

Ohio Supreme Court rules on bid preparation costs

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In a unanimous decision, the Ohio Supreme Court ruled that a bidder may recover its reasonable bid preparation costs if the bidder establishes that its bid was wrongfully rejected because the public authority violated the public competitive bidding laws. *Meccon, Inc. v. Univ. of Akron* (July 21, 2010), Slip Opinion 2010-Ohio-3297. The rejected bidder promptly sought but was denied injunctive relief to suspend the public improvement, and the court later finds, after injunctive relief is no longer available, that the public authority wrongfully rejected the bid.

The Supreme Court had previously ruled in *Cementech, Inc. v. Fairlawn* (2006), 109 Ohio St.3d 475, that a wrongfully rejected bidder cannot recover its lost profits as damages. In that case, the Court determined that allowing a rejected

bidder to recover its purported lost profits harms the taxpayers, in which the competitive bid laws were intended to protect. Injunctive relief and the resulting delays in starting the project are, in the Court's opinion, a sufficient deterrent to a public owner's violation of the competitive bidding laws. The *Cementech* decision did not answer the question of whether bid preparation costs could be recovered by a wrongfully rejected bidder. The Court in *Meccon* decided that such costs could be recovered.

The Court, in distinguishing the *Cementech* case, said that the recovery of bid preparation costs is the only remedy available to a wrongfully rejected bidder who alleges that a public authority failed to comply with competitive bidding laws, and promptly seeks, but is denied, injunctive relief. The Court noted that denial of the requested injunctive relief means the determination of whether the public authority wrongfully rejected the bid will not take place until after the construction of the project has been started, and perhaps substantially performed by another contractor. By then, it is too late for the improperly rejected bidder to perform the contract.

The Supreme Court concluded that allowing recovery of bid preparation costs will serve to enhance the integrity of the competitive bidding process. The availability of recovery may deter the public authority from violating the competitive bidding laws, but at the same time strikes a balance between protecting the public from incurring extra cost due to the wrongful conduct of the public authority, and lessening the damages sustained by the lowest and best bidder who, in good faith, participated in the competitive bidding process.

If you have any questions about the Supreme Court's decision or related matters, please contact Patrick A. Devine at (614) 462-2238 or pdevine@szd.com.

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