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

WINTER 2012

Construction Reform Breaks Out of Its Shell — An Update on Ohio's Construction Reform

IN THIS ISSUE

In our last issue of BrickerConstructionLaw.com, we presented you with *Construction Reform in a Nutshell*, describing the processes adopted by the General Assembly as a result of Amended Substitute H.B. 153. See *Construction Reform in a Nutshell*, BrickerConstructionLaw.com, Fall 2011 available at http://www.bricker.com/documents/publications/2300.pdf.

Many changes have occurred since entering the new year. Namely, the Ohio Department of Administrative Services (ODAS), released administrative rules required by H.B. 153. On December 26, 2011, the Surety Bond Rule, the Contract Form Rule, and the Subcontract Form Rule became effective. On February 2, 2012, the Prequalification Rule, Best Value Rule, Electronic Advertising Rule, and Electronic Bidding Rule became effective.

For a detailed description of the project delivery methods permitted under the new law, and to better understand the impact of the new administrative rules, please refer to *Construction Reform in a Nutshell*.

Electronic Advertising and Bidding Rules

The electronic advertising rule applies only to projects using a construction manager or a construction manager at-risk. When a public authority wishes to employ a construction manager or a construction manager at-risk, it may advertise electronically. A public authority has three electronic options:

One option is to place an advertisement on the website of the newspaper of general circulation in the county where the contract will be performed. Another option is to place an advertisement on the state public notification website developed by the Ohio Department of Administrative Services, Office of Information Technology. The website is available at http://publicnotice.ohio.gov/index.stm. Currently, the website is used for informational purposes; but, it is expected to go live as early as February 2012. Users of the website will be required to register with the Ohio Business Gateway and establish an online account to use the state public notice website.

The final electronic way a public authority can advertise its construction project is to place an advertisement on its own official website or websites of appropriate trade associations. A public authority does not have to provide all information in the advertisement. The advertisement can direct interested construction managers or construction managers at-risk to a full description of the project and provide information to submit a proposal.

The electronic bidding rule applies to multi-prime and general contracting project delivery methods. When a public authority is the state or a state institution of higher education, the rule requires that all bids be posted exclusively through the state's enterprise electronic bidding module. Any modification to the bid must also be announced in an addendum published through the electronic bidding system.

Interested bidders may be required to register the first time they use the system or subscribe to a web-based subscription service. One catch, however, is that the rules allow the state to charge registration fees and maintenance fees to use the electronic bidding system. The good news for members of diversity or inclusion programs is that the rule permits the state to waive such fees if the public authority requires the use of a diversity program or inclusion program.

A lack of technical assistance from the state will not excuse a failure to properly submit a bid. The rules expressly state that the lack of technical assistance does not relieve a bidder from properly

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submitting its bid. The rules also provide that the state cannot be held liable when a bidder is not able to submit a bid because of technical issues or obstructions. Furthermore, the rule provides that the inability or failure of an interested bidder to submit a complete bid, presumably due to technical issues or obstructions, cannot be sufficient grounds for a disappointed bidder to protest the award of a contract.

The state is required to establish processes to verify the time that bid information and other information is received. The purpose of this rule is to address bid protests that arise based on technical issues with submitting bids.

Finally, after the bid deadline, the state must publicly issue the bid tabulation electronically.

Prescribed Procedures and Criteria for Selecting a Construction Manager At-Risk

A construction manager at-risk is 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." A construction manager at-risk differs from a general contractor in that a construction manager at-risk typically provides pre-construction services. As the project design progresses, a construction manager at-risk provides schedules and estimated construction costs, advises on constructability and value engineering, and provides a guaranteed maximum price for construction costs when the design is sufficiently complete. In addition, a construction manager at-risk enters into contracts with subcontractors to perform the actual work with limited exceptions as will be discussed below.

Short-listing: The construction manager at-risk selection process largely mimics the current construction manager selection process. ORC 9.331 requires the public authority to advertise its intent to employ a construction manager at-risk and receive proposals after a minimum 30-day period. ORC 9.334 requires the public authority to then select no fewer than three construction manager at-risk candidates the public authority considers most qualified. Under OAC 153:1-6-01(C)(1), the factors that must be considered in selecting the top candidates include:

- Competence to perform the required management services as indicated by the technical training, education, and experience of the construction manager at-risk's personnel, especially the technical training, education, and experience of the construction manager at-risk's employees who would be assigned to perform the services;
- Ability in terms of workload and the availability of qualified personnel, equipment, and facilities to perform the required management services competently and expeditiously, and experience working on similar types of projects;
- Past performance as reflected by the evaluation of previous clients with respect to factors such as control of costs, quality of work, dispute resolution, administration of subcontractors, and meeting of deadlines;
- Financial responsibility including evidence of the capability to provide a surety bond in accordance with paragraph (A) of rule 153:1-4-02 of the Administrative Code;
- History of performance with meeting goals of any diversity and inclusion programs required by a public authority or by applicable law, and compliance with applicable affirmative action programs. For public improvement projects subject to section 9.47 of the Revised Code, a valid certificate of compliance must be submitted; and
- Other qualifications that are consistent with the scope and needs of the project including, but not limited to, knowledge of the local area and working relationships with local subcontractors and suppliers.

A common complaint in the construction manager and design professional selection process has been the inability to ask for the fee. While the construction manager's fee cannot be considered when determining the top construction manager at-risk candidates, public authorities may request pricing from these candidates after they are ranked to determine which construction manager at-risk offers the best value.

Selecting the Winner: To begin the process of selecting which of the short-listed construction manager at-risk candidates will be awarded the project, the public authority provides the selected candidates with a description of the project, statement of the available design detail, description of how the guaranteed maximum price will be determined, and form of contract to be used for the project.

The public authority convenes an evaluation committee to evaluate the construction manager candidates. The public authority has discretion to

select the members of the evaluation committee. If the public authority wishes to use the project's design professional or other independent advisors to support the evaluation committee or advise it on technical and pricing issues, those advisors cannot participate as voting members of the committee.

Based on proposed pricing and performance criteria, the public authority, through its evaluation committee, ranks the candidates and begins contract negotiations with the top-ranked candidate determined to be the "best value." It will be rare that a construction manager at-risk will be able to provide a guaranteed maximum price at the time of selection because the design will rarely be sufficiently developed at that point. Moreover, a construction manager at-risk adds the most value to a project when it has an opportunity to participate in the design development process and, therefore, should be selected at the earliest possible stage of the project.

Best value in the context of construction manager at-risk is determined based on **pricing** and **performance** criteria. Under OAC 153:1-6-01(D)(1), the pricing criteria used in the evaluation must include pricing for the following:

- Preconstruction fee;
- Construction fee;
- At-risk fee;
- General conditions;
- Contingency; and
- The guaranteed maximum price proposal, if applicable at the time proposals are requested.

Under OAC 153:1-6-01(D)(2), the performance criteria considered in the evaluation may include the following:

- Schedule;
- Approach to the work, including any anticipated self-performed work;
- Work sequencing;
- Performance history;
- Approaches to performance specifications when used;
- Plan for anticipated procurement difficulties;
- Plan for meeting any goals set as part of any diversity and inclusion program required by the public authority or by applicable law; and
- Plan for additional considerations, which may include technical design, technical approach, quality of proposed personnel, and management plan.

The public authority has the option of seeking a guaranteed maximum price proposal from the short-listed firms as a part of the pricing criteria. If the public authority seeks a guaranteed maximum price, it must define the guaranteed maximum price proposal requirements. The guaranteed maximum price may include the total cost of the work, allowances, unit prices, assumptions and clarifications, project schedule, and the scope of work for any work the short-listed firm wishes to self-perform. After the short-listed firms submit their guaranteed maximum price proposal (in a sealed envelope), the evaluation committee will interview each of the short-listed firms and score the performance and pricing criteria. After the interviews and scoring, the public authority will open the short-listed firms' guaranteed maximum price proposals and conduct comparative analysis of all proposals — utilizing the assistance of the project's design professional or other independent advisors if necessary. The evaluation committee ranks short-listed firms based on the committee's scores and enters into negotiations with the firm determined to provide the best value.

A construction manager at-risk may self-perform work only if authorized by the public authority. In order to be eligible to self-perform work, the construction manager at-risk must submit a signed and sealed bid for the self-performed work prior to receiving and opening bids for the same work from subcontractors. All subcontractors must be pre-qualified based on criteria established by the construction manager at-risk and approved by the public authority.

Prescribed Procedures and Criteria for Selecting a Design-Build Firm

The design-build model allows public authorities to contract with a single entity for both design and construction services. Under this model, the public authority issues a public announcement for design-build services and then selects no fewer than three candidates considered most qualified based on the same factors used to select a construction manager at-risk. However, under OAC 153:1-6-02(C)(1), a public authority must also consider information related to the design-build firm's compliance with sections of the Ohio Revised Code relating to the contractor's ability to provide professional design services (ORC 4703.182, 4703.332, and 4733.16), including the use of a licensed design professional for all design services.

After first interviewing short-listed candidates, the public authority provides the short-listed candidates with detailed information about

the project — description, design criteria, preliminary project schedule, requested pre-construction and design services, optional guaranteed maximum price description for the actual construction and timeframe for guaranteed maximum price development, and the proposed contract form. The public authority also requests that candidates provide a technical and pricing proposal for its fees. Some projects (parking garages, etc.) may lend themselves to requesting a schematic design and a guaranteed maximum price as part of the evaluation phase. Others may not be as amenable to asking for a guaranteed maximum price at such an early stage. If a public authority wishes to obtain a guaranteed maximum price at the evaluation phase of a more complicated project, the public authority is permitted to provide a stipend for preparing such proposals, but is not required to do so.

The short-listed candidates are ranked after reviewing the technical and pricing proposals, and the public authority then begins negotiations with the firm determined to provide the best value. The public authority is not required to accept the lowest proposal when evaluating either design-build or construction manager at-risk candidates. ORC 153.693(A)(4) requires that the public authority "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."

Best value in the context of design-build is also determined based on pricing and performance criteria. Under OAC 153:1-6-02(D)(1), the pricing criteria used in the evaluation must include pricing for the following:

- Design services fee;
- Preconstruction fee;
- Design-build services fee;
- General conditions;
- Contingency; and
- If applicable at the time proposals are requested, a guaranteed maximum price proposal as set forth in paragraph (F) of the rule.

Under OAC 153:1-6-02(D)(2), the performance criteria considered in the evaluation includes the same criteria used for selecting a construction manager at-risk, discussed above.

If using design-build, new ORC 153.692 requires public authorities to engage the services of a "criteria architect" or "criteria engineer," who may be an outside consultant or a properly qualified employee of the public authority. This individual's role is to develop baseline design criteria and requirements for the project and to work with the public authority to evaluate proposals from the candidates. The criteria architect/criteria engineer may not work for the design-builder once the design-builder has been selected, but may continue to work for the public authority as an independent monitor of the design-builder's performance if the public authority wishes to continue the criteria architect or engineer's involvement in the project.

Standards for Establishing Prequalification Criteria for Subcontractors When Using Construction Manager At-Risk and Design-Build Contracting

The rules require a construction manager at-risk or design-build firm to adopt criteria for evaluating prospective subcontractors for performing trade contracts — where trade contact is defined as "an agreement to perform any part of the work on the project under a direct contract with a construction manager at risk or design-build firm." OAC 153:1-7-01(A)(4). Those criteria must:

- Include the experience of the bidder, the bidder's financial condition, conduct and performance on previous contracts, facilities, management skills, and ability to execute the contract properly;
- Further any goals set as part of a diversity and inclusion program required by the public authority or by applicable law;
- Require prospective bidders to affirmatively state that they have not violated any affirmative action program during the last five years preceding the date of the prequalification application. For public improvement projects governed by section 9.47 of the Revised Code, a prospective bidder may meet this requirement by submitting a valid certificate of compliance; and
- Require a prospective bidder to submit proof of current licenses to perform the work as required by a public authority or by applicable law.

A public authority may include additional criteria for trade contracts and the public authority has discretion to approve or disapprove of any of the above referenced criteria. Furthermore, if the construction manager at-risk or design-build firm wishes to self-perform work, it must meet the above reference criteria.

Prescribed Contract Forms

For the construction manager at-risk delivery model, the rules permit the use of various forms of contract documents, including the American Institute of Architects, ConsensusDOCS, LLC, and the Construction Management Association of America. In addition, the rules permit the use of contract forms developed by the Office of the State Architect Department of Administrative Services.

For the design-build delivery model, the rules also permit the use of various forms of contract documents, including the American Institute of Architects, ConsensusDOCS, LLC, the Design-Build Institute of America, the Engineers Joint Contract Documents Committee, and contract forms developed by the Office of the State Architect Department of Administrative Services.

The final ODAS general contracting contract documents became effective on December 26, 2011. The final construction manager at-risk contract documents developed by the ODAS became effective on February 2, 2012. ODAS posted draft design-build contract documents on its website on February 9, 2012. The final design-build contract documents are still being developed; however, the ODAS expects these documents to be available in mid-March.

Prescribed Subcontract Forms

Any contractor acting in the capacity of a design-builder, construction manager at-risk, or a general contractor is required to use the state subcontract form when entering into any subcontract. The form may be modified as long as the modified form does not conflict with any of the requirements set forth in the rules. Under the state-prescribed subcontract form, the subcontractor has no contractual rights against the public authority unless the public authority takes an assignment of the subcontract. If a contractor fails to use the state subcontract form, the subcontract form rule provides that the contractor and subcontractor must still comply with all the requirements of the rules. The rule provides for flow-down provisions in that the contractor and subcontractor are to mutually assume towards each other the rights, remedies, obligations, and responsibilities of the other. In other words, the subcontractor has the same rights, remedies, obligations, and responsibilities between it and the contractor as the contractor has with the public authority. And consequently, the contractor assumes the same rights, remedies, obligations, and responsibilities towards the subcontractor as the public authority assumes towards the contractor.

The subcontract form must contain a contingent assignment clause that provides the public authority with the option to take an assignment of the subcontract upon termination of the contractor's contract and written notice to the subcontractor. In addition, the rule requires that the subcontract form contain an intended third-party beneficiary provision, which makes the public authority an intended third party beneficiary of the subcontract. As an intended third party beneficiary, the public authority is entitled to enforce the contract against the contractor or subcontractor.

The current version of the subcontract form is available at http://das.ohio.gov/Divisions/GeneralServices/StateArchitectsOffice/ListofStandardRequirementsDocuments.aspx#Misc.

Bonding Requirements for Construction Manager At-Risk and Design-Build Contracting

Before the construction manager at-risk or the design-build firm signs the contract with the public authority, it needs to provide separate performance and payment bonds to cover 100% of the contract sum. At all times during the project, the surety bond must cover 100% of the contract value. This is important when the contract sum increases during the project as a result of change orders. If the construction manager at-risk or the design-build firm does not cause the surety to provide written consent to such an increase in the bond, the public authority is relieved from the obligation to pay the construction manager at-risk or the design-build firm for work performed as a part of the increase in the contract sum.

In a situation where the surety enters bankruptcy, liquidates assets or makes a general assignment for the benefit of its creditors, is placed in receivership, petitions the state or federal government for protection from its creditors, or allows its license to do business in Ohio to lapse or be revoked, the construction manager at-risk or the design-build firm must provide a replacement bond within 21 days. Where the construction manager at-risk or the design-build firm fails to provide such a replacement bond, the public authority is relieved from paying anything to the construction manager at-risk or the design-build firm.

The surety bond rule requires that the construction manager at-risk or the design-build firm use the state's standard bond forms. Those forms are currently the 2012 edition of "Document 00 61 13.13 – Performance Bond Form" and "Document 00 61 13.16 – Payment Bond Form," which can be found

at http://das.ohio.gov/Divisions/GeneralServices/StateArchitectsOffice/ListofStandardRequirements-Documents.aspx#misc. When compared to the form of bond required by ORC 153.54 and used for other project delivery methods on public projects, the bonds required for construction manager at-risk and design-build projects are a similar broad form of indemnity bond, which is more owner friendly than other bond forms such as those published by the AIA.

Conclusion

The most current rules for Ohio construction reform are available at http://ocr.ohio.gov/Rules.aspx and the most current contract forms from the ODAS are available at http://ocr.ohio.gov/Documents.aspx.

As a result of the new laws and the administrative rules, ODAS is planning the OCR Academy to provide training to those interested in learning more about construction reform and how public authorities and contractors must conduct themselves under the new rules.

It is critical that all public authorities educate themselves on the new project delivery methods, the best project delivery method to use for a given project, and the specifics of the new laws and rules. Regardless of the form of delivery model used to construct a project, it is important to have counsel experienced with the various delivery models and contract forms. It is also important to consult counsel experienced with modifying the permitted contract forms to meet specific owner and project needs or to address applicable federal, state, and local laws that may not be addressed in those standard form contracts that were drafted for general use across the country.

What the Courts Are Saying

Ohio Public Owner's Discretion in Determining Responsible Bidder Upheld . . . Again

Just this month, the Court of Appeals for Franklin County, Ohio reinforced already-strong Ohio precedent regarding the broad discretion of an Ohio public owner in determining to whom to award a construction contract. See *State of Ohio ex rel. Glidepath, LLC v. Columbus Regional Airport Auth.*, 10th Dist. No. 10 AP-783, 2012 Ohio 20. The owner was the Columbus Regional Airport Authority, which has a statutorily imposed "lowest responsive and responsible" bid award standard. (Contrast that to what is generally considered the even more broad standard of "lowest and best," enjoyed by many other Ohio public owners.)

The project, valued at approximately $14 million, was for furnishing and installing a new automated baggage handling system. There were six bids. The disappointed bidder-plaintiff was read low by nearly $700,000 and its bid was deemed responsive.

An eleven member committee recommended to the airport's CEO that the disappointed bidder be deemed "not responsible" and that the airport award the contract to the second lowest bidder. The committee's reasons were numerous, including:

- The director of finance and audit services at the airport was dissatisfied with the bidder's income statement and balance sheet, and even suspected that some information was misrepresented;
- There was concern about a nearly $3 million unbilled receivable;
- The committee was also concerned with information on the bidder's financial position as reported by Dun & Bradstreet;
- The bidder's project manager lacked the minimum experience identified in the bidding documents; and
- The bidder's references were not positive.

A bid protest meeting was held, wherein the disappointed bidder attempted to persuade the selection committee to change its recommendation. The attempt failed. Another protest meeting was held, and this too was unsuccessful, bringing the total number of times the disappointed bidder was rejected to three.

The disappointed bidder unsuccessfully sued for a temporary restraining order, preliminary and

permanent injunctive relief, a writ of mandamus (presumably for an order directing the airport to award the contract to the disappointed bidder), and an award of bid preparation costs.

The disappointed bidder then appealed, presenting two main arguments: 1) there was a lack of specificity in the announced bid evaluation criteria; and 2) the airport misapplied the criteria it did announce.

Specificity

The airport applied the same bid evaluation criteria set forth in Ohio Revised Code 9.312, namely "the experience of the bidder, the bidder's financial condition, conduct and performance on previous contracts, facilities, management skills, and ability to execute the contract properly." The disappointed bidder argued that the airport was required to announce even more specific standards demonstrating how the responsibility criteria of R.C. 9.312 would be analyzed. The court of appeals gave the argument short shrift, noting that several years earlier it had rejected an allegation that R.C. 9.312 was unconstitutionally vague when it, in fact, held that the statutory criteria were "clear and reasonable."

Application

The court noted that the disappointed bidder mounted a spirited defense of its reputation and ability to perform the contract. But the court held that the responsibility analysis was an inherently subjective process and that it was precluded from substituting its own judgment for that of the airport. The court went on to determine that the airport had not abused its broad discretion in making the determination that the disappointed bidder was "not responsible" for purposes of the contract in question. The trial court's decision was upheld in all respects and the bidder remained disappointed.

A Contract's Notice Provisions are Strictly Enforced in Ohio

In a recent case, the Ohio Court of Claims strictly enforced a contract's notice provisions against a contractor when the contractor failed to provide notice of its claim within the time required by the contract. The purpose behind contractual notice provisions is to provide the owner with sufficient notice of issues on the project so that the owner can take measures to minimize or eliminate the impact that such issues have on the schedule and cost of the project. Failure to provide proper contractual notice to the owner prejudices the owner and, as we see from this case, prevents the contractor from recovering costs for alleged delays.

In *Tritonservices, Inc. v. University of Cincinnati*, Ohio Court of Claims, Case No. 2009-02324, unreported, an HVAC contractor found itself behind schedule and having funds withheld from its pay applications as liquidated damages. The contractor attempted to recover additional costs associated with alleged delays resulting from asbestos abatement, another contractor's work, and the management of the project schedule. In addition, the contractor attempted to have the owner rescind liquidated damages.

From the start of the project, there was a lag between the HVAC contractor's completion date and the other contractors' completion date because the award of the HVAC contractor's contract occurred later than the other contractors'. To provide a common completion date for all contractors on the project, the project manager and the HVAC contractor executed a change order to compensate the contractor for the later completion date.

The change order, however, also accounted for time associated with the discovery of asbestos during the project. At trial, the HVAC contractor argued that the change order did not include compensation for delays relating to the asbestos. The court, however, found that this was not the case.

The express language of the change order provided that it included acceleration necessary due to the abatement of the asbestos. The contractor's representative admitted that he signed the change order, but claimed he did so without reading it because the pricing summary the contractor submitted ahead of the change order did not contain anything regarding the asbestos issue. The court, however, pointed out that the owner's project manager sent the change order to two representatives of the contractor in an email reiterating that the change order included acceleration associated with the asbestos abatement.

A change order is a valid amendment to the contract. Where a party to a contract signs a change

order, that party is contractually foreclosed from seeking additional compensation for items within the scope of the change order. The court of claims held that the contractor was not entitled to compensation because the language of the change order specifically accounted for acceleration in the work necessary to make up for delays caused by asbestos abatement.

The contractor also argued that it suffered losses in productivity because of unexpected delays associated with ceiling demolition performed by another contractor and the owner's management of the schedule. During the project, the contractor discussed the possibility of compensation for the delays. In response, the owner's project manager told the contractor that it would have to submit a claim in accordance with the procedures in the contract.

The contractor ultimately submitted a loss of productivity claim for costs associated with delays, acceleration, and working out-of-sequence — part of which were related to the asbestos discovered during construction. Acting within the requirements of the contract, the architect prepared its analysis and recommendation of the contractor's claim. As a result of the analysis, the architect recommended that the claim be denied because the contractor did not submit the claim within the time period required by the contract and the contractor did not properly substantiate the claim according to the dispute resolution procedures in the parties' contract. The project manager ultimately denied the contractor's claim.

One of the fundamental provisions in the parties' contract was the provision that required the contractor to provide the owner with notice of its claim. According to the contract, the contractor was required to submit notice of its claim in writing within 10 days of the event giving rise to the claim. The contract provided that notice was required to "permit the timely and appropriate evaluation of the claim, determination of responsibility and opportunity for mitigation." The contract further provided that a failure to provide timely notice results in the contractor waiving its claims. The court stated that this provision is a clear and unambiguous provision that is valid. As a result of the contractor submitting its claim past the 10 day notice period, the contractor's claims were waived.

The contractor attempted to skirt the issue of proper written notice by claiming the owner had actual notice through the contractor's reports that were submitted daily and the contractor's complaints during meetings to discuss the project schedule. The court provided that even if the contractor submitted its daily reports every day that they were generated, daily reports do not satisfy the contract's notice requirements — this is even the case where the daily report form specifically requests that the contractor provide information related to delays in its work and to identify the parties responsible for the delays.

In the alternative, the contractor argued that the owner waived the dispute resolution process because it failed to comply with the time requirements set forth in the contract for resolving claims. The court was not convinced with this argument.

Essentially what the contractor was arguing was that an implied waiver, or waiver by estoppel, existed. Waiver by estoppel exists where the conduct of a party is inconsistent with the party's intent to claim a right, which misleads and prejudices the other party. The effect of such conduct is that the party that claims the right is prevented from doing so.

The court, however, provided that the owner did not conduct itself inconsistently with its intent to follow the contract's dispute resolution procedures. In fact, the project manager actually insisted upon following the contract's claim submittal procedures when it informed the contractor that it would have to file a claim according to the contract terms.

The contractor also attempted to have the court rescind the liquidated damages. The contractor claimed that the liquidated damages were the result of the owner's failure to properly manage the project schedule.

Again, the court was not convinced by the contractor's argument. An original baseline schedule was signed, and therefore accepted, by all the contractors. The HVAC contractor even signed an updated baseline schedule. At no time did the schedule's completion date change, and at no time did the contractor make a valid request for an extension of the contract time. Because the contractor did not request an extension of time or prove that the owner was responsible for the delay, the owner properly applied liquidated damages against the contractor for failing to complete the project according to the contract's schedule.

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

These Rules represent our collective wisdom, over 100 years of construction law experience and over 100 years of construction experience. While no one can guarantee success, we believe that if an Owner understands and follows these Rules, the Owner will have a successful project. We emphasize the need for deep understanding of the Rules. To help you, we 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 constructability review by your construction manager.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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.

Bricker & Eckler LLP Presents An Interactive Workshop

The 3rd Annual

Bidding for Public Construction Contracts in Ohio

WHEN

Friday, March 30, 2012

Registration will begin at 7:30 a.m. Program begins at 8:00 a.m. Program concludes at 4:45 p.m.

LOCATION

The Conference Center at OCLC
6600 Kilgour Place, Dublin, Ohio 43017-3395
614.761.5077

COST*

$199

- Early bird registration through March 9, 2012
- Members of sponsoring organizations

$239

- Regular registration

Special Rates

- Two or more from same organization—Call for special pricing

** Additional 10% discount for 2011 Top Gun attendees*

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