



SUMMER 2015

## Contracting with Architects and Engineers – what’s required today?

**An Update since Construction Reform**

### IN THIS ISSUE

- **Contracting with Architects and Engineers – what’s required today?**
- **Federal Trial Court Addresses the Use of the Engineer’s Standard of Care as a Contract Term**
- **Bricker’s Top Gun Construction Claims Seminar**

Ohio’s Design Services Law (also often referred to as Ohio’s Qualifications-Based Selection Law) as originally enacted in 1988 applied to the State of Ohio and its agencies. In 1995 the qualifications-based selection (QBS) law was expanded to apply to other public authorities.<sup>1</sup> The law remained virtually unchanged, with the exception of an added provision that specifically stated no fee information for design services could be requested prior to the ranking of firms based upon qualifications,<sup>2</sup> until 2011; at that time, HB 153 implemented construction reform, which allows the State and all public authorities to use design-build services for public construction projects. In addition to adding the required QBS process for the selection of a design-build firm, the Design Services Law included other changes. One of these was the deletion of the \$25,000 threshold for design services costs, below which the law did not previously apply.

When is the QBS process required for design services? As defined in Ohio Revised Code (ORC) Section 153.65(C), “professional design services” means “any services within the scope of practice of an architect or landscape architect registered under Chapter 4703. of the Revised Code or a professional engineer or surveyor registered under Chapter 4733. of the Revised Code.” With the elimination of the \$25,000 threshold, the statutory process applies to any design services contract, no matter the cost. For example, survey services, which often cost less than \$1,000, are subject to the process.

The revisions to the process did include a new exception. If the professional design fee will be less than \$50,000, **and** the public authority maintains a file with current qualifications (the qualifications must have been submitted within the immediately preceding year), the public authority may select a design professional or firm determined to be most

qualified to provide the required services from the qualifications in the file.<sup>3</sup> ORC Section 153.68, which has been part of the Design Services Law since it was first enacted, permits public authorities to “institute prequalification requirements” and maintain files with current qualifications for use when the public authority requires design services.

One other exception to the Design Services Law was included in the original legislation and remains. The public authority head may determine in writing that a project is “an emergency requiring immediate action.”<sup>4</sup> In this situation, the QBS process is not required.

### **Overview of the QBS Process for a design professional, including a criteria architect or criteria engineer for a project using the design-build delivery model (selection of a design-build firm requires other steps outlined in both the ORC and the Ohio Administrative Code)**

1. Determine if the design services are subject to the QBS process.
  - Are the services within the scope defined for a registered architect<sup>5</sup> or engineer<sup>6</sup>?
  - Will the cost of services be less than \$50,000 AND does the public authority have a file with current qualifications from design firms for the required services?
  - Has the public authority head determined the project is an emergency requiring immediate action?
2. If the QBS process is required, issue a public announcement or notice of the available contract for design services.
  - No prescribed time period between the announcement and the time for submitting qualifications.

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- Options for how notice is issued: (1) send to architect, landscape architect, engineer and surveyor associations; (2) news media; or (3) any publications or other public media, including electronic media.
3. Review, evaluate, and rank the qualifications received.
    - Interviews are not required.
    - Ranking 3 firms is required by the ORC, unless fewer than 3 firms submit qualifications or are determined qualified to provide the required services; if fewer than 3 firms are ranked, the public authority must determine in writing that fewer than 3 firms are available.
    - No estimate or measure of compensation can be requested from a design firm prior to selecting and ranking firms.
  4. Select the design firm ranked most qualified for the contract.
  5. Negotiate a contract with the firm ranked most qualified.
    - If the parties are unable to negotiate a contract, the public authority must give written notification to the firm ranked most qualified that the negotiations are terminated; then the public authority may begin negotiations with the design firm ranked next most qualified.
    - Design firm must provide professional liability insurance, unless the public authority waives the requirement or accepts another assurance of financial responsibility.

Note that the public authority may only reject the recommendation of an interview committee for selection of the most qualified design firm and award of a contract for design services if it finds 1 of 6 items defined in Ohio Administrative Code (OAC) 153:1-1-03 exists for the design firm or the QBS process. This section of the OAC became effective March 27, 2014.

The OAC contains 2 other sections that amplify the Design Selection Law. However, these 2 sections are limited in application to the State. “State” is defined in OAC 153:1-1-01 as:

any organized body, office, or agency established by the laws of this state for the exercise of any function of state government; or any institution of higher education as defined in section 3345.011 of the Revised Code. The “state” does not include the department of

transportation or the Ohio turnpike commission when engaging professional design services for transportation projects.

### Using Prequalified Design Firms

The Design Services Law permits public authorities to prequalify design firms and to select design firms that have current qualifications on file with the public authority if the estimated cost for design services will be less than \$50,000. For public authorities other than the State, the ORC and OAC provide no further guidance or direction on the process to prequalify firms or to maintain a file with current qualifications. For the State, OAC 153:1-1-02 provides a process for selecting the most qualified design firm from the list of prequalified firms maintained by the State. This process appears to be separate from the ORC 153.71(A) exception to the QBS process.

Non-state public authorities can determine their own process for establishing a file with qualifications from design firms to use when the estimated cost of services will be less than \$50,000. The public authority may formally authorize the establishment and maintenance of the file with qualifications separate from a QBS process for a specific project. The public authority could more informally, through administrators without formal board, commission, or council action, establish a file by soliciting qualifications from design firms to provide various architecture and engineering services. If the public authority is soliciting qualifications for a specific project, it can also indicate that qualifications received in response to the RFQ will be placed in the public authority’s file for current qualifications. The public authority can notify firms that they are responsible to update qualifications on an annual basis, or the public authority can follow up with firms individually to request updated qualifications when specific services are required for which the estimated cost will be less than \$50,000.

### Conclusion

The QBS process required for public authorities can be tailored to a specific project, depending upon the size and complexity of the construction project, as long as the essential steps required by the ORC are followed. Consult legal counsel for assistance to define a process and document it appropriately, as well as to prepare a design services agreement with the firm selected as most qualified to provide the required services.

Summary of Changes to the Design Services Law	Things that remain the same
<ol style="list-style-type: none"> <li>1. The exemption from the QBS process when design services compensation is estimated to be less than \$25,000 was eliminated.</li> <li>2. All design services contracts are subject to the QBS process, unless: <ul style="list-style-type: none"> <li>• The public authority maintains a file with current qualifications and the estimated cost of design services will be less than \$50,000.</li> <li>• The public authority head determines in writing that there is an emergency requiring immediate action.</li> </ul> </li> <li>3. The announcement or legal notice may now be issued through electronic media, if the public authority considers this appropriate. PublicNoticesOhio.com is the official website for posting Ohio public notices. This is a service provided by the Ohio Newspaper Association and, effective September 15, 2014, replaced the previous Ohio public notice website (part of the Ohio Business Gateway). A newspaper publishing the notice should also post the notice to this website.</li> <li>4. Design-build firm selection requirements are included in the ORC and OAC; this is a 2-step process and includes both qualifications and pricing, both of which are evaluated to determine the design-build firm that will provide the best value for the project. The required criteria architect/criteria engineer for a design-build project is selected following the QBS process.</li> </ol>	<ol style="list-style-type: none"> <li>1. Contracts for architecture and engineering services are subject to the statutory QBS process. <ul style="list-style-type: none"> <li>• Architecture includes planning and programming, as well as all design services.</li> <li>• Engineering includes surveyors, geotechnical services, soil borings, construction materials testing and inspection, abatement, investigations, and commissioning services, all of which are provide by or overseen by currently registered engineers.</li> </ul> </li> <li>2. The process remains essentially the same.</li> <li>3. No fee estimate or measure of cost of services may be requested from firms before the ranking and selection of the most qualified design firm.</li> </ol>

### End Notes

<sup>1</sup> “Public authority” is defined in ORC Section 153.65(A) (1) as “the state, a state institution of higher education as defined in section 3345.011 of the Revised Code, a county, township, municipal corporation, school district, or other political subdivision, or any public agency or authority, board, commission, instrumentality, or special purpose district of the state or of a political subdivision.” “Public authority” does not include “the director of transportation when exercising the director’s authority to prepare plans for, acquire rights-of-way for, construct, or maintain roads, highways, or bridges.” ORC Section 153.65(A)(2) (effective July 1, 2013).

<sup>2</sup> ORC Section 153.691 (effective Sept. 26, 2003)

<sup>4</sup> ORC Section 153.71(A) (effective Sept. 29, 2011)

<sup>5</sup> ORC Section 153.71(B) (effective Sept. 29, 2011)

<sup>6</sup> OAC 4703-1-01(B) defines the “Practice of Architecture” as “providing or offering to provide those service, hereinafter described, in connection with the design and construction, enlargement, or alteration of a building or group of buildings and the space within and the site surrounding such buildings, which have as their principal purpose human occupancy or habitation, except where

otherwise exempted by sections 3781.06 to 3781.18 and 3791.04 of the Revised Code. The services referred to include pre-design, programming, planning, providing designs, drawings, specifications and other technical submissions, the administration of construction contracts, and the coordination of any elements of technical submissions prepared by others including, as appropriate and without limitation, consulting engineers; providing that the practice of architecture shall not include the practice of engineering as defined in Chapter 4733. of the Revised Code, but a registered architect may perform such engineering work as is incidental to the practice of architecture.”

<sup>6</sup> ORC Section 4733.01(E) states that “[t]he practice of engineering’ includes any professional service, such as consultation, investigation, evaluation, planning, design, or inspection of construction or operation for the purpose of assuring compliance with drawings or specifications in connection with any public or privately owned public utilities, structures, buildings, machines, equipment, processes, works, or projects in the proper rendering of which the qualifications of section 4733.11 of the Revised Code are required to protect the public welfare or to safeguard life, health, or property.”

# Federal Trial Court Addresses the Use of the Engineer's Standard of Care as a Contract Term

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Ohio Revised Code 2305.09(D) establishes the time limitation for suing somebody for most types of negligence (i.e. “tort”) as four years. That raises the question: Four years from when? The answer is four years from when the cause of action accrues, which, of course, leads to more questions about what constitutes an “accrual.” Sometimes the cause of action accrues long after the occurrence of a negligent act, such as when defective construction is discovered years after the work is completed. That is known as “delayed damages” or the “discovery rule.”

For professional negligence, a specific type of negligence committed by engineers, architects, accountants, and other certain licensed professionals (as opposed to “malpractice,” which is limited to attorneys and medical professionals) R.C. 2305.09(D) still applies. Professional negligence is generally defined as failing to meet the standard of care established by similar professionals in the same area and at the same time. It typically requires expert testimony to prove.

For some time now, Ohio courts have not given plaintiffs suing for professional negligence the advantage of the delayed damages theory, ruling that the cause of action accrues when the negligent act is committed. For engineers and architects, this usually means that the cause of action accrues when the drawings or report are issued. This creates problems for plaintiffs in negligence because it could be a while before a contractor gets around to building the design (and even longer for a defective design to be discovered), leaving a plaintiff with a negligence claim with a very short window to file suit, or perhaps none at all.

For someone with a contract with an engineer or architect, this is usually not a problem, because that person can sue in contract, which has an eight-year statute of limitations in Ohio. However, a complication often lies in determining what term in the contract has been breached when the construction project does not perform as desired. That can be hard to nail down. Many form contracts, including those published by the American Institute of Architects and the Engineers Joint Contract

Document Committee, address this problem by incorporating the standard of care as an express “catch all” contract term.

That raises the question of how the courts in Ohio would treat the standard of care being used in a contract. Would they hold that a tort is a tort and should not be considered as an action in contract, applying the four year statute of limitations with no delayed damages for accrual of the cause of action? Or would they hold for freedom of contract and allow a tort concept to be enforced by contract, if the parties had agreed to it previously?

The U.S. District Court for the Northern District of Ohio recently addressed this issue in *Life Time Fitness, Inc. v. Chagrin Valley Engineering, Ltd.*, 2014 U.S. Dist. LEXIS 168216. In this case, both an owner and its wholly owned general contracting company sued the engineering company hired by the owner to design a parking lot, alleging that the engineering company failed to follow the recommendations of the owner’s geotechnical engineer, who had evaluated the site prior to the owner hiring the engineer.

Despite having a contract with the engineer, the owner sued in tort as well as for breach of contract, citing to a provision in the contract requiring the engineer to perform its work using “high professional standards and good professional skill and judgment,” another way of stating the engineer’s standard of care. The engineering company asked the trial court to grant it summary judgment, arguing that the owner was impermissibly trying to characterize a tort claim as a contract claim in order to get by the statute of limitations for tort, which had passed. But the engineering company could cite no case law prohibiting the incorporation of the standard of care into a contract and the court had no problems with the concept. The court overruled the engineer’s motion with regard to the breach of contract claim and applied the longer statute of limitation to the claim, allowing the case to proceed to trial. At trial, expert testimony will likely be used by both parties to address the question of whether the engineer breached the standard of care required by the contract.





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- 7:15-7:45 **REGISTRATION**
- 7:45-8:00 **WELCOME & INTRODUCTIONS**  
**Jack Rosati, Jr., Esq.,** *Bricker & Eckler LLP, Construction Group Chair*
- 8:00-9:00 **BEGINNING A PROJECT – Decision Points**  
**Chris McCloskey, Esq.,** *Bricker & Eckler LLP*  
**Ben Hyden, Esq.,** *Bricker & Eckler LLP*
- Impact of initial project decisions on claims
  - Types of claims
  - Choosing a project delivery method
  - Selecting project professionals
  - Types of documents – professional services and construction contracts
- 9:00-9:30 **BEGINNING A PROJECT – Decision Points (continued)**  
**Jack Rosati, Jr., Esq.,** *Bricker & Eckler LLP*  
**Laura Bowman, Esq.,** *Bricker & Eckler LLP*
- Examples of possible claims in each delivery model – GC, CMR, DB, and multiple prime
- 9:30-9:45 **BREAK**
- 9:45-10:30 **STRATEGIES FOR MINIMIZING CLAIMS – Insurance & Bonds**  
**Doug Shevelow, P.E., Esq.,** *Bricker & Eckler LLP*  
**Joseph Urquhart, CPCU,** *Overmyer Hall Associates*
- Review basic insurance concepts and types
  - Review typical insurance requirements for a construction project
  - Types of claims under insurance
  - Role of the surety on a construction project – contractor default?
  - Professional liability insurance for design professionals and other consultants
- 10:30-11:00 **STRATEGIES FOR MINIMIZING CLAIMS – Project Documentation**  
**Ben Hyden, Esq.,** *Bricker & Eckler LLP*  
**Bill Zollinger, NV5**
- Tips for project documentation and administration
- 11:00-12:00 **STRATEGIES FOR MINIMIZING CLAIMS – Project Schedule**  
**Mark Evans, P.E., Esq.,** *Bricker & Eckler LLP*  
**Bob Vail, VN Services**
- Schedule approaches and analysis. Managing the time=money equation
  - Examples of schedule claims and strategies for managing time-related claims
- 12:00-1:00 **LUNCH**
- 1:00-2:00 **SPECIFIC CLAIMS – Unforeseen Site Conditions**  
**Doug Shevelow, P.E., Esq.,** *Bricker & Eckler LLP*  
**Desmond Cullimore, P.E., BCEE, Esq.,** *Bricker & Eckler LLP*
- Who bears the risk for unforeseen site conditions?
  - Can an owner disclaim liability for unforeseen site conditions?
  - Common contract provisions that address unforeseen site conditions
  - Tips on how to successfully resolve an unforeseen site condition claim
- 2:00-3:00 **SPECIFIC CLAIMS – Lien & Bond Claims and Errors & Omissions**  
**Chris McCloskey, Esq.,** *Bricker & Eckler LLP*  
**Desmond Cullimore, P.E., BCEE, Esq.,** *Bricker & Eckler LLP*
- Mechanic lien claims on public and private sector construction projects
  - Bond claims
  - Claims against the design professional
- 3:00-3:15 **BREAK**
- 3:15-4:15 **SPECIFIC CLAIMS – Defective and Nonconforming Work**  
**Chris McCloskey, Esq.,** *Bricker & Eckler LLP*  
**Tarik Kershah, Esq.,** *Bricker & Eckler LLP*  
**Bob Sewell,** *Gilbane Building Company*
- Methods for addressing critical failures in performance and managing resolutions
  - Examples of claims for defective and nonconforming work
- 4:15-4:45 **DISPUTE RESOLUTION**  
**Tarik Kershah, Esq.,** *Bricker & Eckler LLP*  
**Sam Wampler, Esq.,** *SansCourt LLC*
- Project level resolution, mediation, arbitration, and litigation

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