

As Introduced

**136th General Assembly
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S. B. No. 262

Senator Blessing

To amend sections 9.334, 153.12, 153.501, 153.503,
and 153.693 of the Revised Code to require a
public authority or other party to a
construction contract to note variations from an
industry standard form.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That sections 9.334, 153.12, 153.501, 153.503,
and 153.693 of the Revised Code be amended to read as follows:

Sec. 9.334. (A) (1) Every public authority planning to
contract for construction management services with a
construction manager at risk shall evaluate the proposals
submitted and select not fewer than three construction managers
at risk the public authority considers to be the most qualified
to provide the required construction management services, except
that the public authority shall select and rank fewer than three
when the public authority determines in writing that fewer than
three qualified construction managers at risk are available.

(2) For projects valued at less than four million dollars,
the public authority may require the construction manager at
risk to submit a proposal described in division (A) (1) of this
section along with a pricing proposal described in division (C)

of this section. The public authority shall provide each 21
construction manager at risk who desires to submit a proposal 22
under this division a pre-proposal meeting to explore the 23
proposals further, in which the public authority shall provide 24
the construction manager at risk with a description of the 25
project, including the scope and nature of the proposed services 26
and potential technical approaches. The public authority shall 27
proceed with selection and ranking as described in division (A) 28
(1) of this section, based only on the proposal submitted under 29
that division. Once the construction managers at risk have been 30
selected, the public authority shall proceed to evaluate the 31
pricing proposals of each selected construction manager at risk 32
as described in division (D) of this section, continuing the 33
selection process from there. 34

~~(B)~~ (B) (1) The public authority shall provide each 35
construction manager at risk selected under division (A) of this 36
section with a description of the project, including a statement 37
of available design detail, a description of how the guaranteed 38
maximum price for the project shall be determined, including the 39
estimated level of design detail upon which the guaranteed 40
maximum price shall be based, the form of the construction 41
management contract, and a request for a pricing proposal. 42

(2) When utilizing an industry standard published 43
construction management contract form, the public authority 44
shall provide the contract form in a manner that indicates any 45
alteration to the standard form by striking through and 46
underlining any changes to the original language of the standard 47
form or by cross-referencing conditions that are supplemental to 48
the standard form. Failure to indicate an alteration to the 49
original language of the standard form in the manner required 50
above results in the alteration being void and without effect 51

such that the original language prevails. 52

(C) The pricing proposal of each construction manager at 53
risk shall include at least the following regarding the 54
construction manager at risk: 55

(1) A list of key personnel for the project; 56

(2) A statement of the general conditions and contingency 57
requirements; 58

(3) A fee proposal divided into a preconstruction fee, a 59
construction fee, and the portion of the construction fee to be 60
at risk in a guaranteed maximum price. 61

(D) The public authority shall evaluate the submitted 62
pricing proposals and may hold discussions with individual 63
construction managers at risk to explore their proposals 64
further, including the scope and nature of the proposed services 65
and potential technical approaches. 66

(E) After evaluating the pricing proposals, the public 67
authority shall rank the selected construction managers at risk 68
based on its evaluation of the value of each pricing proposal, 69
with such evaluation considering the proposed cost and 70
qualifications. 71

(F) The public authority shall enter into negotiations for 72
a construction management contract with the construction manager 73
at risk whose pricing proposal the public authority determines 74
to be the best value under division (E) of this section. 75
Contract negotiations shall be directed toward: 76

(1) Ensuring that the construction manager at risk and the 77
public authority mutually understand the essential requirements 78
involved in providing the required construction management 79

services, including the provisions for the use of contingency 80
funds and the possible distribution of savings in the final 81
costs of the project; 82

(2) Ensuring that the construction manager at risk will be 83
able to provide the necessary personnel, equipment, and 84
facilities to perform the construction management services 85
within the time required by the construction management 86
contract; 87

(3) Agreeing upon a procedure and schedule for determining 88
a guaranteed maximum price using an open book pricing method 89
that shall represent the total maximum amount to be paid by the 90
public authority to the construction manager at risk for the 91
project and that shall include the costs of all the work, the 92
cost of its general conditions, the contingency, and the fee 93
payable to the construction manager at risk. 94

(G) (1) If the public authority fails to negotiate a 95
construction management contract with the construction manager 96
at risk whose pricing proposal the public authority determines 97
to be the best value under division (E) of this section, the 98
public authority shall inform the construction manager at risk, 99
in writing, of the termination of negotiations. 100

(2) Upon terminating negotiations, the public authority 101
may enter into negotiations as provided in this section with the 102
construction manager at risk that the public authority ranked 103
next highest under division (E) of this section. If negotiations 104
fail, the public authority may enter into negotiations as 105
provided in this section with the construction manager at risk 106
the public authority ranked next highest under division (E) of 107
this section. 108

(3) If a public authority fails to negotiate a 109
construction management contract with a construction manager at 110
risk whose pricing proposal the public authority determines to 111
be the best value under division (E) of this section, the public 112
authority may select additional construction managers at risk to 113
provide pricing proposals to the public authority pursuant to 114
this section or may select an alternative delivery method for 115
the project. 116

(H) If the public authority and construction manager at 117
risk fail to agree on a guaranteed maximum price, nothing in 118
this section shall prohibit the public authority from allowing 119
the construction manager at risk to provide the management 120
services that a construction manager is authorized to provide. 121

(I) Nothing in this section affects a public authority's 122
right to accept or reject any or all proposals in whole or in 123
part. 124

Sec. 153.12. (A) With respect to award of any contract for 125
the construction, reconstruction, improvement, enlargement, 126
alteration, repair, painting, or decoration of a public 127
improvement made by the state, or any county, township, 128
municipal corporation, school district, or other political 129
subdivision, or any public board, commission, authority, 130
instrumentality, or special purpose district of or in the state 131
or a political subdivision or that is authorized by state law, 132
the award, and execution of the contract, shall be made within 133
sixty days after the date on which the bids are opened. The 134
failure to award and execute the contract within sixty days 135
invalidates the entire bid proceedings and all bids submitted, 136
unless the time for awarding and executing the contract is 137
extended by mutual consent of the owner or its representatives 138

and the bidder whose bid the owner accepts and with respect to 139
whom the owner subsequently awards and executes a contract. The 140
public owners referred to in this section shall include, in the 141
plans and specifications for the project for which bids are 142
solicited, the estimate of cost. The bid for which the award is 143
to be made shall be opened at the time and place named in the 144
advertisement for bids, unless extended by the owner or its 145
representative or unless, within seventy-two hours prior to the 146
published time for the opening of bids, excluding Saturdays, 147
Sundays, and legal holidays, any modification of the plans or 148
specifications and estimates of cost for the project for which 149
bids are solicited is issued and mailed or otherwise furnished 150
to persons who have obtained plans or specifications for the 151
project, for which the time for opening of bids shall be 152
extended one week, with no further advertising of bids required. 153
The contractor, upon request, is entitled to a notice to proceed 154
with the work by the owner or its representative upon execution 155
of the contract. No contract to which this section applies shall 156
be entered into if the price of the contract, or, if the project 157
involves multiple contracts where the total price of all 158
contracts for the project, is in excess of ten per cent, in the 159
case of a contract made by the state or a public board, 160
commission, authority, or instrumentality of the state, or 161
twenty per cent, in the case of a contract made by a county, 162
township, municipal corporation, school district, special 163
purpose district, or other political subdivision or a public 164
board, commission, authority, or instrumentality of the 165
political subdivision, above the entire estimate thereof, nor 166
shall the entire cost of the construction, reconstruction, 167
repair, painting, decorating, improvement, alteration, addition, 168
or installation, including changes and estimates of expenses for 169
architects or engineers, exceed in the aggregate the amount 170

authorized by law. 171

The unit or lump sum price stated in the contract shall be 172
used in determining the amount to be paid and shall constitute 173
full and final compensation for all the work. 174

Partial payment to the contractor for work performed under 175
the lump sum price shall be based on a schedule prepared by the 176
contractor and approved by the architect or engineer who shall 177
apportion the lump sum price to the major components entering 178
into or forming a part of the work under the lump sum price. 179

Partial payments to the contractor for labor performed 180
under either a unit or lump sum price contract shall be made at 181
a rate of not less than ninety-six per cent of the estimates 182
prepared by the contractor and approved by the architect or 183
engineer. No subcontract shall be paid at a rate lower than the 184
rate being paid to the contractor by the public authority. 185

The amounts and time of payments of any public 186
improvements contract made by the state or any county, township, 187
municipal corporation, school district, or other political 188
subdivision, or any public board, commission, authority, 189
instrumentality, or special purpose district of or in the state 190
or a political subdivision or that is authorized by state law, 191
except as provided in section 5525.19 of the Revised Code, shall 192
be governed by this section and sections 153.13 and 153.14 of 193
the Revised Code. If the time for awarding the contract is 194
extended by mutual consent, or if the owner or its 195
representative fails to issue a timely notice to proceed as 196
required by this section, the owner or its representative shall 197
issue a change order authorizing delay costs to the contractor, 198
which does not invalidate the contract. The amount of such a 199
change order to the owner shall be determined in accordance with 200

the provisions of the contract for change orders or force 201
accounts or, if no such provision is set forth in the contract, 202
the cost to the owner shall be the contractor's actual costs 203
including wages, labor costs other than wages, wage taxes, 204
materials, equipment costs and rentals, insurance, and 205
subcontracts attributable to the delay, plus a reasonable sum 206
for overhead. In the event of a dispute between the owner and 207
the contractor concerning such change order, procedures shall be 208
commenced under the applicable terms of the contract, or, if the 209
contract contains no provision for resolving the dispute, it 210
shall be resolved pursuant to the procedures for arbitration in 211
Chapter 2711. of the Revised Code, except as provided in 212
division (B) of this section. Nothing in this division shall be 213
construed as a limitation upon the authority of the director of 214
transportation granted in Chapter 5525. of the Revised Code. 215

(B) If a dispute arises between the state and a contractor 216
concerning the terms of a public improvement contract let by the 217
state or concerning a breach of the contract, and after 218
administrative remedies provided for in such contract and any 219
alternative dispute resolution procedures provided in accordance 220
with guidelines established by the executive director of the 221
Ohio facilities construction commission are exhausted, the 222
contractor may bring an action to the court of claims in 223
accordance with Chapter 2743. of the Revised Code. The state or 224
the contractor may request the chief justice of the supreme 225
court to appoint a referee or panel of referees in accordance 226
with division (C) (3) of section 2743.03 of the Revised Code. As 227
used in this division, "dispute" means a disagreement between 228
the state and the contractor concerning a public improvement 229
contract let by the state. 230

(C) When utilizing an industry standard published 231

construction management contract form, the public authority 232
shall provide the contract form in a manner that indicates any 233
alteration to the standard form by striking through and 234
underlining any changes to the original language of the standard 235
form or by cross-referencing conditions that are supplemental to 236
the standard form. Failure to indicate an alteration to the 237
original language of the standard form in the manner required 238
above results in the alteration being void and without effect 239
such that the original language prevails. 240

Sec. 153.501. (A) A public authority may accept a 241
subcontract awarded by a construction manager at risk, a design- 242
build firm, or a general contracting firm, or may reject any 243
such subcontract if the public authority determines that the 244
bidder is not responsible. When utilizing an industry standard 245
published construction management contract form, the public 246
authority shall provide the contract form in a manner that 247
indicates any alteration to the standard form by striking 248
through and underlining any changes to the original language of 249
the standard form or by cross-referencing conditions that are 250
supplemental to the standard form. Failure to indicate an 251
alteration to the original language of the standard form in the 252
manner required above results in the alteration being void and 253
without effect such that the original language prevails. 254

(B) A public authority may authorize a construction 255
manager at risk or design-build firm to utilize a design-assist 256
firm on any public improvement project without transferring any 257
design liability to the design-assist firm. 258

(C) If the construction manager at risk or design-build 259
firm intends and is permitted by the public authority to self- 260
perform a portion of the work to be performed, the construction 261

manager at risk or design-build firm shall submit a sealed bid 262
to the public authority for the portion of the work prior to 263
accepting and opening any bids for the same work, except when 264
the public authority requests a guaranteed maximum price 265
proposal due at the time of selection. 266

Sec. 153.503. (A) The Ohio facilities construction 267
commission, pursuant to Chapter 119. of the Revised Code, shall 268
adopt rules to do all of the following: 269

~~(A)~~ (1) Prescribe the procedures and criteria for 270
determining the best value selection of a construction manager 271
at risk or design-build firm; 272

~~(B)~~ (2) Set forth standards to be followed by construction 273
managers at risk and design-build firms when establishing 274
prequalification criteria pursuant to section 153.502 of the 275
Revised Code; 276

~~(C)~~ (3) Prescribe the form for the contract documents to be 277
used by a construction manager at risk, design-build firm, or 278
general contractor when entering into a subcontract; 279

~~(D)~~ (4) Prescribe the form for the contract documents to be 280
used by a public authority when entering into a contract with a 281
construction manager at risk or design-build firm. 282

(B) The rules adopted under divisions (A) (3) and (4) of 283
this section shall include a requirement that a public 284
authority, construction manager at risk, design-build firm, or 285
general contracting firm utilizing a prescribed industry 286
standard published contract or subcontract form shall provide 287
the form in a manner that indicates any alteration to the 288
standard form by striking through and underlining any changes to 289
the original language of the standard form or by cross- 290

referencing conditions that are supplemental to the standard 291
form. Failure to indicate an alteration to the original language 292
of the standard form in the manner required above results in the 293
alteration being void and without effect such that the original 294
language prevails. 295

Sec. 153.693. (A) (1) For every design-build contract, the 296
public authority planning to contract for design-build services, 297
in consultation with the criteria architect or engineer, shall 298
evaluate the statements of qualifications submitted by design- 299
build firms specifically regarding the project, including the 300
design-build firm's proposed architect or engineer of record. 301

(2) For projects valued at less than four million dollars, 302
the public authority may require the design-build firm to submit 303
a statement along with a pricing proposal described in division 304
(B) (2) (h) of this section. The public authority shall provide 305
each design-build firm who desires to submit both a statement 306
and a proposal a pre-proposal meeting to explore the proposals 307
further, in which the public authority shall provide the design- 308
build firm with a description of the project, including the 309
scope and nature of the proposed services and potential 310
technical approaches. After and only after the public authority 311
ranks and selects firms under division (B) (1) of this section, 312
the public authority shall review the pricing proposals 313
submitted by selected firms under this division, and proceed 314
under division (B) (3) of this section, continuing the selection 315
process from there. 316

(B) Following this evaluation, the public authority shall: 317

(1) Select and rank not fewer than three firms which it 318
considers to be the most qualified to provide the required 319
design-build services, except that the public authority shall 320

select and rank fewer than three firms when the public authority
determines in writing that fewer than three qualified firms are
available;

(2) Provide each selected design-build firm with all of
the following:

(a) A description of the project and project delivery;

(b) The design criteria produced by the criteria architect
or engineer under section 153.692 of the Revised Code;

(c) A preliminary project schedule;

(d) A description of any preconstruction services;

(e) A description of the proposed design services;

(f) A description of a guaranteed maximum price, including
the estimated level of design on which such guaranteed maximum
price is based;

(g) The form of the design-build services contract~~7~~. If
using an industry standard published design-build services
contract form, the public authority shall provide the form in a
manner that indicates any alteration to the standard form by
striking through and underlining any changes to the original
language of the standard form or by cross-referencing conditions
that are supplemental to the standard form. If the public
authority fails to indicate an alteration to the original
language of the standard form, the alteration is void and
without effect and the original language prevails.

(h) Except for projects under division (A) (2) of this
section, a request for a pricing proposal that shall be divided
into a design services fee and a preconstruction and design-
build services fee. The pricing proposal of each design-build

firm shall include at least all of the following: 349

(i) A list of key personnel and consultants for the 350
project; 351

(ii) Design concepts adhering to the design criteria 352
produced by the criteria architect or engineer under section 353
153.692 of the Revised Code; 354

(iii) The design-build firm's statement of general 355
conditions and estimated contingency requirements; 356

(iv) A preliminary project schedule. 357

(3) Evaluate the pricing proposal submitted by each 358
selected firm and, at its discretion, hold discussions with each 359
firm to further investigate its pricing proposal, including the 360
scope and nature of the firm's proposed services and potential 361
technical approaches; 362

(4) Rank the selected firms based on the public 363
authority's evaluation of the value of each firm's pricing 364
proposal, with such evaluation considering each firm's proposed 365
costs and qualifications; 366

(5) Enter into contract negotiations for design-build 367
services with the design-build firm whose pricing proposal the 368
public authority determines to be the best value under this 369
section. 370

(C) In complying with division (B)(5) of this section, 371
contract negotiations shall be directed toward: 372

(1) Ensuring that the design-build firm and the public 373
authority mutually understand the essential requirements 374
involved in providing the required design-build services, the 375
provisions for the use of contingency funds, and the terms of 376

the contract, including terms related to the possible 377
distribution of savings in the final costs of the project; 378

(2) Ensuring that the design-build firm shall be able to 379
provide the necessary personnel, equipment, and facilities to 380
perform the design-build services within the time required by 381
the design-build construction contract; 382

(3) Agreeing upon a procedure and schedule for determining 383
a guaranteed maximum price using an open book pricing method 384
that shall represent the total maximum amount to be paid by the 385
public authority to the design-build firm for the project and 386
that shall include the costs of all work, the cost of its 387
general conditions, the contingency, and the fee payable to the 388
design-build firm. 389

(D) If the public authority fails to negotiate a contract 390
with the design-build firm whose pricing proposal the public 391
authority determines to be the best value as determined under 392
this section, the public authority shall inform the design-build 393
firm in writing of the termination of negotiations. The public 394
authority may then do the following: 395

(1) Negotiate a contract with a design-build firm ranked 396
next highest under this section following the negotiation 397
procedure described in this section; 398

(2) If negotiations fail with the design-build firm under 399
division (D)(1) of this section, negotiate a contract with the 400
design-build firm ranked next highest under this section 401
following the negotiation procedure described in this section 402
and continue negotiating with the design-build firms selected 403
under this section in the order of their ranking until a 404
contract is negotiated. 405

(E) If the public authority fails to negotiate a contract 406
with a design-build firm whose pricing proposal the public 407
authority determines to be the best value as determined under 408
this section, it may select additional design-build firms to 409
provide pricing proposals to the public authority pursuant to 410
this section or may select an alternative delivery method for 411
the project. 412

(F) The public authority may provide a stipend for pricing 413
proposals received from design-build firms. 414

(G) Nothing in this section affects a public authority's 415
right to accept or reject any or all proposals in whole or in 416
part. 417

Section 2. That existing sections 9.334, 153.12, 153.501, 418
153.503, and 153.693 of the Revised Code are hereby repealed. 419

Section 3. The changes in sections 9.334, 153.501, 420
153.503, and 153.693 of the Revised Code and division (C) of 421
section 153.12 of the Revised Code as amended by this act apply 422
to a contract entered into on or after the effective date of 423
this section and do not apply to a contract already in effect on 424
the effective date of this section. 425