

ORIGINAL

IN THE SUPREME COURT OF OHIO

MODERN OFFICE METHODS, INC.)

Plaintiff-Appellant,)

-v-)

THE OHIO STATE UNIVERSITY)

Defendant-Appellee.)

No. 2012-1626

On Appeal from the 10th District Court of Appeals

10th Dist. App. No.: 11-AP-01012

Motion for Stay Pending Appeal

Joseph L. Trauth, Jr. (0021803)
Charles M. Miller (0073844)
Lori Goetz Heilman (0086533)
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
Phone: (513) 579-6515
Fax: (513) 579-6457
jtrauth@kmklaw.com
cmiller@kmklaw.com
lheilman@kmklaw.com

Michael DeWine (0009181)
Attorney General of Ohio
Craig D. Barclay
James E. Rook
Assistant Attorneys General
Court of Claims Defense Section
150 East Gay Street, 18th Floor
Columbus, OH 43215-3130

*Attorneys for Defendant-Appellee,
The Ohio State University*

*Attorneys for Plaintiff/Appellant,
Modern Office Methods, Inc.*

RECEIVED
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FILED
OCT 24 2012
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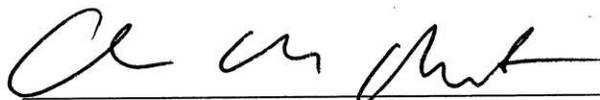
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MOTION

Pursuant to Rule 14.4(A) of the Rules of Practice of the Supreme Court of Ohio, Plaintiff/Appellant Modern Office Methods, Inc. (“MOM”) respectfully requests this Court issue and injunction pending appeal prohibiting Defendant/Appellee The Ohio State University (“OSU”) from replacing copiers leased from MOM with units leased under an improperly awarded replacement contract with another vendor. OSU determined that MOM was the overall best bidder. In spite of this determination, OSU rejected its RFP results and awarded a contract to a different vendor. An injunction is appropriate in this instance because the Court of Claims’ *sua sponte* dismissal for lack of subject matter jurisdiction was plain error. The injunction is necessary because OSU wrongfully contracted with a vendor who was not the best proposer to the RFP, the contract OSU entered was not permitted under the RFP, and OSU had improper contacts with the employee of the new vendor who is responsible for the OSU relationship.

This Motion is more fully supported by the attached Memorandum in Support.

Respectfully submitted,



Joseph L. Trauth, Jr. (0021803)

Charles M. Miller (0073844)

Lori Goetz Heilman (0086533)

KEATING MUETHING & KLEKAMP PLL

One East Fourth Street, Suite 1400

Cincinnati, Ohio 45202

Phone: (513) 579-6515

Fax: (513) 579-6457

jtrauth@kmklaw.com

cmiller@kmklaw.com

lheilman@kmklaw.com

Attorneys for Plaintiff/Appellant,

Modern Office Methods, Inc.

MEMORANDUM IN SUPPORT

I. INTRODUCTION/PROCEDURAL POSTURE

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 when injunctive relief is sought along side or alternatively to monetary damages.

In this matter, Appellant Modern Office Methods, Inc. (“MOM”) challenged the award to a competing vendor of a 40-month, \$16 million contract for exclusive rights to lease office copier equipment to The Ohio State University (“OSU”). MOM’s complaint sought monetary damages in two forms: 1) return of its bid preparation costs, and 2) lost revenues on MOM’s preexisting contract with OSU. MOM also seeks injunctive relief, primarily in the form of the cancelation of the illegal contract.

Despite the clear and unequivocal invocation of the jurisdiction of the Court of Claims, the trial court *sua sponte* dismissed the complaint for lack of subject matter jurisdiction, claiming MOM did not seek any monetary damages. The trial court did so without notice to MOM, and without giving it an opportunity to brief the issue. Adding to the irregularity of the dismissal, the trial court dismissed the complaint even though OSU had filed a motion to dismiss that was pending at the time of the *sua sponte* dismissal to which MOM had not had an opportunity to respond. Importantly, OSU’s motion **did not** contend the court lacked jurisdiction. It is highly unusual for a trial court to dismiss a matter *sua sponte* on grounds different than those argued without granting the plaintiff the opportunity to state its position on the issue.

Alongside the complaint, MOM filed a motion for preliminary injunction. MOM’s motion for preliminary injunction was pending at the time of the *sua sponte* dismissal. The trial

court denied the motion for preliminary injunction in the dismissal entry because of the supposed lack of jurisdiction. This was a procedural ruling, not substantive, in the sense that the trial court decided that a court that lacks jurisdiction to decide a case also lacks jurisdiction to rule on the preliminary injunction motion. A review of the merits shows that MOM is entitled to an injunction.

In the three short weeks between the filing of the complaint and *sua sponte* dismissal, MOM deposed ten OSU witnesses, engaged in an ancillary discovery dispute with the competing vendor, produced thousands of pages of discovery and received several DVDs of discovery from OSU. The evidence obtained during the discovery makes clear that ComDoc should not have been awarded the contract and that the RFP should be reissued.

The discovery establish that:

1. OSU has admitted that MOM was the best bidder when the original evaluation criteria were considered.
2. OSU abandoned its evaluation criteria when evaluating the proposals.
3. The contract OSU entered with ComDoc is substantially more lucrative to the vendor than the RFP permitted because the contract:
 - a. Replaced cost-per-copy with mandatory monthly volumes;
 - b. Extended the contract term by 4 months (11.1%);
 - c. Guaranteed 12 months of revenue on each copier; and
 - d. Mandated the program University wide.
4. A member of the evaluation committee had improper contact with a ComDoc manager during the RFP process.
5. A ComDoc executive offered remunerations to a second member of the evaluation committee during the RFP process.
6. ComDoc was improperly credited with Xerox's OSU experience.

Each of the above violations independently constitutes grounds to invalidate the ComDoc contract and to require OSU to reissue the RFP. Taken together, there can be no question MOM will prevail on the merits.

Because the trial court plainly erred in disavowing jurisdiction over this case, and because it is equally clear that MOM will prevail on the merits below, MOM is entitled to an injunction pending appeal suspending the ComDoc contract and prohibiting OSU from removing any additional MOM equipment prior to the completion of a proper RFP process. Currently, more than 400 MOM copiers remain on lease to OSU and could face removal during this appeal.

II. STATEMENT OF RELEVANT FACTS

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. At the beginning of this case, MOM leased approximately 750 copiers to OSU – over half of the entire OSU copier fleet. During the pendency of this case, MOM’s fleet at OSU has been reduced to a little over 400 copiers.

MOM was most recently awarded privileges to lease copiers to OSU as a preferred vendor under a 2002 RFP. MOM and Gordon Flesch, a competing company, were each selected as vendors under the 2002 RFP. Xerox Corporation protested the award, and was allowed to participate in the 2002 program under a contract it had with the State of Ohio. The 2011 RFP was intended to replace the 2002 contract.

A. 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. Triplett Dep. 35:23-36:2.¹ The 2002 RFP stated that any unsuccessful bidder to that

¹ As this case has not undergone jurisdictional review, this Court has not yet certified the record. Nevertheless, record citations are being supplied.

RFP could not sell around the contract. Triplett Dep. 9:5-10:2. 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.

The three Uniprint approved vendors, MOM, Gordon Flesch, and Xerox had the right to lease office space in the Uniprint building on campus. MOM and Gordon Flesch leased space. Xerox did not because it viewed the cost as an unnecessary expense. Triplett Dep. 41:7-12.

B. 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. Triplett Dep. 29:4-34:23. Gill-Parks affirmatively took this step on her own. Triplett Dep. 32:18-33:3. 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. Triplett Dep. 29:9-15. 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." Triplett Dep. 30:12-31:3 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." Triplett Dep. 31:7-9.

ComDoc leased approximately five 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. Triplet Dep. 40:20-41:17. 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. Triplett Dep. 42:1-43:2. It was this proximity to Gill-Parks that facilitated Mathews' improper contacts discussed below.

C. 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.

1. *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. See Deposition of Sheryl Huegel ("Huegel Dep.") at 20:1-2 ("The university bid a cost-per-click RFP. People responded to a cost-per-click RFP.") 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. *Id.* All options required that the proposer supply equipment within 10 days of order. *Id.*

The electronic forms OSU provided upon which to submit pricing proposals would accept exclusively cost-per-copy data. *Id.* 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. *Id.*

2. *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. (Triplett Dep. 9:1-4) Under Option 2, a single proposer would be selected, with Uniprint again providing the specified services. *Id.* This was the only change between options 1 and 2. *Id.* Option 3 was identical to Option 2 except the approved vendor would not use Uniprint. *Id.* 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.

3. *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.

D. MOM Submitted a Proposal that Complied with the RFP

MOM has been serving OSU for over twenty years, and at the time of the RFP leased 750 multi-function machines to OSU. MOM submitted a proposal that fully complied with the RFP.

The proposal submitted by MOM was based upon OSU’s representations that 1) all units would be coterminous; 2) the initial contract would be for only 36 months; 3) there would be no monthly minimum guaranteed per machine; 4) all units and add-ons be priced on a per click basis; and 5) no OSU department would be required to participate in the program.

Had MOM been provided the opportunity to submit a proposal on the assumptions that 1) all units would have a 12 month minimum placement; 2) the initial contract would include be 40 months and include a 4 month ramp up period; 3) each machine would carry a minimum monthly guaranteed click count; 4) all units would carry a fixed monthly fee and add-ons would be billed at a fixed monthly rate; and 5) all OSU departments would be required to participate in the program, then MOM would have submitted bids substantially lower in cost than the MOU that OSU has entered with ComDoc.

The reason MOM could submit substantially lower bids under the terms of the MOU is that the MOU substantially reduces the risk and increases the reward for the vendor over the RFP terms. The MOU provides a guaranteed minimum income stream to the vendor each month. This minimum actually increases the cost to OSU because its printing and copying is cyclical (e.g., may be reduced during holiday months, between quarters, over breaks, and during the summer). Thus, in some months, OSU will pay substantial overages, while in others, it will fall substantially short of the minimums. The MOU substantially increases the scale of the contract by requiring all departments to contract with the Vendor. Under the RFP, the vendor would have to compete for every machine in every department, even if it was the only vendor selected under the program. The 12 month minimums and the four month additional contract length combined to greatly increase the average lease term and correspondingly increases the value to the vendor.

Because of these changes, MOM and other proposers would have also submitted lower bids had they been aware that the ultimate agreement would contain the terms of the MOU, rather than those of the RFP.

E. OSU's Evaluation of the Proposals

The OSU Evaluation Committee for the RFP was comprised of Debbie Gill-Parks, Jeff Dible, Mark Evans, Sherry Huegel, Brendan Foley, and Tom Crawford. Crawford Dep. 13:12-17.

1. *The Initial Evaluation*

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.” Id. The evaluation criteria assigned relative weights to be given to each criterion. Mullins Dep. 14:9-23; Bolyard Dep. 18:14-19:7. The weights assigned to the categories differed by option. Option 3 was to be scored:

Pricing	40%
Bidder Qualifications	10%
Program Enhancements	10%
Service Requirements	40%

Huegel Dep. 35:4-21; Baggs Dep. 9:12-24.

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.” Huegel Dep. 29:17-19. When asked why MOM was the best overall bid when it was not the lowest priced bid, Huegel referenced the evaluation criteria and explained, “[MOM] scored a higher rating based upon the weighted averages that were applied.”² Huegel Dep. 29:23-30:3.

² MOM was the best bidder even though OSU improperly inflated ComDoc's score by evaluating Xerox instead of ComDoc on the three qualitative categories. Crawford Dep. 38:11-13 (“Q. So the ComDoc/Xerox qualitative score was the University's evaluation of Xerox? A. Correct.”).

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.

2. *OSU Abandoned the Evaluation Criteria After Addendum 1A*

In Addendum 1A, OSU explained that after a thorough evaluation of all bids submitted in response to the original RFP, the bid selection committee eliminated Option 1 and discussed ways to further narrow down the remaining bids related to Options 2 and 3. The committee developed Addendum 1A to afford the top four bidders on the original RFP “the opportunity to then price specifically the fleet of MFDs.” Dible Dep. 59:24-62:4. The initial purpose of Addendum 1A was “to further clarify and to further validate that [the vendors] were bidding apples to apples.” Huegel Dep. 30:19-21. Because the initial purpose of Addendum 1A was simply to clarify the pricing component, the responses thereto did not change the fact that MOM was the “overall best bidder.” As the OSU Project Lead for this RFP explained, “Actually, if you look at the delta from the RFP to the addendum, the playing field didn’t change. No positions changed.” Huegel Dep. 32:12-14. MOM remained the “best overall bidder.”

OSU didn’t decide how it was going to evaluate the responses to Addendum 1A until after it reviewed the vendor responses. Crawford Dep. 35:16-24 (“After [the responses] were cleaned up, then the Evaluation Committee met to talk about the different pricing and how we would move forward with evaluating.”) At this point, the evaluation became completely ad hoc.

After the responses to Addendum 1A were reviewed, OSU elected to evaluate the four remaining bids under only the pricing criteria and completely disregard the three other factors comprising 60% of the evaluation criteria (bidder qualifications, program enhancements, and service evaluation). Crawford Dep. 36:1-37:9 (“the final determination was based on the price”); Huegel Dep. 33:23-34:6 (“The university was looking at this point now to get to the best pricing.”) Thus, the entire weighted average based on the four initial criteria – pricing, bidder qualifications, program enhancements, and service requirements – was disregarded in OSU’s ultimate decision in awarding the contract. Huegel Dep. 36:22-37:5.

The cause of the change was the views of one person—OSU’s Associate Vice President of Administration and Planning Mark Evans. When asked about the Evaluation Criteria, Evans responded, “I am aware that there was some analysis along those lines done. And when it was done and brought to me, I said, ‘Do all of the vendors that we’re zeroing in on’—at that point, we were zeroing in on four—‘meet our qualitative considerations, our qualitative requirements?’ . . . And the answer was yes.” Evans Dep. 38:20-39:4. Evans didn’t like the evaluation criteria. As the senior executive on the Evaluation Committee, he decided to create his own evaluation criteria. “At that point, we were down to four vendors who had met all of our qualitative considerations, and we were looking at *where do we think we can get the best price. That’s what I was looking at. And that’s what I based my recommendation on to senior management.*” Evans Dep. 36:19-24. Evans unilaterally changed the evaluation criteria after the proposals were submitted because he disagreed with the factors weighting. Evans Dep. 39:9-16.

F. 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. See Deposition of Bill Matthews, "Matthews Dep.," at 19:2-20:5. ComDoc maintained this office even though there were no new leases permitted during the entire time the RFP was in place.

Matthews reported to the Uniprint building on a nearly daily basis. Triplett Dep: 41:18-21. Uniprint employees did not understand why Matthews was there so frequently because the OSU work he had would not keep him busy. Triplett Dep. 42:7-43:2. As a Uniprint approved vendor, Matthews primary OSU contact was Becky Triplett. Triplett Dep. 46:3-10. Matthews would have had no cause to speak to Gill-Parks about the machines he had placed under the 2002 program. Id. 48:3-17. No OSU employee ever witnessed a representative of MOM, Gordon Flesch or Xerox hold private meeting with Gill-Parks. Triplett Dep. 48:22-49:6. The same cannot be said for Matthews.

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. Stephen Mullins witnessed Mathews sitting in Gill-Parks office on three to five separate occasions during the RFP. Mullins Dep. 9:20-12:13. Becky Triplett witnessed Matthews seated in Gill-Parks' office on at least three or four occasions. Triplett Dep. 45:6-19. Jeff Baggs witnessed Mathews in Gill-Parks office on "multiple mornings". Baggs Dep. 16:22-17:8. Baggs also witnessed Gill-Parks close her door when Mathews entered. Baggs Dep. 25:11-15. At no time after any of these meetings did Gill-Parks ever inform Triplett of any

issues Gill-Parks discussed with Matthews that would have impacted day-to-day relations with ComDoc. Triplett Dep. 46:3-23. In fact, Gill-Parks told Triplett nothing about these meetings even though Triplett was ComDoc's primary OSU contact. Triplett Dep. 46:24-47:2. Uniprint employees were concerned about the meetings at the time "probably because of the appearance." Bolyard Dep. 12:19-13:16. "There was wonder on what they were talking about." Id. at 14:8-9.

Pursuant to the RFP, "The primary point of contact for OSU will be John Maloney . . . Any bidder that initially contacts other OSU personnel directly, in writing, or by telephone, without previous notification and approval will be disqualified from consideration." Matthews's contacts with Gill-Parks violate the express terms of the RFP and should automatically disqualify ComDoc's proposal from consideration under the RFP. Rather than disqualifying ComDoc, OSU awarded the contract to it under a Memorandum of Understanding dated on or about August 31, 2011.

OSU does not deny that these inappropriate contacts occurred. Instead, it takes the position that the inappropriate contacts will only disqualify a vendor if an internal OSU investigation concludes that the inappropriate contacts impacted the evaluation. Crawford Dep. 41:19-24.

G. ComDoc Awarded Contract that Drastically Differs from the RFP

In June 2011, OSU further narrowed the proposers to two – ComDoc and Gordon Flesch. Dible Dep. 65:12-14. In early August 2011, OSU selected ComDoc as the winning bidder. Id. at 66:1-7; 68:17-21. During negotiations with ComDoc, several aspects of the RFP changed. Base monthly minimums and a minimum 12-month placement were added to the ComDoc contract in negotiations with ComDoc – after Gordon Flesch had been eliminated. Dible Dep. 75:17-76:4. When OSU and ComDoc negotiated, however, ComDoc proposed the alternate pricing structure that included monthly minimums. Dible Dep. 55:14-22.

OSU admitted that as part of the negotiation phase, it was willing to accept changes to a bid in order to get a lower overall price for the university – despite the fact that the RFP specifically required firm pricing. Dible Dep. 29:8-19 (“Then at the end, if you can give me a better price because of something else, why wouldn’t I take it for the university’s best interests?”). After the RFP was issued and bidders submitted their bids, OSU used the negotiation process to get “the right to talk to [the best bidder] further and ask [the best bidder] additional questions to get a better price for the university.” Dible Dep. 51:9-11. The concessions that OSU received through negotiations with ComDoc resulted in overall cost savings to OSU, but they were a result of material departures from the RFP. Evans Dep. 43:12-44:20. As Evans explained, “[S]o in order to achieve the improvements in the agreement that we sought, we also – we also agreed to – we agreed to some things that were requested by ComDoc.” Evans Dep. 45:22-46:1.

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. Dible Dep. 48:5-8; 71:10-23; 75:14-16. Additionally, OSU blended aspects of Options 2 and 3, essentially creating a transition period into Option 3. Triplett 11:5-12:17, 21:20-22:1.

1. *The MOU is Longer than the Term Included in the RFP*

The terms of the MOU supersede the terms of the RFP. The MOU expands the 36 month term of the RFP by including an additional 4 month (120 day) “Roll Out Period” on the front end

of the agreement. Huegel Dep. at 53:7-8; Triplett Dep. at 55:10-18; Mullins Dep. at 18:24-19:1. The ultimate contract awarded to ComDoc, therefore, is four months longer than that described by the RFP. Dible Dep. 71:10-23. ComDoc admitted that the "Roll Out Period" added value to its contract. Matthews Dep. 41:1-4.

Delaying the ending date of the contract to December 31, 2015 means several hundred additional units will be leased under the MOU than contemplated by the RFP because each unit will be in place for an additional 4 months and additional units will be added to the contract during the final 4 months of the program. These facts combine to significantly increase the average per unit lease term, which is a major material change to the terms of the RFP that substantially increases the value of the contract to the vendor, and therefore substantially lowers the cost-per-copy rate a vendor would propose.

2. *The MOU Emasculates the Co-Terminus Provisions of the RFP*

The RFP contained a co-terminus provision, meaning that every copier leased under the RFP would expire on the same day. This could result in a machine leased in month 34 of a 36 month lease being in place for only three months. Crawford Dep. 28:11-15. The MOU requires a minimum unit placement of 12 months. Mullins 19:15-20. Thus, if a copier is in place for only the last three months of the contract, OSU will be required to compensate ComDoc for an additional 9 months for that machine. Crawford Dep. 28:16-19. OSU has the option of leasing the copier for the additional 9 months or making a termination payment, but either way the co-terminus nature of the RFP has been eviscerated. Crawford Dep. 29:12-21. The 12 month minimum was requested by ComDoc, even though ComDoc and OSU were aware that the RFP did not contain a minimum placement period and that this was a material change from the RFP. Matthews Dep. 38:23-39:1; 40:7-9; Gill-Parks Dep. 22:3-14; Dible Dep. 75:14-16. OSU explained that giving up the co-terminus lease requirement and agreeing to a 12-month minimum

lease in the MOU after negotiations with ComDoc “was something that we gave up in order to get some of the things that we wanted.” Evans Dep. 46:12-13. ComDoc admitted that the addition of the 12-month minimum added value to ComDoc under the MOU. Matthews Dep. at 40-:17-21. OSU admitted this change was a benefit to ComDoc. Mullins 19:21-23. OSU, however, couldn’t identify a benefit to the increased length of the contract term – any more than it “was a concession on our part that in exchange for which we got some things that we wanted.” Evans Dep. 56:13-20.

3. *The MOU Guarantees Monthly Minimum Volumes*

Unlike the RFP, the MOU contains a monthly minimum volume for each unit. Crawford Dep. 23:8-17; Mullins Dep. 18:20-22. The RFP did not allow the submission of bids based upon monthly minimum volumes. Huegel Dep. at 20:1-2; Gill-Parks Dep. at 42:3-7. In fact, OSU admits those proposers bidding under the RFP “responded to a cost-per-click RFP.” Huegel Dep. at 20:1-2. “When we wrote the RFP, we were writing it as a true cost-per-page contract so that the customers are only charged for what they use. . . . If you get a good price on the cost per page and you’re only paying for what you’re using, you will save.” Triplett Dep. 53:15-53:2. But, when negotiating the MOU with ComDoc, the university altered the terms of the RFP and created minimums at ComDoc’s request. Huegel Dep. at 20:13; Matthews Dep. 37:3-7; Dible Dep. 38:19-39:12. OSU never discussed minimum allowance with any other bidder to the RFP. Dible Dep. at 43:15-17. Dible admitted that the guaranteed minimum was “a different model than the price per click.” Id. at 48:5-8. OSU admitted this change benefitted ComDoc. Mullins 19:9. For the university, one major benefit of the minimum monthly volume had nothing to do with pricing; minimum monthly volume was simply a concession when OSU “asked for a lot and [] got many things in negotiations.” Evans Dep. 54:15-17. One OSU employee claimed monthly minimums were included “so that we got additional price concessions,” but could not quantify

the amount because “the price concessions are all rolled up in all the negotiations.” Crawford Dep. 25:21-22, 26:22-23.

Importantly, the decision to add minimum monthly volumes to the contract was not made until after ComDoc had been selected and negotiations to finalize the MOU began. Huegel Dep. at 25:5-19. Monthly minimum volume is a boon for a vendor because it creates a guaranteed minimum return on investment for the vendor. Without them, the vendor could be burdened with the substantial expense of underutilization of a machine leased on a cost per page basis. Crawford Dep. 25:22-26:19. The significance of this change cannot be overstated.

4. *OSU Mandates All University Departments Must Lease from ComDoc*

OSU has elected mandate that all OSU departments lease copier equipment from ComDoc. This represents a material change from the RFP that stated that OSU would not impose exclusivity upon its departments. The original RFP was not as mandated RFP; it did not mandate that every department in the university use the vendor selected through the bidding process. Dible Dep. 13:3-9; 24:9; 26:10-17. As Dible explained, “[The RFP] did not state that [the winning bidder] was going to be mandated . . .” Id. at 18:15-16. In fact, in response to questions from multiple vendors, OSU expressly informed vendors prior to the proposal submissions that the contract would not be mandated. Triplett Dep. 23:23-24:5. This was yet another change that benefitted the vendor. Mullins Dep. 19:24-20:5.

Tom Crawford, OSU’s Director of Purchasing, intended to impose a mandate even before the RFP was issued. “As the Director of Purchasing, for two years I had been saying I had wanted that contract mandated.” Crawford Dep. 15:20-22. A mandate can drive additional cost savings because “typically, the more business we can give a vendor, the lower the cost.” Crawford Dep. 16:14-16, 17:19-20. When asked if there is a process that OSU employs to

determine the cost savings of imposing the mandate, Crawford concisely stated, “Yes. It’s the bid process, usually.” Crawford Dep. 17:21-18:1.

OSU could have included an option in RFP for pricing based upon a mandate. Crawford Dep. 18:2-6. This way, each vendor could have expressly told OSU the discount the vendor would offer in order to obtain a monopoly over OSU business. Crawford Dep. 18:7-10. The evaluation committee might have had to obtain final approval from senior management to impose the mandate, but that is not reason for OSU to not include a mandate option in the RFP. Crawford Dep. 18:23-19:8. This is particularly the case here, where the Director of Purchasing had desired to mandate this contract for two years prior to issuing the RFP. Crawford Dep. 15:20-22, 22:13-18.

ComDoc admitted that the mandate added value to the vendor supplying services under the MOU. Matthews Dep. 41:5-7; 41:24-42:3). OSU also admitted that a mandate drives down pricing. Crawford Dep. 16:14-16, 17:19-20, 22:19-23:7. Had the RFP included an option for exclusivity, other proposers—including MOM—would have submitted substantially lower bids. Id. As a result of this major material change, the RFP must be rebid. More remarkable yet, OSU did not solicit or obtain a single concession or price reduction from ComDoc for mandating the contract. Crawford Dep. 33:8-11.

As a result of the several major materials changes described above, the MOU is an agreement wholly different than the RFP. No vendor other than ComDoc was permitted to submit proposals for terms substantially similar to those contained in the MOU. Had the other proposers, including MOM, been given the opportunity to submit proposals based upon the terms of the MOU, ComDoc would not have been the lowest or best bidder.

H. OSU Refuses to Rescind MOU

MOM formally protested the contract award to ComDoc. MOM informed OSU of ComDoc's violation of the RFP process, and of the multiple material changes between the RFP and the MOU, all of which should result in the contract being rebid.

OSU responded to MOM's protest via letter dated September 22, 2011. OSU refused to delay implementation of the MOU or to vacate the award. OSU acknowledged "The contract resulting from the RFP award did change somewhat in the areas noted by MOM (modification to the co-terminus period; extension of launch period; monthly minimum payments based on small percentage of current volume), but such modifications were in exchange for concessions during the negotiation process." OSU never identified what "concessions" were made, nor why other vendors were not given the opportunity to state which concessions they would offer in exchange for these numerous material changes.

Despite acknowledging these multiple material changes, OSU denied MOM's protest and refused to reissue the RFP. OSU blamed MOM for not being prescient. "The claim that MOM did not have an opportunity to submit a bid based upon the final MOU terms is not correct. MOM could have proposed any alternative service model they wanted, priced however they wanted, including as described in the [MOU]. MOM chose not to submit such alternative proposal and submitted another alternative." In other words, MOM should have anticipated every material change OSU might have made, and submitted multiple alternative bids to cover every possibility. Under OSU's theory, the actual RFP is rendered meaningless. The abuse of discretion OSU exhibited in the RFP process is basis for the rescission of the agreement, and the issuance of a new RFP.

III. LEGAL ANALYSIS

The status quo should be maintained until this case is resolved. OSU currently relies upon multiple vendors, including MOM, Gordon Flesch, Xerox Direct, and ComDoc to provide cost-per-copy services to the University. ComDoc should not be permitted to further benefit at the expense of Plaintiff based on an RFP process which was fundamentally flawed, and likely tainted. Plaintiff is suffering the potentially non-compensable damage of the termination of hundreds of equipment leases, and the reputational damage of losing a major customer.

A. Legal Standard for the Issuance of Injunctive Relief

Under Ohio law, this Court must consider and balance the following four factors in deciding whether to grant injunctive relief: (1) the probability of the plaintiff's success on the merits; (2) whether the issuance of the injunction is necessary to prevent irreparable harm; (3) the injury caused to others by granting injunctive relief; and (4) whether the public interest will be served by granting such relief. *Frisch's Restaurant v. Shoney's*, 759 F.2d 1261, 1263 (6th Cir. 1985); see also *Proctor & Gamble Co. v. Stoneham*, 140 Ohio App.3d 260, 267, 747 N.E.2d 268 (2000), *Convergys v. Tackman*, 169 Ohio App.3d 665, 666, 864 N.E.2d 145 (2006), *Thomas J. Dyer Co. v. Franklin Cty. Convention Facility Auth.*, 61 Ohio Misc. 2d 132, 133-34, 575 N.E.2d 532, 533 (Franklin Cty. C.P. 1990); *Diamond Co. v. Gentry Acquisition Corp.*, 48 Ohio Misc. 2d 1, 2, 531 N.E.2d 777, 778-779 (Cuyahoga Cty. C.P. 1988); *Dodd v. Rue*, 64 Ohio Misc. 21, 27-28, 15 Ohio Op.3d 196, 200 (Hamilton Cty. C.P. 1979).

These four factors do not serve as a litmus test for awarding injunctive relief. Rather, they should be balanced by the Court in order to determine whether injunctive relief is justified. The four factors "do not establish a rigid and comprehensive test for determining the appropriateness of injunctive relief; rather, they are factors to be balanced, not the prerequisites that must be met." *Frisch's Restaurant*, 759 F.2d at 1263. For example, if the likelihood of the

success on the merits is substantial, then the probability of irreparable harm need not be as great in order to warrant injunctive relief. *Id.*

In the present case, MOM requests an injunction prohibiting OSU from moving further forward with the contract it has entered with ComDoc. Injunctive relief is appropriate because additional implementation of the contract will change the status quo by allowing OSU to continue to act on its improper award of the contract to ComDoc. Intervention by the Court at this phase will protect the status quo without causing undue injury to OSU or third parties.

MOM is highly likely to succeed on the merits. OSU's abandonment of its evaluation criteria—under which OSU determined MOM to be “the best overall bidder”—combined with the multiple changes from the RFP to the contract—all of which favored ComDoc—nullified the RFP process. OSU's actions are equivalent to awarding a contract for oranges based upon a bid for apples after placing a thumb on the scale. If OSU wants to purchase oranges, it must issue an RFP for oranges. Similarly, if OSU wants to contract for a mandatory, exclusive, monthly-minimum priced, minimum lease period, copier/printer vendor, it must issue an RFP for one. An RFP for a non-exclusive, cost-per-copy contract, without any payment guaranties, is not sufficient to select a vendor for the contract it awarded. Once the RFP process determined that MOM was “the best overall bidder,” OSU was not free to ignore its own evaluation criteria and select a different vendor for a non-bid contract.

B. MOM Will Succeed in this Appeal

Under R.C. 2743.03, the Court of Claims “has exclusive, original jurisdiction of all civil actions against the state.” Additionally, the Revised Code grants the Court of Claims “full equity powers in all actions within its jurisdiction.” R.C. 2743.03(A)(1). As the Court emphasized in its dismissal, 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.” Id. at 2743.03(A)(2).

Once 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. *Ballengue 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”); *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.”) 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.*, 2004 Ohio 6073, at ¶23, citing *Boggs v. State* (1983), 8 Ohio St. 3d 15, 8 O.B.R. 84, 455 N.E.2d 1286 and *Friedman v. Johnson* (1985), 18 Ohio St. 3d 85, 18 O.B.R. 122, 480 N.E.2d 82. Even when a party does not affirmatively plead monetary damages, but is otherwise 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.”)

The Court of Claims dismissal fails to recognize MOM’s patent request for monetary damages. Not only did MOM specifically allege breach of contract, a claim for which the Court

of Claims has exclusive jurisdiction, but MOM also specifically requested monetary damages. The request for relief portion of the Complaint specifically reads:

- IV. Damages against OSU in excess of \$25,000 on Count II;
- V. Damages in the amount of MOM's proposal preparation costs; and,
- VI. All such further relief as this Court deems just and equitable.

Therefore, MOM's request for monetary damages in relation to OSU's breach of contract sufficiently establishes the Court of Claims jurisdiction to hear the case. Because MOM has properly sought both monetary damages and other equitable relief, this Court has jurisdiction to hear MOM's claims and issue the appropriate relief. Therefore, the dismissal for lack of subject matter jurisdiction was not proper.

C. MOM Will Succeed on the Merits on Remand

To prevail on a complaint seeking injunctive relief with respect to the award of a public contract, the moving party must prove by clear and convincing evidence: 1) that the award constituted an abuse of discretion and 2) the award resulted in some tangible harm to the public in general or to the contractor individually. *See Rein Construction Co. v. Trumbull County Bd. of Commissioners* (2005), 138 Ohio App.3d 622, 631, 741 N.E.2d 979.

There were multiple fatal flaws to the RFP. A member of the Evaluation Committee had inappropriate contacts with ComDoc during the RFP process—calling the evenhandedness of the process into question. OSU abandoned its evaluation criteria, under which MOM was “the best overall bidder,” in favor of Mark Evan's personal preferences for selecting a vendor based on price alone. This criteria changed only after all of the bids were reviewed—a prohibited practice in RFP processes. OSU's contract with ComDoc is so vastly different from the RFP terms and conditions that the contract cannot be said to be mere modification of the RFP, but is an entirely

different agreement. The MOU terms are so vastly more favorable to the vendor than MOM, and likely every other vendor, would have bid significantly lower given the opportunity—which is what RFPs are supposed to afford. The RFP was so riddled with errors that it must be reissued.

1. *Inappropriate contact between Gill-Parks and Matthews*

The RFP established that “The primary point of contact for OSU will be John Maloney. ... Any bidder that initially contacts other OSU personnel directly, in writing, or by telephone, without previous notification and approval **will be disqualified** from consideration.” Under the RFP, disqualification under this provision is mandatory. No discretion is allowed. Recognizing that establishing the contents of improper conversations may be difficult or impossible, this provision of the RFP prohibits contact with even the appearance of impropriety.

“[T]he purpose of competitive bidding is to provide a fair and honest process for the awarding of public contracts.” *Rein*, 138 Ohio App. 3d 622, 629-30, 741 N.E.2d 979. Not only is a “fair and honest process” free from actual impropriety, but also the appearance of impropriety. “The appearance of a fair and impartial bidding process may be as important as the reality of one.” 2005 Ohio Op. Atty Gen. No. 29, 2005 Ohio AG LEXIS 34, *8. The bidding process must maintain a public perception free from any indication of “favoritism, fraud, or collusion.” *Danis Clarkco Landfill Co. v. Clark County Solid Waste Management District* (1995), 73 Ohio St.3d 590, 602, 643 N.E.2d 646. When impropriety is alleged the issue becomes whether “the public’s perception of the bidding process [will] be positive or negative.” *Rein*, 138 Ohio App. 3d 622, 630, 741 N.E.2d 929, 985. “**No amount of post-bidding explanation regarding the harmlessness of the deviation will cure the appearance of some sort of impropriety.**” *Id.* (emphasis added).

ComDoc and OSU violated the RFP protocol in a manner that requires OSU to disqualify ComDoc as a proposer. A ComDoc representative, Bill Matthews, held multiple closed door

meetings with Debbie Gill-Parks, a member of the Evaluation Committee, during the preparation of the RFP and continuing through the proposal preparation, submission and evaluation periods. Matthews entered the campus office of OSU's Debbie Gill-Parks for one-on-one meetings, sometimes behind closed doors, on a repeated basis while the RFP was being prepared and continuing through the bid evaluation period. Multiple OSU staff witnessed these meetings. Uniprint employees Becky Triplett, Jeff Baggs and Steve Mullins each witnessed meetings on multiple occasions. All questioned whether the RFP was being discussed. All agreed Matthews had no legitimate business purpose to meet with Gill-Parks other than to discuss the RFP.

ComDoc maintained an office at the Uniprint facility on OSU's campus, but was only responsible for about six machines on the entire campus. By contrast, MOM, which provided 750 machines on OSU's campus, held no meetings with Gill-Parks over the same time period. Neither did Gordon Flesch or Xerox. ComDoc's small responsibility to the OSU campus for these six machines in no way required multiple closed door meetings with Gill-Parks.

Although the contents of the closed door conversations is obviously unavailable, the timing of the meetings violates the RFP procedures and suggests that the RFP was the subject of discussion. Even more important, despite the numerous witnesses to these meetings, both Gill-Parks and Matthews refused to offer an explanation of their meetings and instead completely denied having any meetings. Thus their attempts to cover up their improper conduct could not be any more clear. ComDoc's contact with Gill-Parks was clearly in violation of the RFP procedures.

As Gill-Parks' boss, OSU Vice President Mark Evans, forthrightly testified regarding the meetings Gill-Parks held with Matthews:

If an individual is only—his only job was to represent ten units on campus, I wouldn't expect [Gill-Parks] would meet with him very often – you know, rarely.

Never, or almost never. So if someone said, you know, your hypothetical question—then I would say, Well, there're not having meetings about the ten devices. What are the meetings about?

Evans Dep. 70:10-71:2. This is precisely why the RFP must be reissued. The RFP prohibited Gill-Parks' contacts with Matthews. At least three OSU employees independently witnessed Gill-Parks meet with Matthews on multiple occasions—at least one time with the door closed. Gill-Parks had no cause to meet with Matthews regarding day-to-day business—that was Becky Triplett's responsibility. Moreover, because ComDoc only had 6 machines on campus, there wasn't anything to talk about. Uniprint employees were concerned about the meetings and could offer no explanation for them. Gill-Parks and Matthews deny the meetings even occurred. A reasonable conclusion is that Gill-Parks was coaching Matthews on the RFP. The RFP requires ComDoc's disqualification.

The appearance of impropriety here is unavoidable. “No amount of post-bidding explanation regarding the harmlessness of the deviation will cure the appearance of some sort of impropriety.” *Rein*, 138 Ohio App. 3d 622, 630, 741 N.E.2d 929, 985. Even OSU Uniprint employee's questioned whether their boss—Gill-Parks—was inappropriately meeting with Matthews to discuss the RFP. The OSU Associate Vice President to whom Gill-Parks reports, when asked about this exact scenario stated his concern about the topics discussed in the meeting. These meetings occurred during the proposal formulation and evaluation process. These meetings leave the appearance that Gill-Parks was coaching her friend whom she had brought on campus in violation of the previous RFP just a few months before. These contacts require the RFP be reissued.

2. *Evaluation criteria not followed*

Under the Revised Code, “The request for proposals shall state the relative importance of price and other evaluation factors.” R.C. 125.071(B). Similarly, OSU procedures also demands:

“E. Evaluation Criteria (*assign weight values*): The bid evaluation criterion summarizes the measurable elements considered when evaluating vendor proposals. Each vendor is evaluated relative to the evaluation criteria and ranked based on their overall ability to provide the products and services as defined in the specifications. ***This process is the determining factor for recommending awards and must be considered prior to issuance of the bid preparation documentation.***” OSU Bid Preparation Form (emphasis added). OSU failed to comply with R.C. 125.071(B) or the OSU purchasing policy by failing to establish and communicate in advance of the proposal submission deadline the formula for evaluating bids and for assigning weight values to the criterion. This failure to follow the Revised Code and OSU policy created a scope creep, where OSU’s method of evaluating the proposals changed to fit the committee members desired results.

A court should find an abuse of discretion and enjoin a RFP process “where a bid deviates from the specifications or instructions in such a way that the competitive nature of the bidding process is destroyed, and a suit may enjoin the execution of a contract on that bid.” *Forest Cty Land Group v. Ohio Dept. of Mental Health* (1999), Summit Cty. App. Nos. 19079, 19080, 1999 Ohio App. LEXIS 1580, *6. Here, OSU admits that after it determined that MOM was “the best overall bidder” in response to the RFP, OSU removed its qualitative criteria, and focused solely on price. The Ohio Supreme Court has found this precise conduct to void an RFP process. “Appellant [governmental agency] modified their requirements without notice. This action tended to undermine the integrity of the competitive bidding process.” *Dayton ex rel. Scandrick v. McGee* (1981), 67 Ohio St. 2d 356, 359, 423 N.E.2d 1095.

The Supreme Court explained, “The evil here is . . . that there are absolutely no guidelines or established standards for deciding [what will] qualify as the ‘lowest and best’ bid.

Absent such standards, the bidding process becomes an uncharted desert, without landmarks or guideposts, and subject to a [government] official's shifting definition of what constitutes 'many percentages.' Neither contractors nor the public are well served by such a situation." *Id.* at 360. OSU had included in the RFP a list of evaluation criteria. It assigned relative weights to each criterion prior to issuing the RFP. OSU evaluated the proposals according to the preset formula. OSU determined that MOM was "the best overall bidder." All was well. Mark Evans then decided that he preferred to weight the criteria differently, eliminated MOM from the award, and OSU negotiated with ComDoc. Evans' decision to abandon the predetermined evaluation formula because he did not like the result, was an abuse of discretion.

Evans' conduct here closely mirrors the conduct of a state official in another case where an RFP award was vacated. *Fouche v. Denihan* (1990), 66 Ohio App.3d 113, 583 N.E.2d 453. The State of Ohio issued an RFP for the Wayne County Deputy Registrar of Motor Vehicles. After the bids were evaluated, the Registrar decided to emphasize different evaluation criteria than listed in the RFP. Specifically, the Registrar preferred the office be located closer to the driver's licensing bureau than to the title agency. The 10th District Court of Appeals found the modification of the evaluation criteria to be unacceptable. "No language in the RFP which grants explicitly to the Registrar of the Bureau of Motor Vehicles the unbridled discretion to regrade the proposals, change the weight given to the criteria after the fact, and choose the deputy registrar based on this new criteria which is unknown both to the candidates and the evaluators." *Id.* at 118. Similarly, no language in the RFP granted Evans the authority to regard the proposals, change the weight given to the criteria after the fact, and choose the vendor based on this new criteria which was unknown to both the vendors the other evaluators.

3. *OSU Failed to Solicit Proposals for the Contract It Issued*

OSU is an instrumentality of the State of Ohio governed by Chapter 3335 of the Revised Code. The OSU Board of Trustees most recently set forth the purchasing policies applicable to OSU in Board Resolution 2011-78. The Resolution provides in relevant part:

Except as provided below [in exceptions immaterial to this matter], all equipment, materials, supplies, and services *shall* be purchased through solicitation of competitive bids or proposals Contracts shall be awarded to the lowest responsible and responsive bidder.

Resolution 2011-78, ¶ 2. The use of the term shall connotes that compliance with the provision is mandatory. The Resolution is designed to comport with R.C. 125.071, which is generally applicable to State agencies and based on the same cost thresholds.

“The university [requires] that each employee involved in the expenditure of public funds is held to the highest degree of public trust and will abide by the following: . . . Grant all competitive suppliers equal consideration insofar as state or federal statute and institutional policy permit.” OSU Purchasing Policy 2.21(III)(C)(4).

The statute and OSU policies reflects an Ohio Supreme Court holding that an instrumentality of the State can, under certain circumstances, adopt a RFP process. *Anis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt Dis.* (1995), 73 Ohio St. 3d 590, 1995-Ohio-301, 653 N.E.2d 646. However, the instrumentality of the State “is under a legal obligation to deal in good faith with bidders participating in its RFP process and must comply with the terms and obligations it set forth in its RFP document.” *Id.* at 596. A court will enforce competitive proposal processes to grant “the assurance of open and honest competition in bidding for public contracts so as to save the public harmless, as well as bidders themselves, from any kind of favoritism, fraud or collusion.” *Id.* at 602. Moreover, a “Board ha[s] no discretion to waive non-compliance with a specification where doing so would affect the amounts of the bids and

give one bidder a competitive advantage over another. *Rien Construction Co. v. Bd. of Trumbull Cty. Commissioners* (2000), 138 Ohio App.3d 622, 627, 741 N.E.2d 979. (enjoining county from awarding contract to proposer whose proposal materially departed from the RFP requirements).

OSU officials and Bill Matthews of ComDoc all admitted that adding monthly minimum copies, lengthening the contract term, eviscerating the co-terminus lease provisions, and mandating the program financially benefited the vendor, and would drive down the cost proposals. These changes to the very heart of the RFP were so significant that the vendors' responses to the RFP bear no relationship to what they would have bid for the actual contract. OSU policy requires that *shall* purchase services through competitive bidding. OSU didn't competitively bid the services it purchased from ComDoc. What OSU did here amounted to the cancellation of the original RFP and entering a contract with ComDoc without competitive bidding.

Plaintiff will succeed on the merits of its claim that the OSU failed to comply with Ohio law and OSU policy requiring it to solicit bids or proposals for *the actual program* it desires to purchase. The contract here deviates to such an extent that the competitive nature of the process was destroyed.

D. Issuance of the Injunction is Necessary to Prevent Irreparable Harm

If an injunction is not granted maintaining the status quo, MOM will lose a major governmental contract with OSU. The potential loss of a major government contract due to a questionable bidding process constitutes irreparable harm. *United Power Corp. v. U.S. Defense Mapping Agency* (D.D.C 1990), 736 F.Supp. 354, 357-58.

In *United Power Corp.*, the Defense Mapping Agency ("DMA") issued RFPs to furnish certain equipment for use in computer rooms. The contract was to be awarded only to a "small business." The successful bidder was later determined to not be a small business. DMA,

nevertheless, decided not to cancel the contract. Although United Power had never contracted with the DMA, the court held that the loss of a contract constitutes irreparable harm. The loss of the large contract was so irreparable that the court declined to discuss possibility of success on the merits. This RFP and resulting contract is for the lease of over 1500 copiers. When an institution has several copiers, they are often referred to as a fleet. Comparatively speaking, OSU's copier leases constitute multiple fleets—an entire navy. This multi-year contract is valued at over a million dollars per year. The loss of this large contract constitutes irreparable harm for any business.

In another similar case, Dairy Maid contracted with the United States Army to be the sole provider of milk to United States military personnel in the Republic of Korea. *Dairy Maid Dairy, Inc. v. U.S.* (E.D. Va. 1993), 837 F.Supp. 1370. The contract was a “major contract” for Dairy Maid. The Army later issued a solicitation for bids to provide the milk and awarded the contract to another bidder. Dairy Maid filed a post-award protest and requested injunctive relief. The court held that loss of a major contract constitutes irreparable injury,³ and Dairy Maid was awarded permanent injunctive relief. Notably, the *Dairy Maid* court rejected the Army's argument that the public and military personnel would be harmed due to inadequate supply of milk, since Dairy Maid was able and willing to continue to provide milk until resolution of the protests.

Here, the contract with OSU is a major contract for MOM. Should MOM lose the contract, it will be forced to cease its 20 year relationship with OSU, which will result in the termination of over 750 equipment leases. Like in *Dairy Maid*, there is no harm to OSU if the

³ The court also held that the denial of a right to have a bid fairly and lawfully considered, as well as the inability to recover monetary damages from a government entity, each separately constitute irreparable injury.

status quo anti is maintained because the copiers currently in place can remain in use until the resolution of this matter.

Injunctive relief is particularly necessary in this case against a governmental entity because lost profits are generally not available in suits against the government. *See, Hardrives Paving and Constr., Inc. v. Niles* (1994), 99 Ohio App. 3d 243, 247. Because Plaintiffs will not be able to recover the profits they would have obtained had they been awarded the contract or if their existing leases remained in place pending resolution of the case, injunctive relief is all the more necessary. *Id.*

Additionally, Plaintiffs will suffer substantial, irreversible reputational harm if an injunction is not granted. ComDoc has begun replacing MOM equipment with ComDoc machines. Each MOM machine that is removed represents additional lost revenues for MOM. Moreover, ComDoc has attempted to leverage the OSU contract to obtain business from other universities and governmental entities throughout the State. This reputational injury can be prevented only through the issuance of a preliminary injunction.

Issuance of an injunction is necessary to prevent the adverse action of forcing Plaintiff off of OSU's campus when Plaintiff was not given an equal opportunity to bid for the services OSU desires.

E. No Potential Injury to Others Outweighs the Need for the Injunctive Relief

OSU will not be materially harmed by this injunction. OSU will continue to have printers and copier in place under the existing contracts. ComDoc will not be unnecessarily harmed as it is not entitled to the contract. Its contract is void. A short delay in the implementation of its contract while this appeal is pending will not materially impact ComDoc. Any delay caused to ComDoc is an insignificant harm compared to the harm to MOM of being

forced to remove hundreds of machines while a competitor is granted exclusive mandatory vendor status.

F. The Public Interest Will Be Served by Enjoining an Improper RFP

The public interest will be served by protecting against the awarding of public contracts based upon improper evaluations. The public trusts that the government will be fair and reasonable in awarding public contracts. Otherwise, waste and corruption will ensue. Here, there is no question that OSU has abused the public trust by holding improper meeting with the representative of a vendor who had no place on campus. OSU compounded this error by abandoning its evaluation criteria to revoke MOM's status as "best overall bidder." OSU completed the trifecta of RFP violations by entering a contract with substantive provisions that were materially opposed to the terms of the RFP. Accordingly, the public interest compels the issuance of the injunction.

IV. CONCLUSION

For the foregoing reasons, MOM respectfully requests that this Court issue an injunction prohibiting OSU from further implementing the ComDoc Contract or removing MOM copiers from campus during the pendency of this appeal.

Respectfully submitted,



Joseph L. Trauth, Jr. (0021803)
Charles M. Miller (0073844)
Lori Goetz Heilman (0086533)
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
Phone: (513) 579-6515
Fax: (513) 579-6457
jtrauth@kmklaw.com
cmiller@kmklaw.com
lheilman@kmklaw.com
*Attorneys for Plaintiff/Appellant,
Modern Office Methods, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Modern Office Method's Motion for Injunction Pending Appeal was served upon the following by ordinary mail this 23rd day of October, 2012.

Craig D. Barclay
James E. Rook
Assistant Attorneys General
Court of Claims Defense Section
150 East Gay Street, 18th Floor
Columbus, OH 43215-3130



Charles M. Miller



Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

MODERN OFFICE METHODS, INC.

Plaintiff

v.

THE OHIO STATE UNIVERSITY

Defendant

Case No. 2011-11424

Judge Joseph T. Clark

ENTRY OF DISMISSAL

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This cause came to be heard on September 28, 2011, on plaintiff's motion for a Temporary Restraining Order (TRO). During the hearing, plaintiff withdrew its motion for a TRO and the court granted plaintiff's oral motion to schedule an evidentiary hearing on its motion for a preliminary injunction.

In the verified complaint, plaintiff alleges that defendant wrongfully awarded a contract for the sale and service of office equipment in violation both of the published procedures governing competitive bidding processes and relevant provisions of the Ohio Revised Code. As a frustrated bidder, plaintiff seeks an order both restraining defendant from executing the proposed contract and enjoining defendant to issue a new request for proposal.

Under R.C. 2743.03(A)(2) the equitable jurisdiction of the Court of Claims is limited as follows:

"If the claimant in a civil action as described in division (A)(1) of this section also files a claim for a declaratory judgment, injunctive relief, or other equitable relief against the state that arises out of the same circumstances that gave rise to the civil action described in division (A)(1) of this section, the court of claims has exclusive, original jurisdiction to hear and determine that claim in that civil action. *This division does not affect, and shall not be construed as affecting, the original jurisdiction of another court of this state to hear and determine a civil action in which the sole relief that the claimant seeks against the state is a declaratory judgment, injunctive relief, or other equitable relief.*" (Emphasis added.)

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ENTRY

Pursuant to R.C. 2743.02(A)(1), the state waived its sovereign immunity and consented "to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties * * *. To the extent that the state has previously consented to be sued, this chapter has no applicability." (Emphasis added.)

Plaintiff's complaint seeks injunctive relief. Indeed, the only monetary relief sought by plaintiff is the recovery of expenses associated with preparing and submitting its bid. "[W]hen a municipality violates competitive-bidding laws in awarding a competitively bid project, the rejected bidder cannot recover its lost profits as damages." *Cementech, Inc. v. Fairlawn*, 109 Ohio St.3d 475, 2006-Ohio-2991, ¶14. However, the Supreme Court of Ohio has held "that 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, ¶13. In *Meccon*, the court identified a "significant distinguishing factor" in cases involving public-improvement contracts; "once the public-improvement work commences or is completed, the rejected bidder will not be able to perform the public contract even if the bidder demonstrates that its bid was wrongfully rejected." *Id.* at ¶12, citing *Cementech*, *supra*, at ¶13.

R.C. 153.54 sets forth general provisions for state public improvements and provides in pertinent part as follows:

"(J) For the purposes of this section and sections 153.56, 153.57, and 153.571 [153.57.1] of the Revised Code, 'public improvement,' * * * [has] the same meaning[] as in section 1311.25 of the Revised Code."

R.C. 1311.25(A) states:

"'Public improvement' means any construction, reconstruction, improvement, enlargement, alteration, demolition, or repair of a building, highway, drainage system, water

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Case No. 2011-11424

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ENTRY

system, road, street, alley, sewer, ditch, sewage disposal plant, water works, and any other structure or work of any nature by a public authority.”

As stated above, plaintiff alleges that defendant wrongfully awarded a contract for the sale and service of office equipment. Indeed, at the TRO hearing, counsel for plaintiff conceded that this action does not involve a public-improvement contract.

Civ.R. 12(H)(3) provides that “[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”

For the foregoing reasons, the motion for a preliminary injunction is DENIED and plaintiff's complaint is DISMISSED due to lack of subject matter jurisdiction. All other pending motions are DENIED as moot. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.



JOSEPH T. CLARK
Judge

cc:

Charles M. Miller
Joseph L. Trauth Jr.
One East Fourth Street
1400 Provident Tower
Cincinnati, Ohio 45202

Craig D. Barclay
James E. Rook
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

AMR/dms

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Judge Clark
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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Modern Office Methods, Inc., :
Plaintiff-Appellant, :
v. : No. 11AP-1012
The Ohio State University, : (C.C. No. 2011-11424)
Defendant-Appellee. : (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(B)(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.
