OFCC

OHIO FACILITIES CONSTRUCTION COMMISSION

Construction Reform Rules

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Construction Reform Rules - NEW

DRAFT - NOT FOR FILING

153:1-9-01 Adjusting the public bidding threshold for inflation.

(A) For the purposes of this chapter:

(1) "Rate of inflation" has the same meaning as in section 107.032 of the Revised Code.

(2) "Public bidding threshold" means the monetary threshold contained in section 153.01 of the Revised Code.

(B) The executive director of the Ohio facilities construction commission shall evaluate the public bidding threshold and adjust the amount based on the average rate of inflation during each of the previous five years immediately preceding the adjustment by doing the following:

(1) Determine the rate of inflation by calculating the percent change in the average annual consumer price index (CPI-U), all urban consumers, Midwest, all items, for the previous five calendar years as published by the U.S. department of labor, bureau of labor statistics in the month of January following the fifth year.

(2) Adjust the public bidding threshold by multiplying the calculated preceding five-year rate of inflation by the baseline public bidding threshold and rounding the result to the nearest five thousand dollars to establish the public bidding threshold.

(C) For subsequent adjustments that occur every five years, the executive director shall:

(1) Determine the rate of inflation in the same manner as in (B)(1) of this rule.

(2) Adjust the public bidding threshold by multiplying the rate of inflation by the amount calculated previously as a threshold prior to rounding, and then rounding the result to the nearest five thousand dollars to establish the adjusted public bidding threshold.

(D) If the calculation results in section (C) results in no change in the public bidding threshold, no change to this rule is required.

(E) The public bidding threshold shall be posted on the commission's website at http://ofcc.ohio.gov.

(F) Beginning in January 2017 until the next adjustment period, the public bidding threshold is two hundred fifteen thousand dollars ($215,000.00).

Construction Reform Rules - AMENDED

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153:1-2-01 Form of construction manager at risk contract documents.

(A) The state and state institutions of higher education as defined in section 3345.011 of the Revised Code, shall use the contract forms developed by the ~~office of the state architect in the department of administrative services~~ Ohio facilities construction commission and found on the following website under ~~standard requirements for public facility construction: http://das.ohio.gov/Divisions/GeneralServices/StateArchitectsOffice/ListofStandardRequirementsDocuments.aspx.~~ CM at Risk: http://ofcc.ohio.gov/Documents/AgreementsandStandardRequirements.aspx.

(B) All other public authorities as defined in division (A)(1) of section 153.65 of the Revised Code, excluding the Ohio turnpike commission, shall use one of the following contract forms:

(1) The contract forms developed by the ~~office of the state architect in the department of administrative services~~ Ohio facilities construction commission and found on the following website under CM at Risk: http://ofcc.ohio.gov/Documents/AgreementsandStandardRequirements.aspx.~~standard requirements for public facility construction: http://das.ohio.gov/Divisions/GeneralServices/StateArchitectsOffice/ListofStandardRequirementsDocuments.aspx~~

(2) Contract documents as published and licensed by the American institute of architects and ~~listed in appendix A to this rule, "Industry Form Documents."~~ found on the following website: http://www.aia.org/contractdocs/index.htm.

(3) Contract documents as published and licensed by ConsensusDOCS, LLC and ~~listed in appendix A to this rule, "Industry Form Documents."~~ found on the following website: https://www.consensusdocs.org/Catalog/constructionmanagement.

(4) Contract documents as published and licensed by the construction management association of America and ~~listed in appendix A to this rule, "Industry Form Documents."~~ found on the following website under Construction Manager-at-Risk Model Contract Documents: http://cmaanet.org/contracts.

(C) When using contract documents under paragraph (B) of this rule for a construction manager at risk project, a public authority shall incorporate applicable requirements of federal, state, or local law and may include supplemental terms and conditions or modify the contract documents to include project-specific terms and conditions.

(D) For all construction manager at risk projects, a public authority shall require the construction manager at risk to use the subcontract form developed by the ~~office of the state architect in the department of administrative services~~ Ohio facilities construction commission and found on the following website under ~~standard requirements for public facility construction: http://das.ohio.gov/Divisions/GeneralServices/StateArchitectsOffice/ListofStandardRequirementsDocuments.aspx~~ Misc: http://ofcc.ohio.gov/Documents/AgreementsandStandardRequirements.aspx..

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153:1-2-02 Form of design-build contract documents.

(A) The state and state institutions of higher education as defined in section 3345.011 of the Revised Code, shall use the contract forms developed by the ~~office of the state architect in the department of administrative services~~ Ohio facilities construction commission and found on the following website under ~~standard requirements for public facility construction: http://das.ohio.gov/Divisions/GeneralServices/StateArchitectsOffice/ListofStandardRequirementsDocuments.aspx.~~ design-build: http://ofcc.ohio.gov/Documents/AgreementsandStandardRequirements.aspx.

(B) All other public authorities as defined in division (A)(1) of section 153.65 of the Revised Code, excluding the Ohio turnpike commission, shall use one of the following contract forms:

(1) The contract forms developed by the ~~office of the state architect in the department of administrative services~~ Ohio facilities construction commission and found on the following website under ~~standard requirements for public facility construction: http://das.ohio.gov/Divisions/GeneralServices/StateArchitectsOffice/ListofStandardRequirementsDocuments.aspx~~ design-build: http://ofcc.ohio.gov/Documents/AgreementsandStandardRequirements.aspx.; or

(2) Contract documents as published and licensed by the ~~"American Institute of Architects"~~ American institute of architects and ~~listed in appendix A to this rule, "Industry Form Documents."~~ and found on the following website: http://aia.org/contractdocs/index.htm.

(3) Contract documents as published and licensed by ~~"~~ConsensusDOCS, LLC~~"~~ and ~~listed in appendix A to this rule, "Industry Form Documents."~~ and found on the following website: https://www.consensusdocs.org/Catalog/designbuild.

(4) Contract documents as published and licensed by the ~~"Design-Build Institute of America"~~ design-build institute of America and ~~listed in appendix A to this rule, "Industry Form Documents."~~ found on the following website: http://dbia.org/Pages/Bookstore.aspx.

(5) Contract documents as published and licensed by the ~~"Engineers JointContract Documents Committee"~~ engineers joint contract documents committee and ~~listed in appendix A to this rule, "Industry Form Documents."~~ found on the following website: http://www.edjc.org/product-category/design-build-documents/.

(C) When using contract documents under paragraph (B) of this rule for a design-build project, a public authority shall incorporate applicable requirements of federal, state, or local law and may include supplemental terms and conditions or modify the contract documents to include project-specific terms and conditions.

(D) For all design-build projects, a public authority shall require the design-build firm to use the subcontract form developed by the ~~office of the state architect in the department of administrative services~~ Ohio facilities construction commission and found on the following website under ~~standard requirements for public facility construction: http://das.ohio.gov/Divisions/GeneralServices/StateArchitectsOffice/ListofStandard~~

~~RequirementsDocuments.aspx.~~ Misc:
http://ofcc.ohio.gov/Documents/AgreementsandStandardRequirements.aspx.

(E) This rule does not apply to the department of transportation as the director of the department of transportation has specific statutory authority under Chapters 5517., 5525. and 5526. of the Revised Code to establish a design build program, criteria and selection process.

DRAFT - NOT FOR FILING

153:1-3-01 Definitions.

(A) For the purpose of this chapter, "construction manager at risk" shall have the same meaning given it in section 9.33 of the Revised Code.

(B) For the purpose of this chapter, "public authority" and "design-build firm" shall have the meanings given them in section 153.65 of the Revised Code, but this rule does not apply to the department of transportation as the director of the department of transportation has specific statutory authority under Chapters 5517., 5525. and 5526. of the Revised Code to establish a design build program, criteria and selection process.

(C) For the purpose of this chapter, "general contracting firm" shall have the same meaning given it in section 153.50 of the Revised Code.

(D) "Contingent payment clause" means language that makes the contractor's obligation to pay the subcontractor contingent upon the contractor's receipt of payment from the public authority for the subcontractor's work.

(E) "Contractor" means either a construction manager at risk, design-build firm, or general contracting firm.

(F) "Work" means the labor, materials, equipment, and services, individually or collectively, which are required by the contract documents to be performed or provided by the contractor for the project.

(G) "Contract documents" means collectively the documents that constitute the substance of the contract between the contractor and the public authority, including, but not limited to, all exhibits and addendum to that contract, drawings, specifications, general conditions, supplementary conditions, and any change orders.

(H) "Subcontractor" means any person or entity who undertakes to perform any part of the work on the project that is in privity of contract with a contractor.

(I) "Subcontract form" means the subcontract form developed by the ~~office of the state architect in the department of administrative services~~ Ohio facilities construction commission. The current version of the subcontract form shall be found on the following website under ~~standard requirements for public facility construction: http://das.ohio.gov/Divisions/GeneralServices/StateArchitectsOffice/ListofStandardRequirementsDocuments.aspx.~~ Misc: http://ofcc.ohio.gov/Documents/AgreementsandStandardRequirements.aspx.

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153:1-4-02 Type and amount of surety bonds.

(A) Prior to the execution of the contract, the construction manager at risk or design-build firm shall provide the public authority with separate performance and payment bonds. The penal sum of each bond shall equal one hundred per cent of the contract sum.

(B) If the contract sum increases at any time after the construction manager at risk or design-build firm provides surety bonds in accordance with paragraph (A) of this rule, the construction manager at risk or design-build firm shall cause the penal sum of each surety bond to be increased as necessary to maintain compliance with paragraph (A) of this rule. The delivery of written consent from the affected surety or sureties to the public authority by the construction manager at risk or design-build firm confirming the increased penal sums is a condition precedent to the public authority's obligation to pay the construction manager at risk or design-build firm for any portion of the work associated with the increase in the contract sum.

(C) If at any time prior to final payment to the construction manager at risk or the design-build firm, any surety providing a surety bond for the project (1) is adjudged bankrupt or has made a general assignment for the benefit of its creditors; (2) has liquidated all assets or has made a general assignment for the benefit of its creditors; (3) is placed in receivership; (4) otherwise petitions a state or federal court for protection from its creditors; or (5) allows its license to do business in Ohio to lapse or to be revoked, then the construction manager at risk or the design-build firm shall, within twenty-one days of any such action listed above, provide the public authority with new surety bonds in the form and amount described in the applicable subdivision of these rules. The delivery to the public authority by the construction manager at risk or design-build firm of replacement surety bonds is a condition precedent to the public authority's obligation to make any payment to the construction manager at risk or design-build firm.

(D) The public authority shall require the construction manager at risk or the design-build firm to submit a separate performance bond and a separate payment bond using the ~~2012 edition of "Document 00 61 13.13 – Performance Bond Form" and "Document 00 61 13.16 – Payment Bond Form." These forms may be~~ "Performance Bond Form" and "Payment Bond Form" found on the website of the ~~office of the state architect in the department of administrative services~~ Ohio facilities construction commission under either CM at Risk or Design-Build: ~~standard requirements for public facility construction: http://das.ohio.gov/Divisions/GeneralServices/StateArchitectsOffice/ListofStandardRequirementsDocuments.aspx~~ http://ofcc.ohio.gov/Documents/AgreementsandStandardRequirements.aspx. Any bond submitted under this rule shall name as obligee the public authority or the state, as applicable.

DRAFT - NOT FOR FILING

153:1-6-01 Best value selection of a construction manager at risk.

(A) Definitions:

(1) "Best value" means a selection process in which proposals contain both pricing and performance components, and award is based upon a combination of pricing and performance considerations to determine the offer deemed most advantageous and of the greatest value to the public authority.

(2) "Preconstruction fee" means a combination of home office overhead and profit for services provided during the preconstruction phase of the project, as defined in the contract documents.

(3) "Construction fee" means a combination of home office overhead and profit for services provided during the construction phase of the project, as defined in the contract documents.

(4) "At-risk fee" means the portion of the construction fee attributable to the risk the construction manager at risk assumes by agreeing to be responsible for the performance of the work. The difference between the construction fee and the at-risk fee is the fee the construction manager at risk would charge to provide construction phase services as a construction manager as defined under division (A) of section 9.33 of the Revised Code.

(5) "General conditions" means materials, services, and equipment necessary to perform the work but that are not incorporated into the project as defined in the contract documents.

(6) "Contingency" means an amount set aside by the construction manager at risk firm to pay for unexpected events, as defined in the contract documents.

(B) Two-step process: For each construction manager at risk project, a public authority shall engage in a two-step best value selection process consisting of a qualifications phase and a request for proposal phase. For each construction manager at risk project, it shall be the responsibility of a public authority to:

(1) Identify the qualifications criteria required for the project in accordance with paragraph (C)(1) of this rule and determine how the qualifications criteria shall be evaluated in the qualifications phase of the selection;

(2) Identify the performance criteria and pricing criteria required for the project in accordance with paragraphs (D)(1) and (D)(2) of this rule and determine how they shall be evaluated and weighted in the request for proposal phase of the selection;

(3) Identify if there are any minimum or mandatory technical requirements for the project; and

(4) Establish a process for maintaining records of decisions made at all stages of the selection process.

(C) Qualifications phase: Prior to the announcement of the qualifications phase, a public authority shall establish criteria and the scoring method for the evaluation of a firm's qualifications.

(1) A public authority shall include the following as part of its qualifications criteria:

(a) Competence to perform the required management services as indicated by the technical training, education, and experience of the construction manager at risk's personnel, especially the technical training, education, and experience of the construction manager at risk's employees who would be assigned to perform the services;

(b) Ability in terms of workload and the availability of qualified personnel, equipment, and facilities to perform the required management services competently and expeditiously, and experience working on similar types of projects;

(c) Past performance as reflected by the evaluation of previous clients with respect to factors such as control of costs, quality of work, dispute resolution, administration of subcontractors, and meeting of deadlines;

(d) Financial responsibility including evidence of the capability to provide a surety bond in accordance with paragraph (A) of rule 153:1-4-02 of the Administrative Code;

(e) History of performance with meeting goals of any diversity and inclusion programs required by a public authority or by applicable law, and compliance with applicable affirmative action programs. For public improvement projects subject to section 9.47 of the Revised Code, a valid certificate of compliance shall be submitted; and

(f) Other qualifications that are consistent with the scope and needs of the project including, but not limited to, knowledge of the local area and working relationships with local subcontractors and suppliers.

(2) Evaluation committee: A public authority shall convene an evaluation committee. The composition of the committee is at the discretion of the public authority; however, the composition of the committee shall not consist of enough members of a public body to constitute a quorum. As used in this rule, the term "public body" has the meaning defined in section 121.22 of the Revised Code. A public authority may permit the project's professional design firm or other independent advisors to support the evaluation committee or advise it on technical and pricing issues, but shall not permit participation as a voting member of the committee.

(3) Release of request for qualifications: Once qualifications criteria are established and the evaluation committee has been selected, a public authority shall prepare and release the request for qualifications and any clarifications that may be made to it. A public authority may electronically announce all available construction manager at risk contract opportunities in accordance with rule 153:1-5-01 of the Administrative Code. A public authority shall answer any questions from interested firms in writing and make all questions and answers available to all interested firms.

(4) Short-listed firms: Once the public authority receives responses to the request for qualifications, the evaluation committee shall evaluate those responses and select no fewer than three firms which it considers most qualified to provide the required services, except that the evaluation committee shall select and rank fewer than three firms when it determines in writing that fewer than three qualified construction managers at risk are available. The firms selected and ranked in the qualifications phase shall be referred to as the "short-listed firms" in the request for proposal phase.

(D) Request for proposal phase:

(1) Pricing criteria: As part of its preparation for the pricing component of the request for proposal phase, a public authority shall establish pricing criteria which shall contain the following components:

(a) Preconstruction fee;

(b) Construction fee;

(c) At-risk fee;

(d) General conditions;

(e) Contingency; and

(f) If applicable at the time proposals are requested, a guaranteed maximum price proposal as set forth in paragraph (F) of this rule.

(2) Performance criteria: As part of its preparation for the technical component of the proposal phase, a public authority shall establish performance criteria which may include an evaluation of a firm's proposed:

(a) Schedule;

(b) Approach to the work, including any anticipated self-performed work;

(c) Work sequencing;

(d) Performance history;

(e) Approaches to performance specifications when used;

(f) Plan for anticipated procurement difficulties;

(g) Plan for meeting any goals set as part of any diversity and inclusion program required by the public authority or by applicable law; and

(h) Plan for additional considerations which may include technical design, technical approach, quality of proposed personnel and management plan.

(3) Request for pricing and technical proposal: Once the evaluation committee has selected the short-listed firms, a public authority shall release a request for pricing and technical proposals. A request for pricing and technical proposals shall include:

(a) A description of the project, including a statement of available design detail;

(b) A description of any preconstruction services;

(c) The form of construction management contract;

(d) 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, if not otherwise set forth in the construction management contract; and

(e) A request for a pricing proposal, including the estimated cost of construction for the project, for the purpose of calculating the fees proposed by a construction manager at risk.

(4) Pricing proposal: A construction manager at risk shall include at least the following in its pricing proposal:

(a) A list of key personnel for the project;

(b) A statement of the general conditions and contingency; and

(c) A fee proposal, which includes the pricing criteria components set forth in paragraphs (D)(1)(a) to (D)(1)(c) and (D)(1)(f) of this rule as established by the public authority.

(5) Technical proposal: A construction manager at risk shall include at least the following in its technical proposal:

(a) A project-specific plan;

(b) The identity of the proposed team;

(c) The project-specific approach to deliver the expected services; and

(d) The performance criteria components set forth in paragraphs (D)(2)(a) to (D)(2)(h) of this rule as established by the public authority.

(6) Pre-proposal submission meetings: Prior to the submission of technical and pricing proposals, a public authority may meet individually with each short-listed firm to permit the firm to ask questions regarding the proposal requirements.

(E) Determination of best value:

(1) The evaluation committee shall interview each short-listed firm that submits a pricing and technical proposal. The purpose of the interview is to allow each short-listed firm an opportunity to clarify and respond to questions related to its proposal. The public authority may provide a list of questions to the short-listed firms in advance of each interview. The interview will not be scored or included in the scoring of the proposal. Should a public authority find any major discrepancy or irregularity in a pricing proposal, the public authority shall notify the affected firm in writing to address the concern at the interview and require the firm to provide its response in writing no later than the date of the interview.

(2) The evaluation committee shall evaluate each pricing and technical proposal utilizing the performance criteria and pricing criteria established by the public authority. The committee shall evaluate the performance criteria separately from pricing criteria and then combine the evaluations to reach a final evaluation.

(3) The committee shall rank the short-listed firms based on the final evaluation of each proposal to determine the best value.

(4) The public authority shall announce the firm determined to be the best value and shall enter into negotiations for a construction management contract in accordance with the requirements set forth in divisions (F), (G) and (H) of section 9.334 of the Revised Code.

(F) Guaranteed maximum price: If a public authority intends to seek a guaranteed maximum price (GMP) proposal from the short-listed firms as part of the pricing criteria, the following procedures shall be followed:

(1) The public authority shall define the guaranteed maximum price proposal requirements which may include total cost of the work, allowances, unit prices, assumptions and clarifications, project schedule and scope of work to be self-performed.

(2) The short-listed firm shall submit its GMP proposal to the public authority in a separate sealed package,

identifying the firm's name and consistent with instructions provided by the public authority.

(3) The GMP proposal shall be opened after the evaluation committee concludes its interviews under paragraph (E)(1) of this rule and scoring of the performance and pricing criteria.

(4) The evaluation committee shall conduct a comparative analysis of, and normalize, the GMP proposals received from the short-listed firms. In performing the analysis, the committee may request the assistance of the project's professional design firm or other independent advisors selected under paragraph (C)(2) of this rule.

(5) Each firm's GMP proposal shall be considered with the performance score given by the evaluation committee and the committee shall rank the short-listed firms based on the final evaluation of each short-listed firm's proposal to determine the best value.

(6) The public authority shall announce the firm determined to be the best value and shall enter into negotiations for a construction manager at risk contract in accordance with the requirements set forth in divisions (F), (G) and (H) of section 9.334 of the Revised Code.

(G) Public records: Records that are maintained by the public authority during the qualifications phase and proposal phase are public, to the extent permitted by sections 149.43 and 149.433 of the Revised Code, and shall be available for inspection only after the announcement of the public authority set forth in paragraph (E)(4) or (F)(6) of this rule.

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

DRAFT - NOT FOR FILING

153:1-6-02 Best value selection of a design-build firm.

(A) Definitions:

(1) "Best value" a selection process in which proposals contain both pricing and performance components, and award is based upon a combination of pricing and performance considerations to determine the offer deemed most advantageous and of the greatest value to the public authority.

(2) "Design services fee" means the compensation for services provided by the architect or engineer of record.

(3) "Preconstruction fee" means a combination of home office overhead and profit for services provided during the preconstruction phase of the project, as defined in the contract documents.

(4) "Design-build services fee" means a combination of home office overhead and profit for services provided during the construction phase of the project, as defined in the contract documents.

(5) "General conditions" means materials, services, and equipment necessary to perform the work but that are not incorporated into the project as defined in the contract documents.

(6) "Contingency" means an amount set aside by the design-build firm to pay for unexpected events, as defined in the contract documents.

(B) Two-step process: For each design-build project, a public authority shall engage in a two-step best value selection process consisting of a qualifications phase and a request for proposal phase. For each design-build project, it shall be the responsibility of a public authority to:

(1) Identify the qualifications criteria required for the project in accordance with paragraph (C)(1) of this rule and determine how it shall be evaluated in the qualifications phase of the selection;

(2) Identify the performance criteria and pricing criteria required for the project in accordance with paragraphs (D)(1) and (D)(2) of this rule and determine how they shall be evaluated and weighted in the request for proposal phase of the selection;

(3) Identify if there are any minimum or mandatory technical requirements for the project;

(4) Establish a process for maintaining records of decisions made at all stages of the selection process; and

(5) If appropriate, determine the amount of any stipend to be paid to the non-selected short-listed firms for a responsive pricing and technical proposal.

(C) Qualifications phase: Prior to the announcement of the qualifications phase, a public authority shall establish criteria and the scoring method for the evaluation of a firm's qualifications.

(1) Qualifications criteria: A public authority shall include the following as part of its qualifications criteria:

(a) Competence to perform the required design-build services as indicated by the technical training, education, and experience of the design-build firm's personnel and key consultants, especially the technical training, education, and experience of the employees and consultants of the design-build firm who would be assigned to perform the services, including the proposed architect or engineer of record;

(b) Ability of the firm in terms of workload and availability of qualified personnel, equipment, and facilities to perform the required professional design-build services competently and expeditiously, and experience working on similar types of projects;

(c) Past performance of the firm as reflected by the evaluation of previous clients with respect to such factors as control of costs, quality of work, dispute resolution, administration of subcontractors, and meeting deadlines and the past performance of the design-build firm's proposed architect or engineer of record;

(d) Compliance with sections 4703.182, 4703.332, and 4733.16 of the Revised Code, including the use of a licensed design professional for all design services;

(e) Financial responsibility including evidence of the capability to provide a surety bond in accordance with paragraph (A) of rule 153:1-4-02 of the Administrative Code;

(f) History of performance with meeting goals of any diversity and inclusion programs required by a public authority or by applicable law, and compliance with applicable affirmative action programs. For public improvement projects subject to section 9.47 of the Revised Code, a valid certificate of compliance shall be submitted; and

(g) Other qualifications that are consistent with the scope and needs of the project including, but not limited to, knowledge of the local area and working relationships with local subcontractors and suppliers.

(2) Evaluation committee: A public authority shall convene an evaluation committee. The composition of the committee is at the discretion of the public authority; however, the composition of the committee shall not consist of enough members of a public body to constitute a quorum. As used in this rule, the term "public body" has the meaning defined in section 121.22 of the Revised Code.

(a) During the qualifications phase, a public authority shall consult with the criteria architect or engineer, as defined in division (I) of section 153.65 of the Revised Code.

(b) A public authority may permit other independent advisors to support the evaluation committee or advise it on technical and pricing issues, but shall not permit an advisor to participate as a voting member of the committee.

(3) Release of request for qualifications: Once qualifications criteria are established and the evaluation committee has been selected, a public authority shall prepare and release the request for qualifications and any clarifications that may be made to it. A public authority shall answer any questions from interested firms in writing and make all questions and answers available to all interested firms.

(4) Short-listed firms: Once a public authority receives responses to the request for qualifications, the evaluation committee shall evaluate those responses and select no fewer than three firms which it considers most qualified to provide the required services, except that the evaluation committee shall select and rank fewer than three firms when it determines in writing that fewer than three qualified design-build firms are available. The firms selected and ranked in the qualifications phase shall be referred to as the "short-listed firms" in the request for proposal phase.

(D) Request for proposal phase:

(1) Pricing criteria: As part of its preparation for the pricing component of the request for proposal phase, a public authority shall establish pricing criteria which shall contain the following components:

(a) Design services fee;

(b) Preconstruction fee;

(c) Design-build services fee;

(d) General conditions;

(e) Contingency; and

(f) If applicable at the time proposals are requested, a guaranteed maximum price proposal as set forth in paragraph (F) of this rule.

(2) Performance criteria: As part of its preparation for the technical component of the proposal phase, a public authority shall establish performance criteria which may include an evaluation of a firm's proposed:

(a) Schedule;

(b) Approach to the work, including any anticipated self-performed work;

(c) Work sequencing;

(d) Performance history;

(e) Approaches to performance specifications when used;

(f) Plan for anticipated procurement difficulties;

(g) Plan for meeting any goals set as part of any diversity and inclusion program required by the public authority or by applicable law; and

(h) Plan for additional considerations which may include technical design, technical approach, quality of proposed personnel and management plan.

(3) Request for pricing and technical proposal: Once the evaluation committee has selected the short-listed firms, a public authority shall release a request for pricing and technical proposals. A request for pricing and technical proposals shall include:

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

(b) The design criteria produced by the criteria architect or engineer;

(c) A preliminary project schedule;

(d) A description of any preconstruction services;

(e) A description of the proposed design services;

(f) The form of the design-build services contract;

(g) 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, if not otherwise set forth in the construction management contract; and

(h) A request for a pricing proposal, including the estimated cost of construction for the project, for the purpose of calculating the fees proposed by a design-build firm.

(4) Pricing proposal: A design-build firm shall include at least the following in its pricing proposal:

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

(b) Design concepts adhering to the design criteria produced by the criteria architect or engineer;

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

(d) A preliminary project schedule; and

(e) A pricing proposal which includes the pricing criteria components set forth in paragraphs (D)(1)(a) to (D)(1)(f) of this rule as established by the public authority.

(5) Technical proposal: A design-build firm shall include at least the following in its technical proposal:

(a) A project-specific plan;

(b) The identity of the proposed team;

(c) The project-specific approach to deliver the expected services; and

(d) The performance criteria components set forth in paragraphs (D)(2)(a) to (D)(2)(h) of this rule as established by the public authority.

(6) Pre-proposal submission meetings: Prior to the submission of technical and pricing proposals, a public authority may meet individually with each short-listed firm to permit the firm to ask questions regarding the proposal requirements.

(E) Determination of best value:

(1) The evaluation committee shall interview each short-listed firm that submits a pricing and technical proposal. The purpose of the interview is to allow each short-listed firm an opportunity to clarify and respond to questions related to its proposal. The public authority may provide a list of questions to the short-listed firms in advance of each interview. The interview will not be scored or included in the scoring of the proposal. Should a public authority find any major discrepancy or irregularity in a pricing proposal, the public authority shall notify the affected firm in writing to address the concern at the interview and require the firm to provide its response in writing no later than the date of the interview.

(2) The evaluation committee shall evaluate each pricing and technical proposal utilizing the performance criteria and pricing criteria established by the public authority. The committee shall evaluate the performance criteria separately from pricing criteria and then combine the evaluations to reach a final evaluation.

(3) The committee shall rank the short-listed firms based on the final evaluation of each proposal to determine the best value.

(4) The public authority shall announce the firm determined to be the best value and shall enter into negotiations for a design-build contract in accordance with the requirements set forth in divisions (B), (C) and (D) of section 153.693 of the Revised Code.

(F) Guaranteed maximum price: If a public authority intends to seek a guaranteed maximum price (GMP) proposal from the short-listed firms, the following procedures shall be followed:

(1) The public authority shall define the guaranteed maximum price proposal requirements which may include allowances, unit prices, assumptions and clarifications, project schedule and scope of work to be self-performed;

(2) The GMP proposal shall be submitted to the public authority in a separate sealed package, identifying the firm's name and consistent with instructions provided by the public authority;

(3) The GMP proposal shall be opened after the evaluation committee concludes its interviews under paragraph (E)(1) of this rule and scoring of the performance criteria;

(4) The evaluation committee shall conduct a comparative analysis of, and normalize, the GMP proposals received from the short-listed firms. In performing the analysis, the committee may request the assistance of the criteria architect or engineer, or other independent advisors selected under paragraph (C)(2) of this rule.

(5) Each firm's GMP proposal shall be considered with the performance score given by the evaluation committee and the committee shall rank the short-listed firms based on the final evaluation of each short-listed firm's proposal to determine the best value.

(6) The public authority shall announce the firm determined to be the best value and enter into negotiations for a design-build contract in accordance with the requirements set forth in divisions (B), (C) and (D) of section 153.693 of the Revised Code.

(G) Public records: Records that are maintained by the public authority during the qualifications phase and proposal phase are public, to the extent permitted by sections 149.43 and 149.433 of the Revised Code, and shall be available for inspection only after the announcement of the public authority set forth in paragraph (E)(4) or (F)(6) of this rule.

(H) Stipend:

(1) A public authority may provide a stipend for a responsive pricing and technical proposal received from the non-selected short-listed firms. The decision to award a stipend is at the sole discretion of a public authority.

(2) The amount of the stipend shall be determined by a public authority and may be a lump sum amount or a percentage based on the level of effort anticipated to be expended to meet the proposal requirements.

(3) After the award of the design-build contract and upon the submission of complete and acceptable documentation to the public authority of all actual costs of preparing a pricing and technical proposal, the remaining eligible design-build firms may receive payment up to the amount specified in paragraph (H)(2) of this rule, or the design-build firm's actual costs of preparing the proposal, whichever is less.

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

(J) This rule does not apply to the department of transportation as the director of the department of transportation has specific statutory authority under Chapters 5517., 5525. and 5526. of the Revised Code to establish a design build program, criteria and selection process.

DRAFT - NOT FOR FILING

153:1-8-01 Electronic bidding.

(A) When bids are required for a public improvement project and the state and state institutions of higher education as defined in section 3345.011 of the Revised Code (collectively referred to as the state) elect to accept bids through an electronic bidding system, the state shall comply with this rule and require all bids to be submitted exclusively through the state's enterprise electronic bidding module for construction.

(B) At the time it first advertises for the solicitation of bids, the state may require interested bidders to register to use the state's enterprise electronic bidding system or to subscribe to a web-based subscription service as part of the state's electronic bidding module for construction. The state shall notify all interested bidders of any registration requirements, including but not limited to any terms of use, and the estimated ~~timeframe~~time frame to complete the process. Any electronic bidding system used by the state shall be capable of issuing a unique vendor identification ~~number~~.

(C) The state may require interested bidders to pay a ~~registration~~ fee ~~and maintenance fees~~ to use the state's enterprise electronic bidding system or may require interested bidders to subscribe to a web-based subscription service as part of the state's electronic bidding module for construction at their own cost. The state may waive any ~~registration or maintenance~~ fees for members of diversity and inclusion programs required by the public authority or by applicable law, or other good cause shown.

(D) The state may provide assistance or training to interested bidders on the proper use of the electronic bidding software or web-based subscription service. The state may establish a process by which bidders can receive technical assistance if needed prior to the submission of any bid. The training or technical assistance may be in the form of paper or online job aides, webinars, classroom training, or ~~helpdesk~~help desk assistance. The state's technical assistance or lack of technical assistance during the bidding process shall not relieve the interested bidder of the obligation to properly submit a bid.

(E) The state shall include notice of the availability of electronic bidding in any legal notice or advertisement of the public improvement project ~~and shall include any registration deadlines~~. Interested bidders are responsible for proper registration in the state's enterprise electronic bidding system or web-based subscription service prior to submitting a bid. All electronic bids considered by the state shall be received prior to the published bid deadline.

(F) All modifications of the applicable electronic bid form by the state for a specific project shall be announced in an addendum published through the electronic bidding system.

(G) The state may require interested bidders to include supplemental information with their electronic bid. All unsolicited supplemental bid information submitted by a bidder shall be ignored by the state when reviewing the bid and awarding the contract.

(H) For all bids filed electronically, an electronic copy of the bid guaranty shall be included with all bid submissions in accordance with section 153.08 of the Revised Code. The original, unaltered bid guaranty shall be delivered to the public authority within three business days after the public bid opening.

(I) The state may establish a method for interested bidders to gain access to a computer for general public use in order to submit an electronic bid.

(J) The state's electronic bidding process shall allow interested bidders to submit, resubmit and withdraw a bid prior to the bid deadline. All electronic information submitted by interested bidders within the electronic bidding software or a web-based subscription service shall be protected from view by any other bidder or the state prior to the bid deadline.

(K) The state shall establish a process for interested bidders to electronically certify their identity and the validity of their submitted bid.

(L) After the bid deadline, the state shall publicly issue the bid tabulation by electronic means.

(M) The state shall establish a process to verify when bid information and other relevant data are received in order to address any bid protests due to technical issues encountered in submitting electronic bids. The state shall not be held liable if an interested bidder is unable to submit a complete bid prior to the published deadline due to technical issues or obstructions and the inability or failure of an interested bidder to submit a complete bid shall not constitute sufficient grounds for a bid protest by a disappointed bidder seeking the award of the contract. The state may communicate to interested bidders to submit bids well in advance of the published deadline to ensure the bid is received on time.

(N) Any tampering with the electronic bidding system, the electronic bidding process or bid documents by an interested bidder shall result in the bid of such bidder being rejected by the state.

Construction Reform Rules – NO-CHANGE

DRAFT - NOT FOR FILING

153:1-3-02 Form of subcontract.

(A) The contractor shall use the subcontract form when entering into any subcontract.

(1) A public authority may supplement the subcontract form to include project- specific requirements that do not conflict with the requirements set forth in this chapter.

(2) A contractor may supplement the subcontract form to include terms and conditions that do not conflict with the requirements set forth in this chapter.

(3) In the event of a conflict between the subcontract form and any part of a contract between the contractor and the subcontractor, the provision of the subcontract form prevails.

(4) Unless the public authority takes assignment of the subcontract under paragraph (B)(2) of this rule, the subcontractor will not have any contractual rights against the public authority.

(5) A contract between a contractor and subcontractor failing to include the subcontract form shall not relieve the contractor or subcontractor of their obligation to fully comply with all required provisions set forth in this chapter.

(6) The subcontract form shall require compliance with all applicable federal, state, and local law, including but not limited to sections 153.03, 1311.25 to 1311.32, 2305.31, 4113.61, 4113.62, and 4115.03 to 4115.21, and Chapters 4703. and 4733. of the Revised Code.

(B) The subcontract form shall address the following terms and conditions:

(1) Mutual rights and responsibilities: The subcontract form shall contain a provision requiring, to the extent that the contract between the public authority and the contractor applies to the subcontract work:

(a) The contractor and the subcontractor to be mutually bound by the terms of the contract documents;

(b) The contractor to assume toward the subcontractor the rights, remedies, obligations, and responsibilities that the public authority has and assumes toward the contractor;

(c) The subcontractor to assume toward the contractor the rights, remedies, obligations, and responsibilities that the contractor assumes toward the public authority; and

(d) The subcontractor to perform its portion of the work in accordance with the contract documents.

(2) Contingent assignment: The subcontract form shall contain a provision providing for the assignment of the subcontract to the public authority, at the public authority's option, upon the termination of the contractor's contract and written notice to the subcontractor.

(3) Intended third party beneficiary: The subcontract form shall contain a provision indicating that the public authority is an intended third party beneficiary of the subcontract, entitled to enforce any rights thereunder for its benefit.

(4) Insurance: The subcontract form shall contain a provision requiring the subcontractor to maintain insurance in accordance with the contract documents.

(5) Right to audit: The subcontract form shall contain a provision entitling the public authority and any agents designated by the public authority to have access to and the right to audit and the right to copy at the

public authority's cost all of the subcontractor's books, records, contracts, correspondence, instructions, drawings, receipts, vouchers, purchase orders, and memoranda relating to the work for not less than three years following completion of the work consistent with section 149.43 of the Revised Code with regard to the public authority's obligation to maintain confidentiality of trade secrets.

(6) Indemnification: The subcontract form shall contain a provision requiring the subcontractor to indemnify, defend, and hold harmless, to the fullest extent permitted by law, the public authority, its consultants, and employees from all claims and expenses for bodily injury and property damage other than to the work itself that may arise from the performance of the subcontract work, but only to the extent caused by the negligence of the subcontractor or a person or entity for whom the subcontractor may be liable. The subcontract form shall not require a subcontractor to waive its immunity under the workers' compensation laws of this state from claims brought against the subcontractor by the subcontractor's employees.

(7) Prompt payment: The subcontract form shall contain a provision requiring the contractor, notwithstanding a contingent payment clause in a contract, to make payments to the subcontractor in accordance with applicable law, including section 4113.61 of the Revised Code, and that progress payments to the subcontractor for satisfactory performance of the subcontract work shall be made no later than ten days after receipt by the contractor of payment from the public authority for that subcontract work.

(8) Retainage: The subcontract form shall contain a provision requiring that retainage shall be at a rate equal to or less than the percentage retained from the contractor's payment by the public authority for the subcontract work.

(9) Warranty: The subcontract form shall contain a provision requiring that the subcontractor fully warrant, for the benefit of the public authority, that all materials and equipment shall be new unless otherwise specified, of good quality, in conformance with the contract documents and free from defective workmanship or materials.

(10) Non-waiver of lien or payment bond rights: The subcontract form and any supplemental terms to the contract between the contractor and subcontractor shall not include any terms or conditions that seek to prohibit a subcontractor from exercising its rights under Chapter 1311. of the Revised Code or under any contractor-provided payment bond.

(11) Nondiscrimination: The subcontract form shall contain a provision specifically requiring the subcontractor to comply with applicable law regarding equal employment opportunity, including section 153.59 of the Revised Code and, to the extent applicable, all executive orders issued by the governor of the state of Ohio.

(12) Dispute resolution: The subcontract form shall require the contract between the contractor and subcontractor to contain a dispute resolution provision that is comparable to the dispute resolution provision in the contract between the public authority and the contractor.

DRAFT - NOT FOR FILING

153:1-4-01 Definitions.

(A) For the purpose of these rules, the following terms shall have the meanings given them in section 9.33 of the Revised Code: "construction manager," "construction manager at risk," and "construction management services."

(B) For the purpose of this chapter, the following terms shall have the meanings given them in section 153.65 of the Revised Code: "public authority," "design-build contract," "design-build firm," "architect or engineer of record" and "design-build services."

(C) "Performance bond" means a written guaranty from a surety to a public authority providing financial assurance that the principal will perform the work in accordance with the contract documents.

(D) "Payment bond" means a written guaranty from a surety to a public authority providing financial assurance that the principal will make the required payments to subcontractors and material suppliers for all labor, materials, and other services related to the project.

(E) "Work" means the labor, materials, equipment, and services, individually or collectively, which are required by the contract documents to be performed or provided by the construction manager at risk or design-build firm for the project.

(F) "Contract sum" means the amount stipulated in the contract that is the total amount payable to the construction manager at risk or design-build firm for performance of the contract, including adjustments authorized by executed change orders. For purposes of these rules, contract sum does not include any compensation for architect or engineer of record services under a design-build contract.

DRAFT - NOT FOR FILING

153:1-5-01 Electronic advertising.

(A) For the purposes of this chapter, the following terms shall have the meaning given them in section 9.33 of the Revised Code: construction manager, construction manager at risk, and public authority.

(B) This rule applies only to a construction manager or a construction manager at risk project.

(C) In addition to the requirements set forth in section 9.331 of the Revised Code, a public authority planning to employ construction manager or construction manager at risk services may advertise electronically by using one or more of the following:

(1) Placing an advertisement on the website of the newspaper of general circulation in the county where the contract is to be performed;

(2) Placing an advertisement on the state public notification website;

(3) Placing an advertisement on its own official website or on other non-official websites, such as appropriate trade association websites.

(D) A public authority may utilize reasonable and available means to electronically advertise to members of diversity and inclusion programs required by the public authority or by applicable law.

(E) The content of an electronic advertisement may indicate where an interested party may find a full description of the project and information on how to submit a proposal.

DRAFT - NOT FOR FILING

153:1-7-01 Prequalification of prospective bidders on subcontracts.

(A) Definitions:

(1) "Construction manager at risk" shall have the meaning as set forth in division (B)(1) of section 9.33 of the Revised Code.

(2) "Public authority" shall have the same meaning as set forth in division (A)(1) of section 153.65 of the Revised Code.

(3) "Design-build firm" shall have the same meaning as set forth in division (F) of section 153.65 of the Revised Code.

(4) "Trade contract" means an agreement to perform any part of the work on the project under a direct contract with a construction manager at risk or design-build firm.

(5) "Work" means the construction which is required by the contract documents, to be performed or provided by the construction manager at risk or design-build firm for the project. Construction includes labor, materials, equipment, and services.

(6) "Prequalification" means a project-specific review conducted by the construction manager at risk or the design-build firm to identify a pool of subcontractors with sufficient skill and experience to perform work on a particular project.

(B) A construction manager at risk or a design-build firm shall establish criteria for the prequalification of prospective bidders on subcontracts that shall:

(1) Include the experience of the bidder, the bidder's financial condition, conduct and performance on previous contracts, facilities, management skills, and ability to execute the contract properly;

(2) Further any goals set as part of a diversity and inclusion program required by the public authority or by applicable law;

(3) Require prospective bidders to affirmatively state that they have not violated any affirmative action program during the last five years preceding the date of the prequalification application. For public improvement projects governed by section 9.47 of the Revised Code, a prospective bidder may meet this requirement by submitting a valid certificate of compliance; and

(4) Require a prospective bidder to submit proof of current licenses to perform the work as required by a public authority or by applicable law.

(C) A public authority may require the construction manager at risk or a design-build firm to include additional criteria for specific trade contracts that are consistent with the scope and needs of the project including, but not limited to, knowledge of the local area and working relationships with local suppliers.

(D) The prequalification criteria established pursuant to paragraphs (B) and (C) of this rule by the construction manager at risk or design-build firm are subject to the approval of the public authority, who may approve or reject the criteria, in whole or in part.

(E) The same criteria established for a trade contract pursuant to paragraphs (B) and (C) of this rule, as approved by the public authority, shall apply to any self-performed work by the construction manager at risk or design-build firm, if such work is allowed by the public authority.