

153:1-3-01**Definitions.**

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

(B) For the purpose of these rules, "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 these rules, "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. 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/ListofStandardRequirements>

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 these rules.
- (2) A contractor may supplement the subcontract form to include terms and conditions that do not conflict with the requirements set forth in these rules.
- (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 division (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 these rules.
- (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, 4115.03 to 4115.21, 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.