

ORIGINAL

In the
Supreme Court of Ohio

MODERN OFFICE METHODS, INC.,

Plaintiff-Appellant,

v.

THE OHIO STATE UNIVERSITY,

Defendant-Appellee.

: Case No. 2012-1626
:
: On Appeal from the
: Franklin County
: Court of Appeals,
: Tenth Appellate District
:
: Court of Appeals Case
: No. 11-AP-01012
:

**MEMORANDUM OF DEFENDANT-APPELLEE
THE OHIO STATE UNIVERSITY OPPOSING A STAY PENDING APPEAL**

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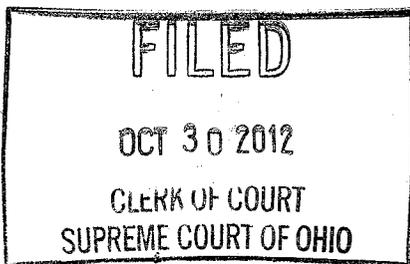


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INTRODUCTION

Plaintiff-Appellant Modern Office Methods, Inc. (“MOM”) asks this Court for an injunction prohibiting Defendant-Appellant The Ohio State University from continuing to implement an office equipment contract with ComDoc, Inc. MOM styles its motion as a request for a stay, but it actually seeks broader relief in the form of an injunction pending appeal. For two reasons, the Court should deny MOM’s request.

First, MOM’s conduct over the preceding thirteen months undercuts its suggestion that suddenly now an injunction is necessary to avoid imminent and irreparable harm. MOM’s lack of urgency goes back to its failure to file a motion for a temporary restraining order with its Complaint and has continued even after it appealed to this Court. Such dilatory conduct should not be rewarded, and this Court should deny an injunction.

Second, MOM’s chance of success here is *nil*, to say nothing of probable, and every judge below that considered its claims rejected them. Through its appeal MOM has done nothing but fire a blank. MOM asks the Court to review only the common-sense rule that dismissal of its damages claims translates into a loss of jurisdiction in the Court of Claims. Yet MOM *does not challenge the predicate dismissal of its claims*—only the resulting loss of jurisdiction. There is simply nothing left on the line in this case, and thus no justification for review, and certainly no justification for an injunction.

For these and other reasons below, this Court should deny injunctive relief.

STATEMENT OF THE CASE AND FACTS

OSU’s Memorandum in Opposition to Jurisdiction (“OSU Opp. Jur.”) sets forth the full factual and procedural background of this case. *See* OSU Opp. Jur. at 3-6. A brief overview is included here for convenience.

A. OSU issued a Request for Proposal regarding copying and printing equipment and maintenance services, and it chose a vendor other than Plaintiff MOM.

This dispute began with Ohio State's RFP for procurement and servicing of office equipment used for printing and copying. MOM submitted a proposal, but OSU ultimately chose a competing proposal offered by ComDoc. ComDoc and OSU then commenced negotiations and entered into a Memorandum of Understanding executed August 31, 2011, and providing for performance to start September 1, 2011. OSU Opp. Jur. at 3-4.

B. MOM objected and sued OSU in the Court of Claims, which dismissed the damages claims and dismissed the complaint for lack of subject-matter jurisdiction.

MOM protested the award, and after OSU declined to reconsider its decision, MOM sued OSU in the Court of Claims on September 26, 2011. *Modern Office Methods, Inc. v. Ohio State University*, No., 11AP-1012, 2012-Ohio-3587, ¶ 5 (10th Dist.) ("App. Op."). MOM also filed a request for a preliminary injunction. Although its Complaint referenced a TRO, Compl. ¶ 91, MOM never moved for one. Nonetheless, the trial court held a hearing on September 28, 2011. At that time, MOM withdrew its request for a TRO and sought an evidentiary hearing on its preliminary injunction request. App. Op. ¶¶ 5-6.

That hearing was initially set for October 19, 2011. But because MOM wanted substantial discovery, including several depositions and extensive document production, the hearing was moved to January 11, 2012, with MOM's consent. *Id.* ¶¶ 5-6, 25.

On October 11, 2011, OSU filed a Motion to Dismiss. But on October 18, 2011, the Court of Claims, on its own motion, dismissed MOM's Complaint for lack of subject-matter jurisdiction. The Order also denied MOM's motion for a preliminary injunction and collectively denied all other pending motions as moot. MOM moved for reconsideration, which the court denied on November 15, 2011, and MOM appealed. App. Op. ¶¶ 6-7.

C. The Tenth District affirmed the dismissal of MOM's Complaint for lack of subject-matter jurisdiction after concluding that both damages claims failed to state claims for relief.

On appeal, the Tenth District affirmed. It explained that although the Court of Claims ultimately dismissed MOM's Complaint for lack of subject-matter jurisdiction, that jurisdictional decision flowed logically from its conclusion that both of MOM's damages claims failed to state a claim upon which relief could be granted under Civ. R. 12(b)(6). Accordingly, "MOM's claims for declaratory and injunctive relief [could] only be pursued in the Court of Claims if its claim for money damages and/or its breach of contract claim [could] be pursued in the Court of Claims." App. Op. ¶¶ 11-13.

In reviewing the predicate dismissal of MOM's damages claims, the Tenth District rejected MOM's breach of contract claim, finding no authority to support MOM's claim that responding to an RFP can form the basis of a contract, nor any allegation by MOM that OSU had breached an existing contract. App. Op. ¶¶ 14-19. The court likewise rejected MOM's claim for bid-preparation costs. The court expressed skepticism whether *Meccon, Inc. v. Univ. of Akron*, 126 Ohio St. 3d 231, 2010-Ohio-3297, which authorizes recovery of bid-preparation costs in cases involving competitive bidding for public construction projects, could be extended to RFPs for goods and services contracts. App. Op. ¶¶ 22-23. But it ultimately reserved judgment on that question, finding "[e]ven assuming, for purposes of this argument . . . that the process set forth in *Meccon*" applied here, "MOM is not eligible to recover . . . because it did not promptly seek" injunctive relief. App. Op. ¶ 24.

MOM has now sought review in this Court, raising as its sole proposition of law the question whether the Court of Claims may exercise continuing jurisdiction over a complaint based solely on the fact that it "seeks monetary damages on [its] face," regardless of whether

those damages claims fail as a matter of law. *See* MOM Memorandum in Support of Jurisdiction at 9 (Prop. of Law) (“MOM Jur. Mem.”).

ARGUMENT

An “injunction is an extraordinary remedy,” and “its allowance is a matter of grace If its allowance would be inequitable or unjust, it may be refused.” *Perkins v. Quaker City*, 165 Ohio St. 120, 125 (1956); *see also Garono v. State*, 37 Ohio St. 3d 171, 173 (1988). For two key reasons, MOM is not entitled to this act of judicial grace.

First, MOM failed to diligently pursue the injunction it seeks from this Court. Second, not only has MOM failed to demonstrate a likelihood of success on the merits, but it cannot show *any* chance of success. As an initial matter, any claimed likelihood of success by MOM—let alone its assertion that success is assured, Mem. in Support of Mot. for Stay Pending Appeal at 22—is a stretch given MOM’s resounding failure in the courts below. Moreover, MOM presses a jurisdictional argument that is academic at best, and at bottom, plainly meritless.

A. **No stay or injunction is warranted because MOM has not diligently pursued relief.**

It is axiomatic that equity acts to protect the diligent. *McPherson v. McPherson*, 153 Ohio St. 82, 91 (1950) (“Equity aids the vigilant, not those who slumber on their rights.”). MOM’s conduct in this litigation has been anything but diligent, and therefore the requested stay and injunction should be denied.

MOM knew of the agreement between ComDoc and OSU at least as early as September 7, 2011. *See* Compl. ¶¶ 60-61 & Exhibit C. MOM likewise learned no later than September 7, 2011, that OSU and ComDoc had begun implementing their agreement. In fact, in its letter lodging a formal protest, MOM complained that the agreement permitted ComDoc to begin placing equipment with OSU in the 120-day period prior to January 1, 2012, when the contract period was set to begin. *See id.* Despite knowing that OSU and ComDoc were moving ahead,

MOM never pursued, *and in fact affirmatively abandoned*, its request for a TRO, and after that, consented to further delay by agreeing to continue the hearing on its preliminary injunction from October 2011 to January 2012. App. Op. ¶¶ 5-6, 25.

True enough, after the Court of Claims denied its preliminary injunction request on jurisdictional grounds, MOM sought an injunction pending appeal from the Tenth District. But its diligence ended there. After the Tenth District denied that request, MOM abandoned the effort entirely. Having been told that an injunction was beyond the jurisdiction of the court, MOM never sought relief in Common Pleas Court—whose jurisdiction to issue an injunction is without doubt—in parallel with its appeal of the jurisdictional point. MOM was within its rights to take its chances on appeal. But having made its procedural bed, it cannot now complain about having to lie in it.

Finally, and tellingly, MOM's conduct before *this* Court confirms that MOM's efforts to secure an injunction have been inadequate. This Court's rules contemplate that those seeking an appeal may require immediate injunctive relief. *See* S. Ct. Prac. R. 2.2(A)(3)(a) (allowing party in discretionary appeal to "file a notice of appeal in the Supreme Court without an accompanying memorandum in support of jurisdiction" along with a motion seeking a stay. In other words, MOM sat on its hands for nearly two months after its loss below. It could have filed a stay (but did not) immediately after deciding to appeal the Tenth District's decision; and MOM could have sought a stay (but did not) the day it appealed to this Court. Instead, MOM waited until the day OSU's brief in opposition to jurisdiction was due, 75 days after the decision it now appeals.

MOM insists that an injunction is necessary to preserve the status quo and avoid immediate and irreparable injury. But its conduct in the preceding thirteen months belies any such claim of urgency. For that reason, the injunction should be denied.

B. No stay or injunction is warranted because MOM has no likelihood of success on the merits of this appeal.

The injunction (or stay) standard is well-known and turns on (1) the likelihood of a plaintiff's success on the merits; (2) whether an injunction will prevent irreparable harm to the plaintiff; (3) what injury to others would be caused by an injunction; and (4) whether the public's interest is served by an injunction. *See, e.g., Charles Penzone, Inc. v. Koster*, No. 07AP-569, 2008-Ohio-327, ¶ 9 (10th Dist.); *Bob Krihwan Pontiac-GMC Truck, Inc. v. Gen. Motors Corp.*, 141 Ohio App. 3d 777, 783 (10th Dist. 2001).

MOM dwells on the factual predicate for its claims that OSU acted improperly in conducting the RFP process. Were the parties before a trial court or an appellate court reviewing the merits of the grant or denial of injunctive relief, that discussion might be pertinent. But here, the question before the Court is whether MOM is entitled to an injunction pending appeal. And that depends on MOM's probability of success on the merits of *this appeal*. That inquiry is doomed, because even if this Court could overlook MOM's lack of diligence in pursuing this injunction (and it should not), it certainly cannot conclude that MOM has demonstrated any likelihood of success in this appeal. Accordingly, the Court should deny the requested injunction.

1. MOM cannot demonstrate any possibility of success on the merits of the jurisdictional question raised on appeal—much less that such success is likely.

As detailed in OSU's opposition to jurisdiction, the threshold jurisdictional principle at issue in this appeal is undisputed: the Court of Claims has exclusive, original jurisdiction over claims for monetary damages against the State, and that jurisdiction extends to equitable claims if they are ancillary to the damages claims. Because MOM's damages claims fail, the courts

below correctly dismissed its complaint for lack of subject-matter jurisdiction. *See* OSU Opp. Jur. at 7-8.

Here, MOM insists, without support, that the Court of Claims' jurisdiction is irrevocable so long as the complaint contains *any claim for monetary relief*—even if that claim fails as a matter of law. MOM Jur. Mem. at 9-11. Were MOM correct, a plaintiff could confer irrevocable jurisdiction on the Court of Claims through mere incantation. But a hollow claim for “money damages” cannot settle the jurisdictional inquiry for all time. The words in the complaint are important, but they are not dispositive. *Cf, e.g., Windsor House, Inc. v. Ohio Dept. of Job and Family Servs.*, No. 11AP-367, 2011-Ohio-6459, ¶ 25 (10th Dist.) (“A review of the recent case law leads us to conclude that we must analyze both the nature of the claim and the relief sought in order to decide whether the Court of Claims has subject matter jurisdiction.”)

2. **Even assuming MOM's appeal were construed to include a challenge to the dismissal of its predicate damages claims, MOM offers nothing that would cast doubt on the correctness of the dismissal of those claims for failure to state a claim.**

Even assuming MOM's appeal were read to include a challenge to the predicate dismissal of its damages claims, MOM is not entitled to an injunction. Settled law compelled dismissal of those claims, and MOM cannot overcome that hurdle.

First, as to its breach of contract claim, black-letter principles of contract foreclose MOM's reliance on the RFP as the basis of a contract. Compl. ¶¶ 79-81. It is beyond dispute that an RFP or other solicitation of bids is not an offer that can form the basis of a contract. *See* 1-2 Corbin on Contracts § 2.3 (2009); 1 Williston on Contracts § 4-13 (4th ed. 2007); *see also Cleveland Constr., Inc. v. City of Cincinnati*, 118 Ohio St. 3d 283, 2008-Ohio-2337, ¶ 7. In light of this principle, the Tenth District's conclusion that MOM's breach of contract claim fails as a matter of law, App. Op. ¶ 17, is indisputable.

Before this Court, MOM does not challenge the Tenth District's analysis, instead claiming, "Count II alleged a breach of contract and sought damages for lost revenues due to any ComDoc machine leased to OSU in violation of the 2002 contract." MOM Jur. Mem. at 11. To be sure, MOM alleged a breach of contract and that the breach would result in lost revenue. Compl. ¶¶ 78-86. But the contract it asserts was breached—based on the RFP—was no contract at all. MOM cannot overcome that hurdle simply by recasting the allegations in its Complaint. *See* OSU Opp. Jur. at 8-9.

The Tenth District likewise correctly dismissed MOM's claim for bid-preparation costs because that claim does not meet this Court's *Meccon* standard. First, *Meccon* involved a public construction project subject to strict competitive-bidding requirements. *Meccon* simply does not apply to RFPs for goods and services contracts. Second, competitive-bid procedures are mandatory. In contrast, the RFP process contemplates wide discretion on the part of OSU. App. Op. ¶¶ 16, 23. Finally, construction is altogether different and more complex than ordinary procurement. MOM offers no authority applying *Meccon* to the RFP process, and no sound reason to do so exists. *See* OSU Opp. Jur. at 10-11.

And, as the Tenth District explained, MOM's RFP response-preparation claim fails, even if *Meccon* were applicable, because MOM did not promptly seek injunctive relief. Under *Meccon*, recovery is limited to those who first "pursue[] injunctive relief in a timely and good-faith manner." 2010-Ohio-3297 ¶ 15. Here, MOM failed to "promptly seek a temporary restraining order to delay the project or execution of the contract." App. Op. ¶ 24. MOM stresses that it did *seek* an injunction, MOM Jur. Mem. at 14, but in actuality, it agreed to *delay resolution* of that claim for several months, *Id.* ¶¶ 5-6, 25. And that cannot be enough under

Meccon's prompt-pursuit rule. Otherwise, anyone could meet it with a half-hearted effort to "seek" relief.

In sum, both of MOM's damages claims fail as a matter of law. And having limited its appeal to the narrow jurisdictional issue on which it plainly cannot prevail, MOM cannot establish the requisite likelihood of success. Accordingly, it is not entitled to injunctive relief.

CONCLUSION

For the foregoing reasons, the Court should deny MOM's request for an injunction pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum of Defendant-Appellee The Ohio State University Opposing a Stay Pending Appeal was served by U.S. mail this 30th day of October, 2012, upon the following counsel:

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