



The Contracting Community Has a Say in OFCC Contracts

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Many of us have heard the old saying that “decisions are made by those who show up.” The Ohio Facilities and Construction Commission (“OFCC”) is currently giving design and construction professionals involved in the construction of public schools the opportunity to show up, or more accurately speak up, to provide comments on contract general conditions and specifications of OFCC, including those in the Ohio School Design Manual (“OSDM”), as well as on the materials and methods of design used in the OSDM. This comment period offers industry professionals an important chance to provide input on the construction documents that control school construction projects throughout Ohio. It is crucial that design and construction professionals take this opportunity to give its opinion on current issues, as well as potential issues that may impact the industry in the coming years. Interested parties have until **February 15, 2019** to submit comments on materials and methods of design used in the OSDM, and until **March 1, 2019** to provide comments on OFCC's contract documents.

OFCC Contract Documents

The OFCC targets a five-year cycle to update its contract documents. Although its contract documents have been updated twice since Ohio's construction reform in June 2011, OFCC recently started its process to review and revise its contract documents. After the public comment period ends on March 1, the OFCC will create small committees to draft the new documents. In 2020, OFCC expects to produce a new and revised Architect/Engineer agreement, multiple-prime contract, general construction contract, construction manager at risk contract, design-build contract, and consultant agreements. These revised agreements serve as a template that public owners may use to bid public projects. The OFCC has stated that the intent of the new documents is to balance the interests of public owners, architects and engineers, contractors, and subcontractors.

OFCC's expected revisions include a requirement that contractors identify all subcontractors and consultants to be used during construction, particularly on guaranteed maximum price (“GMP”) contracts. The OFCC is interested in approving subcontractors and consultants before submission of GMP bids.

Contractors have long sought greater fairness in Ohio's public contract documents. Historically, public owners have held the upper hand in contract negotiation and project control. Contractors will seek to improve contract language regarding shared saving clauses, payment terms, contractor self-performance, and inconsistencies in public contracts that vary by district.

OSDM Documents

One issue that industry professionals may want to comment on is the OFCC's unreasonable interpretation of the intended-life-span and/or durability requirements of certain specifications in the OSDM, including those that exceed Ohio's 10-year statute of repose. For instance, the OSDM contains a requirement that structures and exterior enclosures “be designed and constructed of materials which will perform satisfactorily for 40 years, with only minor maintenance and repairs, and for 100 years before major repairs or replacement of primary structural or exterior enclosure elements is required.” The OFCC has taken the position in litigation that this requirement constitutes an express 40- or 100-year warranty, and therefore the 10-year statute of repose provided by R.C. 2305.131 does not apply. The industry must

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demand the contract documents be clarified to confirm that Ohio's relevant statutes of limitations and/or statute of repose are the outside limits on claims. The OFCC's current interpretation places an unreasonable risk on design and construction professionals, forcing them to bear project risks decades after the period defined by the statute of repose. Furthermore, it negatively impacts the surety and insurance industry, as sureties will not agree to bear risks for decades after project completion and, if they do, the required premiums will be astronomical to account for such risks. Industry professionals must let the OFCC know this interpretation is unacceptable and must be clarified, either in the OSDM itself or by contract.

Another issue industry professionals may ask the OFCC to consider is a mechanism for equitable adjustments to be made due to significant and unforeseen increases in material and labor costs. These increases occur due to a variety of geographic, political, and economic factors. As a result, public construction bids for lump sum and GMP contracts are becoming more difficult to price out—particularly when the project schedule is to last over a period of years or for projects that are delayed between design and construction. Over the last two years, the price of steel, drywall, copper, concrete, and wood have increased 10-40 percent. Failure to account for rapidly fluctuating pricing after the award of a project leads to costly and time-consuming disputes and claims. Failure to identify and remedy these cost increases also leads to delay and subcontractor/material supplier default. The OFCC must address this issue, and allow for equitable adjustments to be made for significant and unforeseen price increases of materials and labor.

Bottom line:

Industry professionals are strongly encouraged to take advantage of this rare opportunity to influence the contents and interpretation of the OSDM and other OFCC contract documents. The period for comments on the materials and methods of design used in the OSDM is open until Friday, February 15, and comments should be submitted to eugene.chipiga@ofcc.ohio.gov. Those wishing to provide comments on OFCC contract documents have until Friday, March 1, to go to <https://ofcc.ohio.gov/services-programs/Contracts-Documents-Update> and complete the OFCC's survey. Remember: decisions are made by those who speak up.

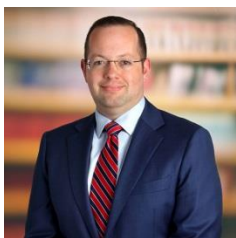


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