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## Spotlight Focuses on Public Projects For Final Issue of 2003

*Our December issue covers, as usual, a host of topics, but public construction predominates in the two articles. You will notice the emphasis in Greg Parks’ lead article, “Practical Guidance for Complying with the Public Records Law on Public Construction Projects.” Anyone involved with a public project to the extent of preparing project records that are monitored by the public body may be impacted by the Public Records Act. We think that many of our readers will need to know what Greg has to say.*

This month’s offerings include a bonus article, prepared by Luther Liggett, Jr., a member of Bricker & Eckler LLP’s Government Relations Department. The article highlights a recent change in the law that affects public contracts. This year’s budget bill, House Bill 95, included a requirement that no contractor or vendor be awarded a public contract if the State Auditor has issued a “finding for recovery” against that company and the finding is unresolved. Starting January 1, 2004, the State Auditor is to maintain a database of such unresolved findings, and public agencies must verify that a contractor is not in that database before awarding a contract. Again, this is information that you need to know if you are involved in public contracts of any kind.

Our usual “What the Legislators Are Considering” changed hardly at all from last month, as December was not a busy month for the General Assembly. The next column—“What the Courts Are Saying”—departs from the emphasis on public projects with three decisions applicable in either public or private construction. The first two decisions come from the Sixth Circuit and deal with employee terminations. In the first case, a contractor terminated employees because the property owner/customer ordered them off its property. Could the contractor fire them for this reason? It depended on the employees’ conduct that brought on the

owner’s anger, and here the court determined that their conduct was a protected activity, making their termination illegal. But the termination in the second case, also decided by the Sixth Circuit, was justified when the employee, a crane operator, used his crane to threaten other employees. Our last case, a decision of the Stark County Court of Appeals, tackles a different subject altogether: arbitrator misconduct and how to prove it.

The “Aesthetic Effects” clause in most AIA contracts gives the architect final say over matters relating to aesthetic effects and is the subject of this month’s “Holman, Gillis & Shevelow on Construction Documents.” Next you’ll find a brief listing of seminars coming up in January, followed by the return of OSHA Corner. (This will alternate, for a few months at least, with the new “Hindsight About Unforeseen Site Conditions,” which returns in January.)

Finally, ADR Corner wraps up the issue with the first of a series of articles on preparing for mediation. In this one, columnist Sam Wampler provides advice about information gathering. Altogether, we think this issue provides plenty of material for your serious reading while you are waiting for the New Year’s Eve Ball to drop on Times Square.

# Practical Guidance for Complying with the Public Records Law on Public Construction Projects



**Gregory T. Parks**  
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Construction managers, project managers, architects, and engineers deal with masses of paper every day to document their projects. Keeping a record—a “paper trail,” a computer database, or both—of what occurs on the job is a major responsibility, and they take it especially seriously when the job is a public project, such as a school building, a courthouse, a jail, or a stadium.

In recent years, such owners’ representatives who work on public projects have seen a new paper come across their desks: a Public Records Request. Filed by an interested citizen, a member of the media, or perhaps an unhappy competitor, this request seeks a glimpse into the representative’s records for the public project, as authorized by what is known as the Ohio Public Records Act, R.C. § 149.43.

Typically, a “person” requests certain records from a public body. On a public construction project, the public owner may in turn request that a particular person (e.g., a construction manager) produce the requested records. However, Ohio courts have interpreted the Public Records Act to extend directly to private persons in custody of public records. *State ex rel. Cincinnati Enquirer v. Krings* (2001), 93 Ohio St.3d 654 (public records request was also sent to representative of the construction manager). Potentially, contractors on a public project also could directly receive a request to produce public records. This article will explain the public records law and how to comply with it.

What is this law, and how far must a construction manager, project manager, architect, or contractor go to comply with it? Anyone who works on a public project—or hopes to do so—may want to know the answers to the following questions:

1. What are the requirements and the scope of the Ohio Public Records Act?
2. When is a construction contractor responsible to provide records to the public?
3. What is the construction contractor’s liability for failing to comply with this obligation?

To answer these questions, this article will explore current public records law and the potential consequences for private persons, including construction managers, architects, project managers, and contractors, who work on public projects.

**The Public Records Act.** Ohio’s Public Records Act is the means by which Ohio’s citizenry obtain government information. Through this legislation, Ohio’s General Assembly affirmatively charged state and local governments to allow the public full access to most government records. For at least 40 years, the state laws of Ohio have contained some version of the public records law. Why did the General Assembly determine that such openness was necessary? Writing in *An Ohio Sunshine Laws Update* (2000), former Attorney General Betty Montgomery turned to the Writings of James Madison to explain the need:

A popular government without popular information, *or the means of acquiring it*, is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power which knowledge gives.

Private persons working on public projects must sometimes provide the “means of acquiring” that public information.

The Act defines a public record as “records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in Ohio.” But it goes on to state 22 exceptions—records kept by a public office but exempt from the category of public records. Most of these have no relationship to construction projects but deal with such personal matters as adoption proceedings and DNA records.

In promulgating this Act, the General Assembly had to balance the public’s right to know with the potential harm, inconvenience, or burden imposed on a public office to make such information available.

**Private Persons’ Role in Maintaining Public Records.** Ohio’s Public Records Act extends to the “person responsible” for a public record. (“Upon a request made in accordance with division (B)(1) of this section, a public office **or person responsible for public records** shall transmit a copy . . . .”) For example, a public school district contracts with a construction manager, i.e., a private person, to administer a public construction contract building a new high school. To a greater or lesser extent, the construction manager is executing a government

function to build a public building. Ohio’s citizens—including contractors on the project and disappointed bidders—are entitled to see the open record of such a public work.

Does this mean that the construction manager must always disclose every document in the public project file? The Ohio Supreme Court devised a three-part test to determine if and when the construction manager (or any contractor) is subject to the requirements of the public records laws:

1. The person must prepare records on behalf of the school district;
2. The person’s performance must fall within the purview of the school district—in other words, be subject to school district monitoring; and
3. The school district must have access to the records held by the person.

Generally, records that pass this three-part test are subject to the Ohio Public Records Act. This test comes from the *Krings* opinion noted above. You may remember this case as the subject of a short article, “Construction Records May Be Public Documents, Subject to Public Records Act,” in the January 2002 issue of ohioconstructionlaw.com. (Missed the article? Like all past articles, it is available on our website, [www.ohioconstructionlaw.com](http://www.ohioconstructionlaw.com).)

The construction manager will create job logs and meeting minutes, monitor costs, requests for information, change orders, and create or review a host of other associated documents during the course of a public construction project. Together or individually, these types of documents serve to chart the course of conduct on the project and to detail the expenditure of public funds. The construction manager reports either directly or indirectly to the school board. In turn, the board reviews and even approves certain types of project documents.

It is noteworthy that Ohio courts impose the Act on persons regardless of an agency relationship with the public body. The Ohio Supreme Court has noted that the public is not necessarily required to gain access to public records by going through private persons. However, nothing prohibits the public from making such a request directly to the private person.

**Complying with the Act.** Ohio courts are clear that the public has a right of access to records regardless of the physical location of the records. A public body cannot move records into the custody of a private third party in order to get around the Act. “Governmental entities cannot conceal information concerning public duties by delegating these duties to a private entity,” the Supreme Court said in *Krings*.

Public records include documents that are created or received by a private party administering a govern-

mental function. Public records serve to document the particular function. In this case, the governmental function is the construction of a public work.

Public records are categorized into three general categories:

1. Documents that a public body must disclose under the Act;
2. Documents that may be disclosed at the discretion of the public body; and
3. Documents that a public body is prohibited from disclosing.

Private persons faced with complying with the Act should not assume that all public records are subject to disclosure. Some public records are exempt from disclosure by state or federal law. Why? Because certain governmental activities would be frustrated if the public had open access to certain types of public records (e.g. mediation communications, attorney-client privileged documents, certain criminal proceedings). Other apparently public records are expressly exempt from the Act, by definition. These types of records include medical records, adoption records, and Civil Rights Commission records. Exceptions to the Act are narrowly construed, and the presumption heavily favors disclosure.

In the construction arena, the Act specifically exempts from disclosure two examples of records of commercial importance: trademarked documents and intellectual property. For example, in order to prevent commercial exploitation, the architect’s design drawings are generally not subject to disclosure. Likewise, a contractor’s financial data and business plans are protected from disclosure for similar commercial, competitive reasons.

Once a person determines that it may be subject to the requirements of the Act, the next step may be to recognize when someone makes an appropriate public records request, the kind that triggers the Ohio Public Records Law. Such a request must be of sufficient clarity that the party producing the record is able to identify the requested records. It is the responsibility of the person requesting public records to identify those records with “reasonable clarity.”

Remember, Ohio law is heavily weighted towards disclosure of public records. Still, a person asked to produce public records is not required to create, compile, or even search multiple files for a specific type of information. Moreover, the person is not required to format or produce the record in a medium different from the way it is kept in the normal course

A public body cannot move records into the custody of a private third party in order to get around the Act. “Governmental entities cannot conceal information concerning public duties by delegating these duties to a private entity,” the Supreme Court said in *Krings*.

of business. The person making the public records request must specify the desired outcome: copies of the records or the opportunity to inspect the records. However, the person should carefully consider and consult the public owner before disregarding a records request because it fails to specify the types of records sought, if inspection or copies are desired, or the type of document format requested. If someone requests inspection of the records, the person may have to make such records available at the site of the records' physical location within normal business hours. Rather than a literal meaning, Ohio courts use a reasonable access standard. For example, if the records requested are physically located at the job site that is accessible 24 hours a day, the contractor can limit the hours of access to a reasonable period of time (i.e., 9:00 a.m. to 5:00 p.m.).

In contrast, a person cannot deny access to certain records because the person's business may be impeded or hindered by such an inspection. To deny the public access, a person would have to prove that the request unreasonably interfered with the person's business, which can be a difficult standard to meet.

How quickly must the disclosure be made, once the request is received? The Ohio Supreme Court has recognized that "**when** records are available for public inspection and copying is often as important as **what** records are available." *State ex rel. Lucas County Board of Commissioners v. Ohio Environmental Protection Agency* (2000), 88 Ohio St.3d 166, 172.

The Act requires compliance with public records requests within a reasonable amount of time. Each case is fact-specific. For example, a voluminous document

request that requires documents to be retrieved from a storage facility has a different time connotation than a request for records stored in the business office files. But the reasons not to produce documents promptly are strictly construed by the courts. In one case, the Ohio Supreme Court found that a school district had delayed too long when it took a week to respond to a newspaper's request for the names and resumes of applicants for the position of Treasurer. It ordered the district to pay reasonable attorney fees to the other side. *See State ex rel. Consumer News Services, Inc. v. Worthington City Board of Education* (2003), 97 Ohio St.3d 58, 2002-Ohio-5311.

Who pays for the cost of copying the requested records? The person producing the records may directly charge the public the actual cost of copying public records, including those kept on electronic media. A public body is prohibited from charging the

requesting person labor costs, and a contractor should be likewise prohibited. But a private person is not prohibited by law from seeking to recover the costs of administering public records requests elsewhere—from the public owner, if permitted by the person's contract with the public owner.

**The Dangers of Noncompliance.** What happens when someone requests access to a public record but doesn't get it, or doesn't get it within a reasonable amount of time? Under section (C) of the Act, "the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office **or the person responsible for the record** to comply with division (B) of this section and that **awards reasonable attorney's fees** to the person that instituted the mandamus action."

In anticipation of such an action, both private person and public owner may wish to consider a contractual allocation of risk, including but not limited to the reimbursement of the costs, including attorney fees, associated with a public records challenge.

Perhaps one of the most difficult positions that a private person, including a contractor, could face is a public records request made by another contractor seeking to develop a claim or even asserting a claim through litigation. In such circumstances, the contractor holding the documents should consult counsel as well as the public owner, and should carefully consider whether to withhold public records on the sole basis that a dispute exists. "Trial preparation records" are specifically exempted from the definition of "public records" under section (A)(1)(g) of the Act. But how much can this exception encompass? Clearly, the contractor's entire file does not become nondisclosable "trial preparation records" just because a lawsuit is contemplated.

The rules of discovery in civil litigation probably do not change the public record holder's duty to produce documents. This is true even though compliance may seem burdensome or may appear to provide an unfair advantage to the requesting party. A few courts have held that a party to litigation participates in the litigation discovery process and therefore is relieved of the duty to make disclosures under the Act. However, such opinions would seem to contradict the overarching purpose of the Act.

In sum, because private persons on public projects may document a certain governmental function—building public works—such persons may find it helpful to be aware of the scope and requirements of Ohio's Public Records Act. Owner's representatives and contractors may have rights and obligations under the Act, and both they and the public owner of a construction project may want to consider these **before** entering into a contract.

What happens when someone requests access to a public record but doesn't get it, or doesn't get it within a reasonable amount of time?

## Amended Substitute House Bill 95 (Budget Bill)

# Public Contracting Verification of “No Finding for Recovery”

House Bill 95, the Budget Bill, contains numerous substantive provisions of law in addition to financial budget appropriations. Among those provisions is a new section of codified law to expressly prohibit the award by certain governmental agencies of any public contract to a vendor who has an unresolved “finding for recovery” from the State.

While on its face the law may seem only to impact delinquent vendors, of great significance is the additional process now required by these public authorities in issuing any contract, otherwise at risk that the contract later may be held void as being entered into improperly.

The law takes effect January 1, 2004.

### Current Law

Ohio’s State Auditor is a Constitutional office holder charged with serving the public as “the chief inspector and supervisor of public offices.” Ohio Revised Code § 117.09. In that capacity, the Auditor is to audit public offices generally as directed in Ohio Revised Code § 117.10:

The auditor of state shall audit all public offices as provided in this chapter. The auditor of state also may audit the accounts of private institutions, associations, boards, and corporations receiving public money for their use and may require of them annual reports in such form as the auditor of state prescribes.

The auditor of state may audit the accounts of any provider as defined in section 5111.06 of the Revised Code, if requested by the department of job and family services.

Upon the Auditor’s issuance of an audit report, and filing with the legal counsel of the public authority audited, a cause of action may accrue to recover funds improperly disbursed. Ohio Revised Code § 117.34. Such actions include findings that,

“any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated.” Ohio Revised Code § 117.28.

With the Auditor’s findings, the agency’s legal counsel undertakes to recover the funds. The Auditor must notify Ohio’s Attorney General of all findings:

The auditor of state shall notify the attorney general in writing of every audit report which sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated and of the date that the report was filed.

Under separate legal authority, the Attorney General then may pursue an action:

R.C. § 117.42. Upon request of the auditor of state, the attorney general may file and prosecute to judgment or decree appropriate actions to prevent the unlawful expenditures of public funds, cancel contracts not made in compliance with law, enforce liabilities arising from false certifications or failure to furnish financial reports, secure compliance with this chapter, secure compliance with fiscal, accounting, or budgeting requirements, opinions, or adjustments made in an audit report, secure compliance with the laws, ordinances, rules, and orders pertaining to any public office, and enforce generally the laws relating to the expenditure of public funds. All sums collected as a result of any action taken under this chapter shall be placed in the treasury of the appropriate public office.

To pursue collections of funds owing to the State, including tax delinquencies and any other monies, the Attorney General maintains a staff of Assistant Attorneys General, as well as Special Counsel appointed locally across the State to institute court proceedings. Payment is made to outside counsel based upon a percentage of amounts collected. R.C. § 109.08.

For decades, this collections system has been automated and operating primarily for delinquent tax collections or other debts to the State.



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## The New Law

**Prohibition:** Of concern to policymakers in times of economic difficulties is the possibility of using scarce public funds to pay private contractors who also owe monies to the State. Accordingly, House Bill 95 included new law that affirmatively prohibits public agencies from awarding contracts to recipients who owe:

No state agency and no political subdivision shall award a contract for goods, services, or construction, paid for in whole or in part with state funds, to a person against whom a finding for recovery has been issued by the auditor of state, if the finding for recovery is unresolved.

**Applicability:** The law broadly defines “State agency” consistent with Ohio Revised Code § 9.66(A)(4) as, “every organized body, office, or agency established by the laws of the state for the exercise of any function of state government”. It is unclear whether this definition includes public subdivisions as “State agencies.” Of equal concern is that “political subdivision” remains undefined. Ohio Revised Code § 9.66(A)(3) defines “Political subdivision” as “any county, municipal corporation, or township of the state.” But the question remains why the statute did not include this reference, as the law expressly did for the phrase, “State agency.”

Because of this express omission, the law may not apply to separately defined public subdivisions such as School Districts (Revised Code Chapters 3311, 3313), Library Districts (Revised Code Chapter 3375), or institutions supported in whole or in part such as Ohio’s public Colleges and Universities.

A “finding for recovery” also is defined to tie into the Auditor’s specific determination under authority of Ohio Revised Code § 117.28, detailed above. Thus, the only debt prohibiting a contractor from doing business with a public agency is a debt identified by the Auditor in a finding. Not included in these debts to the State are taxes or other debts generally pursued by the Attorney General as owing to the State.

**“Unresolved Finding” Defined:** The statute narrows the new contract prohibition further by creating six exceptions:

1. The finding is paid in full.
2. The debtor is in a repayment plan, providing incentive to a debtor to enter into an agreement of any sort. There is no limitation on how minimal

the repayment might be, or how long it might take to complete.

3. The Attorney General waives “a repayment plan.” In drafting the statute, this appears to be too broad an exception on its face, essentially allowing a waiver entirely. Thus it will be important to follow on what policy conditions the Attorney General provides such a waiver, if any.
4. The debtor is in an enforceable settlement agreement, allowing for broader terms than mere repayment. This exception provides important flexibility for litigation, but also begs the repayment question, allowing the possibility that a contractor might get new work even if not making repayments.
5. The agency and the Attorney General agree that the contractor is providing sole source essential services, giving the public agency leeway to insure that services continue to the public’s benefit. A novelty is that this provision provides for the Attorney General to work with public subdivisions, not previously provided for in other statutes.
6. The finding for recovery is embroiled in pending litigation, regardless of stage or likely conclusion.

**Database:** Under prior law, the Auditor sent its findings to the Attorney General, and the Attorney General pursued recoveries, in the Attorney General’s discretion. In an aggressive schedule, the General Assembly directed that the Attorney General shall submit by December 1, 2003 to the Auditor the status of collecting all “findings for recovery” for the years 2001, 2002, and 2003.

With the information from the Attorney General, the Auditor then must create and maintain an accessible database, operational by January 1, 2004.

**Public Authority Process:** Of greatest significance to affected public agencies is that the public agency “shall verify” that the contract award does not go to a person in the Database.

“Person” generally includes corporations under Ohio law. But the new law is unclear as to whether a corporation within which works a principal against whom a finding is made might be prohibited as well. If not, a debtor may merely avoid bidding on contracts with the individual or corporation named in any finding, whether by using a different corporate entity or by bidding with a different “person.” As this law must be strictly construed against enforcement, it is likely that the prohibition will be limited only to the “person” literally named in the finding for recovery.

Of legal concern is that any public contract awarded might be void *ab initio* if the public agency does not “verify” before award. This possibility is based upon

Of greatest significance to affected public agencies is that the public agency “shall verify” that the contract award does not go to a person in the Database.

Ohio's 200-year precedent to guard against misspending of taxpayer funds, that an enforceable public contract is not formulated unless all legal requirements first are met. Only recently the Cuyahoga County Court of Appeals invalidated a public contract for failure to follow all applicable procedures, based upon this precedent. *Cuyahoga County Board of Commissioners v. Richard L. Bowen & Assoc., Inc.* (2003), 2003-Ohio-3663, 2003 Ohio App. LEXIS 3310. (For a summary of this decision, see "What the Courts Are Saying" in the July 2003 issue of ohioconstructionlaw.com.) In addition, the Franklin County Court of Appeals has held that an unsuccessful bidder might seek money damages from the public agency which improperly awards a contract. *Tiemann, et al. v. University of Cincinnati* (Franklin Ct. App. 1998), 127 Ohio App.3d 312, 712 N.E.2d 1258.

Thus, both the public agency and the apparently successful contractor must document that the public agency "verified" that no "finding for recovery" is

outstanding. Otherwise, the contract might be challenged as void, even if no finding is outstanding, merely because the agency did not "verify." This process is similar to Ohio's requirement that public agencies require a contractor to file an affidavit stating that contract parties do not owe personal property taxes, Ohio Revised Code § 5719.042.

### Conclusion

Buried in the Budget Bill is a significant new requirement of law, that certain public agencies issuing contracts first verify that the proposed contractor is not subject to a State Auditor's "Finding for Recovery," and otherwise prohibiting an award. This is significant not only for its direct implication to the contractor, but also as the new law impacts the contract award process.

For more information contact the Government Relations Department at Bricker & Eckler, [www.bricker.com/legalservices/practice/govern/](http://www.bricker.com/legalservices/practice/govern/).

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# What the Legislators Are Considering...



This monthly column focuses on legislation pending in Ohio that is of interest to the construction industry. Our goal is to provide a concise summary, including just enough information that anyone who wants to learn more will know where to direct questions about the bills. To that end, we provide you with the opening section of each bill's Analysis compiled by the Legislative Service Commission, reprinted with permission. For the rest of the Bill Analysis, check out Bills Online, [www.legislature.state.oh.us/bills\\_online.cfm](http://www.legislature.state.oh.us/bills_online.cfm). For the text of any particular bill, go to [www.legislature.state.oh.us/search.cfm](http://www.legislature.state.oh.us/search.cfm).

Please recognize that this summary omits some bills that may be of interest to our readers. Also, due to the nature of the legislative process, the status of any bill may change on a daily basis. The very brief summaries here cannot explain all facets of any currently pending legislation. Readers with additional questions about pending or desired legislation should contact one of the attorneys in Bricker & Eckler's Government Relations Practice Group. For more information on the attorneys in this group, check out [www.bricker.com/legalservices/practice/govern](http://www.bricker.com/legalservices/practice/govern).

## Summaries of Pending Legislation

### \*\*\* HOUSE BILLS\*\*\*

#### State Contractors: Fair Employment in Northern Ireland, H.B. 15

Reps. Miller, Ujvagi, Domenick, Allen, Sferra, Skindell

##### Bill Summary:

- Requires firms that contract with the state to supply goods, render services, or construct public improvements to implement the MacBride Principles of Fair Employment with respect to their business activities in Northern Ireland.

*Assigned to the House Commerce & Labor Committee.*

#### Vehicles To Display Lights in Road Construction Zones, H.B. 18

Reps. Miller, Carano, Ujvagi, Domenick, Allen, Sferra, Skindell

##### Bill Summary:

- Permits the Director of Transportation, a board of county commissioners, or a board of township trustees to require that

vehicles display lighted lights during hours of actual work within a construction zone.

- Assesses one point against an offender's driver's license for a violation of the requirement to display lighted lights, in addition to a criminal penalty.
- Provides that the requirement to display lights applies only when signs giving notice are erected in accordance with the Director's specifications and when a violation occurs during hours of actual work within the construction zone.

*Assigned to the House Transportation & Public Safety Committee.*

#### Including Drainage Protection in County Building Codes, H.B. 25

Reps. Gibbs, Grendell, Peterson, Seitz, Otterman, McGregor, Core, Gilb, Hollister, Niehaus, Setzer, Wagner, DeBose, Domenick, Skindell, Carmichael, Aslanides, Buehrer, Cates, Chandler, Cirelli, Clancy,

Collier, Flowers, Hoops, Hughes, Kearns, Koziura, S. Patton, Reidelbach, Taylor, Wolpert

##### Bill Summary:

- Authorizes a board of county commissioners to adopt and include regulations in its building code to protect existing surface and subsurface drainage for property that is not subject to the Subdivision Law.
- Requires regulations not to be inconsistent with, more stringent than, or broader in scope than standards adopted by the Natural Resource Conservation Service in the United States Department of Agriculture concerning drainage or rules adopted by the Environmental Protection Agency for reducing, controlling, or mitigating storm water runoff from construction sites, where applicable.
- Eliminates the Residential Construction Advisory Committee.

*Signed into law by Governor Taft on 7/30/03; effective 10/29/03.*

### **Making Unlicensed Practice of Certain Professions a Deceptive Trade Practice, H.B. 38**

Reps. Willamowski, Hagan, McGregor, Seitz, Setzer, Schaffer, Buehrer

#### **Bill Summary:**

- Provides that a person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person performs for or with the expectation of compensation, whether directly or indirectly received, a service for which a license, certificate, permit, or registration is required, including licenses, certificates, permits, or registrations required under specified laws, while not holding a current and valid license, certificate, permit, or registration.

*Assigned to the House Civil & Commercial Law Committee.*

### **Prevailing Wage on School Construction + Ohio Contractors on Public Improvements, H.B. 45**

Reps. Boccieri, Ujvagi, Brown, Beatty, Harwood, Koziura, Otterman, Allen, Strahorn, Miller

#### **Bill Summary:**

- Subjects school facilities construction to the Prevailing Wage Law.
- Prohibits schools from awarding a contract for a public improvement supported in whole or in part by the state to a contractor who does not have a principal place of business in Ohio.

*Assigned to the House Commerce & Labor Committee.*

### **Drug-Free Public Works Projects, HB. 136**

Rep. G. Smith

#### **Bill Summary:**

- Requires public improvement contractors to have written safety programs that include drug and alcohol testing.
- Requires public works contractors for projects financed with money appropriated by the General Assembly to establish drug-free workplace programs.
- Requires the Department of Administrative Services to adopt, by rule, specified standards and requirements for drug-free workplace programs.

*Assigned to the House State Government Committee.*

### **Establishing Statewide Uniform Residential Building Code, H.B. 175**

Reps. Buehrer, Widener, Olman, D. Evans

#### **Bill Summary:**

- Requires the Board of Building Standards to adopt a statewide uniform *residential* building code, separate from the nonresidential building code, for one-, two-, and three-family dwelling houses and accessory structures incidental to those dwelling houses.
- Requires the Residential Construction Advisory Committee to recommend a residential building code to the Board of Building Standards.
- Permits a certified building department established by a county, township, or municipal corporation to administer and enforce the residential building code, the nonresidential building code, or both.
- Specifies that an owner of a residential building in an area without a local building department certified to enforce the residential building code is not required to receive approval of the plans and specifications for the residential building.
- Permits specified local governments to adopt additional regulations governing residential buildings and property maintenance regulations if the regulations are not in conflict with the statewide residential building code and address subject matter that is not addressed in that code.
- Provides procedures for the Board of Building Standards to determine whether a conflict exists with a local regulation, and requires the incorporation of a local regulation into the statewide residential building code if the regulation conflicts with that code but is necessary for health, safety, or welfare.
- Requires a political subdivision with a certified building department to collect, on behalf of the Board of Building Standards, a fee of 1% of any local fees collected in connection with residential buildings.
- Removes detailed requirements that the Board of Building Standards adopt energy conservation and thermal efficiency standards for residential structures while retaining this requirement in a general manner.
- Adds penalty provisions for violations of the Building Standards Law.

- Removes the authority of a county or municipal corporation to require licensing of residential contractors.
- Requires residential contractors to be licensed statewide by the Ohio Construction Industry Examining Board.
- Increases the Ohio Construction Industry Examining Board from 17 to 22 members by adding a five-member residential construction section to the Board.
- Modifies the composition of the Residential Construction Advisory Committee.
- Provides procedures for a homeowner and residential contractor to follow prior to a homeowner filing a claim against the contractor or seeking arbitration.

*Assigned to the House Homeland Security, Engineering & Architectural Design Committee.*

### **Prohibiting Pay Retainage, H.B. 208**

Reps. Young, Brinkman, Buehrer, McGregor, Flowers, Aslanides, Peterson, D. Evans, Gibbs, Reidelbach, Callender

#### **Bill Summary:**

- Eliminates statutory authority allowing or requiring the practice of holding a retainage from payments to contractors in the case of public improvement projects.
- Limits the use of holding a retainage to a percentage-based system in the private sector.
- Requires contractors who contract to perform public improvements to have a written safety program.

*Assigned to the House Commerce & Labor Committee, which reported out a substitute bill on 12/20/03.*

### **School Facilities—Renovate Rather Than New, H.B. 217**

Reps. Williams, Hagan, McGregor, Miller, Widowfield, Aslanides, Martin, Allen, Brinkman

#### **Bill Summary:**

- Prohibits the Ohio School Facilities Commission from prohibiting a school district undertaking a state-assisted classroom facilities project from renovating an existing facility rather than acquiring a comparable facility by new construction as long as certain conditions are satisfied.

*Assigned to the House Education Committee.*

### Construction & Demolition Debris Fees, H.B. 259

Reps. Harwood, Kearns, Seitz, Oelslager, Carano, Cirelli, Strahorn

#### Bill Summary:

- Eliminates the current annual license fee for construction and demolition debris facilities, and instead establishes a 22¢ per cubic yard or 66¢ per ton fee on the disposal of construction and demolition debris.
- Requires monthly remittance of disposal fees from owners or operators of construction and demolition debris facilities to local boards of health or the Director of Environmental Protection, and allows quarterly remittance of the fees.
- Authorizes municipal corporations and townships to appropriate a portion of the disposal fees for specified purposes.

*Assigned to the House Energy & Environment Committee.*

### Revising Building and Fire Codes, H.B. 266

Reps. Flowers, Widener

#### Bill Summary:

- Renames the Board of Building Standards as the Board of Building and Fire Standards and adds five members to the renamed Board.
- Transfers authority to adopt the State Fire Code from the State Fire Marshal to the Board of Building and Fire Standards.

- Creates a five-member Ohio Building Code Advisory Committee and a five-member Ohio Fire Code Advisory Committee to assist the Board of Building and Fire Standards in Ohio Building Code and State Fire Code development.
- Transfers the State Fire Marshal’s office from the Department of Commerce to the Department of Public Safety, where it will become the Division of the State Fire Marshal.
- Adds two members to the State Board of Building Appeals.
- Transfers the regulation of underground storage tanks from the State Fire Marshal to the Superintendent of Industrial Compliance.
- Requires the Superintendent of Industrial Compliance to propose rules to the Board of Building and Fire Standards for the adoption of an Aboveground Petroleum Storage Tank Program and gives the Superintendent primary responsibility, with specified exceptions, for administering that program.
- Creates a 16-member Aboveground Petroleum Storage Tank Study Committee for the purpose of submitting a recommendation whether unregulated aboveground petroleum storage tanks should be registered or otherwise regulated.
- Makes appropriations.

*Assigned to the House State Government Committee.*

### Adopting Uniform Mediation Act, H.B. 303

Rep. Oelslager

#### Bill Summary:

- Creates the Uniform Mediation Act.
- Specifies when the Uniform Mediation Act applies to a mediation proceeding.
- Sets forth specific exclusions from the Uniform Mediation Act and provides parties with an opportunity to opt out from the coverage of the Act.
- Provides that mediation communications are privileged and are not subject to discovery or admissible in evidence except when the privilege is waived by all parties or in specified exceptions.
- Prohibits communications by a mediator in specified circumstances.
- Requires mediators to make a reasonable inquiry before accepting a mediation to determine whether any conflict of interest arises and to disclose any conflicts to the mediation parties as soon as is practicable.
- Provides that mediation communications are confidential to the extent agreed by the parties.
- Provides that an attorney or other individual designated by a party may accompany the party to and participate in a mediation.

*Assigned to the House Judiciary Committee.*

### \*\*\* SENATE BILLS\*\*\*

### Compensatory Time in Lieu of Overtime, S.B. 26

Sens. Coughlin, Spada, Stivers, Schuler

#### Bill Summary:

- Permits private employers to award compensatory time off in lieu of monetary overtime compensation to their employees, subject to the consent of the employee and other specified conditions.
- Permits public and private employers to establish biweekly work schedule programs to allow their employees to work 80 hours in any two consecutive work weeks.
- Prohibits private employers from requiring their employees to accept compensatory time off in lieu of monetary payment for overtime and prohibits

public and private employers from requiring their employees to work a biweekly work schedule program.

- Establishes civil and criminal penalties for violations of the bill’s provisions.

*Assigned to the Senate Insurance, Commerce & Labor Committee.*

### Rural Accelerated School Building Assistance Program, S.B. 54

Sens. Carey, Mumper

#### Bill Summary:

- Creates the Rural Accelerated School Building Assistance Program to provide early state assistance for classroom facilities acquisition for school districts with territories greater than 350 square miles.

*Assigned to the Senate Finance & Financial Institutions Committee.*

### Modifications Pertaining to Public Libraries, Sub. S.B. 55

Sens. R. Gardner, Stivers, Miller, Mumper, Schuler, Prentiss, Mallory, Austria, Carey, Dann, Herington, Fedor, Coughlin, Hagan, Harris, Spada

#### Bill Summary:

- Increases from \$15,000 to \$25,000 the competitive bidding threshold for improvements to free public libraries.
- Removes the monetary limit specified for life insurance coverage offered by free public libraries to their employees, but limits life insurance procurements to group term life insurance.

- Allows a board of library trustees to authorize its employees to use a credit card held by the library to pay for library expenses.
- Allows a county budget commission to waive certain tax budget requirements in a county in which a single library receives all of the county library and local government support fund distribution that is distributed to libraries.
- Makes changes to the law authorizing political subdivisions to self-insure for health care benefits.

*Signed into law by Governor Taft on 10/09/03; effective on 01/08/04.*

### **Tort Reform, Sub. S.B. 80**

Sens. Stivers, Hottinger, Goodman, Wachtmann, Amstutz, Randy Gardner, Austria, Nein, Schuring, Armbruster, Coughlin, Carey, Harris, Mumper, Schuler

#### **Bill Summary: Statutes of repose**

\* \* \*

- Provides that the ten-year statute of repose does not bar a civil action for wrongful death based on a product liability claim against a manufacturer or supplier of a product if the product involved is asbestos, that the cause of action based on asbestos that is the basis of the action accrues upon the date on which the claimant is informed by competent medical authority that the decedent's death was related to the exposure to the product or upon the date on which by the exercise of reasonable diligence the claimant should have known that the decedent's death was related to the exposure to asbestos, whichever date occurs first, and that the civil action for wrongful death must be commenced within two years after the cause of action accrues and may not be commenced more than two years after the cause of action accrues.
- Provides that the ten-year statute of repose does not bar an action based on a product liability claim against a manufacturer or supplier of a product for bodily injury caused by exposure to asbestos if the cause of action that is the basis of the action accrues upon the date on which the plaintiff is informed by competent medical authority that the plaintiff has an injury that is related to the exposure, or upon the date on which by the exercise of reasonable diligence

the plaintiff should have known that the plaintiff has an injury that is related to the exposure, whichever date occurs first.

- Prohibits a cause of action to recover damages for injury or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and a cause of action for contribution or indemnity for such damages that arises out of a defective and unsafe condition of an improvement to real property from accruing later than ten years from the date of the performance of the services or the furnishing of the design, planning, supervision of construction, or construction.
- Allows a cause of action to recover damages for injury or wrongful death to be brought within two years from the date of discovery of a defective and unsafe condition of an improvement to real property if that discovery is made during the ten-year statute of repose but less than two years prior to the expiration of that period.
- Specifies that the ten-year statute of repose described in the prior two dot points does not apply to a civil action for injury or wrongful death against the owner of, tenant of, landlord of, or other person in possession and control of an improvement to real property and who is in actual possession and control of the improvement at the time the defective and unsafe condition of the improvement constitutes proximate cause of the injury or wrongful death.
- Prohibits the above-described ten-year statute of repose from being asserted as an affirmative defense by any defendant who engages in fraud with regards to an improvement to real property.

*Passed the Senate on 6/11/03; assigned to the House Judiciary Committee.*

### **Deadline for Providing Copies of Public Records, SB. 87**

Sens. Dann, Miller, Coughlin, Brady

#### **Bill Summary:**

- Requires a public office or person responsible for public records to provide copies of public records within ten days or, if requested to be provided by United States mail, within 15 days after receipt of the request.

*Assigned to the Senate State & Local Government & Veterans' Affairs Committee.*

### **Modifying Qualifications of County Engineers, S.B. 90**

Sen. Schuring

#### **Bill Summary:**

- Eliminates the requirement for a county engineer to be a registered surveyor.
- Requires the office of the county engineer to have a registered surveyor on its staff if the county engineer is not a registered surveyor.
- Requires a county engineer to have an engineering degree with a major area of study in civil engineering.

*Assigned to the Senate State & Local Government & Veterans' Affairs Committee.*

### **Requiring an Indoor Air Quality (Mold) Program for School Buildings, S.B. 121**

Sen. Dann

#### **Bill Summary:**

- Amends several statutes for the purpose of adopting new section numbers and enacting sections to establish sanitation requirements and standards for indoor air pollutants for schools and to require boards of health or a board's designated representative to conduct inspections of schools and school buildings.

*Assigned to the Senate Health, Human Services & Aging Committee.*

### **Modifying Requirements for Registration of Professional Engineers & Surveyors, S.B. 150**

Sen. Coughlin

#### **Bill Summary:**

- Increases from \$16 to \$20 the annual renewal of registration fee for professional engineers and professional surveyors.
- For registration renewals of professional engineers and professional surveyors beginning with calendar year 2008, implements continuing professional development requirements.
- Authorizes the State Board of Examiners of Architects to adopt rules pertaining to continuing education requirements for architects who hold a certificate of qualification under state law.

*Assigned to the Senate Insurance, Commerce & Labor Committee.*

# What the Courts Are Saying...



Each month, *ohioconstructionlaw.com* summarizes recent decisions of Ohio and federal courts that may affect construction projects and those involved with them in Ohio. From time to time, we may even include a case from another state, if it seems 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!

This month, we need to alert you to an update on one case we summarized in our July 2003 column, *Cuyahoga County Board of Commissioners v. Richard L. Bowen & Associates, Inc.* (July 10, 2003), Cuyahoga App. No. 81867, 2003-Ohio-3663. That decision held that an architectural contract was void because the public body had ignored the law by contracting with the fourth-ranked firm. On November 26, the Ohio Supreme Court determined not to review the decision, making the Court of Appeals' ruling the final word in the case. The summary of the Court of Appeals' decision, like all of our articles, is available online at [www.ohioconstructionlaw.com](http://www.ohioconstructionlaw.com).

program was handled. According to the Sixth Circuit in *Bowling Transportation, Inc. v. National Labor Relations Board*, 2003 U.S. App. LEXIS 24604 (6<sup>th</sup> Cir. Dec. 8, 2003), their termination violated the National Labor Relations Act.

The surprising fact about this case is that there was no union activity involved in the employees' actions, and the employees were not even thinking about forming a union. Still, the National Labor Relations Act protected their complaints as "protected concerted activities," a category of activities usually thought to be union-related.

But the Act does not require that protected concerted activities be union-related. In 29 U.S.C. § 157 it requires only that they be "for the purpose of collective bargaining **or other mutual aid or protection.**" So when employees complain on behalf of other employees, their conduct may be protected activity that cannot result in their termination—even when their complaints so annoy the customer on whose property they are working that he asks their employer to remove them from the job site.

Bowling provided transportation services (heavy equipment operators) for steel producers but at the time of the dispute had just one customer: AK Steel. In the incentive program at the heart of the dispute, AK Steel encouraged contractor safety by paying a per-employee bonus of up to a dollar for each injury-free hour the contractor worked. Contractors did not have to pass the bonus on to their employees, although they were "strongly encouraged" to do so. Bowling passed on half of the bonus and used the other half to buy safety equipment and fund a Christmas party.

Dissatisfied with the way Bowling handled the bonus program, two of its employees decided to complain to AK Steel's manager of transportation in the facility where they worked. His response was to call

Although the courts seemed to slow down a bit in the last month—at least as far as issuing construction-related decisions—we found three opinions we think will interest you. We begin with a decision of the Sixth Circuit (the federal appellate court for Ohio, Kentucky, Tennessee and Michigan) that raises questions about how far a contractor can go in following an Owner's orders to get rid of an offensive employee. If a federal statute protects the employee's conduct, the contractor had better think twice. Then we turn to another decision of the Sixth Circuit that shows what happens when a crane operator turns his crane into a weapon to threaten other employees. Finally, we focus on an opinion from the Court of Appeals for Stark County that deals with the issue of arbitrator misconduct.

## Firing Employees for "Concerted Activity" Of Complaining to Customer Violates Law

What began as a safety incentive program offered by AK Steel to its contractors soured when employees of one contractor, Bowling Transportation, Inc., were fired for complaining to AK Steel about the way the

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the project manager for Bowling and tell him to remove the two employees from the premises. Bowling did more than that: it terminated them. They took their complaint to the National Labor Relations Board, and the Board's General Counsel sued Bowling for violating a federal statute, the NLRA.

Both the National Labor Relations Board and the Sixth Circuit agreed that the employees' complaints were protected activity under the Act. The Board ordered Bowling to reinstate the employees to their former jobs or "substantially equivalent positions," with back pay and without prejudice to their seniority rights or any other privileges.

Bowling argued that, at the time of the dispute, it had no other jobs for the employees. All of its work was for AK Steel, in one facility or another, and AK Steel had banned these employees. The Sixth Circuit suggests, in a footnote to the opinion, that these truck drivers might have been given office jobs or placed on paid leave pending litigation against AK Steel. But it found the employers' potential hardships in finding equivalent work for the men "largely irrelevant." The employer could not interfere with its employees' protected concerted activity, regardless of the employer's own hardships.

Although the court noted that the facts presented "some practical concerns for enforcement," these could not justify discriminatory action. The court looked at other forms of discrimination and argued by analogy:

*If instead AK Steel had banished [the complaining employees] from its facilities because they were African-American or because they were women, it would hardly be an appropriate defense for Bowling to follow AK Steel's directive to remove them, even if it were facing complete elimination from the site.*

Instead, the court found that Bowling had an obligation to stand up to its customer, AK Steel, even to the point of suing it for breach of contract if Bowling's failure to remove the employees resulted in its own termination. The court refused to let an employer use the "just-following-orders" or "devil-made-me-do-it" defense to an unfair labor practice.

It is easy to see how Bowling's position—between a rock and a hard place—could be repeated on a construction site. Many contracts give the Owner the right to request removal of any of the contractor's employees for any reason. What happens when that reason is an illegal one, such as protected concerted activity under the National Labor Relations Act? Normally, a contractor could just shift the offending

employee to another job site. But what if, as was the case here, the other job sites all belong to the same Owner? The Sixth Circuit's latest decision makes it pretty clear that the contractor cannot rely on following an Owner's orders if what the Owner is requesting violates the law.

## But It's Okay To Fire Employee Who Threatens Others with Crane

On the same day as the *Bowling* decision, December 8, a different panel of the Sixth Circuit approved the firing of another employee at a steel plant, this time for apparently operating his crane in a threatening manner. The decision, *Mains v. LTV Steel Company*, 2003 U.S. App. LEXIS 25702 (6<sup>th</sup> Cir. Dec. 8, 2003), affirmed an arbitrator's award in favor of the employer, LTV Steel. According to the Sixth Circuit, "Discharging an employee for threatening other employees with a crane is a legitimate reason for discharge. . . . If such conduct is not a legitimate reason for discharge, it is difficult to imagine what is."

The incident that led to Mains' termination, after 27 years of working for LTV, occurred when he was operating a crane to load steel coils onto a buggy. He was using a Heppenstal lifting device, which locks in place on the crane and weighs nearly 10,000 pounds. In an understatement, the court noted that the Heppenstal "could severely injure or kill a person on the ground if the locking device is not completely secured."

Based on a report that Mains was not placing the coils correctly, a supervisor and another employee went to check out the work. Sure enough, he was placing the coils too close together on the buggy, and the supervisor signaled him to separate them a bit. Reportedly, Mains slammed the coil down on the buggy, causing it to slide much further away than necessary. Turning to leave, the supervisor looked back over his shoulder and saw the Heppenstal directly overhead, about 10 feet in the air. In a highly agitated state, the supervisor reported this presumed threat to LTV's area manager, who directed that Mains be fired.

Following the collective bargaining agreement, the company gave Mains a hearing and took his grievance all the way through a lengthy arbitration involving several witnesses and a reenactment of the activity with the crane. The arbitrator supported management's conclusion that Mains had deliberately moved the crane at the supervisor in order to threaten him. She was particularly influenced by Mains' lack

"Discharging an employee for threatening other employees with a crane is a legitimate reason for discharge. . . . If such conduct is not a legitimate reason for discharge, it is difficult to imagine what is."

of remorse for endangering his colleagues. She found that his discharge was justified.

So Mains sued both his employer and the union—the employer for breaching the collective bargaining agreement in terminating him, and the union for failing to represent him fairly. All of his claims failed. The court found that the union’s decisions throughout the arbitration had been reasonable and had done nothing to taint the arbitration.

The Sixth Circuit also found that LTV was justified in terminating Mains for his action with the crane. It made no difference—as he argued—that no one was hurt. According to the court, “It would be irrational to say that an employer cannot discharge an employee who threatens other employees with serious bodily harm or even death. An employer need not reserve discharge only for those employees who successfully carry out their threats.”

### When Arbitration Award Is Challenged For Bias, Court Must Hear Evidence

It rarely happens, but it did earlier this month in Stark County: a court’s confirmation of an arbitration award in a construction dispute was reversed by a Court of Appeals. The decision in *Image Inc. v. Westfall* (Stark App. Dec. 15, 2003), 2003-Ohio-6873, arose from the construction of a new home, based on a contract that contained an arbitration clause.

The parties disagreed over changes, extras, and payment amounts. Unpaid subcontractors filed mechanic’s liens. Finally, the builder brought suit for breach of contract, unjust enrichment, and interference with business relationships.

Because of the arbitration clause, the court ordered arbitration before a panel of three arbitrators. Apparently, each side chose one arbitrator and a third was chosen by some unspecified means (probably a decision of the other two arbitrators). At the end of a lengthy arbitration, the panel announced its decision in favor of the builder, who was to receive \$13,600.

But when the written award came out, it was a surprise: In a split decision, the arbitra-

tors ordered the builder to pay the homeowners \$17,800. The homeowners moved the court to confirm the written award, while the builder moved to have it vacated, based on misconduct of one of the arbitrators. The court held a hearing but permitted no evidence before it confirmed the award.

So the builder appealed, arguing that the court had made six mistakes. It took only one mistake to convince the Court of Appeals there had been an error. The builder should have been allowed to present evidence of arbitrator bias. Reversing, the court sent the case back to the trial court so the builder could do just that.

What evidence was the builder ready to submit? The arbitrator selected by the builder was ready to testify as to what happened following the arbitration hearing and the announcement of an award to the builder. There was also a tape recording in which one arbitrator admitted to deliberating on his own, following the hearing, and coming up with considerably different facts and figures. According to the builder-selected arbitrator, the arbitrator selected by the homeowners announced his reluctance to tell his clients that they owed any money. After the hearing, he prepared a spreadsheet, “which ultimately materially changed the order.”

The Court of Appeals never decided whether such conduct by an arbitrator would or would not show bias. But it did decide that the builder should have been allowed to present this evidence at the trial court’s hearing, before the award was either confirmed or vacated, and the homeowners should have had a chance to cross-examine the builder’s witnesses. Because there was no evidentiary hearing, the appellate court reversed the lower court’s decision.

Losers in an arbitration—or parties who feel that they have lost—often want to claim arbitrator bias to get an award vacated. Very few decisions support such a claim, or even indicate what actions **might** be seen as bias. The *Image Inc.* decision stands out as one of a handful that even discusses arbitrator conduct that could indicate bias. It is sure to be scrutinized by disappointed arbitants in the future, and it should help them at least to get an evidentiary hearing before a court.

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HOLMAN, GILLIS AND SHEVELOW ON

# Construction Documents

## The Owner's Building or the Architect's Work of Art? The "Aesthetic Effects" Clause

*Forty-third in a Series—Each issue of ohioconstructionlaw.com discusses important terms found in typical construction documents. This month, Doug Shevelow, P.E., investigates a clause in the AIA Document A201, the General Conditions, that gives the architect unchallenged authority for the inexplicable topic of TASTE.*

Parties to any contract desire to quantify their risks, hence costs, as clearly as possible. One way to accomplish risk minimization is to avoid ambiguous language. Ambiguity can lead to different interpretations, which in turn lead to conflict and the potential for increased costs.

When a contract expressly grants one party sole power to interpret an ambiguous term, the other party is at a disadvantage. The AIA A201 contains such an example. Subparagraph 4.2.13 says this:

The Architect's decision on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents.

The 1976 version of the A201 used the word "artistic" in place of "aesthetic."

Subparagraph 2.6.1.9 of AIA Document B141, the Owner-Architect Agreement, also touches this matter:

The Architect shall render initial decisions on claims, disputes or other matters in question between the Owner and Contractor as provided in the Contract Documents. However, the Architect's decisions on matters relating to aesthetic effect shall be final if consistent with the intent expressed in the Contract Documents.

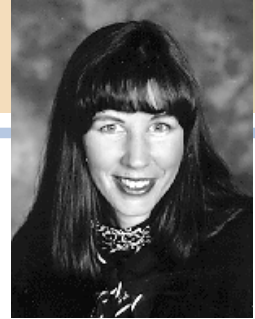
This is the essence of subjectiveness. It calls for a determination to be made solely from the architect's point of view. Architects justify this language because their finished work, upon which their reputations and livelihoods rest, is available for the entire world to see. They desire total control just in case the plans and specifications leave room for the contractor to make a judgment call that they disagree with.

When does the "aesthetic effect" clause become meaningful? When matters are not sufficiently described in the plans and specifications. But are there really such matters, and if so, what elements of the design are they likely to be? A review of the case law reveals that most disputes regarding the architect's control over aesthetic matters arise out of variations in the exterior finish of a structure.

In *Mississippi Coast Coliseum Commission v. Stuart Construction Co., Inc.*, 417 So.2d 541 (Miss. 1982), the finish of a large concrete section of a coliseum concourse did not match the rest of the concourse. Interestingly, the owner was more bothered by the mismatch than was the architect, who recommended that the work be accepted if accompanied by certain warranties. Because the architect's recommendation was conditional, the Supreme Court of Mississippi allowed the project owner to overrule its architect and withhold from the contractor the \$75,000 needed to fix the discoloration problem.

This case seems to answer *whose* intent counts (at least in the courts of Mississippi) when discerning the intent of the Contract Documents—the Owner's.

In *NSC Contractors v. Borders*, 564 A.2d 408 (Md. 1989), the top court in Maryland distinguished between an architect's power to reject aesthetically defective work and the architect's power to decide how much money to withhold from the contractor because of the nonconforming work. In this case the architect determined that the arrangement of exterior bricks in a church building façade was not



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sufficiently varied. Too many like shades of the 25 different brick shades were concentrated in a particular area. Several fixes, including limited brick replacement and painting, failed to satisfy the architect. It recommended that \$216,000 be withheld from the Contractor to remedy the problem. The Contractor sued because it thought the reduction should be less.

The court agreed that the Contractor did not have the ability to challenge the architect's decision, because of the A201 "artistic effect" clause, but the Contractor did have a right to challenge the architect's determination of the cost to fix the problem. The architect did not help itself when its director of construction administration was "unable to fully explain the calculations used to reach this estimate" during trial.

As in *NSC Contractors*, most of the case law citing this particular subparagraph of the A201 comes from the context of determining whether some other dispute between a contractor and an owner is subject to arbitration. Courts generally decide in favor of arbitration, contrasting the dispute in question with a dispute under 4.2.13, a matter clearly not subject to arbitration.

But when the architect takes exclusive jurisdiction over aesthetic effects, it can create unintended

consequences, as demonstrated by *Aetna Casualty & Surety Co. v. Leo A. Daly Company*, 870 F. Supp. 925 (S.D. Iowa 1994).

In *Aetna*, the issue was whether or not the architect was responsible for a design change that allowed the sprinkler system to freeze and significantly damage the interior of a racetrack clubhouse. In determining that the architect was not liable because the contractor made the design change, the court contrasted the contractor's negligent decision to change the configuration of soffits with one that involved "artistic effect," which would have made the architect responsible. This implies that the "aesthetic effects" clause may impose a duty upon an architect to evaluate possible deleterious effects of aesthetic changes in which it has no role.

Contractors, especially on projects with complex or troublesome finishes, need to have extra certainty at bid time regarding exactly what the architect is and is not willing to accept. Thorough questions and documentation at the pre-bid conference and pre-construction conference, as well as strict compliance with product data submittals, may be a contractor's only defense against the architect's all-powerful "aesthetic effect" clause. Effective contract language with suppliers and subcontractors is strongly suggested also, just in case a contractor needs to seek indemnity should problems arise.

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## Upcoming Seminars

### Involving Bricker & Eckler LLP Construction Attorneys

For Registration Information, call Aisha Head (614) 227-8893 or (800) 844-5292

Date & Time	Seminar	Location	Attorneys	Sponsors
Jan. 27, 2004 11:30 to 1:00	15 <sup>th</sup> Annual Ohio Public Works Forecast	OSU Fawcett Center Columbus, OH	L. Liggett	Bricker & Eckler LLP
Jan. 28, 2004 11:30 to 1:00	15 <sup>th</sup> Annual Ohio Public Works Forecast	Embassy Suites 4554 Lake Forest Dr Blue Ash, OH (Cincinnati Area)	L. Liggett	Bricker & Eckler LLP
Jan. 29, 2004 11:30 to 1:00	15 <sup>th</sup> Annual Ohio Public Works Forecast	Holiday Inn 6001 Rockside Rd Independence, OH (Cleveland Area)	L. Liggett	Bricker & Eckler LLP
Jan. 29, 2004 1:00 to 4:00	Ohio Township Assoc. Winter Conference (Competitive Bidding)	Hyatt Regency & Convention Center Columbus, OH	G. Parks	Ohio Township Association

# What's New in the World Of Job Safety?

*The Occupational Safety and Health Administration (OSHA) can seriously affect any contractor or construction project. Compliance with OSHA regulations can be time-consuming and tedious, but it is essential to maintain a viable position in the construction industry. This month, as always, we report on recent developments in the world of OSHA.*

## OSHA Changes Recordkeeping Forms for 2004

Employers should be aware that OSHA has issued a revised Form 300, Log of Work Related Injuries and Illnesses, effective January 1, 2004. The form now includes a place to record instances of occupational hearing loss. Some terminology and the directions for calculating incident rates have changed, too. Input from employers influenced the changes.

## NIOSH Publishes Excavator, Backhoe Safety Guidelines

A new NIOSH publication, *Preventing Injuries When Working with Hydraulic Excavators and Backhoe Loaders*, can be found at [www.cdc.gov/niosh/docs/wp-solutions/2004-107/pdf/2004-107.pdf](http://www.cdc.gov/niosh/docs/wp-solutions/2004-107/pdf/2004-107.pdf). (NIOSH is the National Institute for Occupational Safety & Health.) The publication includes two case studies based on worker fatalities.

The first fatality occurred when a laborer and an operator were loading manhole sections onto a truck and the quick-disconnect coupling attaching the bucket to the excavator stick failed, allowing the bucket to fall and kill the laborer.

The second fatality occurred when a backhoe was being used to excavate the foundation for a house. When the operator returned to the machine after inspecting the trench, he accidentally activated the boom swing control, and the boom struck a laborer, killing him.

NIOSH also includes recommendations for injury prevention including training topics, installation and maintenance advice, safe work practices, and personal protective equipment.

## Citations Show Varied Hazards Of Blasting Work

Two recent cases show how varied and serious the hazards can be on a construction site when blasting is needed to aid excavation. In the first case, a Wisconsin blasting company is facing nearly \$140,000 in fines after one of its employees was killed when an explosive blast brought down overhead power lines and electrocuted him. OSHA classified three of the six violations as serious: blasting near power lines without safety control measures, not providing sufficient training, and using electric blasting caps where high voltage power lines made their use dangerous.

The second case resulted in two willful and seven serious violations being levied against a Colorado road contractor, with proposed fines totaling over \$146,000. The willful violations included failure to provide adequate warnings prior to detonation and operating equipment within 50 feet of holes filled with explosives. There were no injuries, however.

## OSHA Receives Comments On Proposed Confined Space Rules for Construction

How much is it worth to save a live? What about six lives? A new rule proposed for confined space entry on construction sites would cost approximately \$86 million per year, OSHA estimates, and would prevent 6 fatalities and 900 injuries annually.

An estimated 641,000 construction site confined spaces would be affected by the proposed rule, which would require employers to develop a written confined space program, including rescue plans. The draft proposal is very similar to OSHA's

general industry rule, a key difference being that certain engineering controls would be required, based on the classification of the confined space.

The construction projects most affected by the work would be commercial buildings, bridge construction, highway construction, sewerage and water treatment construction, and housing. The expected confined spaces are boilers, heating ducts, vaults, water tunnels, silos, tanks, pump houses, and storm drains. The affected occupations are expected to be elevator technicians, painters, boilermakers, laborers, masons, welders, steel workers, plumbers, and inspectors.

OSHA estimates that each confined space will require 15 minutes of paperwork. If a confined space entry permit is required, an additional 15 minutes per space would be required.

A small business review panel expressed support for the rulemaking process while at the same time criticizing the proposed rule. Panel members claim that the training costs are excessive and the rule will create confusion on job sites when it is not clear which standard should apply—the one for general industry or the construction standard.

## Ohio Landscapers Sign Alliance With OSHA

OSHA and the Ohio Landscapers Association have formed an alliance to promote workplace safety proactively, rather than waiting for an accident to happen. They will implement safety and health programs, conduct training, and share information on workplace practices and problems. There are approximately 500 landscaping contractors in the OLA.

# ADR Corner

## Preparing for Success in Mediation, Part 1: Information Gathering



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Throughout the past year, the ADR Corner has addressed the subject of mediation. We have looked at what distinguishes mediation from other forms of Alternative Dispute Resolution (ADR) such as negotiation and arbitration. We have examined why mediation has gained popularity in the construction industry and considered the advantages and disadvantages of mediation when compared with negotiation, arbitration and litigation. The September 2003 column explored how the timing of mediation can affect the prospects for success. Selecting a mediator was the topic in October and included consideration of reputation, training, experience, style, knowledge, availability, and bias in choosing the right mediator for a particular dispute. This month we turn to the more arduous task of *preparing for mediation*.

This article begins a series of articles that will cover many aspects of preparing for mediation. After an overview of the preparation process, we will look at steps that help shape a mediation preparation plan, and then we will move on to the execution of the plan with an eye to providing the best opportunity to succeed at the mediation.

NOTE: This series of articles is written from the advocate's point of view, but a party contemplating mediation without legal representation may still find many of the points applicable.

**Overview of the Preparation Process.** When preparing for mediation, the advocate has several tasks:

- Gathering essential information
  - From the client
  - From the adversary
  - From other outside sources (public records, weather reports, construction manager, design professional, etc.)
  - Through consultation with experts
- Developing effective communication
  - With the client
  - With opposing counsel
  - With the mediator

- Establishing an efficient use of time
  - Necessary to succeed (avoid shortcuts if possible)
  - Avoid duplication (prepare for arbitration/litigation as well)
- Using technology

This month we discuss the first of these, information gathering.

By the time a construction dispute reaches the lawyer's office it probably has a certain amount of excess baggage with it in the form of acrimonious letter writing, high levels of emotion, financial distress, and frustration at having to proceed to the "next level" by involving construction counsel.

When a construction dispute arises, experienced construction counsel should quickly assess the prospects for taking the dispute to mediation. A quick review of the dispute resolution process in the parties' contract may provide a clue to this probability. There is no harm in assuming that the dispute will find its way to mediation at some point along the resolution continuum. In some instances, mediation may be mandated by the parties' contract. An example is the process required under the General Conditions of the AIA Document A201. (For a discussion of how mediation fits into the claims process under this document, see the November 2002 issue of ohioconstructionlaw.com, available electronically at www.ohioconstructionlaw.com.) If it appears that mediation is or should be on the horizon for the parties' dispute, then preparation for mediation begins with the first words out of the mouth of the advocate.

Because construction disputes are generally complex and technical in nature, I often find myself dealing with counsel with whom I am familiar. As an advocate, I want to develop a credible and, I hope, a good relationship with counsel in order to facilitate the mediation and to serve the best interests of the client. Unnecessarily adversarial approaches are usually counterproductive in this process, although personalities sometimes make such encounters unavoidable.

**Gathering Information.** Gathering information is important for two reasons: 1) to assist in understanding the issues; and 2) to assist in telling the story.

If it appears that mediation is or should be on the horizon for the parties' dispute, then preparation for mediation begins with the first words out of the mouth of the advocate.

Because the disputing parties were apparently unable to resolve the dispute between themselves, they must now try to explain the dispute to strangers, including their respective attorneys, potentially a mediator, and quite possibly an arbitrator, judge or even a jury.

Construction disputes are almost always document- and fact-intensive. Attorneys depend on “facts” to develop their client’s case, regardless of whether it involves a construction dispute, defending a murder suspect, or handling a divorce. The facts always play a crucial role in such matters. The client will assume the attorney knows the law; after all, that is why the client came to the attorney in the first place. However, it is unlikely that the attorney will have sufficient facts early on to assess the client’s position fully respecting a construction dispute. Identifying what information is necessary to gain an understanding of the dispute will be an important part of any plan to prepare for mediation. Regardless of the nature of the dispute, however, the experienced attorney will seek the following information, at a minimum:

**Contemporary job records.** Any time you are assessing a construction dispute you must answer two important questions: 1) What does the contract say? and 2) Are there contemporaneous job records that may shed light on the dispute? For example, if the dispute centers on a submittal, it would be important to have all contract documents that address the submittal process and all submittal logs (contractor’s, architect’s, engineer’s, construction manager’s, etc.) as well as all correspondence addressing the issues surrounding the particular submittal. If the dispute concerns a delay claim, it would be important to obtain the daily job logs, the schedule with updates, minutes of weekly meetings, job cost accounting and other contemporaneous job records that might shed light on the controversy. If weather caused the delay, then you would want to obtain two kinds of weather records: those for the time period for which delay adjustment is sought, and historical records to determine whether such weather is compensable.

**Photographs.** A picture is worth a thousand words. Photos can be invaluable in explaining issues in construction disputes. While you might want to go to the job site and take photos relevant to the issues, often there will be progress photos available already. So long as the project photos show what is necessary to an understanding of the issue (e.g.

broken pipe, misaligned steel, weather conditions, etc.), they are often the most convincing because they were created contemporaneously and not in retrospect. Like contemporaneous job documents, photos should be sought from all parties who might have them. Some pictures tell more than others.

**Witnesses.** It may also be necessary to interview potential witnesses to learn more about the dispute. Sometimes a witness can explain what was written in a document or give context to a document that otherwise reveals little by itself.

**Client Interview.** And, of course, the client should be interviewed at length, not only for purposes of gathering information regarding the dispute, but also to learn more about the client’s goals in resolving the dispute. Often a dispute is simply about money, but other times there are principles involved. My experience is that principles can be expensive to honor. Sometimes a client insists that any claim be fully justified and documented because he wants to avoid setting a bad precedent on a project.

When interviewing the client, you should learn early on who has authority to approve a settlement. If the client is a contractor, the attorney may meet first with a job superintendent, project manager or someone from the home office—all without authority to approve a settlement. If the dispute proceeds to mediation, it will be imperative that someone with authority to approve a settlement be present, if possible.

The attorney should get to know this person and begin to understand the objectives of such a decision maker as soon as possible. During the interview, the prospect of mediation should be approached, where appropriate, and the process should be explained at least in its basic form, if necessary. Even though a client may have been through mediation before, unless it was with the same mediator and the same attorney, it is worthwhile taking time to discuss your approach to mediation. It is important that the client understand the process and feel comfortable with it before the mediation actually takes place.

So long as the project photos show what is necessary to an understanding of the issue (e.g. broken pipe, misaligned steel, weather conditions, etc.), they are often the most convincing because they were created contemporaneously and not in retrospect.

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**Consultation with Experts.** It is quite likely that a construction dispute of any magnitude will require consultation with a technical expert. Such consultation should be considered early in the process of preparing for mediation. Often, many of the issues in a dispute may turn on technical interpretations or opinions of experts. These experts can be helpful in identifying information necessary to understand the issues and present the client's point of view at the mediation.

**Pulling It Together.** Once you have consulted with an expert (if necessary), gathered the relevant contemporaneous job records, photographs of the issues in dispute, and have interviewed the client and potential witnesses, you are ready to begin organizing the materials to tell your story. Being able to convey the substance of the information in a well-understood and compelling fashion requires effective communication. Next month we will address the importance of "Effective Communication." We will explain the importance of developing themes and discuss when less is more.

## When Experience Counts<sup>SM</sup>

When experience counts in construction matters, the attorneys of Bricker & Eckler LLP's Construction Law Department are ready to help you meet your construction law challenges.

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