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*A Discussion of Current Laws, Regulations and Practices for
all participants in the Construction Industry*



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Sole-Source Procurement and Changes at the Ohio School Facilities Commission Highlight the Spring Quarter Issue

This quarter, we open with an article on sole source procurement for public owners, especially with regard to water and wastewater treatment works, in an article that will also appear in Bricker & Eckler LLP’s new and upcoming newsletter dedicated to construction issues in the water and wastewater industry. Complex and specialized projects often place public owners in a situation where they are faced with competing forces of the statutory requirement to competitively bid construction work and the practical issues facing some public owners; public owners who require special equipment, systems or construction methods. In this article, Doug Shevelow explains the history of sole-source procurement and the potential conflict with competitive bidding requirements in Ohio. Doug also provides us with insight into how courts view the efforts of public owners attempting to acquire special equipment, systems or construction methods, and how a public owner can go about acquiring them without running afoul of Ohio’s competitive bidding laws.

Our next article discusses the Ohio School Facilities Commission. The OSFC has made a huge impact on K-12 classroom facilities in Ohio as many school districts have participated in one or more of its building programs. While the Commission’s mission remains constant to address K-12 classroom facilities needs for all students in Ohio, the program continues to evolve. In February, the Commission appointed a new Executive Director and rescinded the resolutions adopted in 2007 that had permitted certain Model Responsible Bidder Workforce Standards to be included as contract requirements. In this article, Sylvia Gillis discusses recent changes at the OSFC including changes in key OSFC positions, the repeal of resolutions and new Commission policies.

In our “What the Courts Are Saying” column, the Fifth District Court of Appeals was asked to determine whether an owner’s denial of a contractor’s claim was proper where the contractor failed to submit its claim notice within the time period required under the contract’s notice provisions. In our second case, the Tenth District Court of Appeals strictly interpreted written

contract requirements for making claims that the trial court should have considered to determine whether the contractor waived its rights to its claim under the contract’s strict claims-and-notice provisions when it failed to submit its claim in a timely manner. In our third case, the Twelfth District Court of Appeals was asked to determine whether a public owner has discretion to reject a contractor’s bid where the contractor had a history of filing lawsuits against public owners.

In our “ADR Corner” column, Sam Wampler analyzes two recent Ohio Eighth District Court of Appeals decisions to determine how courts go about reconciling statutes that, at first glance, appear to be inconsistent with one another. In the first case, a contractor wanted to avoid having to arbitrate its claims by pursuing them in court, while the developer insisted on exercising its rights as a property owner under the mechanics’ lien law and its contractual right to arbitration. Conversely, in the second case, the contractor wanted to pursue its contract claims in arbitration while enforcing its mechanics’ lien rights in court, but the developer wanted all of the claims to be resolved in court.

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Sole-Source Procurement for Ohio Public Owners, Especially with Regard to Construction of Treatment Works



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Highlights: Complex and specialized projects often place public owners in a situation where they are faced with competing forces of the statutory requirement to competitively bid construction work and the practical issues facing some public owners—public owners who require special equipment, systems or construction methods. In this article, Doug Shevelow explains the history of sole-source procurement and the potential conflict with competitive bidding requirements in Ohio. Doug also provides us with insight into how courts view the efforts of public owners to acquire special equipment, systems or construction methods, and how a public owner can go about acquiring them without running afoul of Ohio’s competitive bidding laws.

Background

In Ohio, odds are that a public water or wastewater treatment facility is owned either by a municipality, county or regional water and sewer district. These entities are required by statute to make a written contract with the “lowest and best bidder” for all construction contracts that exceed \$25,000.

These owners do enjoy some statutory exceptions to competitive bidding, however, such as for a “real and present emergency.” There are other exceptions, including for purchasing goods and services under the State Term Contract program administered by the Ohio Department of Administrative Services, for purchasing used equipment or supplies at public auctions or sales, and for purchasing services, material, equipment or supplies from another Ohio political subdivision.

On some construction projects, especially ones that are complex and involve new technologies, a public owner may have a very good idea of exactly what equipment and systems it wants, such as a particular water or wastewater treatment process. But the uniqueness of certain equipment and systems may mean that they are not readily available from more than one vendor, creating tension with statutory competitive bidding requirements.

Another problem arises when the desired equipment is not necessarily unique with respect to the rest of the world, but unique in that it is the only equipment that matches equipment or processes already used by the municipality, such as a particular HVAC or emergency power system.

The doctrine of sole-source procurement, when correctly applied, can help a public owner procure the equipment and processes it wants for its water or wastewater project without running afoul of Ohio’s competitive bidding laws.

The Roots of Sole-Source Procurement

A public entity is not required to engage in competitive bidding in the absence of legislation requiring it. *Shafer v. Streicher* (1922), 105 Ohio St. 528, 534. Moreover, Ohio courts have recognized that not all procurements of services by public bodies are amenable to competitive bidding and, indeed, competitive bidding may be waived in some cases. This is roughly known as the “sole-source doctrine,” where courts have recognized that bids need not be solicited for certain specialized services.

The Supreme Court’s expression of this principle comes from *State ex rel. Doria v. Ferguson* (1945) 145 Ohio St. 12, para. 2 of the syllabus:

Although contracts relating to public projects, involving the expenditure of money, may not ordinarily be entered into by public officials without advertisement and competitive bidding as prescribed by law, an exception exists where the contract involves the performance of personal services of a specialized nature requiring the exercise of peculiar skill and aptitude.

In *Doria*, the services not subject to competitive bidding were preparing title abstracts. In *Heninger v. Akron* (1951) 112 N.E.2d 77, the Ohio Ninth District Court of Appeals cited *Doria* to excuse codifying city ordinances from competitive bidding.

The jurisprudence goes back further and includes construction. In *State ex rel. Scobie v. Cass* (1910), 13 Ohio C.C. (n.s.) 449, a courthouse construction commission was permitted to procure services for

painting and decorating the interior walls and ceilings of a new courthouse without competitive bidding. The court held that the commission could award the interior decoration contract without bidding due in part to the rule announced in *State ex rel. v. Mackenzie* (1907), 9th Cir. Ct. Rep. (N.S.), 105:

When the contemplated construction is essentially and absolutely non-competitive, because of its artistic nature; or is strictly monopolistic, because of the function to be performed thereby is necessarily dependent upon a single means which is the subject of an exclusive patent, or franchise, or sole source of supply then the principle of competition is, so far forth, inapplicable.

The common thread throughout the sole source case law is a rational, subjective belief that the chosen contractor delivers the best value for the work because it is uniquely qualified, or that it is physically impossible for the work to be performed by others.

The Importance of Competition

On the other side of the spectrum is the view favoring competitive procurement, under the theme that the purpose of competitive bidding is “to provide for open and honest competition in bidding for public contracts and to save the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms.” *Cedar Bay Constr., Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 21.

A good example is found in *State, ex rel. Schaefer v. Bd. of Commissioners of Montgomery County* (1967), 11 Ohio App.2d 132, where the court held that the county’s specifications for incinerator equipment were so narrow that competitive bidding was stifled in violation of statutory requirements for competitive bidding.

See also *Fischer Auto & Service Co. v. Cincinnati* (Hamilton C.P. 1914), 26 Ohio Dec. 103, where a public owner was enjoined from publicly procuring an automobile when the specifications were too narrowly tailored to a certain make and model. The court used the terms “closed specification” and “open specification” to differentiate between an implied sole-source specification and a generic specification.

However, the courts in both cases, although striking down the challenged procurements, did implicitly acknowledge that there is a place for sole-source procurement. In *Fischer*, the court recognized that an open specification was workable only when “there was at least one other engaged in the same business.” In *Schaefer*, in citing to *Doria*, supra, the court rec-

ognized the sole-source procurement doctrine when it stated “[i]t may be evidence would show that these matters should be excepted from competitive bidding.” But the court did not have enough evidence in front of it to make a determination that competitive bidding could be bypassed. The court held:

It is argued in the reply brief that the respondent board ‘with expert advice, has determined that the incinerator and complementary equipment sought, with the requisite expertise for installation, are available from only one source * * *’.

Whether the board’s determination in this regard is based on actual facts concerning the state of the art or industry of manufacture and installation of incinerator equipment is a matter which the respondent board must plead and prove—we cannot take judicial notice of such facts.

In *The Gamewell Co. v. Phoenix* (C.A. 9, 1954) 216 F.2d 928, (cited by the *Schaefer* court) the court recognized that a certain product may be specified as sole source when it is patented and the sole source is technically justified.

Modern Practice: Implied Statutory Recognition of Sole Source for Equipment and Systems Based on Owner’s Discretion

In modern construction procurement, the question of sole source most often involves equipment and systems to be furnished and installed by one or more of the bidding contractors, instead of sole sourcing an entire contract to a particular contractor.¹ HVAC equipment, roofing systems and water/wastewater treatment equipment are common examples. The modern practice, whose origins quite possibly lie within requirements set out by those entities funding the work, is to oftentimes require that three or more manufacturers be listed as acceptable in the technical specifications.

But there are times when the equipment or systems are sufficiently unique that a particular system or piece of equipment must be used to ensure the project’s success, at least in the mind of the owner. On a water or wastewater project, a particular tertiary filter, membrane process or filter press may have been pilot tested and the entire project may have been designed around it. On a building project, the owner may strongly desire a certain brand of HVAC equipment or controls, because that is what was installed

The common thread throughout the sole source case law is a rational, subjective belief that the chosen contractor delivers the best value for the work because it is uniquely qualified, or that it is physically impossible for the work to be performed by others.

in the owner’s other numerous buildings, making operations and maintenance more efficient.

One way for an owner to obtain the equipment or system that it desires without running afoul of competitive bidding laws is to include the equipment or system as one of several choices in the base bid and then specify the exact equipment desired as an alternate, thereby allowing a bidder to specify its price if certain equipment or systems are selected as an alternate. If the owner decides that the price for the equipment it prefers (the alternate bid) is acceptable it may select the alternate and evaluate bids taking into account the alternate selected. This approach has been accepted by the courts throughout Ohio.

If the owner is convinced of the necessity of sole source, and there are no other comparable equipment or systems available, this is when the owner must make a strong technical justification and proceed under the great discretion afforded to public construction owners under Ohio law.

Ohio statutory municipalities, counties and regional water and sewer districts (organized under ORC Chapter 6119) award construction contracts under the “lowest and best” bidder standard. The inclusion of the term “best” gives the municipality considerable discretion to consider and compare the qualifications of the bidders and equipment suppliers for a contract. See *Cedar Bay Const., Inc. v. City of Fremont* (1990), 50 Ohio St.3d 19, 21. “[C]ourts in this state should be reluctant to substitute their judgment for that of [public] officials in determining which party is the single ‘lowest and best bidder.’” *Id.*

So, the municipal owner must be prepared to demonstrate that the decision to specify certain equipment as sole source is rational. Transparency of the selection process and technical justification are the owner’s best friends for demonstrating rationality.

Such a documented justification of the sole-source determination is what the owner was missing in the *Schaeffer* case.

In a water or wastewater treatment setting the technical justification could be in the form of pilot or bench-scale testing of certain equipment, or hands-on evaluation of the equipment in other installations. For cases involving HVAC controls and equipment, or emergency power generators, an evaluation of the cost savings from system-wide uniformity would be helpful.

Practical Considerations

Once the decision is made to procure by way of sole source a piece of equipment or system, there are ways that the public owner can still help ensure competitive pricing. Requiring bids for alternate systems and equipment (as official bid alternates/substitutions) could convince the owner that the price difference for the preferred system or equipment is or is not worth it. The discretion of Ohio public owners in determining the lowest and best or lowest responsive and responsible bid extends to an owner’s discretion in accepting bid alternates, after bid opening. See *Metzger-Gleisinger v. Mansfield City School District*, 2005-Ohio-2727.

Another practice is to have the design professional, as part of its work to prepare a published estimate of construction cost (another statutory requirement), get firm pricing from manufacturers as early as possible, before any sole-source designation is made.

Footnote

¹ Even so, there are certain processes, such as for *in situ* repair of underground pipe, which may be used by only one particular contractor, or which may even be patented and licensed to very few contractors within a geographical region.

Upcoming Seminars

Involving Bricker & Eckler LLP Attorneys

For Registration Information, call or email Amy Abbey at (614) 227-4989 or aabbey@bricker.com.

Date & Time	Seminar	Location	B&E Speakers	Sponsors
06.10.2011 (Lunch program)	Common Mistakes in the Bidding and Administration of Ohio Public Construction Projects	West Chester Conference Center West Chester, OH	D. Shevelow; B. Hyden	Bricker & Eckler LLP
11.17.2011 (Full day program)	9th Annual Top Gun Construction Claims Seminar	The Conference Center at OCLC Dublin, OH	K. Brown; D. Cullimore; S. Davis; M. Evans; S. Gillis; B. Hyden; C. McCloskey; J. Rosati; D. Shevelow; S. Wampler	Bricker & Eckler LLP

BRICKER & ECKLER'S 20 RULES FOR PUBLIC OWNERS' CONTRACTING SUCCESS

These Rules represent our collective wisdom, over 100 years of construction law experience and over 100 years of construction experience. While no one can guarantee success, we believe that if an Owner understands and follows these Rules, the Owner will have a successful project. We emphasize the need for deep understanding of the Rules. To help you, we shall include articles in Brickerconstructionlaw.com explaining them. If you need further assistance, please contact us.

- 1 **Analyze and understand the risks and requirements of each of your projects**, and how your team will eliminate or minimize those risks and meet those requirements.

- 2 **Beginning with the hiring process, communicate your expectations to your team and follow through** to see that each team member meets those expectations.

- 3 **Conduct a thorough evaluation of your design professional and, if applicable, construction manager candidates** so you hire a team of competent, cooperative, and responsive professionals for each of your projects.

- 4 **Require that your drawings be well coordinated** using a competent third person to review them for conflicts. Discuss coordination with your design professional candidates, understand the process, and see that the process becomes part of the owner – design professional agreement.

- 5 **Understand and address any green building issues (LEED, etc.)**. Begin early during the hiring process by discussing any green building issues with your design professional and, if applicable, construction manager candidates. Incorporate each team member's responsibilities for any green building issues into its contract.

- 6 **Provide sufficient time** so that your design professional can complete the design process, including the coordination of the plans and specifications, and, if applicable, there is time for a constructability review by your construction manager.

- 7 **Hire competent project administration, including observations and inspections**, so that through your design professional and/or construction manager you have knowledgeable eyes inspecting the Work each day to guard you against defective and non-conforming Work.

- 8 **Make sure that your representatives, design professional, and/or construction manager, are knowledgeable about the roofing and through wall flashing Work** and that your representatives carefully review the plans, specifications and shop drawings and then inspect the Work as it is being installed.

- 9 **Provide for the commissioning** of new HVAC systems or major modifications to existing systems.

- 10 **Carefully think through how the risks for unforeseen site conditions** will be evaluated and allocated.

- 11 **Include contractor hiring criteria** in your bidding documents that will permit you to evaluate and hire qualified contractors.

- 12 **Exercise your discretion** and hire qualified contractors that can be expected to work as part of a cooperative team to complete your Project on time, on budget, and free from defects.

- 13 **Use contracts that protect your interests and that are consistent with your expectations**. Have your contracts, including owner-architect agreement, owner-construction manager agreement, and owner-contractor agreement, drafted to protect you.

- 14 **Train your Team in how to use your Contract Documents**. Do not stop simply with good Contract Documents that will protect your interests. Your Team needs to know how to use them. Take the additional step and provide this training.

- 15 **Include indemnification provisions** in your contracts with your contractors, design professional, and, if applicable, construction manager, that will protect you from claims caused by other persons.

- 16 **Be decisive and responsive - understand what you are required to do** and do it in a timely and competent manner.

- 17 **Ensure that your Contract Documents** require a clear and detailed notice of any problem that would affect your budget, completion date, or the quality of the Work.

- 18 **Deal with all problems on your projects immediately, including contemporaneous documentation**; do not let small problems grow into major disputes. If you sense you have a significant problem, contact your legal counsel immediately.

- 19 **Keep your contractors' sureties informed about any significant problems**. If you have a significant problem with a contractor on your project, you want the contractor's surety informed and involved as early as possible.

- 20 **Have the insurance provisions in your Contract Documents** reviewed by your insurance professional, follow his or her recommendations for modifying those provisions and have your insurance professional verify that you have the required coverage.

"By failing to prepare, you are preparing to fail." – Ben Franklin

Recent Changes at the Ohio School Facilities Commission for School Building Projects



Sylvia Gillis
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Highlights: The OSFC has made a huge impact on K-12 classroom facilities in Ohio as many school districts have participated in one or more of its building programs. While the Commission's mission remains constant to address K-12 classroom facilities needs for all students in Ohio, the program continues to evolve. In February, the Commission appointed a new Executive Director and rescinded the resolutions adopted in 2007 that had permitted certain Model Responsible Bidder Workforce Standards to be included as contract requirements.

The OSFC is a relatively young organization. Yet, in thirteen years, it has made a huge impact on K-12 classroom facilities in Ohio as many school districts have participated in a co-funded program or in the Expedited Local Partnership Program. The Commission also reviews and approves applications for the HB 264 energy conservation program and is the state agency for the Qualified School Construction Bonds program.

While the Commission's mission remains to address K-12 classroom facilities needs for all students in Ohio, its approach continues to evolve. Most recently the fifth executive director was appointed by the Commission on February 24, 2011. Rick Hickman brings a familiarity with Commission programs and policies to the position, since he also served as the third executive director a few years ago. With this background, he has been able to jump immediately into a normal routine at the Commission, which includes the same budget issues facing everyone and other concerns unique to the Commission.

At the same time Mr. Hickman was appointed, the Commission also rescinded two resolutions adopted in 2007: Resolutions 07-98 and 07-16. These resolutions added a total of eighteen approved items, labeled "Model Responsible Bidder Workforce Standards," that a board of education on a co-funded Commission building program could adopt to supplement

the bidder evaluation criteria and process included in the standard contract documents prepared for these projects. Two of these items, requiring payment of wage rates based upon Ohio Prevailing Wage Rates published by the Department of Commerce and implementing a Project Labor Agreement for the construction project, were a departure from past Commission policy.

In taking the action to rescind the resolutions, the Commission stated its belief "that many of the Model Responsible Bidder Workforce Standards contained in Exhibit A to Resolution 07-98 are redundant with current law, serve to restrict efficient procurement by increasing project costs or restricting competition by otherwise qualified contractors, or are not reasonably related to responsible bidder criteria."

The rescission of the resolutions that permitted the adoption of any of the 18 items, or variations of them, means that for any bids issued after February 24, 2011, these items may not be included. For boards that adopted any of the Model Responsible Bidder Workforce Standards after February 15, 2007, that action must now be rescinded to conform to the new Commission policy for any future procurement associated with the co-funded project.

For a board of education that decided to enter into a Project Labor Agreement (PLA) with the local building and construction trades council having jurisdiction over the school district's territory, those agreements were always subject to Commission approval. Because a PLA is often prepared and signed before the Board of Education has secured its local share of funding for the project and before it has entered into a Project Agreement with the Commission for the project, Commission approval has always been a future step in the process. Today, even if a board received approval from the Commission for a PLA, that decision must be reviewed and evaluated on a project-specific basis to determine if can still be included as a project requirement.

From a practical perspective, boards of education have always been able to enhance the criteria included in the OSFC Standard Documents and to include additional requirements with approval from the Com-

mission. This was accomplished through the Special Conditions document, which also includes other modifications, additions and deletions of standard OSFC provisions to reflect (1) best practices since the last version of the standard documents (issued in September 2008); and (2) specific project practices of the construction manager and project requirements.

This will continue to be the case, although Special Conditions for each district's project must now be reviewed and approved before they can be included in the Contract Documents issued to bidders. It is important for the district's construction counsel to work closely with the Core Team, and specifically with the Construction Manager to prepare special conditions for each project that reflect the needs for that project and to secure the required approval from the Commission.

A board of education may still choose to implement a local participation program with a defined goal for involvement of businesses and contractors within a defined area. Unlike a charter municipality that may provide an incentive for local participation, public school districts cannot give preferences to local businesses or residents. A thoughtful local participation program, however, can encourage the involvement of local businesses and contractors in the project and be very successful in involving the community.

Other items under consideration by the Commission at this time include:

- Procurement of loose furnishings for classroom facilities constructed through a co-funded program
- Bid-day savings and how those savings can be used for the project
- Encouraging competition among bidders for work on co-funded projects.

In addition to the executive director position, the Commission's chief fiscal officer, Eric Bode, resigned at the beginning of March to take a position with the Department of Education. Both the chief fiscal officer and in-house legal counsel positions are currently vacant, and the Commission expects to have these two important roles filled soon.

In the meantime, it's business as usual at the Commission with a little patience as the staff adjusts to a new director and new directions.

Sylvia Gillis is a partner in the Construction Law Practice Group at Bricker & Eckler LLP. She represents school districts, libraries and other public owners throughout Ohio as their construction counsel.

It is important for the district's construction counsel to work closely with the Core Team, and specifically with the Construction Manager to prepare special conditions for each project that reflect the needs for that project and to secure the required approval from the Commission.

What the Courts Are Saying...



Each month, Brickerconstructionlaw.com summarizes recent decisions of state and federal courts that may affect construction projects and those involved with them in Ohio, Indiana, Kentucky and Michigan. From time to time, we may even include cases from other states if they seem particularly relevant. We highlight what the courts have said in these cases to keep you informed about decisions that may affect your business and your interests, but the summaries themselves are neither legal advice nor legal opinion. If we overlook a case that you think is significant, e-mail us with your suggestions. We can always use feedback, and we would enjoy hearing from you!

Our first case for the Spring Quarter of Brickerconstructionlaw.com comes from the Fifth District Court of Appeals. The Court was asked to determine whether an owner's denial of a contractor's claim was proper where the contractor failed to submit its claim within the time period required by the contract's claim and notice provisions. The court held that the claim was not submitted in a timely manner and the

contractor, by failing to submit its claim according to the terms of the contract, waived its rights to additional compensation. Our second case this quarter comes from the Tenth District Court of Appeals. The trial court hearing the matter decided in favor of a contractor where the contractor sought additional compensation for unexpected costs even though the contractor failed to submit its claim within time

period required by the contract's claim and notice provisions. The Tenth District Court of Appeals held that, because Ohio law requires strict interpretation of contract language, the trial court should have considered whether the contractor waived its rights to the claim under the contract's strict notice provisions by failing to submit its claim in a timely manner. Our third case this quarter comes from the Twelfth District Court of Appeals. The Court was asked to determine whether a public owner has discretion to reject a contractor's bid where the contractor had a history of filing lawsuits against public owners, and specifically against the defendant school district. The Court held that a public owner in Ohio does have the discretion to consider a bidder's history of litigation against public owners as a part of its determination of a bidder's responsibility and reject a bidder based on its litigiousness nature, particularly where there was a history of claims between the two parties to the action.

Are Claims Valid When Filed Outside the Contract Time Period for Notice?

Contracts often contain specific claims processes that require the contractor to give written notice of and submit its claim to the project's architect or engineer and to the project owner within a certain period of time or the claim will be deemed waived. In *Peterman Plumbing and Heating, Inc. v. Board of Education Pickerington Local School District*, 2010 Ohio App. LEXIS 5471, a contractor failed to give notice of and submit its claim within the time period required under the contract and, therefore, the trial court's denial of its claim was upheld on appeal.

In *Peterman*, a school district awarded a plumbing contractor the bid for plumbing work on two school projects. A dispute arose when the plumbing contractor felt that certain work required by the contract was the responsibility of other contractors on the project.

The contract documents required the plumbing contractor to make connections to the sanitary and storm sewer piping, which was terminated five feet outside of the building. The contract documents also required the plumbing contractor to furnish and install storm sewer laterals from the buildings downspout boots to existing storm sewer lines shown on the drawings. The plumbing contractor argued that the contract required that both the site work contractor and the site utilities contractor were responsible for installing the storm sewer laterals to within five feet of the building. The owner provided the plumbing contractor with a notice of default for failing to per-

form the work. In response, the plumbing contractor agreed, under protest, to perform the work pending resolution of the dispute.

The plumbing contractor later submitted a claim for additional compensation and time for the storm sewer work. The architectural firm representing the owner denied the claim. In response, the plumbing contractor filed suit against the owner seeking \$125,000, the cost of installing the storm sewer laterals.

The trial court dismissed the case—holding that the contract allocated the work to the plumbing contractor, the plumbing contractor had a contractual obligation to clarify or correct ambiguities in the contract, and the plumbing contractor failed to comply with the contract's claims provisions, including its obligation to submit notice of its claim on a specific claim form within the time required by the contract. The plumbing contractor appealed the decision.

The appellate court determined that the contractor's failure to comply with the contract's claim and notice provisions was the key issue in this case. The contract required that the contractor submit all claims within 21 days after the occurrence of the event giving rise to the claim. The contract also provided that if the contractor failed to submit the claim as and when required, such failure would be an irrevocable waiver of the claim. Furthermore, if the contractor wanted additional compensation for its claim, the contractor was required to give written notice to the construction manager and the owner before the contractor began the additional work.

Because the contractor failed to give the proper notice within the contract's time period for notice of claims, the Court held that the contractor waived its rights to the claim.

The Court explained that this case “exemplifies the importance of ‘change in contract sum’ clauses in large construction projects, where the likelihood of disagreements over subcontractor duties increases with the project's complexity.” The Court pointed out that the drafters of the district's contract “wisely put in a provision to require timely submission of claims” to encourage early resolution of disagreements and to prevent cost overruns that burden taxpayer resources.

The Contract's Requirement for Notice of Claims—Something More Than Actual Notice is Required

Is a contractor required to provide timely and adequate notice as required by the contract if it intends to make a claim for more money or a time

extension? The answer depends on an interpretation of the contract's claims and notice provisions. In contract disputes, courts use contract construction analysis to determine the intent of the parties to a contract. The intent of the parties to a contract is found in the language of the parties' contract. Where the language is clear and unambiguous, a court may not create a new contract by finding an intent that the parties did not expressly include in the language of the contract. In *Stanley Miller Construction Co. v. Ohio School Facilities Commission, et al.*, 2010 Ohio App. LEXIS 5347, the Tenth Appellate District used contract construction analysis to find that the true issue was whether a contractor failed to provide timely and adequate notice of its claim under the strict terms of the contract.

In *Stanley Miller*, the contract required that the contractor provide written notice of a claim for equitable adjustment no more than ten days after the initial occurrence of the facts which are the basis of the claim. In addition, the contract required the contractor to provide specific and detailed information with its claim. The contractor, however, failed to provide adequate written notice of its claim in a timely manner when the initial facts which were the basis of its claim occurred well in advance of the time the contractor submitted its claim.

From the start of the project, the contractor had "serious reservations" about the construction schedule. It expressed concerns that certain predecessor and successor activities were missing and that not enough time was provided for certain activities. Adjustments were made to the schedule, but the contractor still voiced concern over the adequacy of the schedule.

Ultimately, the contractor was late in completing the project. On the date of substantial completion, the contractor submitted a one-page written notice of its claim seeking additional compensation of \$1.1 million for unexpected costs. The owner requested additional information and documentation regarding the breakdown of the claim from the contractor, but the contractor did not provide the information.

The trial court found for the contractor, basing its decision on its finding that the construction schedule was fundamentally flawed and incomplete. It also based its decision upon evidence that the owner had *actual notice* of the contractor's concerns and failed to remedy those concerns. The trial court, however, did not consider whether the contractor had waived its rights to the claim under the strict terms of the contract.

The owner argued that the trial court ignored the contract's notice provision, which provided that the contractor waives its rights to a claim for additional compensation when the contractor fails to provide written notice of its claim in a timely manner and in accordance with the contract's notice provisions. Because the contractor failed to strictly follow the notice provisions, the contractor waived its right to additional compensation.

The contractor argued that whether it failed to submit a claim under the contract's notice provisions was not the issue, because the owner waived strict compliance with the contract's notice provisions because of the course of its dealing with contractors on the project, and it would be unfair to hold the notice requirement against the contractor under these circumstances.

The appellate court, however, found that failing to remedy issues that are not properly raised according to the terms of the contract has no bearing on whether the owner waives its rights under those notice provisions. Something more than actual notice of the contractor's concerns is required. Where the language of the contract is unambiguous, "[a] court must simply apply the language as written."

For the Court, the true issue in this case was whether the contractor waived its rights under the contract's notice provisions. The matter was remanded to the trial court for a determination of whether, based on the evidence in the record, the contractor waived its right to make a claim.

A School Board did not Abuse its Discretion by Considering a Bidder's Litigation History in Evaluating Whether a Bidder was Responsible

Both private and public construction projects are fraught with the threat of litigation. Indeed, nearly all construction contracts contain dispute resolution provisions, which ultimately provide the parties a right to pursue litigation. However, when a contractor resorts to litigation too frequently, there may be some concern on the part of an owner about entering into a contract with that contractor.

On private projects, if an owner believes the litigation is frivolous, the private owner may choose not to give the contractor who initiated the litigation future contracts (of course on private projects an owner can refuse a contract to any contractor for any reason or no reason at all). This is generally not the case in

Something more than actual notice of the contractor's concerns is required. Where the language of the contract is unambiguous, "[a] court must simply apply the language as written."

public construction. On public projects, an owner is bound by competitive bidding statutes in awarding construction contracts. This creates a tension for public owners when evaluating bids of contractors who may be fully capable of completing the project, but who have a litigious history which leads the owner to believe they will end up in court.

In *Triton Services, Inc. v. Talawanda City School District*, 2011 Ohio 667 (Ohio App. 12th Dist. Feb. 14, 2011), Ohio's Twelfth District Court of Appeals provided public owners with some helpful guidance on how past litigation may be considered in evaluating a bid for a public project.

"The term "responsible" is not limited to a bidder's financial condition, but pertains to many other characteristics of the bidder, such as its general ability and capacity to carry on the work, its equipment and facilities, its promptness, conduct and performance on previous contracts, its suitability to the particular task, and other qualities that would help determine whether or not it could execute the contract properly."

Triton Services was the apparent low bidder for the heating, air conditionings, and ventilating ("HVAC") portion of the construction of a new high school for Talawanda schools. However, while evaluating Triton's bid, Talawanda discovered that Triton did not include the cost to provide certain glycol in its bid. Triton indicated that the glycol was omitted because there was some confusion on Triton's part as to whether the glycol was part of Triton's phase of the project. This glycol was estimated to add between \$50,000 and \$75,000 to Triton's total costs for the project.

Talawanda was particularly concerned about Triton's glycol omission because Triton sued Talawanda in 2007 after the parties disputed the scope of Triton's contractually obligated work for the construction of an elementary school. Based upon Triton's omission of the cost to provide the glycol from its bid price and Triton's prior history of resorting to litigation against Talawanda

on another scope of work dispute, Talawanda rejected Triton's bid as not responsible.

Triton filed suit and contended that Talawanda abused its discretion in rejecting its bid. Triton asked the Butler County Court of Common Pleas to declare it the lowest responsible bidder and to prevent Talawanda from awarding the contract to any other contractor.

During the trial, in an attempt to establish that Talawanda abused its discretion, Triton stated that it

intended to provide the glycol and honor its bid. Further, Triton presented evidence that Talawanda paid about "90 percent" of what Triton sought in the 2007 lawsuit. Finally, Triton explained the reasoning and resolution of all previous lawsuits it filed involving public projects, and argued that litigation is sometimes necessary.

The Court rejected Triton's arguments and embraced a "fluid, abuse of discretion standard," which provides public owners wide latitude in determining whether a bidder is responsible. In finding that Talawanda did not abuse its discretion, the Court explained that "the term 'responsible' is not limited to a bidder's financial condition, but pertains to many other characteristics of the bidder, such as its general ability and capacity to carry on the work, its equipment and facilities, its promptness, conduct and performance on previous contracts, its suitability to the particular task, and other qualities that would help determine whether or not it could execute the contract properly." Further, the Court stated that "determining 'responsibility' will necessarily differ for any given project, and it is 'important that it be subject to a fluid, abuse-of-discretion standard' (citations omitted)."

The trial court refused to interfere with Talawanda's decision to reject Triton's bid, and on appeal the appellate court found that Triton failed to demonstrate that the trial court abused its discretion in denying Triton's request for injunctive relief. The court of appeals noted that the testimony before the trial court favored both parties and that the trial court was in the best position to weigh the evidence before it and its judgment in that regard could not be disturbed in the absence of an abuse of discretion.

This case illustrates the uphill battle a contractor faces when pursuing a bid dispute in court. It must first overcome the presumption that the public owner acted properly—a heavy burden. If the trial court declines to interfere with the public owner's decision, then on appeal the contractor has to overcome two hurdles: 1) it must demonstrate that the public owner abused its discretion in taking whatever action the contractor is objecting to; and 2) it must demonstrate that the trial court abused its discretion in denying injunctive relief. This can be a formidable task.

ADR Corner

Friendly Collision of the Ohio Arbitration Act and the Mechanics' Lien Law in Ohio

All possible circumstances cannot be envisioned when laws are enacted and that is why we turn to the courts for guidance when written laws collide, appearing to create inconsistent outcomes. Two recent court of appeals decisions out of the Eighth District Court of Appeals for Ohio present just such a situation and are instructive of how courts go about reconciling statutes that, at first glance, appear to be inconsistent with one another.

In the first case, a contractor wanted to avoid having to arbitrate its claims by pursuing them in court, including foreclosure of its mechanics' lien, while the developer insisted on exercising its rights as a property owner under the mechanics' lien law as well as its contractual right to arbitration.

Conversely, in the second case, the contractor wanted to pursue its contract claims in arbitration while enforcing its mechanics' lien rights in court, but the developer did not want to arbitrate and instead wanted all of the claims to be resolved in court. Let's take a look at how the courts addressed these circumstances.

Milling Away

In *Milling Away, L.L.C. v. UGP Properties, L.L.C.*, 2011-Ohio-1103, the court was faced with the issue of whether a property owner who demands that a contractor/lienholder commence a court action to enforce its mechanics' lien rights necessarily waives its right to compel arbitration of its contract claims pursuant to a predispute arbitration clause in the parties' construction contract.

Milling Away was a contractor who furnished and installed countertops and cabinet work for a condominium/apartment project, pursuant to a written contract with the developer. The parties agreed that disputes would be settled by arbitration pursuant to the rules of the American Arbitration Association (AAA). When Milling Away was not paid for about \$88,000 of its work (according to Milling Away) that it claimed was due under the contract, it filed a mechanics' lien to protect its interest.

After Milling Away filed the mechanics' lien, the developer served Milling Away with a "notice to

commence suit" pursuant to R.C. 1311.11. Under that statute, if Milling Away failed to file suit to foreclose its lien within 60 days after service of the notice, its lien would be void and unenforceable. This does not mean that Milling Away would lose its right to recover damages from the developer, it simply means that Milling Away would lose its mechanics' lien rights—a useful tool to collect a debt often used by contractors or subcontractors as a means to enforce their contractual right to payment.

Once Milling Away filed suit the developer sought to stay the proceedings and compel arbitration pursuant to the Ohio Arbitration Act (R.C. 2711 et seq.). In opposition to the motion to stay and compel, Milling Away argued that by demanding that Milling Away commence suit, the developer necessarily waived its right to arbitration under the parties' contract.

To understand the issue, it is helpful to consider some previous court decisions regarding waiver of the right to arbitrate a dispute. The courts seem to be uniform in their view that in order to prove a waiver of the right to arbitrate, the party seeking to prove a waiver must prove that the waiving party: 1) knew of the existing right to arbitrate; and 2) acted inconsistently with that right. In considering the second point, courts have stated: "[t]he essential question is whether, based upon the totality of the circumstances, the party seeking arbitration has acted inconsistently with the right to arbitrate." *Whishnosky v. Star-Lite Bldg. & Dev. Co.*, 2000 Ohio App. LEXIS 4081.

Typically, a party who is accused of waiver will file an action in court to enforce its contractual rights without proceeding to arbitration. The opposing party will then file an answer and perhaps a counterclaim—both parties demonstrating the intent to litigate rather than arbitrate their claims. Sometimes they engage in discovery under the Rules of Civil Procedure thus availing themselves of the court process to pursue and/or defend the claims.

Then, one party or the other will either discover its right to arbitrate after the litigation has begun or decide there could be an advantage in arbitrating rather than litigating the dispute. Of course if the other party agrees at this juncture there is no



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problem—the parties can always submit a matter to arbitration. However, in most cases one party wants arbitration the other party doesn't—and usually for no apparent good reason other than “if the other side wants it, I don't.” This ultimately leads to a court having to decide whether there was a waiver of the right to arbitrate as the court was asked to decide in *Milling Away*.

However, in *Milling Away* the parties found themselves in court for a different reason (i.e., R.C. 1311.11). This provision of the Ohio Revised Code allows the owner of property or the holder of an interest in property impacted by the filing of a mechanics' lien to force the lienholder to file suit on its lien upon proper notice to do so—in this case within 60 days of the notice. If the lienholder (*Milling Away*) failed to file suit within 60 days of the notice from the developer, its lien would be unenforceable.

However, *Milling Away* wanted to be in court and did not want to arbitrate its claims. If it did not file for arbitration, but instead filed a lawsuit to enforce

its mechanics' lien and to recover damages from the developer it could be argued that *Milling Away* waived its right to arbitration—but could the same argument be made against the developer? Here, the developer still wanted to arbitrate the contract dispute and filed a motion with the court to compel arbitration pursuant to the parties pre-dispute arbitration agreement.

This is where it gets interesting. *Milling Away* opposed the motion to compel arbitration by arguing that because the developer exercised its rights under R.C. 1311.11 by giving notice to commence suit it waived its right to arbitration. However, the court rejected that argument. It held that R.C. 1311.11 did not require a lienholder such as *Milling Away* to file suit, rather it simply allowed a property owner

to force a lienholder to file suit within 60 days or lose its lien rights. Whether *Milling Away* wanted to retain its lien rights was *Milling Away*'s decision, not the developer's.

Although the court does not mention it, this type of legislation helps reduce clouds on title and makes real property more readily marketable, an outcome that is favored in the law. The fact is that *Milling Away* could have filed for arbitration of its claim; and, whether it pursued its mechanics' lien rights or not, filing suit to preserve its lien rights did not impact its arbitrable claims.

Milling Away also argued that because the developer engaged in settlement negotiations before and after the lawsuit began, it waived its right to compel arbitration. The court also rejected this argument. It noted that the parties never agreed that settlement discussions or any information exchanged in furtherance of settlement would result in a waiver of the right to arbitrate the dispute.

Although the court did not mention it, courts typically encourage settlement of disputes and are hesitant to interfere in any way in that process in the absence of a good reason to do so. Finding that a party who participates in settlement negotiations waives its right to arbitration would discourage rather than encourage settlement discussions and this reason alone should be enough to find that there was no waiver.

The trial court not only ordered the parties to arbitration, but it also dismissed the lawsuit filed by *Milling Away*. This was clearly an error and the court of appeals remanded the case to the trial court with direction to reinstate the lawsuit and stay its proceedings until the arbitration was concluded. The court held that a dismissal would deprive *Milling Away* of its mechanics' lien and that the trial court should have simply stayed the proceedings until after the arbitration.

In essence the court of appeals found that the parties' agreement to arbitrate, the Ohio Arbitration Act and the Mechanics' Lien Law can coexist without substantial conflict so long as the parties act consistent with the rights granted by each. Here, the parties agreed, pre-dispute, to arbitrate their claims; the developer exercised its rights under the Mechanics' Lien Law to insist that the lienholder either commence suit to foreclose or abandon its lien; and the Ohio Arbitration Act allowed the parties to enforce their right to arbitration despite what might otherwise be viewed as a waiver of the right to arbitrate (filing suit at the insistence of the other party).

Panzica

The friendly coexistence of the Mechanic's Lien Law and the Ohio Arbitration Act is also exemplified in a second recent decision from the same court, *Panzica Constr. Co. v. Zaremba, Inc.*, 2011-Ohio-620. Like *Milling Away*, *Panzica* involved the construction of condominiums, but the stakes were much higher—over \$2 million. Just like in *Milling Away*, after *Panzica* filed its mechanics' lien, the developer, *Zaremba*, sent *Panzica* a notice to commence suit pursuant to R.C. 1311.11. If *Panzica* wanted to preserve its lien rights it had to file an action within 60 days of receiving the notice and this is exactly what *Panzica* did.

In essence the court of appeals found that the parties' agreement to arbitrate, the Ohio Arbitration Act and the Mechanics' Lien Law can coexist without substantial conflict so long as the parties act consistent with the rights granted by each.

However, Panzica carefully noted in its lawsuit that it was not waiving its right to arbitrate. At or about the same time Panzica filed its demand for arbitration with the AAA (there was discussion that the filing of the lawsuit and the demand for arbitration were not simultaneous, but the court found that to be immaterial). When Zaremba filed a counterclaim, Panzica immediately filed a motion to stay the proceedings and compel arbitration of the parties' contract claims. In other words, Panzica, the contractor, was seeking the same relief that the developer was seeking in *Milling Away*.

Panzica wanted to arbitrate its contract claims just like the developer in *Milling Away*. That is what makes the two cases different, but as we shall see, the court reached the same result in both instances—it enforced the arbitration agreement and stayed the litigation pending arbitration of the underlying contract claims.

In opposing Panzica's motion to stay the proceedings and compel arbitration, Zaremba argued that by initiating a court action Panzica waived its right to insist upon its arbitration rights under the construction contract. The court was not persuaded, and it noted that Panzica only sought relief based on its non-arbitrable mechanics' lien rights and reserved its breach of contract claims for arbitration.

It also noted that Panzica filed its motion to stay the proceedings and compel arbitration only after

Zaremba filed a counterclaim based on its contract rights, which rights were subject to the arbitration provision of the parties' contract. More importantly, however, the appellate court noted that Panzica acted consistently with its right to arbitrate its contract claims against Zaremba, which was wholly inconsistent with a waiver of those rights.

Conclusion

So what can we take from these two cases? The first thing to take away is that Ohio has a strong policy that favors arbitration of disputes and secondly whether there is a waiver of the right to arbitrate is a fact driven issue. A trial court's determination of the issue of waiver will not be disturbed unless it can be shown that the trial court abused its discretion in reaching its decision.

In both cases the courts recognized the statutory nature of the mechanics' lien laws and how rights flowing there from are separate and distinct from rights arising from parties' contracts. In both cases a contractor's lien rights can be preserved by filing suit to enforce those rights without either party necessarily waiving their contractual right to arbitration.

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