

# 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  
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## COLUMBUS GREEN BUILDING FORUM

Plaintiff/Counter Defendant

v.

OHIO DEVELOPMENT SERVICES AGENCY, et al.

Defendants/Counter Plaintiffs  
Case No. 2011-09705

Judge Patrick M. McGrath  
Magistrate Anderson M. Renick

## DECISION

{¶1} On December 20, 2013, plaintiff/counter defendant, Columbus Green Building Forum (CGBF), filed a motion for summary judgment pursuant to Civ.R. 56. On January 17, 2014, defendants/counter plaintiffs, Ohio Development Services Agency, et al. (Development), filed a response. On January 28, 2014, CGBF filed a reply. The motion is now before the court for a non-oral hearing.

{¶2} Civ.R. 56(C) states, in part, as follows:

{¶3} “Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party’s favor.” See *also*

*Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317 (1977).

{¶4} On September 18, 2012, the Tenth District Court of Appeals issued a decision which reversed this court's decision dismissing the complaint for lack of subject-matter jurisdiction. *Columbus Green Bldg. Forum v. State*, 10th Dist. No. 12AP-66, 2012-Ohio-4244. In its decision, the court of appeals summarized the relevant background of the case as follows: "CGBF filed this action in the Court of Claims on July 22, 2011. CGBF's claims primarily stem from the administration of grants CGBF received from the Department in 2007, 2008, and 2009, to conduct educational programs and technical assistance workshops, including its annual green product exposition. The funding for the grants originated from the United States Department of Energy [USDOE]. Under the grants, CGBF was required to pay the costs of funded projects and to submit requests for reimbursement to the Department. CGBF received \$40,000 in reimbursements under the 2007 grant and \$105,000 in reimbursements under the 2008 grant.

{¶5} "On September 30, 2008, the Department conducted an audit of CGBF's administration of the 2007 and 2008 grants. On December 3, 2008, the Department notified CGBF of its determination that CGBF had been reimbursed for \$70,114.45 in unallowable costs, constituting payments for 'professional consulting services performed by a member of [CGBF's] Board of [Directors].' The disputed costs consisted of payments to CGBF board members Meera Parthasarathy and Lisa Frasure. CGBF's 2007 grant proposal, which is attached to and incorporated into the 2007 grant agreement, requested \$18,630 for personnel costs to be paid to Parthasarathy. CGBF's 2008 grant proposal, which is attached to and incorporated into the 2008 grant agreement, requested \$45,600 for personnel costs to be paid to Parthasarathy. Both proposals identified Parthasarathy and Frasure as CGBF board members and identified Parthasarathy as the coordinator of the events for which CGBF sought funding.

{¶6} "In determining that the disputed payments to Parthasarathy and Frasure were unallowable, the auditor relied on Office of Management and Budget Circular A-122 — *Cost Principles for Non-Profit Organizations* ('OMB A-122'), which undisputedly applies to CGBF's grants. OMB A-122 defines as allowable '[c]osts of professional and consultant services rendered by persons who are members of a

particular profession or possess a special skill, *and who are not officers or employees of the non-profit [grantee].*' (Emphasis added.) CGBF disputed the audit findings and unsuccessfully attempted to resolve the disputed payments with the Department.

{¶7} "On or about November 20, 2008, the Department approved CGBF's grant proposal for 2009 and entered into a 2009 grant with CGBF, for the period November 1, 2008 to September 30, 2009. On March 18, 2009, however, the Department notified CGBF that, based on the audit findings, it would not approve requests for reimbursement under the 2009 grant until Parthasarathy resigned from CGBF's board and CGBF acknowledged its intent to repay the alleged overpayments. Parthasarathy resigned from the CGBF board in February 2009, but CGBF has never indicated an intent to repay the alleged overpayments. In July 2009, the Department's Chief Legal Counsel, Candace M. Jones, solicited approval for an allowance of the disputed costs from the United States Department of Energy. Jones stated that the amounts paid to Parthasarathy 'compensated her for services specifically contemplated and allowed by the subgrant' and that, '[t]o deny CGBF an allowance for compensation elevates the form of Ms. Parthasarathy's working relationship with CGBF over the substance of the services she performed.'

{¶8} "On November 3, 2009, CGBF and the Department executed a first amendment to the 2009 grant, which indicated that the issues surrounding the 2008 audit had been resolved. The amendment reactivated the 2009 grant and extended the period of the grant to September 30, 2010. In September 2010, CGBF and the Department executed a second amendment, which further extended the period of the 2009 grant to October 31, 2010. CGBF began to administer the 2009 grant only after the Department reactivated the grant via the first amendment, and CGBF submitted its first request for reimbursement under the 2009 grant on January 10, 2010. The Department approved and paid CGBF's January 10, 2010 request for reimbursement in the amount of \$5,935.86. CGBF submitted four subsequent requests for reimbursement between April and October 2010, totaling \$51,385.51. Although the Department approved each of CGBF's requests for reimbursement under the 2009 grant, it did not make any payments to CGBF after January 10, 2010.

{¶9} "On January 3, 2011, CGBF received a letter from the Department, referencing 'open audit findings' and stating that the Department would retain \$49,312.31 owing to CGBF under the 2009 grant to offset the overpayments identified

in the 2008 audit. A subsequent email dated February 23, 2011, indicated that the Department would offset \$51,385.81 in approved reimbursements as partial repayment of the overpayments. The Department thereafter turned the matter over to the Attorney General of Ohio for collection and, despite its setoff, certified the amount owing as \$70,114.45, plus interest and fees.

{¶10} “CGBF’s complaint sets forth five causes of action. In its first cause of action, CGBF disputes the 2008 audit findings. CGBF requests a declaratory judgment that the payments to Parthasarathy and Frasure were allowable costs and an equitable order that the Department reverse the audit findings and cease further collection attempts. In its second cause of action, CGBF alternatively requests a declaratory judgment that the remaining amount owing on the overpayments is \$14,090.79, after deducting certain disallowed costs and the amount of the setoff taken by the Department. In its third cause of action, which requests damages, CGBF alleges that defendants’ failure to timely pay approved requests for reimbursement under the 2009 grant constituted a breach of contract.

{¶11} “CGBF’s fourth and fifth causes of action stem from related grant-making activity, but do not specifically involve CGBF’s grants from the Department. CGBF’s fourth cause of action, for declaratory and injunctive relief, challenges the Department’s review process and its award of a 2010 grant to a competing application instead of to CGBF. For its 2010 grant proposal, CGBF partnered with The Ohio State University (‘OSU’) Department of Food, Agriculture, and Biological Engineering to propose programs that would be administered by The Ohio State University Extension network (‘OSU Extension’) throughout the state. The Department ultimately awarded the 2010 grant to a partnership between Green Energy Ohio and OSU Extension. CGBF alleges a conflict of interest or bias because a member of the Department’s grant review team had previously been employed by Green Energy Ohio. CGBF also alleges that the Department violated its policies and procedures relating to the review of grant applications and the award of grant money. CGBF’s final cause of action seeks a declaratory judgment and injunctive relief relating to the Department’s alleged removal of CGBF from an email distribution list used to notify potential grantees of requests for proposals. CGBF prays for damages, as well as declaratory and injunctive relief, under its fourth and fifth assignments of error.” *Id.* ¶ 2-9.

## 2008 AUDIT FINDINGS

{¶12} CGBF's first and third causes of action dispute the 2008 audit findings, seeking a declaratory judgment and damages, respectively. The audit relies on OMB A-122, the purpose of which is to establish "principles for determining the costs of grants, contracts and other agreements with non-profit organizations." OMB A-122, ¶ 1. OMB A-122 defines "prior approval" of a grant cost as "securing the awarding agency's permission in advance to incur costs for those items that are designated as requiring prior approval by this Circular. Generally such permission will be in writing. Where an item of cost requiring prior approval is specified in the budget of an award, approval of the budget constitutes approval of the cost." *Id.* at ¶ (4)(b).

{¶13} The audit identified two items of cost defined in OMB A-122 which concern payment for services that are charged to a grant; personal services and professional services.

{¶14} "8. Compensation for personal services.

{¶15} "a. Definition. Compensation for personal services includes all compensation paid currently or accrued by the organization for services of employees rendered during the period of the award (except as otherwise provided in subparagraph h). It includes, but is not limited to, salaries, wages, director's and executive committee member's fees, incentive awards, fringe benefits, pension plan costs, allowances for off-site pay, incentive pay, location allowances, hardship pay, and cost of living differentials.

{¶16} "b. Allowability. Except as otherwise specifically provided in this paragraph, the costs of such compensation are allowable to the extent that:

{¶17} "(1) Total compensation to individual employees is reasonable for the services rendered and conforms to the established policy of the organization consistently applied to both Federal and non-Federal activities; and

{¶18} "(2) Charges to awards whether treated as direct or indirect costs are determined and supported as required in this paragraph.

{¶19} "\* \* \*

{¶20} "37. Professional services costs.

{¶21} "a. Costs of professional and consultant services rendered by persons who are members of a particular profession or possess a special skill, and who are not officers or employees of the non-profit organization, are allowable, subject to

subparagraphs b and c when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Federal Government.” *Id.*, Attachment B.

{¶22} The audit disallowed certain costs that were charged to the 2007 and 2008 grants for compensation paid to Parthasarathy and Frasure based upon the determination that those costs were for professional services under the OMB A-122 definition. Specifically, Development disallowed the costs at issue because both Parthasarathy and Frasure were members of CGBF’s board of directors and they were found by the auditor to be independent contractors, rather than “W-2” employees of CGBF.

{¶23} However, in a July 22, 2009 letter to USDOE, Candace Jones, Development’s Chief Legal Counsel, argued that, Development “believes that CGBF has performed the services required by the subgrant and supports CGBF’s use of grant funds to pay the costs of services provided by Ms. Parthasarathy.” (CGBF Exhibit 19.)

Jones also stated that the costs were related to “services specifically contemplated and allowed by the subgrant” and that “the compensation budgeted for the services was determined to be reasonable in light of subgrant objectives, and the services were performed as described in the subgrant agreement.” Jones further noted that the audit “did not question the merits of the services or reasonableness of cost” and addressed only the issue of employment status.

{¶24} Jones explained that “the nature of services performed by Ms. Parthasarathy support reconsideration of amounts paid to her as ‘compensation’ under item 8 instead of ‘professional services’ under item 37” inasmuch as such services “are not the type of service that would typically be characterized as “professional and consultant services.” Jones related the following: “Ms. Parthasarathy was not providing technical services as a professional. Rather she was compensated for administrative services necessary for CGBF to carry out its obligations under the subgrant. Development’s Audit Office turned to item 37, however, based on its conclusion that only expenses of W-2 employees could be covered under item 8.” According to Jones, “[t]o deny CGBF an allowance for compensation elevates the form of Ms. Parthasarathy’s working relationship with CGBF over the substance of the services she performed.” *Id.*

{¶25} OMB A-122 does not define the term “employee,” however, item 8 provides examples of what is meant by compensation for personal services, which “includes, but is not limited to, salaries, wages, [and] director’s and executive committee member’s fees \* \* \*.” Furthermore, both the Supreme Court of Ohio and the Sixth Circuit Court of Appeals have applied the common law agency test when the statute or rule in question does not define the term “employee.” See *Bostic v. Connor*, 37 Ohio St. 3d 144 (1988), (finding that whether someone is an employee or an independent contractor is ordinarily an issue of fact regarding who had the right to control the manner or means of doing the work.); *Demski v. U.S. Dept. of Labor*, 419 F.3d 488 (2005) (applying common law agency test to determine if a hired party was entitled to the protection of a whistleblower statute). The United States Supreme Court has also held that when a statute or rule uses the term “employee” without defining it, the common law agency test must be applied to determine whether the hired party is an employee. *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992) (adopting the common law test for determining who qualifies as an “employee” under ERISA and citing numerous other cases where the Court has held that the common law agency test must be used when the statute or rule in question does not define the term “employee”).

{¶26} “In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.” *Id.*, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752. “Since the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Id.*, quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254 at 258.

{¶27} Although the income tax treatment of the hired party is one factor to be considered in determining whether that person is an employee under the general common law of agency, it is not the only factor. The Supreme Court of Ohio has stated that “[t]he key determination is who had the right to control the manner or means of doing the work.” *Bostic, supra*, at paragraph one of syllabus.

{¶28} CGBF submitted evidence regarding the working relationship with CGBF for both Parthasarathy and Frasure. Gregory Faulkner, who served as the president and a member of the board of directors for CGBF, avered that Parthasarathy’s duties as CGBF’s executive director and program coordinator were performed at the direction of CGBF’s board of directors. According to Faulkner, Parthasarathy reported directly to the board of directors and she was required to obtain the board’s approval for major decisions related to events, programs and associated expenses. Parthasarathy also performed administrative tasks that were required for administration of the grants and the board determined her salary and working hours.

{¶29} Similarly, the evidence submitted shows that Frasure’s work for CGBF was performed under the direction and control of its board of directors and Parthasarathy, as CGBF’s executive director. Faulkner avers that Frasure reported to Parthasarathy as the board’s representative and that Frasure was directed regarding both her working hours and the tasks to which she was assigned. According to Faulkner, Frasure’s work at CGBF events consisted of purely administrative tasks that required no special skill and she was provided with the necessary materials to complete those tasks. Faulkner stated that Frasure was never paid for interior design consulting services. (CGBF Exhibit 12, ¶ 48.)

{¶30} Inasmuch as OMB A-122 does not define the terms “employee,” the court finds that the common law agency test should be applied in determining the employment status of Parthasarathy and Frasure. Based upon the factors discussed above, particularly with regard to CGBF’s right to control the manner or means in which Parthasarathy and Frasure performed their work, the court finds that both Parthasarathy and Frasure were employees of CGBF, regardless of their classification as independent contractors for income tax purposes. Therefore, the court concludes that the costs related to the work performed by Parthasarathy and Frasure were allowable under the common law agency test as personal services.



{¶31} Development contends that even if Parthasarathy and Frasure were found to be employees, pursuant to OMB A-110(C)42, the cost submitted by CGBF must be disallowed as a conflict of interest.

{¶32} OMB A-110(C)42 provides:

{¶33} “Codes of conduct. The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. *No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award.* The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to subagreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.” (Emphasis added.)

{¶34} CGBF argues that OMB A-110(C)42 applied to the award of procurement contracts and not to the payment of the grantee’s (CGBF’s) personnel for performing services that were specifically contemplated by the grant. The court agrees.

{¶35} There is no doubt that CGBF’s grant proposals both fully disclosed that Parthasarathy would coordinate the programs and specified the amount she would be paid for her services. OMB A-122, Attachment B provides a specific rule related to the payment of compensation to directors and officers. Indeed, as stated above, Development’s chief legal counsel conceded that “CGBF has performed the services required by the subgrant and supports CGBF’s use of grant funds to pay the costs of services provided by Ms. Parthasarathy.” Development has admitted that it did not question the reasonableness of the compensation paid to Parthasarathy and Frasure. Furthermore, the court notes that the 2008 audit findings did not refer to OMB A-110(C)42 as a basis for disallowing the reimbursement of costs submitted by CGBF.

The court finds that the provisions of OMB A-110(C)42 do not apply to the costs that are at issue in this case.

{¶36} The court of appeals determined that the 2009 grant, with its two amendments, constitutes a legally binding contract and that count three of the complaint sufficiently alleges the essential elements of a claim for breach of contract. Based upon the uncontested evidence submitted by CGBF, the only reasonable conclusion to be drawn is that Development's refusal to pay requests for reimbursement, in the amount of \$51,385.51, which had been approved by Development, constitutes a breach of the contract. Accordingly, judgment shall be rendered in favor of CGBF on both count three of the complaint, and count one to the extent that a collection action has been initiated.

{¶37} Furthermore, inasmuch as Development's counterclaim is based upon its contention that CGBF owes Development for payments it improperly received based upon the 2008 audit findings, CGBF is entitled to summary judgment on the counterclaim. Count two of the complaint seeks declaratory judgment, in the alternative, only to the extent that the findings in the audit are sustained; therefore, plaintiff is not entitled to judgment on that count.

{¶38} As the court of appeals noted, CGBF's fourth and fifth causes of action seek declaratory and injunctive relief arising from related grant-making activity, but do not involve CGBF's grants from the department. The fourth cause of action challenges Development's review process concerning a 2010 grant awarded to a competing application instead of CGBF. Count five concerns Development's alleged removal of CGBF from an email distribution list that was used to notify potential grantees of requests for proposals.

{¶39} "Claims for declaratory and/or injunctive relief may be brought in the Court of Claims 'only if (1) they arise out of the same circumstances as plaintiffs' claim for money damages, and (2) plaintiffs' claim for money damages is permitted by the state's waiver of immunity.'" *Upjohn Co. v. Ohio Dept. of Human Servs.*, 77 Ohio App.3d 827, 834 (10th Dist.1991).

{¶40} The court finds that CGBF's fourth and fifth causes of action do not arise out of the same circumstances as the claim for money damages. The 2010 grant proposal referenced in count four relates to proposed programs in which CGBF sought to partner with The Ohio State University (OSU); programs that would be administered

by OSU's extension network. CGBF alleges bias and a conflict of interest on the part of a member of Development's grant review team who had previously been employed by the successful bidder. The court finds that such claim does not arise out of the same circumstances as the claim for money damages alleged in count three. Accordingly, the court does not have jurisdiction over CGBF's fourth cause of action. Furthermore, inasmuch as CGBF seeks a declaration as a disappointed bidder, its bid partner, OSU must also be joined as a plaintiff. However, the state cannot sue itself. *Ohio Department of Human Services v. Ohio Dept. of Transp.*, 78 Ohio App. 3d 658, 661. (10th Dist. 1992).

{¶41} CGBF's fifth cause of action, concerning the alleged removal of CGBF from an email distribution list that was used to notify potential grantees of requests for proposals, also does not arise out of the same circumstances as the claim for money damages. Moreover, to the extent that CGBF alleges that it was unable to bid on any projects after December 22, 2009, it lacks standing to challenge the contract awarded on a project when it did not submit a bid. *Ohio Concrete Constr. Assn. v. Ohio Dept. of Transp.*, 10th Dist. No. 08AP-905, 2009-Ohio-2400, ¶ 15. Additionally, to the extent that CGBF contends that counts four and five state a claim for money damages based upon CGBF's status as a wrongfully rejected bidder, the court lacks subject matter jurisdiction to hear such claims. *Modern Office Methods, Inc. v. Ohio State Univ.*, 10th Dist. No. 11AP-1012, 2012-Ohio-3587. Accordingly, count five of the complaint must be dismissed.

## **PREJUDGMENT INTEREST**

{¶42} CGBF also asserts a claim for prejudgment interest. R.C. 2743.18(A)(1) provides that interest shall be allowed with respect to any civil action on which a judgment or determination is rendered against the state for the same period of time and at the same rate as allowed between private parties to a suit. The award of prejudgment interest is controlled by R.C. 1343.03(A) which provides, in pertinent part, as follows: "[W]hen money becomes due and payable upon any \* \* \* instrument of writing \* \* \* the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code \* \* \* unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract." The

parties have not identified, nor is the court aware of a provision in the contract that provides a rate of interest for money that becomes due and payable.

{¶43} CGBF has submitted a request for payment that was submitted on October 31, 2010 and it contends that interest should accrue from November 30, 2010, which is 30 days after it submitted its last request for payment pursuant to the 2009 grant. Therefore, plaintiff is entitled to prejudgment interest on the award of damages from November 30, 2010 to the date of this court's judgment entry as follows:

Year	Days	Interest	Amount	Interest
2010	31	4%	\$51,385.81	\$174.57
2011	365	4%	\$51,385.81	\$2,055.43
2012	365	3%	\$51,385.81	\$1,541.57
2013	365	3%	\$51,385.81	\$1,541.57
2014	65	3%	\$51,385.81	\$274.53
			Total interest	\$5,587.68
			Principal +	\$56,973.49
			\$25 filing fee	\$56,998.49

{¶44} Accordingly, judgment shall be rendered in favor of plaintiff in the amount of \$56,998.49, which includes the filing fee paid by CGBF.

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PATRICK M. MCGRATH  
Judge

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### JUDGMENT ENTRY

{¶45} A non-oral hearing was conducted in this case upon plaintiff/counter defendant's, Columbus Green Building Forum (CGBF), motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, CGBF's motion for summary judgment is GRANTED as to counts one and three of the complaint, and defendant/counter plaintiff's counterclaim. Counts four and five of the complaint are DISMISSED. Judgment is rendered in favor of CGBF in the amount of \$56,998.49. All previously scheduled events are VACATED. Court costs are assessed against defendant/counter plaintiff, Ohio Development Services Agency. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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PATRICK M. MCGRATH  
Judge

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