



Selecting design professional or design-build services

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This fact sheet is intended to address the most frequently asked questions about the selection of a design professional or design-build services for public improvement projects. The information is of a general nature. Districts should seek the advice of legal counsel for specific legal problems or questions. Construction counsel for the district can help develop a sequence of activities; provide helpful materials for the selection process, notices and more; and advise on strategic approaches for a project based on the board's goals.

Professional design and design-build firms

What are "professional design services"?

"Professional design services" are services within the "scope of practice of an architect or landscape architect, or a professional engineer or surveyor" (Ohio Revised Code (RC) 153.65(C)).

What are design-build services"?

"Design-build services" are "services that form an integrated delivery system for which a person is responsible to a public authority for both the design and the construction, demolition, alteration, repair or reconstruction of a public improvement" (RC 153.65 (G)).

What is the difference between professional design services and design-build services?

In a professional design services project, a school district contracts with one firm to design its project and another to perform the work. In a design-build project, a school district contracts with a single firm for both its design and construction services.

Statements of qualifications and prequalification requirements

If a school district board of education is planning to contract for professional design or design-build services, it must encourage professional design and design-build firms to submit statements of qualifications to the board (RC 153.66). A school board also can implement prequalification requirements for firms seeking to provide services to the board (RC 153.68).

Are professional design firms and design-build firms required to update statements of qualifications?

The board should encourage professional design and design-build firms that have submitted statements of qualifications to update them regularly (RC 153.66). If the board has implemented prequalification requirements, it can include a requirement that firms must keep a current statement of qualifications on file with the board.

Procedures

In most situations, when a board wants to enter into a contract for professional design services or design-build services, it must follow these three steps:

- publicly announce the project;
- evaluate the qualifications of interested firms and rank the most qualified;
- negotiate a final contract with the chosen firm.

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For more information on this subject, please contact OSBA's Division of Legal Services

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Public announcement of the project

What is a board required to announce?

The board must publicly announce all contracts available when planning to contract for professional design or design-build services (RC 153.67(A)). The announcements must be made in a uniform and consistent manner and far enough in advance of the submission deadline that interested firms have an adequate opportunity to submit a statement of interest for the project.

Announcements also must:

- contain a general description of the project, a statement of the specific professional design or design-build services required and a description of the project's required qualifications (RC 153.67(B));
- indicate how interested firms may submit statements of qualifications for the board's consideration (RC 153.67(C)).

To whom is the announcement sent?

The board must disseminate the announcement to any of the following entities that it determines is appropriate: design-build firms (including contractors or other entities that want to perform the work as design-build firms), appropriate trade associations, publications or the media, including electronic media (153.67(D)).

Evaluating and ranking firms/negotiating contracts

Once a board has publicly announced the available contracts, it must:

- evaluate the statements of qualifications submitted for the project, determine which of the professional design or design-build firms that submitted qualifications are qualified and rank the top firms;
- negotiate a final contract with the selected firm (RC 153.69 and 153.693).

Because the requirements for these two steps differ slightly for professional design firms and design-build firms, this fact sheet discusses the process for each of them separately.

Professional design firms

What factors should a board consider to determine if a professional design firm is qualified?

A board should consider the following factors:

- The firm's competence to perform the required professional design services. Competence is indicated by the technical training, education and experience of the firm's personnel, especially those who would be assigned to perform the services (RC 153.65(A)(1)(a)).
- The firm's ability to perform required services competently and promptly based on its workload and availability of qualified personnel, equipment and facilities (RC 153.65(D)(2)).

- The firm's past performance, as reflected by previous client evaluations, based on costs, quality of work and meeting deadlines (RC 153.65(D)(3))
- Any other factors the board considers relevant (RC 153.65(D)(4)).

The Ohio attorney general, interpreting RC 153.65, has found that during the evaluation process for professional design services, cost control may be considered, but other cost considerations or price proposals may not (1998 Ohio Atty.Gen.Ops. No. 98-027). Firms initially must be ranked on the basis of the statutory qualifications, including previous client evaluations regarding the control of costs.

May a board interview professional design firms to review their qualifications?

Once the board has evaluated the statements of qualifications submitted by professional design firms, it may have further discussions with individual firms to examine their statements of qualifications, the scope and nature of services that would be provided and technical approaches the firm may use toward the project (RC 153.69).

If a majority of the board meets to discuss the project with the potential firm, Ohio's Open Meetings Act (Sunshine Laws) will apply (RC 121.22).

May a board require a fee estimate for a professional design services contract?

In most cases, no. Boards may not require an estimate of fees or compensation prior to selecting and ranking any professional design firm. However, an exception may apply if a state agency has selected and ranked firms that have been preapproved for the payment of funds for the professional design services from a prequalified list (RC 153.691).

How must the board narrow down the qualified firms?

The board must select and rank no fewer than three firms it considers to be the most qualified to provide professional design services. If the board determines, in writing, that there are fewer than three qualified firms available to do the work, it must select and rank those firms (RC 153.69).

Are there rules a board must follow when negotiating a contract with a professional design firm?

Yes. After the board has selected and ranked the professional design firms, it must negotiate with the firm ranked most qualified to perform the requested services for an amount of compensation that the board has determined, in writing, is fair and reasonable (RC 153.69).

During negotiations, the parties must move toward the following:

- ensuring there is a mutual understanding of the project's essential requirements;
- establishing that the firm will make available the personnel, equipment and facilities required to deliver the project on time;
- agreeing on fair and reasonable compensation considering the complexity, scope, estimated value and nature of the services to be provided.

What happens if a board is unable to negotiate a contract with the most qualified design professional firm?

If negotiations fail, the board must notify that firm in writing and then may negotiate with the second most qualified firm (RC 153.69(C)). If the negotiations fail with the second most qualified firm, the board must notify that firm in writing and then may negotiate with the next most qualified firm (RC 153.69(C)(2)).

If the board is still unable to negotiate a contract, it may follow the same procedures until a contract is negotiated. The board may select and rank additional firms based on their qualifications and has the right to accept or reject any or all proposals in whole or part (RC 153.69(F)).

Design-build firms

What factors should a board consider to determine if a design-build firm is qualified?

A board should consider the following factors:

- The firm's competence to perform the required design-build services. Competence is indicated by the technical training, education and experience of the design-build firm's personnel and key consultants. It is especially important for the board to consider the competency of the employees and consultants who would be assigned to perform the services, including the proposed architect or engineer of record (RC 153.65(D)(1)(b)).
- The firm's ability to perform required services competently and promptly based on its workload and availability of qualified personnel, equipment and facilities (RC 153.65(D)(2)).
- The firm's past performance, as reflected by previous client evaluations, based on costs, quality of work and meeting deadlines (RC 153.65(D)(3)).

- The design-build firm's compliance with certain industry requirements (see RC 4703.182, 4703.332 and 4733.16) (RC 153.65(D)(5)).

- Any other factors the board considers relevant (RC 153.64(D)(4)).

In addition, before a design-build firm is selected, the board must evaluate the submitted statements of qualifications in consultation with a "criteria architect" or "criteria engineer" (RC 153.66(B)). This individual may be an independent professional (or firm) or a properly qualified employee of the board (RC 153.692). The individual must help the board develop the initial selection and design criteria and evaluate the various proposals the board received (RC 153.65(I)).

Can the board provide a stipend to design-build firms who submit pricing proposals?

Yes. RC 153.693(E) allows the board to provide a stipend for pricing proposals received from design-build firms.

How must the board narrow down the selected firms?

The board must select and rank at least three firms it considers most qualified (RC 153.693). It must provide each of the selected design-build firms with:

- A description of the project and project delivery.
- The design criteria created by the criteria architect or engineer.
- A preliminary project schedule.
- A description of preconstruction and proposed design services, as well as a description of a guaranteed maximum price.
- The form of the contract.
- A request for a pricing proposal divided into the design services fees and preconstruction and design-build services fees. Each proposal must include a list of key personnel and consultants for the project, design concepts, the firm's statement of general conditions and estimated contingency requirements, and a preliminary schedule.

The board must evaluate the pricing proposals that were submitted by the selected design-build firms and may hold discussions with each design-build firm to further investigate the pricing proposal (RC 153.693(A)(3)). If a majority of the board meets to discuss the project with a firm, Ohio's Open Meetings Act (Sunshine Laws) will apply (RC 121.22). Next, the board must rank the design-build firms that were selected based on the board's evaluation of the value of each firm's pricing proposal, considering the proposed costs and qualifications of each firm (RC 153.693).

Are there rules that a board must follow when negotiating a contract with a design-build firm?

Yes. The board must enter into contract negotiations for services with the design-build firm whose pricing proposal it determined to be the best value (RC 153.693(A)(5)). The contract negotiations must:

- Ensure the parties have a mutual understanding of the essential requirements of the services, the provisions allowing use of contingency funds and the contract terms (RC 153.693(B)(1)).
- Ensure the design-build firm will be able to provide the needed personnel, equipment and facilities to perform within the contracted time (RC 153.693(B)(2)).
- Agree on a schedule and procedure to determine a guaranteed maximum price using an open-book pricing method representing the total maximum amount that will be paid by the board, including the cost of the work, general conditions, contingency and fee payable to the firm (RC 153.693(B)(3)). An "open-book pricing method" occurs when the design-build firm provides the school district, at its request, with all books, records, documents, contracts, subcontracts and other data in its possession pertaining to the performance of design-build services for the district (RC 153.65(J)).

What happens if the board is unable to negotiate a contract with the most qualified design-build firm?

If the board is unable to negotiate a contract with the firm it believes has the best value in its pricing proposal, the board must notify the firm in writing that it is terminating negotiations. The board then may negotiate a contract with the firm ranked second highest using the same negotiation procedures listed in RC 153.693(B), described in the previous answer. If those negotiations also fail, the board may negotiate a contract with the next highest ranked firm and continue until a contract is negotiated.

If the board is unable to negotiate a contract at any point in the process, it may choose additional firms to provide pricing proposals or choose an alternative delivery method for the project (RC 153.693(D)).

Alternate methods

Are there situations when a board may select a design professional or firm without following the statutory requirements?

Yes, there are two situations when a board may deviate from the statutory selection process.

First, if the estimated cost of services is less than \$50,000, the board can use a different procedure to select a design professional or firm provided that: (1) the board chooses a design professional from those that submitted a current statement of qualifications within the preceding year; and (2) the board and design professional negotiate their contract as described in RC 153.69(B) (RC 153.71(A)). The board's selection must be based on its determination that the design professional is the most qualified to perform the services.

Second, the board is not required to follow the statutory process if the board determines, in writing, that the project is an emergency requiring immediate action.

Insurance

Is professional liability insurance required?

Yes. Any individual providing "professional design services to the board or to a design-build firm" must have professional liability insurance for the time in which the services are provided. The amount of insurance must be considered sufficient by the board. The board also may require a design-build firm to carry contractor's professional liability insurance and any other insurance deemed necessary (RC 153.70).

In its discretion, the board may waive the professional liability insurance requirement for good cause or it may permit assurances of professional liability to be provided. Finally, a design-build firm must provide a surety bond to the board pursuant to rules adopted by the Ohio Facilities Construction Commission before construction begins on a contract for design-build services (RC 153.70; OAC 153:1-4-02).

The information in this fact sheet is intended as general information. It should not be relied upon as legal advice. If legal advice is required, the services of an attorney should be obtained.