

The Construction Conversation

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

October, 2023

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Legislative: Contractor Debarment

Senate Bill 133 is sponsored by Senators Paula Hicks-Hudson (D, Toledo) and Bill DeMora (D, Columbus), which would limit the length that the State of Ohio might debar a construction contractor from participating in state construction contracts. (Cont'd p. 2.)

Administrative: OFCC Receives Green Building Award

The United States Green Building Council awarded the Ohio Facilities Construction Commission with its "Leadership Award" in recognition of OFCC's commitment to advancing the green building industry. (Cont'd p. 2.)

Judicial: After-The-Fact Invoice Terms Not Binding

A Court of Appeals has held that a contractor's terms including Interest Rate do not constitute a "written contract" when the customer signs after the contractor finished construction services. (Cont'd p. 2.)

Judicial: Actions Waive No-Oral-Modification Provision

A Court of Appeals affirmed a change order where a homeowner implicitly modified the original contract, thus waiving the no-oral-modification clause, constituting an equivalent "change order". (Cont'd p. 3.)

Administrative: OCILB October Actions

The Ohio Construction Industry Licensing Board adopted procedures to

process out-of-state applicants under Senate Bill 131's requirements. The Board also welcomed a new Board member for the HVAC Section. (Cont'd p. 3.)

Administrative: OFCC Projects

A leading indicator of future construction projects by public agencies and institutions is their initial Qualifications-Based Selection of design professionals, selected through the Ohio Facilities Construction Commission. (Cont'd p. 3.)

Administrative: OFCC Who's Who

The Ohio Facilities Construction Commission was organized in 2012 by merging the prior State Architect's Office with the funding agency Ohio School Facilities Commission, in response to the school funding decisions of the Ohio Supreme Court. (Cont'd p. 3.)

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Legislative: Contractor Debarment (Cont'd)

The legislation was introduced on July 18, 2023, but only assigned to the Senate Judiciary Committee two months later. Hicks-Hudson is an attorney, and ranking Minority Member on the Committee.

The Directors of the Departments of Administrative Services, Transportation, and Ohio Facilities Construction Commission currently have the discretion to debar construction contractors and vendors from participating in future contracts.

However, the disqualification criteria are vague and not mandatory, with no limitation on the period of debarment.

SB 133 would create a maximum debarment period of a minimum of one (1) year to a maximum of three (3) years.

In addition, SB 133 would create categories of mandatory debarment, such as for colluding to restrain competition.

A first hearing for Sponsor Testimony has not been scheduled.

Administrative: OFCC Receives Green Building Award (Cont'd)

OFCC first adopted the “leadership in Energy and Design (LEED®) standard in 2007 for Ohio school construction. Since that time, OFCC has certified 421 LEED projects, using a third less energy and water resources. This number is the most of any state or province in the world.

“When Ohio adopted LEED® as the standard for the state’s K-12 building in 2007, our initial focus was on energy

savings. Since then, our school districts have benefited not only from financial savings but also from meeting standards that make school buildings healthier and more engaging places to learn,” said OFCC Executive Director Cheryl J. Lyman.

Judicial: After-The-Fact Invoice Terms Not Binding (Cont'd)

An HVAC trades contractor had an ongoing business relationship with the owner of an apartment complex. After three unpaid invoices totaling \$3,198.96, the contractor sued.

Each Invoice contained language that the customer would be liable for 18% interest and attorney fees thirty-days past due. For such a small amount owed, the attorney fees provision was important.

The customer did not deny that the contractor performed. However, the customer claimed a lack of any agreement or consideration for the added costs.

R.C. 1343.03 requires that, to enforce an interest rate higher than the statutory rate, the parties must enter into a written agreement signed by both. An after-performance invoice is not a contract.

In this case, the customer signed the Invoices, but after performance of the construction services. Therefore, the Court held that there was no consideration for the added costs. Only the original price and scope of services were agreed to before construction.

Sal’s Heating & Cooling, Inc. v. Harbour View Assoc., Ltd. 8th Dist. Cuyahoga, 2023-Ohio-3632.

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Judicial: Actions Waive No-Oral-Modification Provision (Cont'd)

In 2020, Cuyahoga County mandated connection of home septic sewer systems to the county sewer system. Homeowner hired contractor to modify the system accordingly, signing a contract for only \$8,500.00.

Upon inspection, the County directed additional work before approval. The homeowner verbally authorized the work, but the contractor did not put such agreement in writing, nor give a price.

The additional work cost an additional \$20,000.00. The homeowner only paid half, so contractor sued.

The courts agreed that a contract can be modified by oral agreement notwithstanding a term in the original contract that all amendments be in writing. The oral agreement amends this restriction.

The fact that no price was agreed upon means that the cost only need be reasonable, enforceable by the contractor with proof of its costs.

The homeowner also sued for a violation of the Consumer Sales Practices Act. Because the statute requires advance approval of price, the contractor violated this statute. Since the homeowner suffered no actual damages, the homeowner only could recover the statutory penalty of \$200.00.

ABV Corp. v. Cantor, 8th Dist. Cuyahoga, 2023-Ohio-3363

Administrative: OCILB October Actions (Cont'd)

SB 131 requires the OCILB to allow

an individual to take the appropriate specialty contractor license examination if the individual meets certain requirements and has a substantially similar out-of-state occupational license or similar experience in the trade.

In a separate action, the OCILB determined not to require a letter from the contractor after failing to timely renew three times. If the contractor does not complete the renewal requirements, the Board will not issue the license.

A significant issue in applying originally to take the test is for the applicant to provide evidence of 5 years' experience in the particular trade. In the past, the Board required 5 years' building permits for projects on which the applicant was involved.

The new policy will allow a permit for each of 5 years as one option. However, new options include a Journeyman's card in the trade, or taking 40 hours of code classes in the trade.

The HVAC/Refrigeration Board revoked the license of an HVAC contractor for advertising two business names for a single license. This was the contractor's second offense.

Angela Crawford, owner of Air Supply Heating and Cooling, joined the HVAC/Refrigeration Section as a licensed HVAC contractor.

Administrative: OFCC Projects (Cont'd)

Design-Build or Construction Manager at Risk teams can include trades engineers and contractors. Pending large projects include the following:

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The University of Cincinnati will select a CM at Risk for \$240 million to construct a new Science, Technology, Engineering and Math academic and research facility.

The Ohio State University will select a Construction Manager at Risk to renovate a 25,560 square foot warehouse for the Battery Cell and Research and Demonstration Center, \$20 million.

\$3.975 million, OSU Hospital Roof Replacement, Architect and Engineer.

\$3.283 million, Ohio National Guard Akron Readiness Center renovation, Architect and Engineer.

\$7.5 million Miami University expansion, Miami Tribe of Oklahoma initiative, Architect and Engineer.

\$8 million, University of Cincinnati, Gettler Stadium Improvements, Architect and Engineer.

\$3.8 million, Ohio Department of Transportation Geauga County Outpost replacement, Architect and Engineer.

Ohio University in Athens will select a Design-Build team to connect the Memorial Auditorium Building to the chilled water distribution system, along with electrical lighting upgrades, estimated at \$1.7 million.

For submission details, see the OFCC website, "Project Opportunities".

Administrative: OFCC Who's Who **(Cont'd)**

The Commission itself consists of the Directors of the Department of

Administrative Services, the Office of Budget and Management, and one other cabinet director at the Governor's discretion.

Non-voting members include a Senator and Representative from each party.

Cheryl J. Lyman has served 4 years as Executive Director. Her previous employment includes as Budget Director for Otterbein University, and work for The Ohio State University. She holds degrees from the University of Virginia.

Craig Weise has served with the OFCC since its formation, currently as Chief of Projects. He was integrally involved in developing the variety of construction delivery systems and documents, including Construction Manager at Risk and Design-Build.

Jeff Westhoven as Chief of Program Services has worked at OFCC for a decade, among other duties in charge of energy retrofit efforts. He created the Office of Energy Services at the Department of Administrative Services, where he served six years as a Deputy Director.

Melanie Drerup is OFCC's Chief of Planning, well-known for leading the State's commitment to LEED® certifications for environmental design. She also is responsible for updating the OFCC Design Manual.

Bill Dulaney currently serves as Chief Legal Counsel, a graduate of the University of Dayton School of Law, with 35 years in private practice.

To review the OFCC's Annual Report, all Executives and contact information, see:

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<https://ofcc.ohio.gov/about-ofcc/executive-leadership>

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Join us in

The Construction Conversation Call-In

on

Thursday, November 16, 2023

3:30 p.m.

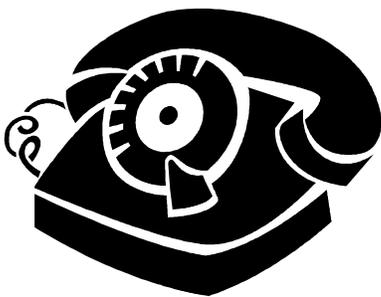
Join Zoom Meeting

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Meeting ID: 848 6232 8665

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