

# CCAO Planning for Future County Facility Needs

## Design, Bidding, and Construction Project Delivery For Ohio Counties

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# Overview

## 1) Design / Bid / Build v. Design/Build

## 2) Procurement

- Design Professional Services
- Construction Services

## 3) Project Delivery (Contract Structure)



# Design / Bid / Build v. Design / Build

## Design / Bid / Build

- Statutorily mandated for practically all construction
- Three step process, just like it says



# Design / Bid / Build v. Design / Build

## Design / Build

- “Master Builder” concept (how the pharaohs built the pyramids)
- Single point of responsibility
- R.C. 5543.22 exception
  - County Engineer may use design/build for “bridge, highway, or safety” projects <\$1.5 million



## Design Professional

- Architects, Engineers, Landscape Architects, Surveyors
  
- When fee is \$25,000 or greater
  - Except for “actual physical disaster” and vote of 3 commissioners, then \$50,000.  
(R.C. 307.88(A)(2))
  
- Statutory Process



# Design Professional Procurement

## R.C. 153.67 – 153.71

### 1. Public Announcement

- Focused: to “pocket firms”; or
- General: dissemination through public media (no formal advertising requirement)

### PRACTICE POINTER

*Keep qualification statements on file.*

*Ask for them to be updated annually.*



# R.C. 153.67 – 153.71

- Evaluation Criteria
  - Competence
  - Capability past performance
  - Other similar factors
- Interviews NOT Mandatory
- CANNOT Ask for Fee Information Yet



## R.C. 153.67 – 153.71

- Select and Rank at Least Three Firms
- Negotiate a Contract with High Scorer
  - Scope
  - Schedule
  - Staffing levels and personnel
  - Price
  - Responsibilities
    - Any construction related tasks?





- Key Contract Terms (*cont.*)
  - Coordination with other professionals
  - Coordination of permits
  - Dispute resolution
  - Ownership of drawings



## PRACTICE POINTER

*Beware form design  
professional contracts.*



## R.C. 153.67 – 153.71: Case Law

### *Ohio ACE v. Voinovich* (1992)

- Price can be used to break ties.

### *Cuyahoga Cty. v. Bowen & Assoc.* (2003)

- Any contract entered into after failing to follow statutory process is null and void.
  - (Commissioners awarded contract to firm that had ranked 4 out of 5.)



# Bidding the Construction

## Why?

“To provide for open and honest competition in bidding for public contracts and to save the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms.”

*Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 21



# Bidding the Construction

## Anything over \$25,000

- Cannot piecemeal
- “actual physical disaster” exception: vote of 3 commissioners, then \$50,000. (R.C. 307.88(A)(2))

## Advertise 2 weeks in newspaper

- Or online for one week
- No addenda closer than 72-hours to bid



# Bidding the Construction

“Lowest and Best Bid” R.C. 307.02;  
307.90

- *Discretion, Discretion, Discretion*
- *Do not have to award to lowest bidder.*



# DISCRETION

So what exactly is an abuse of discretion?

- “An unreasonable, arbitrary, or unconscionable attitude” - *Cedar Bay Constr.*, 50 Ohio St.3d at 22.
- More than just an error in law or judgment
- Irrational or arbitrary conduct



# DISCRETION

If there is no abuse of discretion:

- The court should not substitute its judgment for the owner's
- Even if the owner's decision may seem unwise





# Abuse of DISCRETION

“The trial court erred by improperly substituting its judgment for that of the statutorily authorized decision-maker.”

*Monarch Construction Co. v. Ohio School Facilities Commission* (Franklin App. 2002), 150 Ohio App. 3d 134



# Exercising DISCRETION

## Instructions to Bidders (*key contract document*)

- Contractor Qualification Statement
- Check References
- Investigate Projects not identified



# Exercising DISCRETION

## Instructions to Bidders

- Attendance at Pre Bid Conference
- Strong Surety (A.M. Best A- or better)
- Measure Financial Strength



# Exercising DISCRETION

## Recent Developments

*Assoc. Builders & Contractors v. Franklin County*, 2010-Ohio-1199. March, 2010.

- Definitional disagreement over what it meant to have had a prevailing wage violation.
- Court may flip your decision if it thinks you misapplied your published evaluation criteria so badly that it rises to failure to exercise sound discretion.



# RESPONSIVENESS

## No DISCRETION to Consider a Non-Responsive Bid.

- Responsiveness determined by examining bid, not the bidder.
- Non-Responsive: Gives competitive advantage.



# RESPONSIVENESS

## Examples of Non-Responsive Bid

- Price in words not matching price in number.
- Qualified bid.
- Failure to furnish bid guarantee.
- Failure to identify DBE subcontractors if made a matter of responsiveness by Instructions to Bidders or Law.



# Rejecting a Bidder

Bidder must be notified of the finding and the reasons for the decision.

- Contact the bidder and discuss intention
- Set up meeting allowing bidder to review and respond to allegations
- Give bidder opportunity to withdraw



# Rejecting a Bidder

## If bidder refuses to withdraw:

- Pass resolution to reject the bidder, detailing the process and basis for rejection





# Bid Protest

May be subject to a bid dispute.

- Document all processes and reasons for rejecting other bidders

May also be subject to lawsuit seeking injunctive relief.

- Two step process:
  - TRO
  - Preliminary/Permanent Injunction Hearing

Difficult to obtain, because must show Abuse of Discretion.



## Multiple Prime Contracting

Vs.

## Single Prime Contracting



# Ohio Multi Prime Contracting

R.C. 153.50; 153.51; 153.52

Applies to:

- Counties, Cities, Villages, State Agencies



# Ohio Multi Prime Contracting

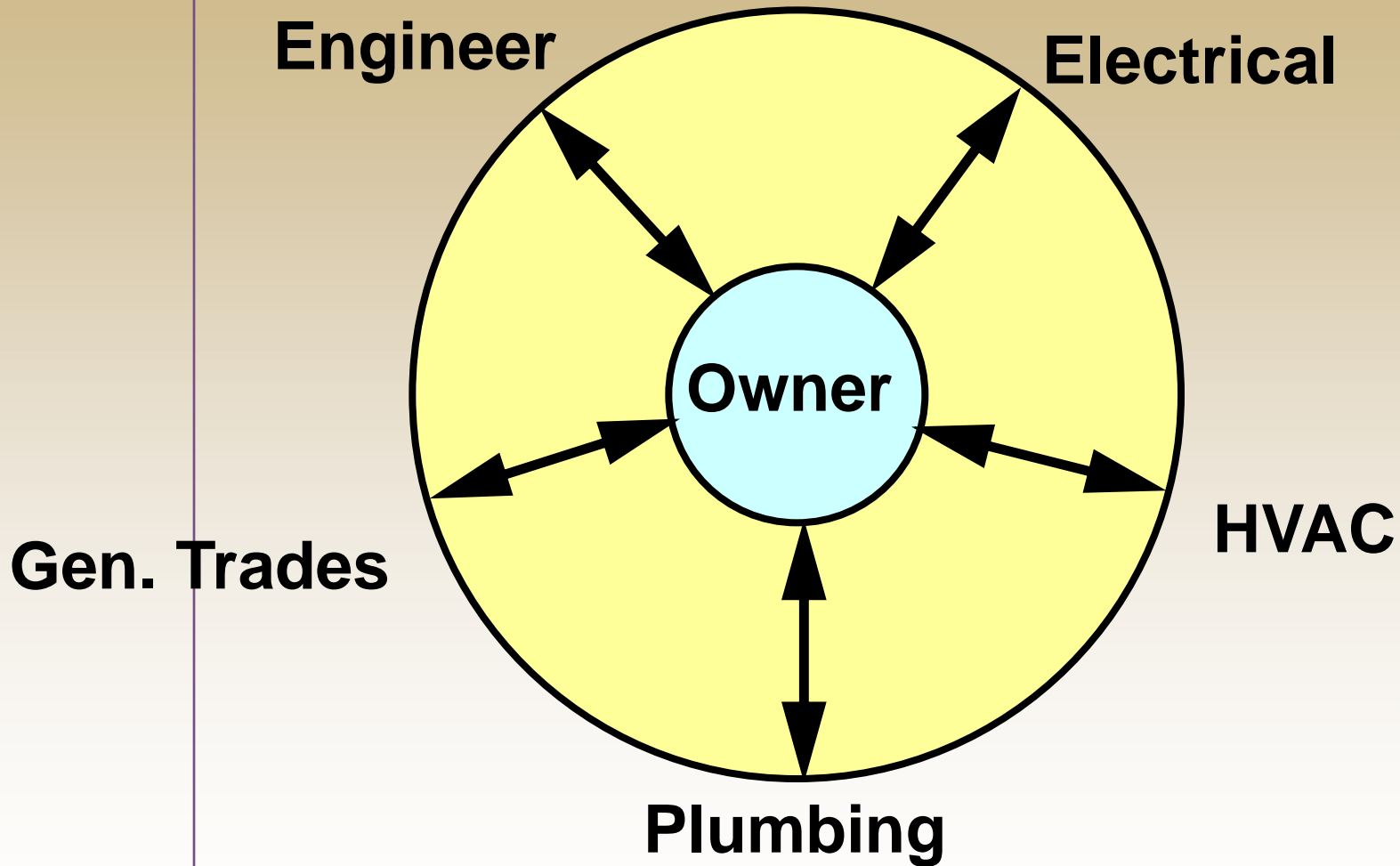
## Thresholds

- \$50,000 whole project
- \$5,000 individual contract

Arguably does not apply to certain Ohio Public Owners (e.g. R.C. 6119 Regional Water & Sewer Districts, Port Authorities, others)



# The Wheel of Misfortune



# Multiprime Alternatives

## Combined Bids R.C. 153.51

- Caveats

## Assignment of the Trade Contracts R.C. 153.51

- Caveats



# To CM or Not to CM

## Defining the Construction Manager

- Much more than simple inspection services
- Schedule Driver, Trades Coordinator, Problem Shooter, Another Set of Eyes



# To CM or Not to CM

## Defining the Construction Manager

- Agency CM v. CM at Risk
- No CM at Risk in Ohio public contracting
- Selection Process for Agency CM is qualifications based, statutorily prescribed





## The Design Professional as Construction Administrator

- Construction Administration IS NOT Construction Management
- Make sure the experience is there
- Potential Conflict of Interest



# To CM or Not to CM

## Alternative to Construction Manager

- “Lead Prime” Contractor Designation and Responsibilities



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QUESTIONS?

