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Fall 2021

ARCHITECTS & ENGINEERS NEWSLETTER

PAYMENT ASSURANCE BILL

Through the efforts of the Ohio Assurance Payment Task Force led by Chris Toddy, Ohio architects, engineers, landscape architects, and surveyors will now be able to file a lien for unpaid fees. Ohio is one of just a few states that have no lien rights for designers. Governor Mike DeWine signed Senate Bill 49 on July 1, 2021, which will become effective September 30 as Ohio Revised Code 4703.20 – 4703.206 (architects), 4703.54 – 4703.546 (landscape architects), 4733.30 – 4733.306 (professional engineers and surveyors).

Main points:

- Lien against property that is subject of the designer contract;
- Secondary to all mechanic's liens and other previously recorded mortgages and liens;
- Amount limited to amount due on the designer contract;
- Affidavit from designer includes name of owner, legal description of the property, date of the contract, as well as other information to be filed with county recorder in county in which the property is located;
- Designer must serve affidavit within thirty days of filing upon all parties named in the affidavit;
- Designer must file Complaint within two years of perfecting lien to enforce lien.

Many lawsuits can be avoided trying to collect fees, which ALWAYS result in a counterclaim for far more damages than the amount of fees owed. The Payment Assurance Act is imperfect insofar as most other properly filed liens take priority, but anyone who knows the history of efforts in Ohio to get lien rights for architects, landscape architects, engineers, and surveyors, understands the hurdles that have been overcome with the signing of Senate Bill 49.[1] ■

179D INTERNAL REVENUE CODE TAX DEDUCTION - ENERGY EFFICIENT COMMERCIAL BUILDING DEDUCTION

The Energy Policy Act of 2005 has been renewed several times with revisions to the level of efficiency required for the deduction. The purpose of 179D deduction is to incentivize owners and developers for installing energy-efficient lighting, mechanical, and building envelope components. The credit only applies to commercial or multifamily properties. The tax benefit is a federal tax deduction ranging from $0.30 (lighting) to as much as $1.80 (whole building) per square foot.

The 179D deduction may be taken by any private property owner who meets the energy requirements. As to a public project the intent of the deduction was to allocate to the architect or entity who designed the technical specifications for the public entity. Because public entities are non-taxable, the deduction cannot be utilized by the public entity, so the tax code allows the deduction to be used by the architect or designer as an incentive to focus on energy efficiency. However, the public entity must allocate the tax deduction to the designer. Attempts by designers in Ohio to use the deduction on State of Ohio projects have been denied. The position of the State was that the State owned the deduction and there was uncertainty as to the State's ability to allocate the deduction to designers.

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[1] *The author was a member of the Task Force along with Luther Liggett, Terry Welker, Steve Glass, David Meleca, John Meegan, Jack Bialosky, Karen Planet, Eric Pros, Bruce Sekanick, and Robert Chordar.*

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Effective April 12, 2021, Ohio Revised Code 9.239 addresses the issue once and for all. It provides the following:

Effective Date: 09-29-2005.

9.239 *[Effective 4/12/2021]* Energy efficient commercial building deduction.

(A) As used in this section:

(1) "Public building" means a building owned by a public entity.

(2) "Public entity" means a subdivision, the general assembly, a court, any department, division, institution, board, commission, authority, bureau or other agency of instrumentality of the state, the five state retirement systems, or any other governmental entity.

(3) "Subdivision" has the same meaning as in section 2744.01 of the Revised Code.

(B) A person that is primarily responsible for designing energy efficient commercial building property installed in a public building may seek allocation of any deduction allowed under section 179D of the Internal Revenue Code in connection with that installation by submitting a written request to the public entity that owns the building and the tax commissioner. Within fifteen days of receiving such a request, the public entity shall respond and, if merited, formally allocate the deduction as required under that section and any associated rules or guidance of the internal revenue service or the United States department of the treasury. The public entity shall send to the commissioner a copy of the response and, if applicable, the document or documents formally allocating the deduction.

(C) If a public entity does not respond within fifteen days of receiving a request under division (B) of this section, the entity shall be considered to have approved the request. The commissioner shall provide the person that submitted the request with any documentation necessary to formally allocate the deduction.

(D) No public entity and no employee or agent of a public entity acting in the employee's or agent's official capacity shall seek, solicit, charge, or accept a fee, payment, or other consideration in exchange for allocating a deduction allowed under section 179D of the Internal Revenue Code or providing documentation of such an allocation as required under that section and any associated rules or guidance of the internal revenue service or the United States department of the treasury.

Conclusion: There is no guarantee that the designer will get the deduction it believes it should receive. But the good news - there is no longer a question as to whether a public entity, such as the state, can allocate the deduction. Just as important, the public entity must respond to the request within fifteen days, or it is considered granted. ■

CLAUSE CORNER

The Ohio legislature has amended the statute of limitations for contracts. Since 2012, a cause of action for breach needed to be filed within eight years after the cause of action accrued for written contracts (within eight years from the date of breach and when the plaintiff suffered damages) pursuant to R.C. 2305.06, and within six years after the cause of action accrued for oral contracts pursuant to R.C. 2305.07.

Effective June 16, 2021, the limitation period has been reduced to six years for breach of written contracts and four years for breach of oral contracts.

For causes of action that accrued prior to the effective date of the amendments, the limitation period is eight years from the effective date of R.C. 2305.06 and six years from the effective date of R.C. 2305.07 or the expiration of the limitation period in effect prior to the effective date of the amendment, whichever occurs first. ■

SENATE BILL 56 STATUS UPDATE

In 2017, Weston Hurd was retained by the American Council of Engineering Companies of Ohio ("ACEC") to assist in drafting legislation to limit the scope of contractual indemnification obligations against design firms in public improvement projects. At that time, ACEC members expressed frustration with onerous indemnification obligations imposed by local municipalities. In addition, the Ohio Turnpike Infrastructure Commission ("OTIC") had proposed legislation defining the scope of indemnification provisions in public improvement projects against design firms with broad language to indemnify and hold harmless the contracting authority for liabilities, damages, losses, and costs, including attorneys' fees and court costs, and imposing a duty to defend the contracting authority against claims arising from the design firm's negligence.

The legislation has been introduced to the Ohio legislature as Senate Bill 56 and is sponsored by Senator Louis W. Blessing III. The bill was unanimously passed by the Senate Judiciary Committee and the full Senate earlier this year. It is currently before the House Civil Justice Committee where it received its sponsor presentation. We anticipate activity on the bill will resume when the General Assembly returns from summer recess. A similar bill was approved by the House 80:3 at the end of the last General Assembly.

Senate Bill 56 limits the scope of indemnification obligations against design firms in public improvement contracts in four significant ways:

1. Indemnification is limited to third-party claims. Traditionally, the concept of contractual indemnity was to protect a party from incurring loss and damages to third-party claims due to the negligence of a party to the contract. Today, the concept has expanded. It is not uncommon to see indemnification provisions obligating a design firm to indemnify against first-party indemnification claims that often trigger attorneys' fees provisions. Senate Bill 56 limits indemnification obligations to third-party claims only.

2. Indemnification is limited to the proportionate share of the design firm and its consultants' tortious conduct, as defined under Ohio's apportionment statute. R.C. 2307.23 provides the procedural mechanism of apportioning liability for purposes of determining joint and several liability among several parties, as well as any contributory fault of a plaintiff. Under Senate Bill 56, the scope of a design firm's obligation to indemnify the public authority is limited to its own proportionate share of the tortious conduct proximately causing the third-party claim for which the public authority is seeking indemnity.

3. Indemnification is limited to liabilities for the death, bodily injury, sickness or disease of a person, property damages of a third-party to the public improvement, damages arising from infringement of intellectual property rights, and related damages, costs, and expenses, including reasonable attorneys' fees. It restricts any indemnification provision from including a duty of a design firm to defend the public authority.

4. Senate Bill 56 allows the design firm contracting with the public authority to include provisions in its sub-contracts creating the same indemnification obligations for its consultants, thereby establishing a procedure by which the contracting design firm may protect itself from exposure for the tortious conduct of its consultants, in proportion to the limits of its own indemnification obligations. ■

OHIO LEGISLATURE IMPOSES CONTRACTUAL RESTRICTIONS FOR PUBLIC CONTRACTS WITH PASSAGE OF BUDGET BILL FOR FISCAL YEARS 2022 AND 2023

On June 28, 2021, the Ohio legislature enacted its new budget for fiscal years 2022 and 2023 in Ohio House Bill 110. The Bill authorizes more than $160 billion in spending of state and federal funds over the next two years, but also makes a myriad of policy changes to state law.

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Significant to the professional design community, the Bill includes significant restrictions to public contracts. Effective September 30, 2021, except as otherwise required or permitted by state or federal law, R.C. 9.27 requires any contract entered into by the state for the procurement of goods or services not include, among other items, any of the following:

- A provision that requires the state to indemnify or hold harmless another person;
- A provision by which the state agrees to binding arbitration or any other binding extra-judicial dispute resolution process;
- A provision that names a venue for any action or dispute against the state other than a court of proper jurisdiction in Franklin County, Ohio;
- A provision that requires the state to agree to limit the liability for any direct loss to the state for bodily injury, death, or damage to property of the state caused by the negligence, intentional or willful misconduct, fraudulent act, recklessness, or other tortious conduct of a person or a person's employees or agents or a provision that would otherwise impose an indemnification obligation on the state;
- A provision that requires the state to be bound by a term or condition that is unknown to the state at the time of signing a contract, that is not specifically negotiated with the state, that may be unilaterally changed by the other party, or that is electronically accepted by a state employee;
- A provision for automatic renewal such that state funds are or would be obligated in subsequent fiscal years.

If a contract contains a term or condition as described above, the term or condition is *void ab initio*. I have previously lectured regarding the lack of leverage A/E firms have in negotiating with the state for public improvement projects, and it is of course unsurprising that public authorities rarely agree to any contractual provisions that violate the foregoing restrictions. But R.C 9.27 codifies restrictions to contract negotiations in a troubling manner. In particular is the requirement that the state not be bound by "a term or condition unknown to the state at the time of signing a contract, that is not specifically negotiated with the state, or that is electronically accepted by a state employee." It is a principle tenet of contract law that clear and unambiguous language of an agreement reflect the intent of the parties and is enforceable. R.C. 9.27(B)(5) seemingly creates a platform for the state to void unwanted terms and conditions in the event of a dispute simply by feigning ignorance. While R.C. 9.27 is not in effect yet, it will certainly be interesting to see how courts will interpret its restrictions in the future. ■

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ARCHITECTS & ENGINEERS NEWSLETTER

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