Construction Reform Issues Highlight the Fall Quarter Issue

This quarter, we open with an article on the general changes brought about by construction reform. Three new construction delivery methods are now available to many political subdivisions. In addition, the advertisement and design professional selection requirements for construction projects have been revised. In this article, Jack Rosati, Sylvia Gillis, and Ben Hyden explain the key elements of construction reform that were recently signed into law.

Our next article continues the discussion of construction reform as it pertains to changes in Ohio’s prevailing wage law. The new law raises the monetary threshold amount for the application of prevailing wage on public improvements for certain projects; makes port authorities exempt from Ohio’s prevailing wage law; provides that political subdivisions once exempt from the prevailing wage laws are now expressly prohibited from opting into the prevailing wage requirements for public improvements; revises the definition of “interested party” — narrowing the field of those who can bring a prevailing wage complaint; and changes the statutory requirements for contractor penalties. In this article, Ben Hyden provides us with a general description of these complicated revisions.

In our “What the Courts Are Saying” column, we begin with a case from the Fourth District Court of Appeals. The Court determined who the “owner” is for purposes of pursuing damages by a contractor on an OSFC co-funded construction project. In a contractor’s suit against a school district on an OSFC project, the Court held that the appropriate party from which to seek damages was the State of Ohio through the Ohio Court of Claims — not the local common pleas court. Our second case this quarter comes from the Tenth District Court of Appeals, which answered an often asked question regarding prevailing wage: for a construction project undertaken by a private entity without the use of public funds, whether Ohio’s prevailing wage law applies depends on the use of the project and not the source of funds used for the improvement. Our third case this quarter comes from the Eighth District Court of Appeals. The Court discussed an architect’s standard of care. A plaintiff must use an expert qualified to testify to an architect’s standard of care to succeed in a negligent design claim against an architect.

Construction Reform in a Nutshell

Monumental changes are coming to public construction in Ohio to address owner dissatisfaction with multiple prime contracting. Public owners will soon be able to choose among several project delivery models for construction projects. Key elements of construction reform included in Amended Substitute H.B. No. 153, recently signed into law by Governor Kasich, are general contracting (GC), construction manager at-risk (CMAR), and design-build (DB) delivery models.

General Contracting
Ohio’s multiple prime contracting law (ORC 153.50) has been rewritten to define GC as the “means of constructing and managing an entire public improvement project, including the branches or classes of work specified in division (B) of this section, under the award of a single aggregate lump sum contract.” The work defined in division (B) is the mechanical, electrical, and plumbing trades.
The GC model allows public owners to solicit bids for a single contract to construct the project. This approach shifts risk away from a public owner by reducing the chance for gaps in the work scopes of multiple contractors, shifts the risk of coordination and related delays to one contractor, and reduces finger pointing between contractors regarding defective work. It does not eliminate disputes about whether a defect was caused by design or construction.

Construction Manager At-Risk
Public owners may now hire a CMAR (defined in ORC 9.33 as “a person with substantial discretion and authority to plan, coordinate, manage, direct, and construct all phases of a project for the construction, demolition, alteration, repair, or reconstruction of any public building, structure or other improvement and who provides the public authority with a guaranteed maximum price [GMP]).” CMARs differ from GCS in that CMARs typically provide pre-construction services. As the project design progresses, CMARs provide schedules and estimated construction costs, advise on constructability and value engineering, and provide a GMP for construction costs when the design is sufficiently complete. CMARs contract with subcontractors to perform the work.

CMAR selection largely mimics the current CM process. ORC 9.331 requires a public owner to advertise its intent to employ a CMAR and receive proposals after a minimum 30-day period. New ORC 9.334 requires a public owner then to rank the top three CMAR candidates.

A common complaint in the construction manager (CM) and design professional (DP) selection process has been the inability to ask for price. While price cannot be considered when ranking the top CMAR candidates, public owners may request pricing from these candidates after the ranking. Pricing includes a statement of general conditions and contingency costs as well as preconstruction and construction fees.

A public owner provides ranked candidates with a description of the project, statement of the available design detail, description of how the GMP will be determined, and form of contract to be used for the project. Based on proposed pricing, a public owner re-ranks the candidates and begins contract negotiations with the top-ranked company.

A CMAR may self-perform work but only if authorized by a public owner; it must submit a signed and sealed bid for the self-performed work prior to receiving and opening bids for the same work. All subcontractors must be pre-qualified based on criteria established by the CMAR and approved by a public owner. The Ohio Department of Administrative Services (ODAS) must prepare administrative rules to establish standards for pre-qualification criteria.

Design Build
DB allows owners to contract with a single entity for both design and construction services. A public owner issues a public announcement for DB services and then ranks the top three candidates. A public owner provides the ranked candidates with more detailed information about the project – description, design criteria, preliminary project schedule, requested preconstruction and design services, GMP description and timeframe for GMP development, and proposed contract form – and requests a pricing proposal that includes design services, preconstruction services, and design-build fee.

The top candidates are re-ranked after reviewing the pricing proposals, and a public owner then begins negotiations with the top ranked firm. A public owner is not required to accept the lowest proposal when evaluating either DB or CMAR candidates. ORC 153.693(A)(4) requires that a public owner “rank the selected firms based on the public authority’s evaluation of the value of each firm’s pricing proposal, with such evaluation considering each firm's proposed cost and qualifications.”

If using DB, new ORC 153.692 requires public owners to engage the services of a “criteria architect” or “criteria engineer” (“CA/CE”), who may be an outside consultant or a properly qualified employee of a public owner. This individual’s role is to develop baseline design criteria and requirements for the project and to work with a public owner to evaluate proposals from the candidates. The CA/CE may not work for the DB once the DB has been selected.

Because of the effort required to develop DB pricing proposals, the owner may choose to provide a stipend for preparing these proposals.

Other Changes in the Law
The budget bill included modified advertising requirements. The definition for “newspaper of general circulation” (ORC 7.12) was changed. Where the code or rule that requires advertisement of a construction project two or more times in a newspaper of general circulation includes a reference to new ORC 7.16(A), the second advertisement may be an abbreviated format if it includes certain information. All public notices must also be posted on a state public notice website – to be developed by ODAS Office of Information Technology – once it is operational.

The $25,000 threshold for the qualification-based selection process for DPs was eliminated with one new exception: if a public owner maintains a file
with current statements of qualifications from DP and DB firms AND the services will cost less than $50,000, the public owner may select a DP from the file. The public owner may only select from DPs that have submitted a current statement of qualifications within the immediately preceding year.

Summary
These revisions took effect 90 days after the bill was signed into law, which was September 28, 2011. In addition, ODAS must do certain things before the changes can be implemented:
- Prescribe procedures and criteria for determining the best value selection of a CMAR or DB firm;
- Create standards to be followed by CMAR and DB firms when establishing prequalification criteria for subcontractors;
- Prescribe the construction contract forms for CMARs, DBs, or GCs to use for subcontracts;
- Prescribe the construction contract forms to be used by public owners for CMARs and DBs; and
- Create bonding requirements for CMARs and DBs.

The construction reform measures will dramatically affect public construction in Ohio. It is imperative that public owners become familiar with the new models, become familiar with requirements specific to each political subdivision, and determine which will work best for projects. Experienced guidance will be a key to avoiding problems.

Construction Reform Changes to Ohio’s Prevailing Wage Laws

By prescribing minimum wages to be paid by employers, Ohio’s prevailing wage laws support the integrity of the collective bargaining process. Ohio’s prevailing wage laws prevent the undercutting of worker’s wages in the private construction sector by providing a comprehensive, uniform framework for worker rights and remedies vis-à-vis private contractors, sub-contractors and materialman engaged in the construction of public improvements. Ohio’s prevailing wage laws provide workers with a comprehensive statutory procedure of administrative and civil proceedings to ensure an employer’s compliance in the event that an employer pays less than the prescribed wages.

While the purpose and justification of Ohio’s prevailing wage laws remains unchanged, Ohio’s biennial budget bill, H.B. 153, included substantial changes to the laws’ application and enforcement mechanisms.

The revisions within H.B. 153 raise the monetary threshold amount for the application of prevailing wage on public improvements (other than road, sewer, and ditch projects). On new public improvements, the monetary thresholds for the application of prevailing wage are $125,000 for the first year after H.B. 153’s effective date, $200,000 for the second year, and $250,000 thereafter. See RC 4115.03(B)(1)(a)-(c). On reconstruction public improvements, the monetary thresholds for the application of prevailing wage are $38,000 for the first year after H.B. 153’s effective date, $60,000 for the second year, and $75,000 thereafter. See RC 4115.03(B)(2)(a)-(c). The law does not provide for any further biennial adjustments.

On public improvements involving roads, streets, alleys, sewers, ditches, and other related projects, the monetary threshold amount is $75,248 for new projects and $23,447 for reconstruction projects. These threshold amounts are adjusted on a biennial basis under the new law. See RC 4115.03(B)(3)-(4).

Public improvements undertaken by port authorities created by a municipal corporation, township, or county under R.C. 4582.02 or 4582.22 after 1964 are now exempt from the prevailing wage laws. H.B. 153 also provides that prevailing wage need not be paid on any portion of a public improvement undertaken by a contractor that
donates labor and materials for the construction of that portion of the public improvement. See R.C. 4115.04(B)(6)-(7).

School districts and education service centers, which are exempt from the prevailing wage laws under 4115.04(B)(3), are now expressly prohibited from opting into the prevailing wage requirements for public improvements. See R.C. 4115.04(C). While this provision precludes school districts and education service centers from opting into the comprehensive statutory procedure of administrative and civil proceedings, nothing contained in H.B. 153 precludes school districts and education service centers from specifying minimum wage rate requirements and specific remedies within the plans and specifications for a project.

The revisions to the prevailing wage laws also modified who may file suit to enforce the prevailing wage requirements as an “interested party.” R.C. 4115.16(A) specifies that, in addition to the underpaid worker, an “interested party” may file a complaint as a result of alleged prevailing wage violations. Prior to the changes contained in H.B. 153, the term “interested party” was broadly interpreted to include all contractors, subcontractors, labor organizations and trade organizations interested in the “public improvement.” As a result, when a contractor or subcontractor bid on a project, this interpretation allowed the contractor, the subcontractor, any labor organization representing the workers of the contractor or subcontractor, and any trade organization that the contractor or subcontractor were members to file suit as an “interested party” for all of the alleged prevailing wage violations that occurred under any contract on any portion of the public improvement.

The changes within H.B. 153 narrow the definition of “interested party.” The language of revised R.C. 4115.03(F)(1)-(4) still provides standing to contractors, subcontractors, labor organizations, and trade associations as interested parties. However, these parties no longer have standing to file suit for prevailing wage violations based upon any contract on any portion of the public improvement. Instead, under revised R.C. 4115.03(F), “interested party” standing is provided to these parties with respect to the “particular contract for the construction of a public improvement” that the contractor and subcontractor actually bid for the project.

Additionally, all “interested party” complaints must allege a specific violation against a contractor or subcontractor, in writing, on a form furnished by the Director of Commerce with sufficient evidence to justify the complaint. The Director of Commerce is prohibited from investigating complaints that do not satisfy this requirement. See the revised R.C. 4115.16(A).

The remaining significant changes to the prevailing wage laws provide relief to contractors from certain statutory penalties. Contractors and subcontractors who make a good faith effort to ensure that its subcontractors comply with the prevailing wage laws are no longer responsible for paying the prevailing wage penalties of its subcontractors under the revised R.C. 4115.10(G). Additionally, contractors and subcontractors whose underpayment to a worker is less than $1,000 are exempt from further liability if the contractor or subcontractor makes full restitution to the employee under the revised R.C. 4115.13(C).

These new prevailing wage requirements become effective 90 days after the bill was signed, which was September 28, 2011.

The purpose of this article is to provide a general description of the changes to Ohio’s prevailing wage laws contained in H.B. 153. Because Ohio’s prevailing wage laws consist of a detailed statutory and regulatory framework, we recommend that you contact legal counsel for advice if you have any questions about the application of the prevailing wage laws to a particular project.

Supreme Court of Ohio Admits Desmond J. Cullimore to the Bar

On November 7, the Supreme Court of Ohio granted Desmond Cullimore admission to the practice of law in Ohio during a swearing in ceremony at the Ohio Theatre.

Desmond is currently an attorney and registered professional engineer in the construction law group of Bricker & Eckler LLP. He earned his Bachelor of Science in Environmental Engineering from Syracuse University. Desmond holds the designation of Board Certified Environmental Engineer from the American Academy of Environmental Engineers with a specialization in Water Supply/Wastewater Engineering and a Wastewater Class 3 operator’s certification from the Ohio EPA.

Desmond has vast experience as an environmental engineer and has diverse knowledge surrounding water quality assessments, water and wastewater facilities, collection/distribution systems, stormwater management, watershed protection, utility management, construction, and landfill environmental monitoring.
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. 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 will 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 constructibility 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, contractor-architecture 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

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All too often a Public Owner will contract with someone who does not do what the person promises to do. These Rules are intended to help protect Public Owners from those broken promises, they are not intended to state the Owner’s obligations under its Agreements.
What the Courts Are Saying

Who is the “Owner” for Purposes of Pursuing Damages by a Contractor on an OSFC Co-funded Construction Project?

The Contractor Contract form for co-funded Ohio School Facilities Commission (“OSFC”) projects states that the contract is between the contractor and “the State of Ohio (the “State”), through the President and Treasurer of the . . . School District Board”; the contract form is signed by the School District Board President and Treasurer under the heading “STATE OF OHIO, BY AND THROUGH THE SCHOOL DISTRICT BOARD.” Ingle-Barr, Inc. entered into two separate contracts using the “Contractor Contract” form for co-funded OSFC projects. In January 2006, Ingle-Barr filed two lawsuits against the Eastern Local School District Board in the Pike County Court of Common Pleas alleging breach of contract and unjust enrichment based upon two separate contracts with the State of Ohio for improvements to the Eastern Local School District facilities.

The trial court found that the contracts were between Ingle-Barr and the State of Ohio and dismissed both complaints on a motion for summary judgment. Eastern Local School District was not a party to either contract, so it could not be found liable for breach of contract. The appropriate party from which to seek damages was the State of Ohio through the Ohio Court of Claims. On appeal, the Fourth Appellate District Court of Appeals agreed with the trial court and affirmed its decision.

In reviewing the trial court’s decisions and considering the arguments raised by Ingle-Barr on appeal, the appellate court determined that summary judgment had been appropriate. The court found that the “clear language of those paragraphs [of the contracts] limit Eastern’s role to simply binding the State to those contracts with Ingle-Barr)” (Ingle-Barr, Inc. v. E. Local School Dist. Bd., 2011-Ohio-584, Paragraph 8).

Ingle-Barr appealed to the Ohio Supreme Court, which declined jurisdiction in the case (Ingle-Barr, Inc. v. Eastern Local School District Board, Ohio Supreme Court, Case No. 2011-0732).

What does this mean for school construction projects in Ohio that are part of an OSFC co-funded building program? Any claim for contractual damages against the Owner on a co-funded OSFC project must be brought against the State of Ohio in the Court of Claims and not against a school district board of education in the local common pleas court.

Interestingly, a few months later Ingle-Barr sued the Scioto Valley Local School District Board, again in the Pike County Court of Common Pleas, with the same result from both the trial court and the Fourth Appellate District Court of Appeals. The second lawsuit included an assignment of error based upon the argument that Ingle-Barr should be able to recover from the Board of Education based on a quasi contract theory. The trial court’s decision that the quasi contract theory could not be used to recover against the Board of Education was affirmed by the appellate court. The appellate court found that “Ohio law does not recognize an equitable claim for unjust enrichment when an express contract covers the exact same subject matter” (Ingle-Barr, Inc. v. Scioto Valley Local School District Board, 2011-Ohio-2353, Paragraph 13). The Ohio Supreme Court has yet to consider the appeal on this lawsuit.

What is a “public improvement” for purposes of the application of the prevailing wage law?

When a construction project is undertaken by a private entity without the use of public funds, the question is often asked whether the prevailing wage law applies. Based upon a recent decision by the Tenth Appellate District Court of Appeals, the answer is that the use of the project can trigger the application of the prevailing wage law.

The Franklin County Court of Common Pleas ruled in favor of a private developer on this question in Kimberly Zurz, Director Ohio Department of Commerce, et al., v. 770 West Broad AGA, LLC., 192 Ohio App. 3d 521 (2011), finding that the prevailing wage law did not apply because no public funds had been spent in the construction of the improvements. The appellate court reversed that decision and remanded the case to the lower court for further proceedings. The appellate court
found that the work performed by 770 West Broad AGA, LLC was a public improvement to which the prevailing wage law applied.

At the trial court level, the plaintiffs claimed a violation of the prevailing wage law because prevailing wage rates were not paid for the construction of the project. The appellate court first reviewed the definition of a "public improvement." Ohio Revised Code Section 4115.03(C) defines "public improvement"; it states that:

“public improvement” includes all buildings . . . and all other structures or works constructed by a public authority of the state or any political subdivision thereof or by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof. When a public authority rents or leases a newly constructed structure within six months after completion of such construction, all work performed on such structure to suit it for occupancy by a public authority is a “public improvement.”

The appellate court found that the improvements constructed by 770 West Broad AGA, LLC fit both requirements of Section 4115.03(C). First, the improvements were constructed for the Department of Administrative Services (DAS) for the use of the Department of Rehabilitation and Corrections (DRC), both of which are public authorities. The court noted that nothing in Section 4115.03(C) requires the expenditure of public funds for the improvement.

In making its decision, the appellate court relied upon two other cases it had decided on the issue: (1) Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations (1991) 61 Ohio St.3d 366; and (2) U.S. Corr. Corp. v. Ohio Dept. of Indus. Relations (1995), 73 Ohio St.3d 210. The facts in each of these two cases closely parallel the situation being reviewed by the Court – a lease agreement required improvements to be completed to make the building usable by the public authority and the party responsible for making the improvements was a private entity that made the improvements without using public funds. The appellate court found that, based upon this precedent, the use of public funds is not required for an improvement to be subject to prevailing wage laws.

In determining whether prevailing wage laws apply to a project, it is important to understand the nature of the entity that will ultimately use the improvements and also the relationship between the parties that create the obligation to undertake the construction activities. For 770 West Broad AGA, LLC, it had entered into a lease agreement with DAS, which is clearly a public authority; and the purpose of the lease was for use by DRC, which is also clearly a public authority. Even without the expenditure of public funds on the improvements made by 770 West Broad AGA, LLC, the improvements clearly fall within the definition of a public improvement included in Ohio Revised Code Section 4115.03(C), and all work performed to complete the improvements was subject to the prevailing wage law.

 Establishing a Design Professional’s Standard of Care

Where a party files an action against a design professional, the liability of the design professional often turns on the standard of care used by the design professional while he or she is engaged in design. The Eight District Court of Appeals, in Michele Kacsmarik, et al., vs. Lakefront Lines Arena, et al., 2011 Ohio App. LEXIS 2184, recently discussed what is needed to establish the design professional’s standard of care. The Court held that a party could not prove that an architect failed to meet the standard of care of an architect in designing an ice rink because the party’s expert witness was not qualified to testify to an architect’s standard of care.

In Kacsmarik, a spectator who was injured at a hockey game brought an action against a construction company, a hockey arena owner, and an architectural firm alleging multiple claims, including negligent architectural work. The spectator failed to establish that the architect firm owed a duty to the spectator or that the firm breached that duty.

A spectator was sitting on a bench near the door used by hockey players to exit the ice rink. After a player had trouble opening the exit door, the spectator left the bench to open the door. After opening the door, the spectator remained in the area near the door. One of the players lost his balance while exiting the rink, slid into the spectator, and cut her ankle, which required surgeries and physical rehabilitation.
The spectator claimed, in part, that the architect negligently performed its design responsibilities in the renovation of the hockey arena by failing to create a design that physically separated hockey players entering and exiting the ice rink from spectators. To succeed in a claim of negligence, the spectator needed to prove that the architect owed a duty to the spectator, the architect breached that duty, and that the breach proximately caused her injuries.

The Court determined that the spectator did not establish the architect's standard of care in the design of an ice rink. A design professional that contracts in a specialized professional capacity is responsible for the foreseeable consequences that stem from the design professional's failure to exercise reasonable care in preparing the design. Whether the architect exercised reasonable care depends on whether the architect met the standard of care required of a licensed architect. Unless the lack of care used in the design is so apparent that a layperson using common knowledge and experience can understand that a lack of care existed, a party must establish the standard of care using expert testimony.

Testifying for the spectator was a "park and recreation expert" with "extensive education, training, and experience in planning, designing and publishing in this field, including the design, construction and operation of ice skating facilities." He was not a licensed architect and did not claim that he was familiar with the architect's standard of care—he was merely critical of the architect's failure to consult with a functional analyst. Based on this testimony, the Court determined that the analyst was not qualified to testify to the standard of care required of an architect engaged in the design of an ice rink. It is important to note that this was not a breach of contract action. Without establishing the architect's standard of care in this situation, the spectator could not succeed on her negligence claims against the architect.