge John A. Connor

EXHIBIT B

Judge Clark
FILED
2012 AUG -9 PM 12:43
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Modern Office Methods, Inc.,
Plaintiff-Appellant,
v.
The Ohio State University,
Defendant-Appellee.

No. 11AP-1012
(C.C. No. 2011-11424)
(ACCELERATED CALENDAR)

D E C I S I O N

Rendered on August 9, 2012

Keating Meuthing & Klekamp PLL, Joseph L. Trauth, Jr. and Charles M. Miller, for appellant.

Michael DeWine, Attorney General, Craig Barclay and James E. Rook, for appellee.

APPEAL from the Court of Claims of Ohio

CONNOR, J.

{¶ 1} Plaintiff-appellant, Modern Office Methods, Inc. ("MOM"), appeals from a judgment entry entered by the Court of Claims of Ohio dismissing MOM's complaint against defendant-appellee, The Ohio State University ("OSU"), requesting declaratory and injunctive relief, as well as monetary damages, due to lack of subject-matter jurisdiction. Because we find the dismissal of the complaint was proper, we affirm.

{¶ 2} MOM is an Ohio business dealing in office equipment sales and leasing. OSU is an instrumentality of the state of Ohio. MOM has a business relationship with OSU and has been serving OSU for more than 20 years. At the time of the filing of the complaint, MOM leased approximately 750 multi-functional machines to OSU. On

January 19, 2011, OSU issued a "request for proposal" ("RFP") requesting proposals for the lease and maintenance of approximately 1,100 multi-functional devices capable of printing, copying, scanning and faxing, and for the maintenance of up to an additional 4,800 multi-functional devices, as well as 331 facsimiles. The RFP provided three options for responding. A proposer could respond under any of the three options or all of the options.

{¶ 3} MOM submitted a proposal but was not selected as the successful responder. MOM's pricing proposal was approximately \$1,000,000 more than the second low responder and approximately \$1,200,000 higher than that of ComDoc, Inc. ("ComDoc"), who was ultimately the successful responder.

{¶ 4} MOM contends that its submitted bid made several specific assumptions as to the pricing and the term of the contract with OSU and claims its bid would have been different if those assumptions changed. Because the contract awarded to ComDoc contained terms substantially and materially different from those set forth in the RFP, and because the memorandum of understanding executed between OSU and ComDoc allowed for the early termination of existing leases (including devices leased from MOM) if it would result in a cost savings to OSU, MOM formally protested the award of the contract to ComDoc, claiming it violated the RFP process. Because of the numerous material changes between the RFP and the memorandum of understanding, MOM argued the contract should be re-bid. However, OSU denied the protest and refused to re-issue the RFP.

{¶ 5} Consequently, on September 26, 2011, in the Court of Claims of Ohio, MOM filed a verified complaint for damages, declaratory judgment, and injunctive relief, asserting the following three causes of action: (1) declaratory judgment—violation of competitive sealed proposal procedures; (2) breach of contract; and (3) injunctive relief. On that same date, MOM filed a motion for preliminary injunction. A hearing was scheduled by the court for a temporary restraining order and it was set to take place on September 28, 2011. On that date, during the course of the hearing, MOM withdrew its motion for a temporary restraining order and orally moved the court to set an evidentiary

hearing on its motion for a preliminary injunction. The Court of Claims scheduled that hearing for October 19-20, 2011.

{¶ 6} On October 11, 2011, OSU filed a combined motion to dismiss, motion for summary judgment, and memorandum contra to MOM's request for injunctive relief and motion for preliminary injunction. On October 18, 2011, MOM and OSU filed a joint motion to continue the October 19-20, 2011 hearing date for MOM's preliminary injunction. On that same date, the Court of Claims filed an entry of dismissal, dismissing MOM's complaint on the grounds that the court lacked subject-matter jurisdiction. Within that same entry, the Court of Claims denied MOM's motion for a preliminary injunction and collectively denied all other pending motions as moot.

{¶ 7} On October 20, 2011, MOM filed a motion for reconsideration. On November 2, 2011, OSU filed its memorandum contra. On November 8, 2011, MOM filed a reply. On November 15, 2011, the Court of Claims filed an entry denying MOM's motion for reconsideration. This timely appeal now follows in which MOM asserts two assignments of error for our review:

I. The Court of Claims erred when it dismissed the complaint, sua sponte, for lack of jurisdiction.

II. The Court of Claims erred when it refused to consider Plaintiff-Appellant's motion for reconsideration.

{¶ 8} "An appellate court reviews an appeal of a dismissal for lack of subject-matter jurisdiction under a de novo standard of review." *Crable v. Ohio Dept. of Youth Servs.*, 10th Dist. No. 09AP-191, 2010-Ohio-788, ¶ 8. Civ.R. 12(B)(1) permits dismissal of the complaint where the trial court lacks jurisdiction over the subject matter of the action. *Guillory v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 07AP-861, 2008-Ohio-2299, ¶ 6. "The standard for determining a Civ.R. 12(B)(1) motion to dismiss for lack of subject matter jurisdiction is whether the complaint states any cause of action cognizable in the forum." *Univ. of Toledo v. Ohio State Emp. Relations Bd.*, 10th Dist. No. 11AP-834, 2012-Ohio-2364, ¶ 8, citing *Crable at* ¶ 8. "Subject-matter jurisdiction relates to the proper forum for an entire class of cases, not the particular facts of an individual case." *Rowell v. Smith*, 10th Dist. No. 10AP-675, 2011-Ohio-2809, ¶ 17, citing *State v. Swiger*, 125 Ohio

App.3d 456, 462 (9th Dist.1998). "A trial court has subject-matter jurisdiction over a case if it has the statutory or constitutional power to adjudicate the case." *Kormanik v. Cooper*, 195 Ohio App.3d 790, 2011-Ohio-5617, ¶ 23 (10th Dist.), citing *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶ 11.

{¶ 9} A motion to dismiss under Civ.R. 12(B)(6) for failure to state a claim is procedural and tests the sufficiency of the complaint. *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, ¶ 11, citing *Assn. for the Defense of the Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117 (1989); *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992). Dismissal for failure to state a claim upon which relief can be granted is proper if, after all factual allegations are presumed to be true and all reasonable inferences are made in favor of the non-moving party, it appears beyond doubt from the complaint that the plaintiff could prove no set of facts warranting the requested relief. *State ex rel. Turner v. Houk*, 112 Ohio St.3d 561, 2007-Ohio-814, ¶ 5; *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, syllabus (1975). A court of appeals reviews the dismissal of a complaint pursuant to Civ.R. 12(B)(6) under a de novo standard. *Woods v. Riverside Methodist Hosp.*, 10th Dist. No. 11AP-689, 2012-Ohio-3139, ¶ 9. The principles controlling a Civ.R. 12(B)(6) motion to dismiss for failure to state a claim are similar to those governing a Civ.R. 12(B)(1) motion to dismiss for lack of subject-matter jurisdiction. *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St.2d 608, 610 (1982) (overruled in part on other grounds); *Gambee v. Gambee*, 2d Dist. No. 82-CA-45 (Aug. 11, 1983).

{¶ 10} "The Court of Claims is a court of limited jurisdiction." *Windsor House, Inc. v. Ohio Dept. of Job and Family Servs.*, 10th Dist. No. 11AP-367, 2011-Ohio-6459, ¶ 15. The Court of Claims has exclusive jurisdiction over civil actions against the state for money damages sounding in law. R.C. 2743.02 and 2743.03; see also *Windsor House* at ¶ 15. "R.C. 2743.03(A)(2) provides that when a claim for a declaratory judgment, injunctive relief, or other equitable relief against the state arises out of the same circumstances giving rise to a civil action over which the Court of Claims otherwise would have jurisdiction, the Court of Claims has exclusive, original jurisdiction to hear and determine that claim." *Interim Healthcare of Columbus, Inc. v. Ohio Dept. of Admin.*

Serus., 10th Dist. No. 07AP-747, 2008-Ohio-2286, ¶ 13, citing *Friedman v. Johnson*, 18 Ohio St.3d 85, 87 (1985).

{¶ 11} While the Court of Claims specifically stated it was dismissing this case, pursuant to its authority under Civ.R. 12(H)(3), due to lack of subject-matter jurisdiction, the trial court did so after reviewing the legitimacy of MOM's claim for monetary damages, based upon *Meccon, Inc. v. Univ. of Akron*, 126 Ohio St.3d 231, 2010-Ohio-3297, and subsequently determining MOM could not rely on *Meccon's* principles in this case to allege a monetary damages claim.¹ Because the Court of Claims has jurisdiction to hear claims for declaratory and injunctive relief where there is also a claim for money damages arising out of the same circumstances giving rise to a civil action over which it otherwise has jurisdiction, and because the instant complaint alleges such causes of action, the complaint states causes of action cognizable in the forum if it properly sets forth a claim for money damages. However, if MOM can prove no set of facts entitling it to recover money damages, the complaint fails to state a claim upon which relief can be granted, and consequently, without a proper claim for damages, the Court of Claims lacks subject-matter jurisdiction to hear the other causes of action.

{¶ 12} Therefore, because the two are intertwined, we approach this case under a combined failure to state a claim analysis and under a lack of subject-matter jurisdiction analysis. The purpose of our analysis is not to decide the factual issues presented in the complaint, but rather to determine whether the facts alone are sufficient to survive a challenge under Civ.R. 12(B)(1) and/or (6).

{¶ 13} As stated above, because MOM's claims for declaratory and injunctive relief can only be pursued in the Court of Claims if its claim for money damages and/or its breach of contract claim can be pursued in the Court of Claims, a determination that MOM has failed to state a legal claim for breach of contract, through which MOM purportedly asserts a claim for money damages, and a determination that MOM cannot

¹ OSU filed a combined "Motion to Dismiss, Motion for Summary Judgment and Memorandum Contra to Plaintiff's Request for Injunctive Relief and Motion for Preliminary Injunction," which precipitated the filing of the Court of Claims' October 18, 2011 judgment entry dismissing the action. In its motion, OSU moved for dismissal pursuant to Civ.R. 12(H)(1), (B)(6), and (B)(7), and further alleged failure to state a claim upon which relief may be granted, although its specific arguments differ from the ultimate findings of the Court of Claims. Alternatively, OSU also requested summary judgment pursuant to Civ.R. 56.

assert a claim for money damages via a request for bid-preparation costs, is fatal to the pursuit of this complaint in the Court of Claims. Therefore, we begin by analyzing MOM's claim for breach of contract.

{¶ 14} In this cause of action, MOM alleges that the RFP constituted an offer of a contract by OSU to submit proposals under the terms of the RFP and that MOM accepted the contract by submitting a proposal. MOM further alleges OSU breached the contract by awarding it to ComDoc when MOM would have been the best bidder, if the RFP had been consistent with the memorandum of understanding. Because the awarding of the contract to ComDoc was improper, MOM argues its devices should not be replaced with ComDoc devices. In addition, MOM alleges it will be damaged by the loss in revenue expected if its devices are removed and replaced with ComDoc devices.

{¶ 15} The "[e]ssential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Williams v. Ormsby*, 131 Ohio St.3d 427, 2012-Ohio-690, ¶ 14, quoting *Kostelnik v. Helper*, 96 Ohio St.3d 1, 2002-Ohio-2985, ¶ 16. MOM cites no authority for its proposition that a contract is created by responding to an RFP when the responder is not ultimately awarded the contract.

{¶ 16} Here, the facts as alleged are that OSU accepted the proposal of ComDoc and awarded it a contract. Although MOM offered or presented a proposal to OSU, the proposal was rejected by OSU and it declined to award a contract to MOM. Thus, no contract was created. Furthermore, the "Standard Instructions and Information" contained within the "Request for Proposal No. 11-51659106AA-JEM," which is attached to MOM's complaint as exhibit A states, in relevant part, as follows:

6. University Rights: University reserves the right to reject all, some, or none of the received Proposals * * *.

7. Evaluation: *If an award of contract is made*, the Bidder whose Proposal, in the sole opinion of the University, represents the best overall value to the University, *will be selected*. Factors which determine the award * * * including but not limited to: the Proposal's responsiveness to all specifications in the inquiry; quality of the Bidder's products

or services; Bidder's ability to perform the contract; and Bidder's general responsibility as evidence by past performance. Although relative, price will not be the sole determining factor in award of the agreement.

(Emphasis added.)²

{¶ 17} As stated above, we are aware of no authority, and MOM has not presented any, which establishes that the submission of a proposal in response to a request for proposal, without more, creates a contract which is then breached *when the contract is awarded to a different responder* pursuant to the RFP process. See generally, *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590 (1995), for an illustration of the RFP process (the district's use of an RFP process to solicit proposals and to thereafter enter into negotiations *with the successful candidate leading to the execution of a contract* was upheld, although its process was governed by a different statutory scheme than that governing OSU's process, which provides OSU with the discretion to establish purchasing policies). Contrary to MOM's assertion, the proposals submitted by MOM (the *unsuccessful responder*) are not a contract. According to the process set forth by OSU, the contract is to be negotiated and awarded *after* the bidder is selected.

{¶ 18} Notably, MOM's breach of contract action does not allege a breach of an existing contract, *e.g.*, the complaint does not allege the breach of a contract between OSU and MOM for devices that OSU is under contract to lease from MOM and no such contract is attached to MOM's complaint, as is required pursuant to Civ.R. 10(D). Furthermore, there is no claim that OSU is prematurely and illegally terminating any existing leases with MOM. Instead, the complaint merely alleges the creation of a contract via MOM's act of responding to OSU's RFP, which we have determined does not exist under basic contract principles.

² Documents attached to the complaint can be considered in analyzing a motion to dismiss for failure to state a claim. See *Adlaku v. Giannini*, 7th Dist. No. 05MA105, 2006-Ohio-4611, ¶ 34, citing *Aleman v. Ohio Adult Parole Auth.*, 4th Dist. No. 94CA17 (Apr. 24, 1995), and *State ex rel. Crahtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249 (1997), fn.1.

{¶ 19} Based upon the foregoing, we find MOM has failed to state a claim for breach of contract and, as a consequence, is not entitled to monetary damages on that claim.

{¶ 20} Next, we analyze MOM's claim for monetary damages pursuant to its demand for bid-preparation costs. OSU argues that the only way MOM can claim bid preparation costs is by extending the principle set forth in *Meccon*, which involved a public-improvement construction project, to the RFP process. OSU argues against such an extension.

{¶ 21} In *Meccon*, the Supreme Court of Ohio held that when a rejected bidder established that a public authority had violated state competitive-bidding laws in awarding a public-improvement contract, the rejected bidder could recover reasonable bid-preparation costs as damages if the bidder "promptly sought but was denied a timely injunction to suspend the public-improvement project pending resolution of the dispute and a court later determines that the bidder was wrongfully rejected by the public authority but injunctive relief is no longer available because the project has already been started or is completed under a contract awarded to another bidder." *Id.* at ¶ 1.

{¶ 22} We find the principles announced in *Meccon* are not applicable to the circumstances in the instant case to permit the possible recovery of damages in the form of bid-preparation costs.

{¶ 23} First, we note that the instant case does not involve a state public-improvement project subject to competitive-bidding laws like in *Meccon*, but rather a contract with OSU for goods and services established using the RFP process. Unlike the extensive statutory provisions which regulate the competitive bidding process for state public improvement projects (see, for example, R.C. 9.312 and R.C. Chapter 153), the RFP process in this case is not governed by that same statutory scheme. Instead, the General Assembly has provided OSU and other public owners involved in the purchase of goods and services using the RFP process with broad discretion to fashion their own rules, rather than requiring them to conform to the strict requirements of R.C. 9.312 and R.C. Chapter 153. This differentiates the instant case from *Meccon*. Even so, public authorities do have considerable discretion in evaluating bidders and awarding contracts under

competitive bidding laws. See *State ex rel. Glidepath, L.L.C. v. Columbus Regional Airport Auth.*, 10th Dist. No. 10AP-783, 2012-Ohio-20, ¶ 13.

{¶ 24} As noted above, the contract at issue involves one for goods and services, rather than a construction project. Even assuming, for purposes of this argument (but without deciding), that the process set forth in *Meccon* regarding the recovery of bid-preparation costs is applicable to a goods and services contract negotiated using the RFP process, MOM is not eligible to recover these damages because it did not promptly seek a temporary restraining order to delay the project or execution of the contract, which is a precondition to the recovery of bid-preparation costs under *Meccon*.

{¶ 25} As discussed above, under *Meccon*, when a rejected bidder establishes a public authority violated state competitive-bidding laws in awarding a public-improvement contract, the bidder can recover reasonable bid-preparation costs as damages if the bidder promptly sought, but was denied injunctive relief, and it was later determined the bidder was wrongly rejected and injunctive relief was no longer available. In *Meccon*, the rejected bidder sought a temporary restraining order to delay the project, which was denied. In the instant case, however, MOM did not file a motion for a temporary restraining order to delay the start of the contract, although it did reference entitlement to a temporary restraining order in its complaint and filed a motion for preliminary injunction. Nevertheless, the Court of Claims scheduled a temporary restraining order hearing, which was to be held two days after the filing of the complaint. On the date of the hearing, MOM withdrew its request for a temporary restraining order and instead orally moved the court for an evidentiary hearing on its motion for a preliminary injunction. Thus, unlike in *Meccon*, the court never issued a ruling with respect to a temporary restraining order. The preliminary injunction hearing was then scheduled for October 19-20, 2011 (23 days after the complaint was filed). On October 18, 2011, the parties filed a joint motion to continue the preliminary injunction date to January 11-12, 2012 (107 days after the complaint was filed). Also, on October 18, 2011, the trial court dismissed the complaint and simultaneously denied the preliminary injunction request, so the preliminary injunction hearing was never held and the continuance request was moot.

{¶ 26} As previously stated, one of the preconditions to obtaining an award for reasonable bid-preparation costs under *Meccon* is that the wrongfully rejected bidder first had to seek a timely injunction to suspend the project pending resolution of the dispute and such relief had to be erroneously denied and no longer available because the project had started or had been completed under a contract awarded to another bidder. This requirement serves to mitigate damages by preventing the improper awarding of a contract or by suspending the contract before it has been performed to such an extent that it is no longer subject to timely correction. *Id.* at ¶ 14. Thus, under *Meccon*, the recovery of bid-preparation costs is meant to compensate the wrongfully rejected bidder who was not awarded the contract but who attempted to mitigate any damages caused by that wrongful rejection. Because MOM did not seek a temporary restraining order, unlike the rejected bidder in *Meccon*, it cannot meet one of the preconditions to obtaining damages in the form of bid-preparation costs. As a result, MOM has failed to state a claim for damages pursuant to a bid-preparations recovery theory and, therefore, MOM can allege no set of facts entitling it to relief on this claim.

{¶ 27} This is not to say that MOM or another responder participating in the RFP process involving goods and services would never have a remedy available or that it might not have alternative avenues for relief. In this instance, however, MOM has failed to state a claim for breach of contract as alleged, so it cannot state a claim for money damages via a breach of contract. And, even if we extended *Meccon* to apply to a goods and services proposal submitted using the RFP process, MOM did not fulfill the pre-condition of promptly seeking a temporary restraining order. Therefore, in considering the present circumstances, and using the avenues presented here, MOM has not properly established a claim for monetary damages and is not entitled to pursue relief in the Court of Claims.

{¶ 28} To summarize, it is not theoretically possible for MOM to obtain monetary damages as alleged in the complaint, due to MOM's failure to state a claim for money damages under either its breach of contract claim or its request for damages pursuant to a claim for bid-preparation costs. With its claim for monetary damages gone, MOM's only remaining claims are for equitable relief (declaratory judgment and injunctive relief) and they cannot be heard in the Court of Claims. Consequently, the Court of Claims lacks

subject-matter jurisdiction to hear this matter. Therefore, dismissal of the complaint is proper, and we overrule MOM's first assignment of error.

{¶ 29} In its second assignment of error, MOM alleges the trial court erred in failing to consider its motion for reconsideration. Because the motion for reconsideration challenged the same issue we have just addressed in MOM's first assignment of error, and because we have determined that dismissal of the complaint is proper, we render MOM's second assignment of error moot.

{¶ 30} In conclusion, we overrule MOM's first assignment of error and render the second assignment of error moot. The judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

BROWN, P.J., and BRYANT, J., concur.
