

# AN ACT

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

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

(2) When utilizing an industry standard published construction management contract form, the public authority shall provide the contract 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, by cross-referencing conditions that are supplemental to the standard form, or by including conditions that are supplemental to the standard form that cross-reference the section or sections of the standard form being altered. Failure to indicate an alteration to the original language of the standard form in the manner required above results in the alteration being void and without effect such that the original language prevails.

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

- (1) A list of key personnel for the project;
- (2) A statement of the general conditions and contingency requirements;
- (3) A fee proposal divided into a preconstruction fee, a construction fee, and the portion of the construction fee to be at risk in a guaranteed maximum price.

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

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

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

(1) Ensuring that the construction manager at risk and the public authority mutually understand the essential requirements involved in providing the required construction management services, including the provisions for the use of contingency funds and the possible distribution of savings in the final costs of the project;

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

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

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

(2) Upon terminating negotiations, the public authority may enter into negotiations as provided in this section with the construction manager at risk that the public authority ranked next

highest under division (E) of this section. If negotiations fail, the public authority may enter into negotiations as provided in this section with the construction manager at risk the public authority ranked next highest under division (E) of this section.

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

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

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

Sec. 153.12. (A) With respect to award of any contract for the construction, reconstruction, improvement, enlargement, alteration, repair, painting, or decoration of a public improvement made by the state, or any county, township, municipal corporation, school district, or other political subdivision, or any public board, commission, authority, instrumentality, or special purpose district of or in the state or a political subdivision or that is authorized by state law, the award, and execution of the contract, shall be made within sixty days after the date on which the bids are opened. The failure to award and execute the contract within sixty days invalidates the entire bid proceedings and all bids submitted, unless the time for awarding and executing the contract is extended by mutual consent of the owner or its representatives and the bidder whose bid the owner accepts and with respect to whom the owner subsequently awards and executes a contract. The public owners referred to in this section shall include, in the plans and specifications for the project for which bids are solicited, the estimate of cost. The bid for which the award is to be made shall be opened at the time and place named in the advertisement for bids, unless extended by the owner or its representative or unless, within seventy-two hours prior to the published time for the opening of bids, excluding Saturdays, Sundays, and legal holidays, any modification of the plans or specifications and estimates of cost for the project for which bids are solicited is issued and mailed or otherwise furnished to persons who have obtained plans or specifications for the project, for which the time for opening of bids shall be extended one week, with no further advertising of bids required. The contractor, upon request, is entitled to a notice to proceed with the work by the owner or its representative upon execution of the contract. No contract to which this section applies shall be entered into if the price of the contract, or, if the project involves multiple contracts where the total price of all contracts for the project, is in excess of ten per cent, in the case of a contract made by the state or a public board, commission, authority, or instrumentality of the state, or twenty per cent, in the case of a contract made by a county, township, municipal corporation, school district, special purpose district, or other

political subdivision or a public board, commission, authority, or instrumentality of the political subdivision, above the entire estimate thereof, nor shall the entire cost of the construction, reconstruction, repair, painting, decorating, improvement, alteration, addition, or installation, including changes and estimates of expenses for architects or engineers, exceed in the aggregate the amount authorized by law.

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

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

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

The amounts and time of payments of any public improvements contract made by the state or any county, township, municipal corporation, school district, or other political subdivision, or any public board, commission, authority, instrumentality, or special purpose district of or in the state or a political subdivision or that is authorized by state law, except as provided in section 5525.19 of the Revised Code, shall be governed by this section and sections 153.13 and 153.14 of the Revised Code. If the time for awarding the contract is extended by mutual consent, or if the owner or its representative fails to issue a timely notice to proceed as required by this section, the owner or its representative shall issue a change order authorizing delay costs to the contractor, which does not invalidate the contract. The amount of such a change order to the owner shall be determined in accordance with the provisions of the contract for change orders or force accounts or, if no such provision is set forth in the contract, the cost to the owner shall be the contractor's actual costs including wages, labor costs other than wages, wage taxes, materials, equipment costs and rentals, insurance, and subcontracts attributable to the delay, plus a reasonable sum for overhead. In the event of a dispute between the owner and the contractor concerning such change order, procedures shall be commenced under the applicable terms of the contract, or, if the contract contains no provision for resolving the dispute, it shall be resolved pursuant to the procedures for arbitration in Chapter 2711. of the Revised Code, except as provided in division (B) of this section. Nothing in this division shall be construed as a limitation upon the authority of the director of transportation granted in Chapter 5525. of the Revised Code.

(B) If a dispute arises between the state and a contractor concerning the terms of a public improvement contract let by the state or concerning a breach of the contract, and after administrative remedies provided for in such contract and any alternative dispute resolution procedures provided in accordance with guidelines established by the executive director of the Ohio facilities construction

commission are exhausted, the contractor may bring an action to the court of claims in accordance with Chapter 2743. of the Revised Code. The state or the contractor may request the chief justice of the supreme court to appoint a referee or panel of referees in accordance with division (C)(3) of section 2743.03 of the Revised Code. As used in this division, "dispute" means a disagreement between the state and the contractor concerning a public improvement contract let by the state.

(C) When utilizing an industry standard published construction management contract form, the public authority shall provide the contract 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, by cross-referencing conditions that are supplemental to the standard form, or by including conditions that are supplemental to the standard form that cross-reference the section or sections of the standard form being altered. Failure to indicate an alteration to the original language of the standard form in the manner required above results in the alteration being void and without effect such that the original language prevails.

Sec. 153.501. (A) A public authority may accept a subcontract awarded by a construction manager at risk, a design-build firm, or a general contracting firm, or may reject any such subcontract if the public authority determines that the bidder is not responsible. When utilizing an industry standard published construction management contract form, the public authority shall provide the contract 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, by cross-referencing conditions that are supplemental to the standard form, or by including conditions that are supplemental to the standard form that cross-reference the section or sections of the standard form being altered. Failure to indicate an alteration to the original language of the standard form in the manner required above results in the alteration being void and without effect such that the original language prevails.

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

(C) If the construction manager at risk or design-build firm intends and is permitted by the public authority to self-perform a portion of the work to be performed, the construction manager at risk or design-build firm shall submit a sealed bid to the public authority for the portion of the work prior to accepting and opening any bids for the same work, except when the public authority requests a guaranteed maximum price proposal due at the time of selection.

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

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

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

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

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

(B) The rules adopted under divisions (A)(3) and (4) of this section shall include a requirement that a public authority, construction manager at risk, design-build firm, or general contracting firm utilizing a prescribed industry standard published contract or subcontract form 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, by cross-referencing conditions that are supplemental to the standard form, or by including conditions that are supplemental to the standard form that cross-reference the section or sections of the standard form being altered. Failure to indicate an alteration to the original language of the standard form in the manner required above results in the alteration being void and without effect such that the original language prevails.

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

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

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

(1) Select and rank not fewer than three firms which it considers to be the most qualified to provide the required design-build services, except that the public authority shall 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; 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, by cross-referencing conditions that are supplemental to the standard form, or by including conditions that are supplemental to the standard form that cross-reference the section or sections of the standard form being altered. 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:

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

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

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

(iv) A preliminary project schedule.

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

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

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

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

(1) Ensuring that the design-build firm and the public authority mutually understand the essential requirements involved in providing the required design-build services, the provisions for the use of contingency funds, and the terms of the contract, including terms related to the possible distribution of savings in the final costs of the project;

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

(3) Agreeing upon a procedure and schedule for determining a guaranteed maximum price

using an open book pricing method that shall represent the total maximum amount to be paid by the public authority to the design-build firm for the project and that shall include the costs of all work, the cost of its general conditions, the contingency, and the fee payable to the design-build firm.

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

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

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

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

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

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

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

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

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*Speaker* \_\_\_\_\_ *of the House of Representatives.*

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*President* \_\_\_\_\_ *of the Senate.*

Passed \_\_\_\_\_, 20\_\_

Approved \_\_\_\_\_, 20\_\_

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*Governor.*

Am. S. B. No. 262

136th G.A.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

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*Director, Legislative Service Commission.*

Filed in the office of the Secretary of State at Columbus, Ohio, on the \_\_\_\_ day of \_\_\_\_\_, A. D. 20\_\_\_\_.

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*Secretary of State.*

File No. \_\_\_\_\_ Effective Date \_\_\_\_\_