

Ohio Senate Government Oversight Committee  
Senate Bill 23  
Interested Party Testimony  
March 8, 2023

Chair Roegner, Vice Chair Antani, Ranking Member Hicks-Hudson, and Members of the Senate Government Oversight Committee –

My name is Chris McCloskey, and I am the Chair of Bricker & Eckler’s Public Sector Industry Group where I practice construction law. I come before you today to offer interested party testimony on Senate Bill 23 (“SB 23”). This legislation proposes to modify section 9.48 of the Revised Code to allow political subdivisions of the state to avoid the competitive bidding requirements that may otherwise be applicable to them when procuring construction services by purchasing those construction services through a national joint purchasing program.

If construction services are to be permitted for procurement under section 9.48, I ask that you amend SB 23 to require unit pricing for those contracts similar to the unit pricing mechanism required in Revised Code section 167.081 for regional councils of governments (COGs). This will provide unit pricing transparency, align the rules applicable to COGs with the rules applicable to national joint purchasing programs operating within the state, and ensure that procurements under section 9.48 comply with federal Uniform Guidance.

Currently, the Ohio Attorney General has said that construction services may not be purchased through joint purchasing programs under section 9.48, OAG 2019-028. In that same opinion, however, the Ohio Attorney General also stated that construction services may be purchased through a regional council of governments under section 167.081. The distinguishing feature between the two statutes is that section 167.081 expressly requires the underlying contract to establish a “unit price” and be awarded “pursuant to a competitive bidding procedure...” Section 9.48, on the other hand, permits the contract to be awarded generally pursuant to “a competitive selection procedure of another political subdivision within this state or in another state.”

Competitive selection procedures applicable in other states do not always align with federal Uniform Guidance, and they typically result in the vendor providing a lump sum price for the work, which does not give the public owner ready visibility on the manner in which the pricing was derived. While a lump sum price is appropriate in a publicly bid contract because of the immediate competition, lump sum pricing is problematic in a cooperative purchasing program proposal due to the lack of unit price transparency when the program is being used as a means to avoid the public bidding process. Moreover, there is extra due diligence that a public owner needs to undertake to ensure that the underlying procurement complies with federal Uniform Guidance when federal funds are involved. If the procurement does not comply, then it can significantly delay the ultimate project while the owner seeks out a replacement vendor.

By passing SB 23 without the unit pricing requirement similar to Revised Code section 167.081, governmental entities would have less information and extra due diligence work to do when making a purchase under this option. Thank you for providing me with the opportunity to

provide testimony on SB 23. I would happy to answer any questions that you may have at this time.