
OHIO FACILITIES CONSTRUCTION COMMISSION

Declaration of public exigency

- Expands the authority of the Executive Director of the Ohio Facilities Construction Commission (OFCC) to declare a public exigency regarding any public works.
- Allows the OFCC Executive Director to declare a public exigency upon the request of a state institution of higher education or any other state instrumentality.

Cultural facilities cooperative use agreements

- Renames a "cooperative contract" under the Public Works Law a "cooperative use agreement."
- Specifies, when an Ohio sports facility is financed in part by state bonds, that construction services must be provided on the state's behalf or at the direction of the governmental agency or nonprofit corporation that will own or manage the facility.
- Specifies that the construction services must be specified in a cooperative use agreement between the OFCC and the governmental agency or nonprofit corporation.
- Exempts the cooperative use agreement and actions taken under it from Public Works and Public Improvements Laws, but subjects them to phases of those laws relating to cultural facilities and the use of domestic steel and the Prevailing Wage Law.
- Specifies that a cooperative use agreement must have a provision requiring a cultural project to be completed and ready to support culture, rather than completed and ready for full occupancy.
- Expands the definition of "governmental agency" in the public works law to include state agencies and state institutions of higher education.

Project labor agreements in public improvement contracts

- Prohibits a state agency, in the bid specifications for a contract related to a public improvement to be constructed by or on behalf of the agency, from requiring a contractor or subcontractor to enter into (similar to current law, which is not currently enforced) or prohibiting a contractor or subcontractor from entering into project labor agreements.



- Prohibits a state agency from discriminating against a bidder, contractor, or subcontractor for refusing or electing to become a party to a project labor agreement.
- Prohibits any state funds from being distributed for constructing a public improvement by or for a political subdivision if the subdivision, in its bid specifications, requires a contractor or subcontractor to enter into, or prohibits a contractor or subcontractor from entering into, project labor agreements.
- Allows an interested party to bring an action against a state agency or political subdivision to have a prohibited contract voided.

State-financed historical facilities

- Specifies that a cultural organization financing a historical facility project with state money may use not more than 3% of the money to pay its cost of administering the project.

Surety bonds

- Transfers from the Director of Administrative Services to the Executive Director authority to adopt rules regarding certain surety bonds.

Electronically filed bids

- Allows a public bid guaranty to be provided by means of an electronic verification and security system.
- Limits the ability to broadcast a public bid opening by electronic means to only bids that are filed electronically.
- Eliminates the requirement that submitted bids be tabulated on duplicate sheets.

Energy and water conservation

- Clarifies that the Executive Director has authority to enter into energy or water conservation contracts on the Executive Director's own initiative or at the request of a state agency.

School Facilities Commission

- Provides that the project scope and basic costs established by the School Facilities Commission at the request of a school district seeking new conditional approval of a classroom facilities project, after a lapse of a previous conditional approval, are valid for 13 months, rather than one year as prescribed under current law.



- Permits funds appropriated to the Commission for classroom facilities projects that were not spent or encumbered during the first year of each biennium, and which are greater than half of such appropriations for the entire biennium, to be used for various Commission programs.
- Requires the Commission, in consultation with the Office of Budget and Management, to prepare a study of the impacts, benefits, and risks associated with a school district funding its share of the cost of a school facilities project under any of the Commission's programs with cash-on-hand resulting from a lease-purchase agreement.
- Eliminates the Education Facilities Trust Fund and the Ohio School Facilities Commission Fund.

Declaration of public exigency

(R.C. 123.10)

The bill expands the authority of the Executive Director of the Ohio Facilities Construction Commission (OFCC) to declare a public exigency. Under current law, the Executive Director may declare a public exigency when an injury or obstruction occurs in any public work of the state maintained by the Director of Administrative Services. The bill removes the limitation "maintained by the Director of Administrative Services" to allow the Executive Director to declare a public exigency regarding any public work of the state.

Current law allows the Executive Director to declare a public exigency on the Executive Director's own initiative or upon the request of the director of a state agency. The bill expands this authorization to allow the Executive Director also to declare a public exigency upon the request of a state institution of higher education or any other state instrumentality.

Cultural facilities cooperative use agreements

(R.C. 123.28 and 123.281)

Ohio's Public Works Law defines "cooperative contract" to mean a contract between the OFCC and a cultural organization providing the terms and conditions of the cooperative use of an Ohio cultural facility. The bill changes the name "cooperative contract" to "cooperative use agreement." The bill also expands the meaning of



"governmental agency," as it is used in the Public Works Law, to include a state agency and state institutions of higher education.

Instead of the current requirement that a cooperative use agreement include a provision specifying that a project can be completed and ready "for full occupancy" without exceeding appropriated funds, the bill requires the specification to be that the project can be completed and ready "to support culture" without exceeding appropriated funds.

Current law provides that a cooperative use agreement generally is not subject to Public Works Law. The bill subjects a cooperative use agreement to provisions of the Public Works Law regarding cultural facilities and the use of domestic steel.

The bill provides that when an Ohio sports facility is financed in part by state bonds, construction services must be provided on the state's behalf or at the direction of the governmental agency or nonprofit corporation that will own or manage the facility. The construction services must be specified in a cooperative use agreement between the OFCC and the governmental agency or nonprofit corporation. The cooperative use agreement, and actions taken under it, are exempt from Public Works and Public Improvements Laws, but are subject to provisions of those laws relating to cultural facilities and the use of domestic steel and the Prevailing Wage Law.

Project labor agreements in public improvement contracts

(R.C. 4116.01, 4116.02, 4116.03, 4116.031, and 4116.04)

The bill limits the application of the Unlawful Labor Requirements in Public Improvement Contracts Law to only state agencies, rather than to "public authorities" under current law. That Law prohibits the imposition of certain labor requirements as a condition of performing public works (essentially, project labor agreements). A "state agency," under the bill, means any officer, board, or commission of the state authorized to enter into a contract for the construction of a public improvement or to construct a public improvement by the direct employment of labor and includes a state institution of higher education. The bill defines a "state institution of higher education" as any state university or college, community college, state community college, university branch, technical college or the Northeast Ohio Medical University and its board of trustees.

Under current law, a "public authority" includes a state agency as described above, any Ohio political subdivision, and any institution supported in whole or in part by public funds, authorized to enter into a contract for the construction of a public improvement or to construct a public improvement by the direct employment of labor. However, under current law, "public authority" does not mean any municipal corporation exercising the municipal corporation's home rule authority, unless the



specific contract for a public improvement includes state funds appropriated for the purposes of that public improvement.

The Ohio Supreme Court held in *Ohio State Bldg. and Constr. Trades Council, et al. v. Cuyahoga County Bd. of Commissioners, et al.*⁸⁸ that the Unlawful Labor Requirements in Public Improvement Contracts Law is preempted by the National Labor Relations Act⁸⁹ and is thus unconstitutional; therefore, the law is not currently enforced. (See "**Comment – federal preemption**," below.)

Imposition of certain labor requirements in public improvement contracts

(R.C. 4116.02)

The bill limits to state agencies, including state institutions of higher education, the prohibition against including certain labor requirements in bid specifications for a public improvement undertaken by them or on their behalf, and no longer applies the prohibition to any political subdivision of the state or any institution supported by public funds. However, the bill also expands this provision by not permitting a state agency to *prohibit* the requirements either. Thus, under the bill, a state agency, when engaged in procuring products or services, awarding contracts, or overseeing procurement or construction for public improvements, must ensure that the agency-issued bid specifications for the proposed public improvement do not require a contractor or subcontractor to do, or prohibit a contractor or subcontractor from doing, either of the following:

(1) Entering into agreements with any labor organization (essentially, a union) on the public improvement;

(2) Entering into any agreement that requires the employees of that contractor or subcontractor to become members of or affiliated with a labor organization or to pay dues or fees to a labor organization as a condition of employment or continued employment.

As under current law, this provision also applies to any subsequent contract or other agreement for the public improvement to which the state agency and a contractor or subcontractor are direct parties.

⁸⁸ 98 Ohio St.3d 214, 2002-Ohio-7213 (2002).

⁸⁹ 29 United States Code 151, *et seq.*



Prohibited actions by state agencies

(R.C. 4116.03)

Similar to current law, the bill prohibits a state agency (rather than a public authority as under current law) from doing any of the following with respect to public improvements undertaken by or on behalf of the state agency:

(1) Awarding a contract for a public improvement if the contract or subsequent contract or other agreement to which the state agency and a contractor or subcontractor are direct parties is required to or prohibited from containing the elements described in (1) and (2) under "**Imposition of certain labor requirements in public improvement contracts**," above;

(2) Discriminating against any bidder, contractor, or subcontractor for refusing or electing to become a party to any agreement with any labor organization on the public improvement that currently is under bid or on projects related to that improvement;

(3) Violating the state agency's duty to ensure that bid specifications issued by the state agency for the proposed public improvement, and any subsequent contract or other agreement for the public improvement to which the state agency and a contractor or subcontractor are direct parties, do not require or prohibit the elements described in (1) and (2) under "**Imposition of certain labor requirements in public improvement contracts**," above.

Use of state funds for certain local projects

(R.C. 4116.031)

The bill prohibits any state funds from being distributed for the purpose of constructing a public improvement by or on behalf of a political subdivision, if the political subdivision, in procuring products or services, awarding contracts, or overseeing procurement or construction for public improvements undertaken by or on behalf of the political subdivision, requires in the bid specifications a contractor or subcontractor to enter into, or prohibits in the bid specifications a contractor or subcontractor from entering into, an agreement described under "**Imposition of certain labor requirements in public improvement contracts**," above. The bill defines a "political subdivision" as a county, township, municipal corporation, or any other body corporate and politic that is responsible for government activities in a geographic area smaller than that of the state.



Enforcement

(R.C. 4116.01 and 4116.04)

Continuing law permits an interested party to bring an action to enforce the Unlawful Labor Requirements in Public Improvement Contracts Law; however, the bill permits those actions to be brought against a state agency or political subdivision, rather than a public authority. An "interested party," under continuing law and with respect to a particular public improvement, includes all of the following:

(1) Any person who submits a bid for the purpose of securing a contract for the public improvement;

(2) Any person acting as a subcontractor of a person mentioned in (1), above;

(3) Any association having as members any of the persons mentioned in (1) or (2), above;

(4) Any employee of a person mentioned in (1), (2), or (3), above;

(5) Any resident who is a resident of the jurisdiction of the state agency or political subdivision for which products or services are being procured for, or work is being performed on, a public improvement.

Similar to current law, the bill permits an interested party to file a complaint against a state agency or political subdivision alleging a violation of the bill, within two years after the date on which the contract is signed for the public improvement, in the court of common pleas of the county in which the public improvement is performed. Under continuing law, the performance of the contract forms the basis of the allegation of a violation. Continuing law requires the court in which the complaint is filed to hear and decide the case and, upon a finding that a violation has occurred, must void the contract and make any orders that will prevent further violations. If the court finds a violation has occurred, the court may award reasonable attorney's fees, court costs, and any other fees incurred in the course of the civil action to the prevailing plaintiff. Under continuing law, the Rules of Civil Procedure govern these actions, and any determination of a court is subject to appellate review.

Comment – federal preemption

In 2002, the Ohio Supreme Court held that specified provisions of the federal National Labor Relations Act (NLRA) preempted Ohio's Unlawful Labor Requirements in Public Improvement Contracts Law. The NLRA generally applies to the private sector, and a state may be limited in regulating labor relations between private employers and unions. Sections 8(e) and (f) of the NLRA specifically allow the



construction industry to enter into agreements and take other actions that other private employers cannot. The Court held that the Revised Code provisions essentially prohibit public authorities from entering into or enforcing project labor agreements on public construction projects, and that those sections of the NLRA allow such agreements. The Court stated that if the state, as a market participant, wants to prohibit the use of project labor agreements, the state may do so as the purchaser of the product or services. However, by prohibiting other entities, such as political subdivisions, from using project labor agreements, the prohibition amounts to a regulation, and the Court held that the state cannot pass laws to regulate the construction industry in contravention of the NLRA.⁹⁰

In a separate case, the federal Sixth Circuit Court of Appeals (whose geographic jurisdictional area includes Ohio) recently concluded that a Michigan law was not preempted by the NLRA because the law was not regulatory in nature and was essentially just a blanket action by the state as a market participant. The Michigan law generally prohibits a governmental unit that awards any construction contract from doing either of the following in any bid specifications, project agreements, or other controlling documents:

- Requiring a bidder or contractor to enter into or prohibiting a bidder or contractor from entering into an agreement with a union for that project;
- Discriminating against a bidder or contractor for becoming or remaining or refusing to become or remain a signatory to, or for adhering or refusing to adhere to, an agreement with a union in regard to that project or a related construction project.⁹¹

Only a court could decide whether any part of this bill concerning project labor agreements is preempted by the NLRA.

State-financed historical facilities

(R.C. 123.281)

The bill specifies that a cultural organization financing a historical facility project with state money may not use more than 3% of the money to pay the organization's cost of administering the project.

⁹⁰ *Ohio State Bldg. and Constr. Trades Council*, supra, at ¶¶65, 69, and 94.

⁹¹ *Mich. Bldg. & Constr. Trades Council & Genessee v. Snyder*, 729 F.3d 572 (6th Cir. 2013); M.C.L.A. 408.875.



Current law authorizes cultural organizations to enter into agreements with the OFCC whereby the organization provides construction services on behalf of the state to construct, partly with state funds, a "state historical facility," which is a site or facility used for cultural activities and that is created, operated, and maintained by the Ohio Historical Society (OHS), owned at least partly by the state or the OHS, and managed by or under contract with the OFCC.

To the extent the state funds are raised by state-issued bonds, the use of the bond proceeds must comply with certain federal restrictions if the bonds are to qualify bondholders for federal income tax exemption on the interest. Noncompliance jeopardizes the bonds' tax-exempt status and invokes the federal anti-arbitrage "rebate" requirements, causing the state to have to pay the federal government the extra yield the state receives from using the bond proceeds for purposes other than the governmental purposes that qualify the bonds for tax exemption. The purpose of the anti-arbitrage rebate provision is to discourage state and local governments from using federally tax exempt bond issuances to raise money that is used to invest in higher-yielding securities, thereby profiting from the spread between the higher yield and the government's interest cost (i.e., arbitrage). One of the federal anti-arbitrage restrictions limits, in effect, the portion of bond proceeds that may be used to pay working capital (i.e., operating) expenditures by counting a limited amount of those expenditures among the legitimate public purpose uses of the bond proceeds. Working capital expenditures in excess of that limit are considered not to be for the public purpose and therefore could invoke the rebate requirement.⁹²

Surety bond authority

(R.C. 9.333 and 153.70)

The bill transfers from the Director of Administrative Services to the Executive Director the authority to adopt rules regarding surety bonds provided by a construction manager at risk, or by a design-build firm, to a public authority.

Electronically filed bids

(R.C. 153.08)

The bill modifies provisions of the Ohio Public Improvements Law regarding the competitive bidding process for the selection of a contractor for the construction of buildings or structures for the use of the state or any institution supported by the state. Currently, a public bid opening may be broadcast by electronic means. The bill limits

⁹² Internal Revenue Code sec. 148. 26 Code of Fed. Regs. 1.148-6.



this to allow only bids filed electronically to be broadcast by electronic means. Current law requires all electronically filed bids to be made available to the relevant public authority after the public bid opening. The bill provides that this may be achieved by means of an electronic verification and security system established under rules adopted by OFCC under the Administrative Procedure Act. Finally, the bill removes a current requirement that all submitted bids be tabulated upon duplicate sheets.

Contracts for energy and water conservation

(R.C. 156.01, 156.02, and 156.04)

The bill clarifies that the Executive Director has authority to enter into energy or water conservation contracts on the Executive Director's own initiative or at the request of a state agency. Continuing law authorizes the Executive Director to contract with various entities for a report containing an analysis and recommendations pertaining to the implementation of energy or water conservation measures, and to enter into an installment payment contract for the implementation of energy or water saving measures.

The bill also replaces references to the Department and Director of Administrative Services with references to the Executive Director who replaced the Department and Director in previous legislation.

School Facilities Commission

Background on School Facilities Commission programs

As an independent agency of the OFCC, the School Facilities Commission (SFC) administers several programs that provide state assistance to school districts and community schools in constructing classroom facilities. The main program, the Classroom Facilities Assistance Program (CFAP), is designed to provide each city, exempted village, and local school district with partial funding to address all of the district's classroom facilities needs. It is a graduated, cost-sharing program where a district's portion of the total cost of the project and priority for funding are based on the district's relative wealth. Districts are ranked by wealth into percentiles. The poorest districts are served first and receive a greater amount of state assistance than wealthier districts will receive when it is their turn to be served based on their respective wealth percentile. Other smaller programs address the particular needs of certain types of districts and schools but most assistance continues to be based on relative wealth.



Lapse in project funding for Classroom Facilities Assistance Program

(R.C. 3318.054)

When a district is eligible for CFAP funding, it must secure local funding to pay its portion of the project cost, usually by seeking voter approval for a bond issue and an accompanying property tax levy to pay its share. For a district for which state funding lapses due to failed voter approval of local funding, the law prescribes procedures for a board to follow if it wishes to revive its project after such a lapse. To do so, the board must request that School Facilities Commission set a new scope and estimated cost for the project based on the district's current wealth percentile and tax valuation. The new scope and estimated costs are valid for one year.

The bill extends that validity of the scope and estimated costs to 13 months.

Reuse of unspent funds

(R.C. 3318.024)

In addition to CFAP as under current law, the bill permits funds appropriated to the SFC for classroom facilities projects that were not spent or encumbered during the first year of each biennium, and which are greater than half of such appropriations for the entire biennium, to be used for the following:

(1) Funding for school districts that voluntarily develop joint use or other cooperative agreements that significantly improve the efficiency of the use of facility space within or between districts;

(2) The School Building Emergency Assistance Program;

(3) Early assistance to a school district that has entered into an Expedited Local Partnership agreement;

(4) The Exceptional Needs School Assistance Program, including assistance for the relocation or replacement of facilities required as a result of any contamination of air, soil, or water that impacts the occupants of the facility;

(5) The Accelerated Urban School Building Assistance Program; and

(6) The Vocational School Facilities Program.



Funding projects with lease-purchase agreements

(Section 285.80)

The bill requires the SFC, in consultation with the Office of Budget and Management, to prepare a study of the impacts, benefits, and risks associated with a school district funding its share of the cost of a school facilities project under any of the SFC's programs with cash-on-hand resulting from a lease-purchase agreement entered into under current law, which agreement itself was not subject to voter approval. The study must be completed not later than nine months after the bill's effective date and must be submitted to the Governor and the General Assembly. Except in limited circumstances specified by the bill and with approval of the SFC, until the study is completed, the bill prohibits a school district from funding its share of the cost of a project with cash-on-hand resulting from an unvoted lease-purchase agreement. (With Commission approval, a district may use such proceeds to pay its share of project cost overruns, locally funded initiatives (nonstate-funded portions of a project), and district costs under the Expedited Local Partnership programs.)

Under current law, the board of education of a school district, the governing board of an educational service center, or the governing authority of a community school may acquire buildings or building improvements and furnishings by a lease-purchase agreement. The agreement must provide for a series of not more than 30 one-year renewable lease terms, at the end of which series title to the property is vested in the district, ESC, or community school, if all of its obligations under the agreement have been satisfied.⁹³

Education Facilities Trust Fund

(Repealed R.C. 183.26; conforming changes in R.C. 3318.33 and 3318.40)

The bill eliminates the Education Facilities Trust Fund, which consists of a portion of the state's tobacco master settlement agreement proceeds to be used to pay costs of constructing, renovating, or repairing primary and secondary schools.

Ohio School Facilities Commission Fund

(Repealed R.C. 3318.33; conforming changes in R.C. 3318.02 and 3318.30)

The bill eliminates the Ohio School Facilities Commission Fund, which consists of (1) transfers of moneys authorized by the General Assembly, (2) investment earnings on the Public School Building Fund, Education Facilities Trust Fund, and School

⁹³ R.C. 3313.375, not in the bill.



Building Program Assistance Fund, and (3) revenues received by the SFC to be used to pay for commission operations.

