

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); *Gambée v. Gambée*, 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.*

Servs., 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 Adlaka 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. Crabtree 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.
