[Cite as *Meccon, Inc. v. Univ. of Akron*, 2013-Ohio-2563.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Meccon, Inc. et al.,	:	
Plaintiffs-Appellants/ Cross-Appellees,	:	
	:	No. 12AP-899
v.		(Ct. of Cl. No. 2008-08817)
	:	
The University of Akron,		(REGULAR CALENDAR)
	:	
Defendant-Appellee/ Cross-Appellant.	:	

D E C I S I O N

Rendered on June 20, 2013

Welin, O'Shaughnessy + Scheaf LLC, *Peter D. Welin*, and *Andrew R. Fredelake*, for plaintiffs-appellants/cross-appellees.

Michael DeWine, Attorney General, *William C. Becker*, and *Mark R. Wilson*, for defendant-appellee/cross-appellant.

APPEAL from the Court of Claims of Ohio.

SADLER, J.

{¶ 1} Plaintiffs-appellants/cross-appellees, Meccon, Inc., and Ronald R. Bassak (collectively referred to as "Meccon"), appeal from a judgment of the Court of Claims of Ohio granting judgment in favor of defendant-appellee/cross-appellant, The University of Akron. For the reasons that follow, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} In order to begin public-improvement work in its football stadium, The University of Akron proposed to award plumbing, fire-protection, and heating,

ventilation, and air-conditioning ("HVAC") contracts. In addition to other contractors, Meccon submitted a bid for the HVAC contract. Another contractor, S.A. Comunale, submitted four bids for the project: one for each of the stand-alone plumbing, fire-protection, and HVAC contracts and a combined bid to perform all three contracts.

{¶ 3} When the bids were opened, S.A. Comunale's was the lowest of the combination bids as the bid was $1.2 million less than the next lowest combination of bids. S.A. Comunale was also the lowest bidder for each of the stand-alone plumbing, fire-protection, and HVAC contracts. Meccon submitted the next lowest bid for the stand-alone HVAC work. S.A. Comunale withdrew its combined bid and its stand-alone plumbing bid, and the university awarded the stand-alone HVAC and fire-protection contracts to S.A. Comunale. For the stand-alone plumbing contract, the university rebid the contract, and S.A. Comunale was once again the lowest bidder. Therefore, the university awarded the plumbing contract to S.A. Comunale.

{¶ 4} On August 6, 2008, Meccon filed suit in the Court of Claims seeking, inter alia, a temporary restraining order, declaratory judgment, preliminary and permanent injunctive relief, and damages for its bid-preparation costs. The complaint alleged the university's award to S.A. Comunale of the three stand-alone contracts, after S.A. Comunale had withdrawn both its combination bid and its plumbing bid, was in violation of the university's own "Instructions to Bidders" and comparable provisions of Ohio statutes.

{¶ 5} Arguing that disappointed bidders were entitled only to injunctive relief and that Meccon's claims for bid-preparation costs and money damages were not cognizable claims, the university filed a motion to dismiss for lack of subject-matter jurisdiction. The Court of Claims granted the university's motion concluding that only the court of common pleas had jurisdiction because Meccon's remaining claim was only for equitable relief. On the same basis, the Court of Claims denied the motion for a temporary restraining order and dismissed the complaint.

{¶ 6} Meccon appealed to the Tenth District Court of Appeals, and this court reversed the Court of Claims with respect to the question of jurisdiction. *Meccon, Inc. v. Univ. of Akron*, 182 Ohio App.3d 85, 2009-Ohio-1700 (10th Dist.) ("*Meccon I*"). This court concluded disappointed bidders can recover bid-preparation costs, and because

such costs constitute monetary damages, the Court of Claims had subject-matter jurisdiction to hear Meccon's claims. Additionally, this court determined Meccon's argument that the Court of Claims erred when it failed to consider Meccon's motion for a temporary restraining order was moot. The Supreme Court of Ohio accepted jurisdiction.

{¶ 7} The Supreme Court of Ohio affirmed the judgment of this court and held that, in appropriate circumstances, reasonable bid-preparation costs are recoverable as money damages. *Meccon, Inc. v. Univ. of Akron*, 126 Ohio St.3d 231, 2010-Ohio-3297 ("*Meccon II*"). Specifically, the Supreme Court of Ohio held, "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." *Id*. at ¶ 13. After holding that injunctive relief must be promptly sought in order to obtain bid-preparation costs as damages, the Supreme Court acknowledged the parties' disagreement regarding whether Meccon had timely sought injunctive relief in this case and remanded the matter to the Court of Claims for consideration of said issue.

{¶ 8} On remand, the parties filed cross-motions for summary judgment regarding whether the HVAC contract was awarded illegally to S.A. Comunale. The Court of Claims answered in the affirmative and the matter proceeded to trial before a magistrate on the issue of whether Meccon promptly sought injunctive relief.

{¶ 9} At trial, it was established that the bidding opened on June 3, 2008, revealing that S.A. Comunale was the lowest bidder and Meccon was the next lowest bidder on the HVAC contract. Bassak, Meccon, Inc.'s president, testified that he learned shortly thereafter that S.A. Comunale could not perform the plumbing contract. Therefore, Bassak testified he contacted David Pierson at the university to inform the university that if S.A. Comunale withdrew the plumbing bid, S.A. Comunale would be ineligible to maintain any of its bids, including its bid for the HVAC contract. On June 13, 2008, Meccon sent a letter of protest to the university protesting the university's decision to award the HVAC contract to S.A. Comunale. The contract between S.A. Comunale and the university was executed on June 22, 2008.

{¶ 10} On July 30, 2008, Meccon received a letter from the university that was sent on July 26, informing Meccon that the university entered into a contract with S.A. Comunale and released Meccon from its bid guaranty. Meccon's complaint for injunctive relief was filed on August 6. According to the testimony from members of S.A. Comunale's management, as of August 6, S.A. Comunale was 80 percent mobilized on site, had executed contracts with contractors, had expended 512 man hours on site, and had purchased materials.

{¶ 11} The magistrate concluded that to determine whether Meccon promptly sought injunctive relief, it had to be determined when the claim for injunctive relief arose. Based on the evidence presented at trial, the magistrate determined Meccon learned the university intended to award the HVAC contract to S.A. Comunale, at the latest, on June 13, 2008, and, therefore, its claim for injunctive relief arose at that time. However, because Meccon did not file a claim for injunctive relief until August 6, 2008, the magistrate concluded Meccon failed to promptly seek injunctive relief in this case as is required for an award of bid-preparation costs under *Meccon II*.

{¶ 12} Meccon filed objections to the magistrate's decision challenging the magistrate's finding that Meccon's right to injunctive relief arose at the latest on June 13, 2008. Meccon argued the evidence at trial established it was unaware the HVAC contract had been awarded to S.A. Comunale until July 30, 2008, when it received the official notification from the university informing Meccon of the event. Because Meccon filed its complaint for injunctive relief within days of receiving the letter, Meccon argued it promptly sought injunctive relief. The Court of Claims overruled Meccon's objections and adopted the decision of the magistrate, including the finding that, by June 13, 2008, Meccon was aware that the legality of the HVAC bid was at issue and, at that time, obligated to take legal action to prevent formal execution of the contract.

II. ASSIGNMENTS OF ERROR

{¶ 13} This appeal followed, and Meccon brings the following 11 assignments of error for our review:

> I. The Trial Court And Magistrate Erred As A Matter Of Law When They Concluded Meccon Did Not Timely Seek Injunctive Relief.

II. The Trial Court And Magistrate Misapplied The Holdings In Gaylor, Inc. v. Goodenow and TP Mechanical Contractors, Inc. v. Franklin County Board Of Commissioners To The Facts In This Case.

III. The Trial Court And Magistrate Erred As A Matter Of Law When They Determined Meccon Did Not Promptly Seek Injunctive Relief, Even Though The Court Could Grant The Relief Requested.

IV. The Trial Court And Magistrate Erred As A Matter Of Law When They Determined Meccon Did Not Promptly Seek Injunctive Relief Because Any Delay Was The Fault Of The University.

V. The Trial Court And Magistrate Erred As A Matter Of Law When They Determined Meccon Did Not Promptly Seek Injunctive Relief Because The University Did Not Declare A Low Successful Bidder Until July 26, 2008.

VI. The Trial Court And Magistrate Misapplied The Holdings In Ohio Hosp. Assn. v. Ohio Bur. Of Workers' Comp. and Ohio Civ. Rights Comm. v. Triangle Real Estate Servs. To The Facts In This Case.

VII. The Trial Court And Magistrate Erred As A Matter Of Law When They Did Not Find That The University Waived The Affirmative Defense Of Laches.

VIII. The Trial Court And Magistrate Erred When It Concluded Meccon Was Not The Lowest Bidder For The Mechanical Contract And Was Not Entitled To Rely On The Bid Opening And Evaluation Procedure In Article 3 Of the Instructions To Bidders.

IX. The Trial Court And Magistrate Erred As A Matter Of Law When They Failed To Consider The University's Violation Of R.C. 153.54, And Concluded That The University Was Excused From Complying With R.C. 153.54.

X. The Trial Court Erred As A Matter Of Law When They Did Not Hold The University Accountable For Violating R.C. 9.31.

XI. The Trial Court And Magistrate Erred As A Matter Of Law When They Did Not Declare The University's Contract With S.A. Comunale Void Or Otherwise Illegal.

III. CROSS-ASSIGNMENT OF ERROR

{¶ 14} The university brings the following cross-assignment of error for our review:

> The trial court erred as a matter of law in finding that the University of Akron violated R.C. 9.31.

IV. DISCUSSION

{¶ 15} If objections are filed, a trial court undertakes a de novo review of a magistrate's decision. *Mayle v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-541, 2010-Ohio-2774, ¶ 15. "However, the appellate standard of review when reviewing a trial court's adoption of a magistrate's decision is an abuse of discretion." *Id*. Therefore, we will only reverse a trial court's adoption of a magistrate's report if the trial court acted in an unreasonable or arbitrary manner. *Id*. In adopting the magistrate's decision, the trial court overruled Meccon's objections related to the magistrate's findings and conclusions regarding whether Meccon acted promptly in seeking injunctive relief in this case. With respect to manifest weight challenges, judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *Watson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 11AP-606, 2012-Ohio-1017, ¶ 31, citing *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. When applying this standard of review, an appellate court must presume the findings of the trier of fact are correct because it is best able to observe the witnesses and use those observations in weighing the credibility of the testimony. *Id*., citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984).

A. Meccon's Claims

{¶ 16} Though setting forth 11 separate assignments of error, Meccon challenges the trial court's conclusions that (1) to determine whether the disappointed bidder acted promptly in seeking injunctive relief, one must first determine when the disappointed bidder knew it would not be awarded the public-work contract, (2) Meccon had such knowledge, at the latest, as of June 13, 2008, (3) by filing its complaint for injunctive relief 55 days later, Meccon did not act promptly, and (4) thus, Meccon was prohibited from being awarded its bid-preparation costs as damages. As noted by the trial court, case law provides little guidance on these issues as this case largely presents matters of

first impression. Because they are interrelated and all challenge the trial court's conclusions we have set forth above, we will address Meccon's 11 assignments of error together.

{¶ 17} The Supreme Court of Ohio held that in appropriate circumstances reasonable bid-preparation costs are recoverable as money damages. *Meccon II* at ¶ 18. Specifically, 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. *Id*. at ¶ 13. Thus, it is clear that seeking injunctive relief promptly is a precondition to damages, and, as such, if Meccon failed to promptly seek injunctive relief in this case, damages are prohibited regardless of whether the university violated a state competitive bidding law in awarding the HVAC contract to S.A. Comunale.

{¶ 18} Meccon asserts it filed its complaint for injunctive relief four business days after receiving official notice from the university on July 30, 2008 that the HVAC contract was being awarded to S.A. Comunale. Therefore, according to Meccon, the Court of Claims erred in concluding Meccon did not promptly seek injunctive relief. In contrast, the university contends the date Meccon received the letter indicating it would not be awarded the HVAC contract is not dispositive because Meccon was aware by June 13, 2008 that the university decided not to award the HVAC contract to Meccon.

{¶ 19} Other than instructing that injunctive relief was required to be promptly sought, the Supreme Court of Ohio gave no additional guidance on how promptness is to be determined. This is so despite acknowledging the parties' disagreement regarding which date in this case, June 13 or July 30, should be the triggering date for determining whether Meccon acted promptly. Hence, it appears the court contemplated that promptness would be an issue to be determined not by a bright-line test as advocated by Meccon, but, rather, on a case-by-case basis dependent on the specific facts of each case.

{¶ 20} Bassak testified that shortly after the bidding opened on June 3, he was confident S.A. Comunale could not perform the plumbing work for the bid submitted and if S.A. Comunale withdrew its plumbing and combined bids, S.A. Comunale would have to

withdraw its entire bid. Based on his assessment, Bassak called Pierson at the university to inform the university that if S.A. Comunale withdrew the plumbing and combined bids, S.A. Comunale would be ineligible for receiving any bids. According to Bassak, Pierson stated Bassak's concerns were noted and the matter was under review.

{¶ 21} On June 13, Bassak sent a letter to protest "the university's decision to award the HVAC contract to the S.A. Comunale company." (Tr., X5-88.) The protest letter stated, in relevant part:

> We are protesting your decision to award the HVAC and Fire Protection work for the above referenced project to the S.A. Co[m]unale Company.
>
> After our review and discussions with the State of Ohio Attorney General's Office, we find their bid to be in violation of Article 4, Withdrawal of Bid, Section 4.2.1.2. The withdrawal of their combination bid for Plumbing, HVAC and Fire Protection would result in the award of the individual HVAC and Fire Protection bids to be at a higher price than in their combination price. This is precisely the reason for Article 4 Section 4.2.1.2.

{¶ 22} According to Bassak, he heard nothing else from the university, and Meccon first learned it was not going to be awarded the contract when it received the university's letter on July 30. The trial court, however, did not find this portion of Bassak's testimony credible because the trial court explicitly found that, by June 13, Meccon was aware of the legality of the S.A. Comunale HVAC contract and, at that point, obligated to take action. When reviewing a judgment under the civil manifest weight of the evidence standard, the court must presume that the findings of the trier of fact are correct, as the trial judge had the opportunity to view and observe the witnesses and to use those observations in weighing the credibility of the testimony. *Mayle* at ¶ 39, citing *Seasons Coal Co.* at 80-81. " 'A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not.' " *Id.*, quoting *Seasons Coal* at 81. *See also State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 24.

{¶ 23} Meccon vehemently argues time should begin to run at the time it officially received notice that it was declared the unsuccessful bidder. Further, Meccon asserts the Supreme Court's decision in *Meccon II* cannot be rationally read to conclude that a disappointed bidder can only recover bid-preparation costs if it seeks injunctive relief prior to the execution of a contract or commencement of construction. That, however, is not an accurate characterization of the trial court's decision. The trial court did not hold that bid-preparation costs would only be recoverable if injunctive relief was sought before contract execution or construction commencement. Rather, the trial court held, under the facts of this case, Meccon's actions were not prompt because Meccon did not seek injunctive relief until 55 days after it gained knowledge that it was not going to be awarded the HVAC contract. The date upon which Meccon learned the contract was going to be awarded to S.A. Comunale, i.e., no later than June 13 versus July 30, was a factual finding determined by the trier of fact and entitled to deference by this court. *Mayle*; *Seasons Coal*.

{¶ 24} We have reviewed the record, and we find the rulings of the trial court are supported by the evidence and are not against the manifest weight of the evidence. Accordingly, we overrule Meccon's eleven assignments of error.

B. The University's Claim

{¶ 25} In the cross-assignment of error, the university contends the trial court erred as a matter of law in finding that it violated R.C. 9.31, which provides in pertinent part:

> A bidder for a contract with the state or any political subdivision, district, institution, or other agency thereof, excluding therefrom the Ohio department of transportation, for the construction, demolition, alteration, repair, or reconstruction of any public building, structure, highway, or other improvement may withdraw his bid from consideration if the price bid was substantially lower than the other bids, providing the bid was submitted in good faith, and the reason for the price bid being substantially lower was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, or material made directly in the compilation of the bid. Notice of a claim of right to withdraw such bid must be made

> in writing filed with the contracting authority within two business days after the conclusion of the bid opening procedure.
>
> No bid may be withdrawn under this section when the result would be the awarding of the contract on another bid of the same bidder.

{¶ 26} Because we have upheld the trial court's conclusion that Meccon failed to promptly seek injunctive relief and is thereby precluded from being awarded bid-preparation costs as damages, the university's cross-appeal is rendered moot.[1] Therefore, the university's cross-assignment of error is rendered moot.

V. CONCLUSION

{¶ 27} For the foregoing reasons, Meccon's 11 assignments of error are overruled, the university's cross-appeal is rendered moot, and the judgment of the Court of Claims of Ohio is hereby affirmed.

Judgment affirmed.

KLATT, P.J., and BROWN, J., concur.

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[1] This was raised and agreed to by the university during oral argument.