

interpreting RC 153.65, has found that during the evaluation process using the factors discussed previously, control of costs may be considered, but other cost considerations or price proposals may not. (1998 Ohio Atty. Gen. Ops. 027)

The board may meet with interested firms during the evaluation process to further discuss their statements of qualifications and the scope and nature of services the firm would provide. If a majority of the board meets to discuss the project with the firm, the Sunshine Law (RC 121.22) requires that discussion to be held during a public meeting.

Following this evaluation process, the board must rank no fewer than three firms based on their qualifications to provide the professional design services. A board resolution will establish the rankings. If fewer than three firms submit qualified proposals, the resolution should reflect that fact.

### **Negotiating**

After the firms are ranked, the board must negotiate with the firm determined most qualified to perform the requested services. During negotiations, the law requires the parties to discuss such things as ensuring they have a mutual understanding of the requirements of providing essential services and determining that the firm will have the necessary personnel, equipment and facilities to deliver the project on time. The parties also must come to an agreement on compensation that is fair and reasonable, taking into account the complexity, scope, estimated value and nature of the professional design services to be provided. The compensation to be paid to the firm must be certified in writing to be fair and reasonable.

Classroom Facilities Assistance Program participants must obtain OSFC approval of the selection of the architect and must use the OSFC forms provided for the architect agreement. Districts participating in Expedited Local Partnership Program projects and locally funded projects are strongly encouraged to work with their construction counsel to modify the American Institute of Architects (AIA) forms to best protect their interests.

### **Construction manager**

A construction manager helps plan, coordinate, manage and direct all phases of a construction project. For a large project involving one or more buildings, the services of a construction manager can be invaluable to the board of education and the school administration. The construction manager is a daily decision-maker, detail manager, documentation specialist and experienced on-site representative of the project owner, the school district. Construction managers are subject to a selection process also detailed in RC 9.33-9.333. A board must follow this process only for a project that has an estimated cost of \$5 million or more. It is very similar to the process mentioned previously, with notice, proposals, evaluation and negotiation steps. For Classroom Facilities Assistance Projects, OSFC mandates the use of a construction management firm and will select one for the school district. (RC 9.33-9.333)

A board must publish a notice of the intent to employ a construction manager. (RC 9.331) The notice must appear for at least 30 days in a newspaper of general circulation in the county where the contract will be performed. The public

owner must evaluate the proposals based on qualifications, experience and training, availability to perform the services and past performance. The top three proposals are ranked, and the board must negotiate with the top-ranked construction manager. It must negotiate then with other managers only if it is unable to reach an agreement with the manager ranked highest. (RC 9.332)

Prior to entering into a contract, the construction manager must provide reasonable financial assurance in the form of a letter of credit, surety bond, certified or cashier's check, or other assurance, in an amount satisfactory to the owner. (RC 9.333) This requirement may be waived for good cause.

### **Conclusion**

The preceding information represents the basics of the design professional selection process; we hope you will find it useful as a starting point. Of course, the practical application of the statutory guidelines involves complicated considerations unique to your particular project. This is a crucial stage of the construction process; working with construction counsel to explore your options and plan for the project is a worthwhile expenditure of time and effort.

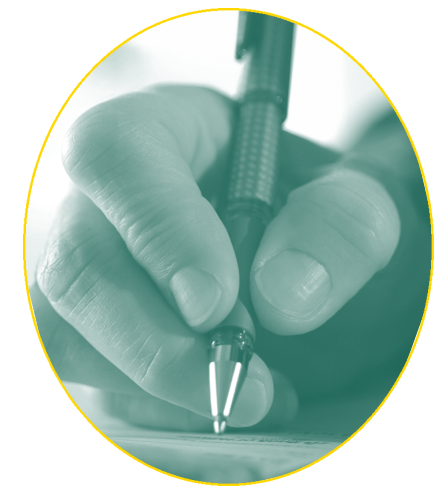
*The information above is intended as general information and not legal advice. If specific legal advice is required, we recommend that you obtain the services of an attorney.*



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7/03

## Before You Sign



## School construction: Selecting a design professional

### **The architect selection process**

The selection of an architect or other design professional to plan, design and prepare specifications for a school construction project is a critical component of the construction process. Prior to engaging a design professional, a school district preparing for construction ideally has completed steps such as selecting and acquiring a site, meeting with bond counsel and studying school district facility needs. The planning stage may be from one to several years as the district decides upon the course of the permanent improvements plan.

This brochure deals only with the process by which the services of a professional design firm and construction manager are selected after a project is ready to proceed.

### **Pre-bond issue**

“Professional design services” are defined as those services within the scope of practice of an architect or landscape architect, or a professional engineer or surveyor registered under Chapters 4703 and 4733 of the Ohio Revised Code, respectively. For simplicity, the term “design professional” will be used in this brochure to refer to all design professionals, including architects.

School districts should consider with board counsel the involvement of design professionals as consultants during the planning or pre-bond issue process. The work of the design professional during this time may include assessing facilities, projecting student enrollment and facilitating community input, among other things. When the services of a design professional might be engaged, as well as and the scope of those services, is a matter of strategic planning for the

board. Hiring a professional design firm using the statutory process usually occurs after the passage of the school district’s bond issue and after the planning period has been completed. The importance of working with board counsel and/or bond and construction counsel during this preliminary process cannot be overstated. A discussion of pre-bond issue services and strategy is beyond the scope of this brochure.

### **Statutory selection process**

When a board of education is ready to proceed with selecting a design professional for a public project, it must follow the statutory process found in Revised Code Section (RC) 153.65 through RC 153.71.

Regardless of what type of construction project the district is pursuing (locally funded, Ohio School Facilities Commission (OSFC) Classroom Facilities Assistance Program or Expedited Local Partnership Program), the same design professional selection process is followed. However, depending upon the project in which you are participating, there may be some differences with regard to OSFC approval. Those differences will be discussed as they relate to selection of design professionals and construction managers.

Selecting a design professional requires several steps, but within that framework boards of education have a great deal of flexibility in choosing the right design firm for the project. For example, unlike the competitive bidding process, cost need not be the determinative factor. The selection process is based on the qualifications of the firm. There also are no strict timelines to follow.

The selection process need not be followed where the estimated professional design fee is less than \$25,000 or where an emergency requires immediate action.

The statutory process involves gathering statements of qualification from interested firms, announcing the project, issuing an invitation to respond to a request for proposals and completing a qualification-based evaluation of the proposals received. The board then must pass a resolution ranking the top three proposals before entering into negotiations, beginning with the top-ranked design professional. It generally takes from 60-120 days to select a design professional, depending upon factors such as the amount of preplanning, the availability of qualified firms, the time necessary to receive proposals after the announcement and the length of negotiations prior to entering into a contract.

### **Prequalification and statements of qualification**

Boards of education contemplating a building project in the future are encouraged to conduct a prequalification process. This includes developing and regularly updating statements of qualification from design professionals interested in public design projects. (RC 153.66) While such a process is not required, boards of education may choose to invite interested firms to submit a current statement of qualifications with the board. (RC 163.68) The board has considerable discretion with regard to the information it wishes to receive in the statement. Basic information, such as the firm’s structure, size, principals, references of previous owners for whom the firm has worked and qualifications for specific

projects, or considerably more detailed information about the firm and its work may be requested.

A board of education’s prequalification requirements must be based on the statutory definition of “qualifications.” RC 153.65(D) defines “qualifications” as the competence of the firm to perform the required services as indicated by the technical training, education and experience of the employees within the firm. Other qualifications include the ability of the firm to perform the services in terms of availability of personnel and workload, and the past performance of the firm with regard to control of costs, quality, and meeting deadlines, among other factors. (RC 153.65)

The type of construction project your district is contemplating is relevant for purposes of selecting a design professional. For Classroom Facilities Assistance Program projects, the state of Ohio, through OSFC, is a co-owner and has rights as set out in RC Chapter 3318. This includes the right to approve the architect selected to design the project. For districts participating in the Expedited Local Partnership Project Program, OSFC reviews the design, plans and specifications for compliance with the *Ohio Design Guidelines*, but selection of the design professional is at the sole discretion of the board. Of course, for locally funded projects, school boards maintain complete discretion, within the statutory process, over the selection of the design professional.

### **Announcement of the project**

Whether a board has an existing file of prequalified design professionals or invites applicants to submit qualifications at the start of the project, the next step

for the board is to publicly announce the contract(s) available. (RC 163.67) The announcement must be made in a timely manner, so that qualified firms have an adequate opportunity to submit a statement of interest in the project. The announcement itself must contain a general description of the project, a statement of the specific professional design services required and a description of the qualifications required. It should indicate how interested firms are to submit statements of interest in the project.

Announcement of the availability of the project must be made to either of the following: 1) each professional design firm that has a current statement of qualifications on file with the public authority, or 2) to architect, engineer, surveyor and landscape artists trade associations, the news media and any other public media or publications the board considers appropriate.

If a board has instituted prequalification requirements, it could choose to announce the project only to those firms that have filed the appropriate documentation with the board. If the board wishes to receive the largest number of qualified responses, the board may use both methods of advertising the availability of the project. The announcement must be made far enough in advance so that interested firms have a reasonable amount of time to respond. (RC 153.67)

### **Evaluation and ranking**

Next, the board evaluates statements of qualification currently on file, along with statements submitted upon announcement of the availability of the project. The Ohio attorney general,