

The Construction Conversation

Ohio's Legislative, Administrative, and Judicial Two-Way Newsletter

May, 2023

A Service of Luther L. Liggett, Attorney at Law
LLiggett@columbus.rr.com

Legislative: Eliminating Competitive Bids

Senate Bill 23 and House Bill 145 would allow any Ohio political subdivision to avoid competitive bidding for construction contractors, merely by joining with another subdivision that participates in a "joint purchasing program" operated by a trade association. (Cont'd p. 2.)

Legislative: Special Election to Change Constitutional Rules

Senate Joint Resolution 2 passed the General Assembly to require a vote of at least 60% of the electors to approve any constitutional amendment, and to set an August election to pre-empt a November vote on abortion rights. (Cont'd p. 2.)

Legislative: Building Code Process At Risk

House Bill 65 and Senate Bill 67 would allow an applicant for a local building permit to seek such permit from any building department in the state, if the local building department "is unable to... issue a permit" in 5 days. (Cont'd p. 2.)

Judicial: Landscape Architect Recovers Against Non-Signatory Spouse

A Landscape Architect successfully sued a husband and wife for unpaid invoices, even though the wife had not signed the contract, on the basis of her own actions showing her interests. (Cont'd p. 2.)

Judicial: Plumber Pays for Another to

Finish Job

A licensed Plumber sued a homeowner after completion of a bathroom and kitchen sink, for which homeowner paid in part, but had to hire another plumber to finish. (Cont'd p. 3.)

Administrative: OFCC Subcontractor Pre-Qualification

The Ohio Facilities Construction Commission has been asked to implement Pre-Qualification Criteria as required in law for Construction Managers at Risk and Design-Build projects. (Cont'd p. 3.)

Judicial: Contract Precludes Unjust Enrichment

Homeowners sued a Pool Contractor company and its corporate owner for both breach of contract and unjust enrichment, seeking to "pierce the corporate veil". (Cont'd p. 4.)

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Legislative: Eliminating Competitive Bids (Cont'd)

Sponsored by Senator George Lang (R, West Chester) and Representative Thomas Hall (R, Middleton), the bills follow prior-session Senate Bill 260.

Senator Lang offered the rationale in Sponsor Testimony that this change would “allow for the efficient, expedited, and professional process of contract administration.”

The Associated General Contractors have testified in opposition, with additional opposition from the Mechanical Contractors Association of Ohio and the National Electrical Contractors Association, Ohio/Michigan Chapter.

SB 23 was reported out of Committee and awaits a floor vote, while HB 145 has enjoyed only two hearings with no opportunity for opponent testimony.

Of concern is adding such legislation into the Budget Bill notwithstanding opposition.

Legislative: Special Election to Change Constitutional Rules (Cont'd)

In addition, voter initiatives would require minimum signatures from all 88 Counties, instead of the current requirement of half.

Historical infrastructure, housing, and the Third Frontier programs would not have passed with that super majority requirement.

Opponents filed suit to stop the Special Election as in violation of state law, which prohibition remains unchanged since

the August election was passed not as a law but merely as a resolution.

The Ohio Ballot Board certified ballot language and designated arguments for and against (accompanying this Newsletter).

Legislative: Building Code Process At Risk (Cont'd)

Sponsored respectively by Representatives Jamie Callender (R, Concord) and Sarah Fowler (R, Ashtabula), and Senators Jerry Cirino (R, Kirkland) and Sandra O'Brien (R, Rome), the legislative committees only heard Sponsor Testimony before moving the proposal into the 4,000-page Budget Bill.

As a result of the move, neither bill required Proponent Testimony to explain the need for such legislation, nor Opponent Testimony explaining the problems with the legislation.

Opposed are the Ohio Building Officials Association, the Ohio Municipal League, and the American Institute of Architects, Ohio Society.

Judicial: Landscape Architect Recovers Against Non-Signatory Spouse (Cont'd)

The law requires “privity of contract” before a party can sue for breach. Typically, the unpaid party sues the signatories, and not persons who are otherwise not named in the contract.

The draft contract named both husband and wife, but when returned was only signed by the husband. The wife had attended all meetings to discuss details of the design.

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When the Landscape Architect sent its first invoice, the owners paid with a check from the wife's trust account.

The husband then contacted the Landscape Architect studio to add work; another invoice followed, along with preliminary work.

When the Landscape Architect sued both husband and wife for payment, the owners sued for return of their initial payment.

The Court of Appeals held that a contract is implied-in-fact if the surrounding circumstances show a meeting of the minds as to the parties in privity. The law does not require a written agreement in general. "If one party failed to execute a written contract, yet the parties proceeded to act as if the contract was in effect, the contract is enforceable."

Stride Studios, Inc. v. Alsfelder, 1st Dist. Hamilton, 2023-Ohio-1502

Judicial: Plumber Pays for Another to Finish Job (Cont'd)

The Plumber did not trust the homeowner to pay, so drafted a contract himself, which homeowner signed.

The Plumber's tools were stolen from the jobsite, so he filed a police report and added the value to the homeowner's invoice.

Having paid the amount in the contract, and not the amount the Plumber invoiced, the homeowner refused to pay more because of a drain leak. Homeowner believed the Plumber was to "completely fix everything" per the contract language, but had to hire another plumber to finish.

The court found that the parties had a contract, but that the Plumber did not present any evidence of completed work, or that the value exceeded the payments. The contract was more in the nature of a performance contract scope of completed items, which the Plumber failed to complete.

Because the homeowner offered some evidence to support his viewpoint, the court of appeals affirmed.

While the amount in controversy might not seem worth the employment of an attorney, nevertheless the Plumber's drafting of a contract is the unauthorized practice of law. The Plumber's failure to present prima facie evidence for his claim needed a lawyer's expertise, and lost the case.

Hudson v. Jones, 5th Dist. Richland, 2023-Ohio-1447

Administrative: OFCC Subcontractor Pre-Qualification (Cont'd)

Over a decade ago, the Ohio General Assembly enacted "Construction Reform" for public projects, specifically enacting requirements to insure the use of qualified skilled trades subcontractors.

Pursuant to that law, Ohio Administrative Code 153:1-7-01(B) requires that "A construction manager at risk or a design-build firm shall establish criteria for the prequalification of prospective bidders on subcontracts...".

R.C. 153.03(B) requires that OFCC set forth standards to be followed by CM's at risk and design-build firms "when establishing prequalification criteria...".

R.C. 153.02 provides that, "The criteria established by a construction

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manager at risk or design-build firm shall be subject to the approval of the public authority involved in the project and shall be consistent with the rules adopted by the Ohio facilities construction commission...”.

However, to date, OFCC has not enacted Prequalification Criteria. As a result, CM’s at Risk and Design-Build firms simply employ their favored subcontractors with no competitive criteria.

The National Electrical Contractors Association, Ohio/Michigan Chapter, and the Mechanical Contractors Association of Ohio submitted proposed criteria to OFCC, based on prior Quality Contracting criteria adopted by Franklin County in 2002. The Ohio Supreme Court upheld those Qualitative Contracting Standards as legally enforceable.

To be effective, the Criteria need to be ministerial and not discretionary, or self-evident, thus avoiding a challenge by a disqualified subcontractor. Effective Criteria encourage qualified Subcontractors to offer subcontracting bids, not having to compete with unqualified bidders.

We await the OFCC’s response in formulating these standards.

Judicial: Contract Precludes Unjust Enrichment (Cont’d)

After the homeowners paid much of the cost, cracks developed in the concrete. Homeowners then hired another contractor to finish the project.

The Court of Appeals reversed the trial court for finding both breach of contract and unjust enrichment for the same work, without separating the damages.

Damages for breach is the amount necessary to place the nonbreaching party in the position had the other performed fully. This entitled the homeowners to only the cost of repair exceeding the contract price.

Damages for unjust enrichment in the absence of a contract prevents a party from keeping funds that belong to another.

Bova v. B&J Pools, Inc., 7th Dist. Mahoning, 2023-Ohio-1680

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Join us in

The Construction Conversation Call-In

on

Wednesday, June 17, 2023

3:30 p.m.

Luther L Liggett is inviting you to a scheduled Zoom meeting.

Join Zoom Meeting

<https://us02web.zoom.us/j/89320466679?pwd=V0dtMWkyOHBsTVJ0QjJWcDJ0eXNtZz09>

Meeting ID: 893 2046 6679

Passcode: 925371

One tap mobile

+13126266799, 89320466679# US
(Chicago)

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