Ohio Construction Reform: House Bill 153 and its Impact on the Construction Industry

Presented by: Jeffrey R. Appelbaum

Contact Information:
Email: Jeff.Appelbaum@thompsonhine.com
Phone: (216) 566 5500
The Problem (The Bad)

- When it comes to public construction, Ohio is a Neanderthal State.
- Our method of procurement has not materially changed in 134 years.
- We are one of a couple states that still procure exclusively by multiple prime contracting.

The Invention of Ohio Public Procurement
We Can’t Use Design Build or Design Assist

Reason:
Requirement for “full plans and specifications” for bidding per ORC §150.01(A).

153.01 Architect must submit accurate plans, estimates, bills of materials, and details to scale.
Whenever any building or structure for the use of the state or any institution supported in whole or in part by the state or in or upon the public works of the state that is administered by the director of administrative services or by any other state officer or state agency authorized by law to administer a project, including an educational institution listed in section 3345.50 of the Revised Code, is to be erected or constructed, whenever additions, alterations, or structural or other improvements are to be made, or whenever heating, cooling, or ventilating plants or other equipment is to be installed or material supplied therefor, the aggregate cost of which amounts to fifty thousand dollars or more, each officer, board, or other authority upon which devolves the duty of constructing, erecting, altering, or installing the same, referred to in sections 153.01 to 153.60 of the Revised Code as the owner, shall cause to be made, by an architect or engineer whose contract of employment shall be prepared and approved by the attorney general, the following:
(A) Full and accurate plans, suitable for the use of mechanics and other builders in the construction, improvement, addition, alteration, or installation;
The Problem

We Can’t Employ a General Contractor

Reason: Multiple Prime requirement in ORC §153.50(A)

153.50 Separate bids for work and materials.
(A) An officer, board, or other authority of the state, a county, township, municipal corporation, or school district, or of any public institution belonging thereto, authorized to contract for the erection, repair, alteration, or rebuilding of a public building, institution, bridge, culvert, or improvement and required by law to advertise and receive bids for furnishing of materials and doing the work necessary for the erection thereof, shall require separate and distinct bids to be made for furnishing such materials or doing such work, or both, in their discretion, for each of the following branches or classes of work to be performed, and all work kindred thereto, entering into the improvement:
(1) Plumbing and gas fitting;
(2) Steam and hot-water heating, ventilating apparatus, and steam-power plant;
(3) Electrical equipment.
(B) A public authority is not required to solicit separate bids for a branch or class of work specified in division (A) of this section for an improvement if the estimated cost for that branch or class of work is less than five thousand dollars.
The Problem

We Can’t Employ a General Contractor

- Reason: Multiple Prime requirement in ORC §153.50.
- Note: General Contracting “option” in ORC §153.51 is illusory

153.51 Separate contracts - single, aggregate contract.
(A) When more than one branch or class of work specified in division (A) of section 153.50 of the Revised Code is required, no contract for the entire job, or for a greater portion thereof than is embraced in one such branch or class of work shall be awarded, unless the separate bids do not cover all the work and materials required or the bids for the whole or for two or more kinds of work or materials are lower than the separate bids in the aggregate.
(B)(1) The public authority referred to in section 153.50 of the Revised Code also may award a single, aggregate contract for the entire project pursuant to division (A) of this section. This award shall be made to the bidder who is the lowest responsive and responsible bidder or the lowest and best bidder, as applicable, as specified in section 153.52 of the Revised Code.

1. Timing Problem
2. Payment for Management and Risk
We Can’t Utilize a Construction Manager-At-Risk

- Reasons:
  - Multiple Prime Requirement;
  - Definition of Construction Manager in ORC §9.33.

9.33 Construction management services definitions.
As used in sections 9.33 to 9.333 of the Revised Code:
(A) “Construction manager” means a person with substantial discretion and authority to plan, coordinate, manage, and direct all phases of a project for the construction, demolition, alteration, repair, or reconstruction of any public building, structure, or other improvement, but does not mean the person who provides the professional design services or who actually performs the construction, demolition, alteration, repair, or reconstruction work on the project.
Some Other Problems

- Public Owner can’t advertise or procure exclusively through electronic means.
- Public Owner can’t fully implement BIM.
- Public Owner can’t award small contracts (i.e., $50,000-$200,000) without full public advertising and competitive process.
- No statewide process for accountability, uniformity of contracting procedures, etc.
Construction Reform!
(The Good)
Origins of the Reform Effort

- History of Past Failures to Reform
- Governor Strickland’s Turnaround Plan: “Advantage Ohio” (Procurement Reform)
- June 27, 2008 Presentation to Ohio Governmental Representatives:
  - “Ohio Public Construction: Challenges for the 21st Century”
- In August, 2008 Governor (through DAS) creates “Ohio Construction Reform Panel”
Panel Creation

- The past failure – “Owner” proposed “single prime” legislation always defeated by MEP Trade Contractors and related Unions

- The proposed plan – Collaborative process that explores win/win solutions with key stakeholders at the table.
Ohio Construction Reform Panel

Panel Composition

- 23 Voting Members
  - 10 Votes from Trade Contractors & Unions
  - 5 Votes from Contracting Agencies
- 30 Alternates/Observers

- Government Representatives
  - Governor’s Office
  - Senate Majority
  - Senate Minority
  - House Majority
  - House Minority
  - Office of Budget and Management

- Contracting Agencies
  - DAS
  - OSFC
  - ODOT
  - Board of Regents
  - Ohio State University

- Private Industry Representative
- Design and CM Associations
  - AIA
  - ACEC
  - CMAA

- Contracting Associations
  - AGC
  - MCA
  - NECA
  - MICA

- Unions
  - IBEW
  - Plumbers & Pipefitters
  - Carpenters & Joiners
  - Laborers
  - Ohio State Building & Construction Trades Council

- Legal Observer—Attorney General
- Facilitator—Jeff Appelbaum and staff from Project Management Consultants LLC
Ohio Construction Reform Panel

**OCRIP Process**

- Creation of Panel
- Survey
- Schedule
  - 4 Plenary Sessions
  - 3 “Supplemental Sessions”
  - 14 Subcommittee Meetings
  - Follow-up drafting review Meetings
- Intended Deliverables
  - Report
  - Draft Legislation
  - Draft Contracts
• Panel met 20+ times from November 2008 to April 2009 to create this report

• No recommendation adopted with less than 75% approval

• All Project Delivery Recommendations had at least 90% approval

• 25 Major recommendations divided into 4 categories (each assigned to a separate subcommittee)
Four Areas of Reform

- Efficiency
- Transparency
- Accountability
- Flexibility

All areas are important, but the project delivery debate, historical tensions, and need for legislation reside here!
Initial Propositions

- Multiple Prime is preserved as one of many options.
- CM as Agent preserved as one of many options.
- MEP contractors will maintain “transparency protection” in every system.
New Project Delivery Recommendations
Construction Manager @ Risk

• Why Use?
  – Precon Services
  – Compress Schedule
  – GMP Open Book Pricing
  – Early Price Guarantee
  – Risk Management: More Collaborative Approach

Note: 96% of Panel Approved (with MEP carve out and subcontractor prequalification)
Bridging Design/Build

• Why Use?
  – Schedule and Cost
  – Highly Collaborative
  – Earliest GMP
  – Enhanced Risk Management

Note: 91% of Panel Approved (with MEP carve out and subcontractor prequalification)
General Contractor

• Why Use?
  – Simplifies risk management and administration
  – Lump sum, competitive pricing
  – Increased opportunity for EDGE participation

Note: 91% of Panel Approved (with $600k limitation and general contractor prequalification)
April to December, 2009

- Full Panel Supplemental Sessions held to work out prequalification process and prequalification criteria.

- Extensive drafting of proposed legislation followed; Panel’s initial draft provided to Legislative Services Commission (LSC).
OCRP Process

April to December, 2009

- LSC drafts Senate and House Bills.
- LSC Senate Version comes out—accurately incorporates panel recommendations.
- House Version is stalled—Goes through 8 drafts but not completed or released.
House and Senate are at impasse with respect to Budget (House Bill 318).

Senate leadership agrees to House proposal to postpone last of five scheduled state income tax reductions, but only if Construction Reform is adopted per Senate Proposed Bill.

This sets up hearing before Senate Finance Committee on December 7, 2009.

My mistaken belief: This is great...Senate Republicans insist on Reform proposed by Democratic Administration!

Finance Committee Construction Reform Testimony

- Hugh Quill- Director DAS
- Jeffrey Appelbaum, OCRP Panel Moderator
- E. Gordon Gee, President OSU
- Eric D. Fingerhut, Chancellor, Board of Regents
- Bruce Johnson, President Inter-University Council
The Issue - The Politics of Reform

While the Administration fully supports construction reform; we also believe that injecting this issue into the current debate over how to fix the state’s immediate general revenue shortfall is counterproductive to both the budget effort and ultimately to the construction reform effort.

The Strickland Administration is very hopeful that as soon as the state’s general revenue-related budget is stabilized, both the House and Senate will begin the full legislative process on construction reform.

Testimony of Director Quill
12/7/2009
AN ACT

To amend sections 5747.02 and 5747.056 of the Revised Code and to amend Sections 265.10, 273.10, and 335.10 of Am. Sub. H.B. 1 of the 128th General Assembly to postpone for two years the last of five scheduled income tax rate reductions, to create the Construction Reform Demonstration Project, to provide for the granting of a delay in implementing all-day kindergarten, and to make an appropriation.
So What “Demonstration Project” Should we start with?

- How about ….
  - $700,000,000 complex hospital Project
  - Already at the DD stage and using CM as Advisor
  - Convert to CM at Risk!

- Sound crazy?
With 1) increased control over process and schedule 2) competition, and 3) design assist and other opportunities:

- **Results:**
  - Schedule reduction despite ultimate increase in scope
  - Reduction of CM Fee despite addition of risk
  - Reduction of General Conditions Costs
  - Potential savings and increased revenue for Ohio State
  - Great increase in MBE/EDGE participation
Other “Demonstration Projects”

- Cleveland Medical Mart and Convention Center
Other “Demonstration Projects”

- Lake Local Schools New High School Project
Construction Reform 2011

House Bill 153

- New Government
- New Legislation
- New Opportunity....
Ohio HB 153 Timeline

- 3/15/2011-- BillIntroduced in House (OCRP Version minus MEP protection and statewide prequalification)
- 5/15/2011-- Bill Passed by House
- 5/31/2011-- Proposed Senate Amendments (Major Issues: subcontractor selection and bidding; GC limitation; bonding)
- 6/02/2011-- JRA Senate Finance Committee Testimony
- 6/8/2011-- Senate Version Passed (House Rejects Senate Amendments)
- 6/27/2011-- Conference Committee Report
- 6/28/2011-- Senate Passes Bill
- 6/29/2011-- House Approves
- 6/30/2011-- Governor Signs Bill
The term "public owner" in ORC 9.33 was revised to "public authority."

Public authorities permitted to use the new contracting methodologies include the state, any state institution of higher education, any county, township, municipal corporation, school districts, or other political subdivisions, or any public agency, authority, board, commission, instrumentality, or special purpose district of the state or of a political subdivision. ORC 9.33(F)(1)

Note: Counties, townships and municipal corporations were excluded from 2009 legislation.
HB 153– New Project Delivery Formats

In addition to traditional multiple prime contracting (ORC §153.51) and CM as Agency (ORC §9.33(A)), HB 153 allows 4 new project delivery techniques:

- General Contracting
- CM at Risk
- Design-Build
- Design Assist
The threshold for projects requiring bidding on full plans and specifications is raised from $50,000 of “aggregate cost” to $200,000 of “estimated cost”. ORC §153.01(A)

- Amount is adjusted by DAS every 5 years. ORC §153.53(B)
- A clear definition of “cost” is set forth in ORC §153.55 (B).
- Project cannot be divided into parts to avoid threshold. ORC §153.55(A)

Requirement of bidding on “full plans and specs” is not applicable to work performed pursuant to a to CM at risk or design-build contract. ORC 153.01(B)

The following expenses are included as costs of the project: (i) professional fees and expenses for services associated with the preparation of plans; (ii) permit costs, testing costs, and other fees associated with the work; (iii) project construction costs; (iv) a contingency reserve fund

Prior restriction to design-build eliminated
Multiple Prime Contracting preserved as “default” project delivery method, but:

- “The requirement to bid separate contracts for (a) plumbing and gas fitting, (b) steam and hot-water heating, ventilating apparatus, and steam-power plant; and (c) electrical equipment on public projects is not applicable to projects using a construction manager at risk, design-builder, or general contractor.” ORC § 153.50(B).
HB 153—CM @ Risk Permitted

Construction Manager at Risk

Construction Manager as Constructor

Δ/E  OWNER  CM

Trade  Trade  Trade  Trade
ORC §9.33 (B) (1) "Construction manager at risk" means a person with substantial discretion and authority to plan, coordinate, manage, direct, and construct all phases of a project for the construction, demolition, alteration, repair, or reconstruction of any public building, structure, or other improvement and who provides the public authority a guaranteed maximum price as determined in section 9.334 of the Revised Code.
CM qualifications obtained after public advertisement (can be by electronic means). ORC §9.331(A)

Public authority selects three most qualified to respond to specific RFP. ORC §9.334(A)

Public authority provides proposers (i) description of the project (including a statement of available design detail), (ii) a description of how the guaranteed maximum price (GMP) will be determined (including the estimated level of design detail upon which the GMP shall be based), (iii) the form of contract that will be used, and (iv) a request for a pricing proposal. ORC §9.334(B)

CM at Risk proposers supply:
- Key personnel list
- General Conditions and contingency requirements
- Fee proposal (preconstruction, construction phase & at risk component) ORC §9.334(C)

Public Authority ranks proposals and negotiates with “best value” proposer. ORC §9.334(E) & (F)

Note: The DAS shall, by June 30, 2012, prescribe the procedures and criteria for determining the best value selection of a construction manager at risk or design-build firm. 153.503
Negotiation process includes confirmation of procedure and schedule for obtaining Guaranteed Maximum Price (GMP) using an **open book pricing method**. ORC §9.334 (F) (3).

If negotiations fail, public authority may terminate negotiations and

- Proceed with next ranked CM ORC §9.334 (G)(2), or
- If negotiations with ranked CMs fail, public authority may select additional CM candidates or proceed with alternate project delivery method. ORC §9.334(G) (3)

If the public authority and CM@Risk fail to agree on a GMP, nothing shall prohibit the public authority from allowing the CM to provide the managements services that a construction manager (as agent) is authorized to provide. ORC 9.334(H)

“A method in which a construction manager at risk provides the public authority, at the public authority's request, all books, records, documents, and other data in its possession pertaining to the bidding, pricing, or performance of a construction management contract awarded to the construction manager at risk.” ORC 9.33(G)

Risk fee eliminated, other adjustments per contract
How Does the CM Select Subcontractors?

2009 OCRP

- Two-step statewide contractor prequalification process.
  - General prequalification
  - Project specific prequalification
- MEP trade contracts competitively bid based upon complete design documents and publicly opened. No design-assist. Award to lowest responsive bid.
- Architectural trade selection governed by contract and rule.

HB 153 (As passed by House)

- No prequalification process.
- No MEP protection. All trade contractor selection governed by contract and rules to be promulgated by DAS.
- Public authority reserves right to challenge award to non-responsible subcontractor. ORC §153.501 (A)
For each trade package, CM at Risk or Design-Builder proposes prequalification criteria (consistent with Rules to be established by DAS) and list of pre-qualified subs for public authority approval. ORC §153.502(A)

For each trade package, CM at Risk or Design Builder must identify at least 3 prequalified bidders or proposers and solicit bids or proposals. ORC §153.502(B)&(C)

Trade packages may be awarded using a design-assist methodology. ORC §153.501(B)

Bids or proposals are shared with public owner. Selection made by CM or Design-Builder on best value basis – not necessarily to “low bidder.” ORC §153.502(D)
Sec. 153.502. (A) Each construction manager at risk and design-build firm shall establish criteria by which it will prequalify prospective bidders on subcontracts awarded for work to be performed under the construction management or design-build contract. The criteria established by a construction manager at risk or design-build firm shall be subject to the approval of the public authority involved in the project and shall be consistent with the rules adopted by the department of administrative services pursuant to section 153.503 of the Revised Code.

(B) For each subcontract to be awarded, the construction manager at risk or design-build firm shall identify at least three prospective bidders that are prequalified to bid on that subcontract, except that the construction manager at risk or design-build firm shall identify fewer than three if the construction manager at risk or design-build firm establishes to the satisfaction of the public authority that fewer than three prequalified bidders are available. The public authority shall verify that each prospective bidder meets the prequalification criteria and may eliminate any bidder it determines is not qualified.

(C) Once the prospective bidders are prequalified and found acceptable by the public authority, the construction manager at risk or design-build firm shall solicit proposals from each of those bidders. The solicitation and selection of a subcontractor shall be conducted under an open book pricing method. As used in this division, "open book pricing method" has the same meaning as in section 9.33 of the Revised Code, in the case of a construction manager at risk, and the same meaning as in section 153.65 of the Revised Code, in the case of a design-build firm.

(D) A construction manager at risk or design-build firm shall not be required to award a subcontract to a low bidder.
Sec. 153.50.
(A) As used in section 153 to 153.52 of the Revised Code:

*     *     *

(2) "Design-assist" means monitoring and assisting in the completion of the plans and specifications.
(3) "Design-assist firm" means a person capable of performing design-assist.

Sec. 153.501
(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.

Not available under 2009 OCRP Proposal (Opposed by MEP Contractors and Unions)

Broad definition of Design Assist

Award criteria by Rule or Contract
Can the CM at Risk Self-Perform Work?

- Yes – – provided that the CM submits a sealed bid for the portion of the work prior to accepting and opening any bids for the same work. ORC §153.501 (C)

- Note: Additional protections likely to be provided by contract, such as restriction on use of contingency for self-performed work.
Must the CM at Risk be Bonded?  Original Version

Before construction begins pursuant to a construction management contract with a construction manager at risk, the construction manager at risk must provide a surety bond to the public authority in accordance with section 153.57 of the Revised Code in an amount not less than:

- the combined contract values of any work under contract to be constructed pursuant to the construction management contract prior to establishment of the guaranteed maximum price, or
- in the amount of the guaranteed maximum price as agreed to by the public authority. ORC 9.333(B

No Bid Bond, or Bond during Precon Phase

Bond value of work before GMP (Performance and Payment Bond)

Bond amount of GMP
Must the CM at Risk be Bonded? Final Version

- Before construction begins pursuant to a construction management contract with a construction manager at risk, the construction manager at risk shall provide a surety bond to the public authority in accordance with rules adopted by the director of administrative services under Chapter 119. of the Revised Code. 9333(B)

- Statute does not specify the amount required for the bond

- Some Options: (1) Full amount of the GMP, (2) Gap bond to cover general conditions and the CM at Risk's fee, and other amounts unbonded by trade contractors (3) Less than full amount for large projects (4) Unbundling payment and performance bond
Not later than June 30, 2012, the Department of Administrative Services shall adopt rules to:

- Prescribe procedures and criteria for determining the best value selection of a construction manager at risk or design-build firm. ORC §153.503 (D)

- 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. ORC §153.503 (C)
HB 153– Design Build Permitted

Bridging Design Build Method

Criteria
A/E

Owner

Design/Builder

A/E

Contractors
A criteria architect or engineer is retained by public authority to:

- Prepare conceptual plans and specifications
- Assist with establishing the design criteria
- If requested, provide other design and construction administration services, including confirming that the design-builder’s design complies with the design intent. ORC §153.65(I)

The criteria architect that creates the design criteria and provides professional design services to assist the public authority in evaluating the design-build requirements shall not provide any design-build services. ORC §153.694

15-35% Design
Reviews Working Drawings for Conformance with Design Concept
Can’t be A/E of Record. What about Sub consultants?
Criteria architect may be selected consistent with the process set forth below, or may be an architect or engineer who is an employee of the Public Authority. ORC §153.692

Criteria architect qualifications obtained after public advertisement (can be by electronic means). ORC §§153.07(A), 153.67

Public Authority evaluates the statements of qualifications submitted by design professionals. ORC §§153.66(A)

Public Authority ranks three firms most qualified to perform the required services. ORC §153.69(A)

Public authority negotiates with the firm ranked most qualified to perform the required services at a compensation determined in writing to be fair and reasonable. ORC §153.69(B)

If negotiations fail, public authority shall inform the design professional firm in writing and

- Proceed with the next ranked design professional firm, or
- If negotiations fail with the ranked firms, public authority may select and rank additional form based on their qualifications. ORC §§153.69 (D), 153.69(E)

Criteria A/E may be “in house”!

Electronic advertising

Typical Quality Based Selection (QBS) Process
D-B qualifications obtained after public advertisement (can be by electronic means). ORC §153.07(A)

Public Authority evaluates the statements of qualifications submitted by the D-B firms, including qualifications for the architect or engineer of record. ORC §§153.66(A), 153.693

- Architect or engineer of record serves as the final signatory on the plans and specifications for the design-build project. ORC §153.65(H)

Public Authority selects three most qualified design-build firms to respond to specific RFP. ORC §163.69(A)
The public authority shall issue a request for proposals to such selected and ranked firms, which RFP shall include all of the following:

- Description of the project and project delivery
- Design criteria produced by the criteria architect or engineer
- Preliminary project schedule
- Description of any preconstruction services
- Description of the proposed design services
- Description of the GMP, including the estimated level of design on which the GMP will be based
- Form of the design-build services contract
- Request for a pricing proposal. ORC 153.693(A)(2)
Design-build firms provide with their responses to the RFP pricing proposals for completion of the work, which pricing proposals include:

- Key personnel list
- General Conditions and contingency requirements
- Fee proposal (design services fee, and a preconstruction and design-build services fee)
- Design concepts adhering to the design criteria produced by the criteria architect or engineer
- Preliminary project schedule. ORC §153.693(A)(2)

Public Authority ranks proposals and negotiates with “best value” proposer. ORC §153.693(A)(4)
Design-Build Firm Selection Process

- Negotiation process includes confirmation of procedure and schedule for obtaining a Guaranteed Maximum Price (GMP) using an open book pricing method. ORC §153.693(B)

- If negotiations fail, public authority shall inform the design-build firm in writing and may
  - Proceed with the next ranked design-build firm, or
  - If negotiations fail with the ranked design-build firms, public authority may select additional design-build candidates or elect an alternative delivery method for the project. ORC §153.693(D)
Contracting Procedures same as CM@R Above

- Subcontractor selection
- Use of Design Assist
- Self-Performance.
- Bonding

The public authority may provide a stipend for pricing proposals received from design-build firms. ORC §153.693(E)
HB 153– General Contracting Permitted
General Contracting

A public authority may enter into a contract for the entire job with a general contractor.

The award must be made to the bidder who is the lowest responsive and responsible bidder or the lowest and best bidder, as applicable.

- Lowest responsive and responsible bidder in the case of any public authority of the state, any public institution belonging thereto, or a school district

- Lowest and best bidder in the case of a county, township, or municipal corporation. ORC §153.52

No $$ Limitation--OCR was $600k
Selecting the Most Appropriate Delivery System

### Typical Considerations
- **Budget Constraints**
  - Need/Desirability of Price Guarantee
- **Timing Constraints**
- **Project Type/Profile**
- **Owner’s in-house capability**
- **Design Approach**
- **Risk Management Approach**

### Example of Selection Score Sheet
Questions?