Designing and Constructing Public Facilities

- Legal Requirements
- Recommended Practices
- Sources of Assistance

Commonwealth of Massachusetts
Office of the Inspector General
Glenn A. Cunha
Inspector General

August 2014

Notice

This manual supersedes the 2011 edition of *Designing and Constructing Public Facilities*. The contents of older editions may not reflect current law or interpretations of the Office of the Inspector General. You may download this manual from our website at www.mass.gov/ig or purchase copies from the State Bookstore, Room 116, State House, Boston, MA 02133, (617) 727-2834.

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August 2014

Dear Reader:

I am pleased to present this updated edition of *Designing and Constructing Public Facilities*. The manual is one component of the Office of the Inspector General's ongoing efforts to prevent fraud, waste and abuse in the expenditure of public resources. It helps ensure that public officials understand their statutory obligations when spending public funds and provides both the public and private sectors with guidance in undertaking public construction projects.

This new edition of the manual incorporates statutory changes to the state's public construction laws and includes the Office of the Attorney General's interpretations of those laws. It also includes a recommended code of conduct for public employees and a model request for proposals for modular construction.

In addition to this manual, the Office also produces *The Chapter 30B Manual: Procuring Supplies, Services and Real Property*, which is a comprehensive guide to the Uniform Procurement Act, M.G.L. c. 30B. Further, the Office's Massachusetts Certified Public Purchasing Official (MCPPO) program offers classes on the state's public construction laws and best practices, as well as other procurement and contracting issues. For additional information on the MCPPO program and the Office's other activities, I invite you to contact us or visit our website at www.mass.gov/ig.

Finally, I would like to thank the Office of the Attorney General, the Division of Capital Asset Management and Maintenance, and the Department of Housing and Community Development for their assistance during the process of revising the manual.

Sincerely,

Glenn A. Cunha
Inspector General

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Foreword

The Office of the Inspector General (Office) developed this manual for public officials who manage or oversee public construction projects and need a ready reference on the legal and procedural requirements of the procurement laws that apply to public design and construction contracts in Massachusetts. The manual provides an overview of the design and construction process in lay terms. It also identifies those steps in the process that specific statutory requirements govern and offers guidance and suggestions regarding those steps not governed by statute.

What's Included and What's Not

This manual focuses on design and construction projects undertaken by public jurisdictions under the public design and construction laws in Massachusetts, with the exception of the procurement procedures set forth in M.G.L. c. 25A for procuring energy management services contracts. The Division of Capital Asset Management and Maintenance (DCAMM) manages and oversees all state agency and building authority energy management services contracts under M.G.L. c. 25A. Information on DCAMM's energy performance contracting program is available at DCAMM's website: www.mass.gov/dcamm. The Department of Energy Resources (DOER) provides technical assistance to governmental bodies that are not state agencies and building authorities, including local jurisdictions, in contracting for energy management services under M.G.L. c. 25A. Information regarding the procedural requirements of the law as well as model documents are available at the DOER's website: www.mass.gov/doer.

This manual often uses the generic term "awarding authority" to refer to the public jurisdiction that has legal authority to undertake a project. You should be aware that your jurisdiction's construction projects may be subject to additional requirements beyond those summarized in this manual. For example, state agency projects must comply with Executive Orders issued by the governor, and local projects must comply with local ordinances. Projects funded in part by a state or federal agency may be subject to additional requirements established by the funding agency. If you need additional information on the legal requirements that apply to your project, consult your attorney.

What's Required and What's Not

We have tried throughout this manual to draw clear distinctions between required practices, which are mandated by law, and recommended practices, which you are free to accept, modify or reject in light of each project's individual circumstances. For required practices, we have included references to the appropriate chapters and sections of the Massachusetts General Laws (M.G.L.) and Code of Massachusetts Regulations (CMR). If you have a question about a specific requirement or if you are dealing with a particularly complex or unusual situation, take the time to read the relevant statute or regulation and consult your attorney. Copies of the Massachusetts General Laws are available in many libraries or from your attorney; you may also access an unofficial version of the Massachusetts General Laws online at www.malegislature.gov/Laws/GeneralLaws/Search. You should also be aware that some provisions of the law may be subject to differing interpretations. Although we have made every effort to interpret these requirements in light of relevant legislative history, case law and administrative rulings, our interpretations represent the opinions of the Office and are not legally binding.

Pursuant to M.G.L. c. 149, § 44H, the Office of the Attorney General is authorized to require compliance with the public design and construction procurement laws, including the power to seek enforcement in the courts. The Fair Labor Division within the Office of the Attorney General handles bid protests.

Further assistance may be available from the various state agencies involved with the public construction process. These agencies are listed in Appendix A of this manual.

The Massachusetts Certified Public Purchasing Official (MCPPO) Program

Our Office offers the MCPPO program, which is a certification program for public purchasing officials. The program promotes professionalism and excellence in public procurement, preparing participants to make best value procurements for their local jurisdictions. The three-day core seminars are offered several times throughout the year and each one concludes with a written examination. Additional special-purpose seminars are offered periodically. Our Office developed this program in consultation with public purchasing officials, including members of the Massachusetts Association of

Public Purchasing Officials, the Massachusetts Association of School Business Officials and the City Solicitors and Town Counsel Association (now the Massachusetts Municipal Lawyers Association). The MCPPO program meets standards set by the National Association of State Boards of Accountancy. The Massachusetts Department of Elementary and Secondary Education has also designated our Office a registered provider of professional development for educators in Massachusetts.

Local jurisdictions often require procurement officials to have or obtain MCPPO certification. In addition, MCPPO certification is required by law in the following cases:

- Chapter 46 of the Acts of 1997 requires charter school administrators who are responsible for procurement to attain MCPPO certification. Charter school administrators can fulfill this requirement by successfully completing the Public Contracting Overview seminar.
- For a school building project receiving Massachusetts School Building Authority (MSBA) funds, the regulations of the MSBA require that the "Eligible Applicant" be designated as an MCPPO for Design and Construction Contracting[1] and that the project director for the owner's project manager and the individual directly assigned to the project by the project designer be certified in the MCPPO program.[2]

Additional information about the MCPPO program can be obtained by visiting our website at www.mass.gov.ig or by emailing the MCPPO program director at ma-igo-training@massmail.state.ma.us.

Using This Manual

This manual begins with Chapter I which, after providing some general information about the design-bid-build project delivery method, identifies preliminary planning issues concerning roles, staffing and project controls that you should address at the outset of a project to ensure success. Chapter II discusses designer selection, which is the procurement process you will use in contracting with architects and engineers. The next six chapters proceed from the planning stage (Chapter III) into the design stage (Chapter IV), through construction bidding under M.G.L. c.149 and M.G.L. c. 30, § 39M, (Chapters V and VI) and procurement of modular buildings (Chapter VII), and

[1] 963 CMR 2.03(2)(o).

[2] 963 CMR 2.11(12), 2.12(6).

concluding with the construction stage, the period from commencement of construction through project closeout (Chapter VIII). Chapter IX summarizes the statutory requirements set forth in M.G.L. c. 149A for using two optional alternative delivery methods for construction contracts estimated to cost $5 million or more: construction management at risk and design-build. The manual appendices contain additional sources of assistance, the two statutory bid forms required by M.G.L. c. 149, a model request for proposals for modular construction and a recommended code of conduct for public employees developed by the Office.

I. Public Construction in Massachusetts

Massachusetts awarding authorities are responsible for a variety of construction projects, including schools, police and fire stations, roads, bridges and wastewater treatment plants. The goal of public construction is to deliver public facilities that meet the needs of the citizens and public employees who will use them and that represent sound investments of tax dollars. High-quality, cost-effective design and construction services are key to achieving this goal on each public construction project.

The procurement and contracting procedures required by the public construction laws in Massachusetts vary depending upon whether the project entails construction work on a building, such as a library renovation project, or non-building construction work, such as a roadway paving project. Massachusetts laws have long required advertising and bidding of both building and non-building construction contracts. ("Non-building" construction is referred to as "public works" construction in M.G.L. c. 30, § 39M, the public works construction bid law, and in this manual.) Where appropriate and necessary, this manual makes clear the differences in requirements applicable to the different types of projects. If you have questions about which law applies to a design or construction contract, consult your jurisdiction's attorney or the Fair Labor Division of the Office of the Attorney General.

Project Delivery Methods for Public Construction

The Design-Bid-Build Project Delivery Method

The design and construction contracting process for public construction projects in Massachusetts typically involves three stages: planning, design and construction. In the planning stage, project requirements are defined and often documented in a study, environmental report, or other planning document. The design stage results in a complete set of plans and specifications describing the project to be built. In the construction stage, bids are solicited on the completed design, and the selected contractor completes the construction. This sequential project delivery method is often referred to as the design-bid-build method. The design-bid-build delivery method is required by M.G.L. c. 149, the public building construction law, and M.G.L. c. 30, § 39M, the public works construction law.

The design-bid-build project delivery method for public construction involves at least three participants: the public owner, the designer and the contractor:

Public owner. The public owner is responsible for defining the project scope, budget and schedule; procuring and managing the project design and construction services; paying for the project, which typically involves financing; and operating and maintaining the completed facility. On some projects, a construction manager, an owner's project manager (OPM) or an owner's representative will assist the public owner with some or all of these tasks. These roles are discussed later in this chapter.

Designer. The designer is the architect or engineer responsible for assisting the public owner in developing the project scope, budget and schedule, and within those parameters, preparing the detailed plans and specifications[3] that define the facility to be constructed. The designer may subcontract specialized portions of the design work, such as structural or mechanical design components, to subconsultants. On projects that do not require an OPM or an owner's representative,[4] the public owner may decide to expand the designer's duties to include oversight of the contractor's performance during the construction stage of the project.

Contractor. The contractor is responsible for providing the labor, materials and equipment to construct the project in accordance with the plans and specifications. On building projects, major components of the project are typically performed by subcontractors working under the contractor's direction.

Under the design-bid-build method, the designer and the contractor each contracts separately with the owner in an arrangement that provides checks and balances for the project.

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[3] Plans consist of the construction drawings; specifications provide a detailed written description of the construction work, including dimensions and materials, represented in the plans.

[4] These roles are discussed later in this chapter.

Alternative Project Delivery Methods

Certain project delivery methods depart from the design-bid-build process. Two such alternative project delivery methods, construction management at risk and design-build, are available to Massachusetts awarding authorities for certain types of projects with an estimated construction cost of $5 million or more, subject to specific conditions. The legal requirements for employing these alternative project delivery methods are contained in M.G.L. c. 149A; these requirements are summarized in Chapter IX of this manual.

Noncompliance with the Construction Bid Laws

The law contains severe civil and criminal penalties for those public officials who seek to evade the requirements of the public construction laws by failing to publicly advertise contracts or by splitting contracts into smaller contracts in order to avoid competitive bidding. M.G.L. c. 149, § 44J(7). Contracts awarded in violation of these requirements may be held unenforceable by a court regardless of whether the designer or contractor was acting in good faith.

In-House Design and Construction

Rather than contracting for design or construction services, you may use qualified employees to provide these on public projects, provided that the employees possess the requisite expertise and knowledge.[5]

Volunteer Design and Construction

Before using volunteers for design or construction work, consider whether they have the appropriate qualifications for the work to be performed. For a feasibility study, do they have the necessary technical expertise to undertake the required analyses and prepare reliable cost estimates? Do they have experience with projects similar in size, use and complexity? And keep in mind that if you do not have a design contract in place, you

[5] Capital improvements at local housing authority developments are sometimes performed by "force account" laborers who are skilled laborers on the housing authority's payroll. A housing authority must obtain prior approval from the Department of Housing and Community Development to use force account labor on state-funded housing development projects.

may sacrifice important public protections such as errors and omissions insurance, a definite scope of services and an enforceable agreement on the schedule.

Although the law does not prohibit the use of volunteer construction labor, we discourage the use of volunteers for larger construction projects or those involving structural, mechanical or electrical work. The volunteers will not be insured or bonded, and deficient work could have costly consequences for your jurisdiction. If you do choose to use volunteers for construction work, make sure that they are qualified to do the work and that they are supervised by qualified staff.

Keep in mind that the bid laws apply to any agreement to spend public funds on public building construction or public works construction. Thus, for example, a town cannot give the local civic association $20,000 to repair the town bandstand.

Before You Begin: Preliminary Planning

A construction project is an inherently complex and risky undertaking. You can reduce your jurisdiction's risk by instituting workable procedures for project oversight and record-keeping at the outset of the project. You should also ensure that all project participants understand the limits of their authority to make decisions on behalf of your jurisdiction.

Planning and Staffing for Project Oversight

Contracting out the design and construction of a project does not absolve the public owner from responsibility and accountability for the project. To protect your jurisdiction's interests, it is essential that you plan and provide for sufficient and effective supervision and oversight of the project by experienced staff and/or consultants at every stage of a public construction project. Although some jurisdictions have traditionally relied on temporary or permanent volunteer building committees to oversee project design and construction, it may be unrealistic to assume that a part-time, volunteer committee will have the time and expertise to provide the necessary oversight functions.

The optimal time to develop an oversight plan that defines the roles and responsibilities of those staff and consultants who will supervise the project is early in the planning process. Several key project oversight roles, including the mandatory roles of OPM and owner's representative for some projects, are summarized below.

Project manager. The public owner designates the project manager as the focal point of responsibility and accountability on the project from the study and design stages through construction completion, start-up and commissioning. In addition to coordinating the work of the project participants, the project manager closely oversees the performance of the designer, the construction contractor and other project participants under contract; monitors the project budget and schedule; and maintains a central file of project records. A project manager may be on staff or under contract. The scope of the project manager's duties and authority will vary depending upon the needs of the jurisdiction and the complexity of the project. Sometimes these services are referred to as project management, program management or commissioning.

Construction manager. The public owner may appoint or contract with a construction manager who may be responsible for some or all of the responsibilities of the project manager described above. Contracting with a construction manager is advisable when the public owner lacks the necessary expertise on staff, especially for large or complex projects.

Some public owners contract with the project designer for construction management services; others hire or contract with a professional construction manager rather than including construction management services in the design contract. Bear in mind that the skills required to design a building or highway project are very different from those required to manage and oversee the construction stage of that project. If you plan to contract with a single design firm for both design and construction management services, make sure that you focus on both sets of skills in evaluating designers for the project.

The construction management role is optional on a public construction project unless your jurisdiction is required to hire or assign an OPM or an owner's representative. These required roles are discussed below.

OPM. Before contracting for design services in connection with a public building contract that is estimated to cost $1.5 million or more, your jurisdiction must contract with or assign a qualified OPM to serve as your jurisdiction's agent during the

planning, design and implementation of the contract. The OPM must be independent of the project designer, general contractor or any subcontractor.

The individual or entity serving in this role must be engaged in the practice of providing project management services for building construction and supervision. In addition, the OPM must either: (1) be a registered architect or professional engineer with at least five years of experience in building construction and supervision; or (2) possess at least seven years of experience in building construction and supervision. You may assign an existing employee to serve as the OPM if that employee meets or exceeds these requirements and has building construction and supervision experience relating to projects of similar size and scope of complexity as the project to which the employee will be assigned.[6] If you elect to contract for the services of the OPM, you are required to use a qualifications-based selection (QBS) process, which means that the OPM must be competitively selected on the basis of qualifications, without price competition. The Office of the Attorney General and the Office of Inspector General (Office) recommend that you procure OPM services by following the designer selection law, which also requires a QBS process.[7] The designer selection law is discussed in Chapter II.

M.G.L. c. 149, § 44A½, contains the following provision regarding the duties of the OPM:

> The duties of the owner's project manager shall include, but need not be limited to, providing advice and consultation with respect to design, value engineering, scope of the work, cost estimating, general contractor and subcontractor prequalification, pursuant to section 44D½ or 44D¾ when applicable, scheduling, construction and the selection, negotiation with and oversight of a designer and a general contractor for the project, ensuring the preparation of time schedules which shall serve as control standards for monitoring performance of the building project, and assisting in project evaluation including, but not limited to, written evaluations of the performance of the design professional, contractors, and subcontractors.

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[6] M.G.L. c. 149, § 44A½.

[7] For projects seeking funding from the Massachusetts School Building Authority (MSBA), OPM services must be procured in accordance with the MSBA's OPM selection guidelines, which are available at the MSBA's website, www.massschoolbuildings.org.

The scope of an individual OPM's duties and authority will vary depending on the needs of the jurisdiction and the complexity of the project. The Division of Capital Asset Management and Maintenance (DCAMM) has issued Owner's Project Manager Guidelines, which provide guidance on the role of the owner's project manager through the different project stages. These guidelines can be accessed at DCAMM's website: www.mass.gov/dcamm.

Owner's representative. M.G.L. c. 30, § 39M½, requires the Commonwealth or any of its public agencies or authorities engaged in a "major contract" to have the services of an owner's representative on the project. A "major contract" is defined as "a contract by which the commonwealth or any of its public agencies or authorities is to procure the construction, repair or rehabilitation of a publicly-owned highway, railway, bridge, tunnel, building platform or any component thereof and for which the certified estimate of cost exceeds $50,000,000, or a contract or lease by which the commonwealth or any of its public agencies or authorities is to procure, directly or indirectly, the construction, repair or rehabilitation of a privately-owned, publicly-used highway, railway, bridge, tunnel, building platform or any component thereof." M.G.L. c. 30, § 39M½(a). The owner's representative provides professional project oversight, conducts peer reviews of engineering, serves as the primary manager of cost recovery and value engineering and files annual reports on the project with our Office, the Secretary of Transportation, the House and Senate chairs of the joint committee on transportation, and the Office of the State Auditor.

Before the engagement of the owner's representative, the agency or authority must prepare an estimate of the anticipated total cost of the owner's representative services. The owner's representative must be selected before the award of any major contract; according to M.G.L. c. 30, § 39M½(g), any major contract awarded before the selection of an owner's representative is "null and void as against public policy."

The owner's representative must be a registered engineer with at least five years of experience in the construction and supervision of construction "of the type which is subject to the pertinent major contract in nature, scope and complexity." M.G.L. c.

30, § 39M½(a). The owner's representative may be an employee of the agency or authority or it may be a contracted individual. If the agency or authority plans to contract with an owner's representative, it must select the owner's representative using a documented process that is competitive and evaluates qualifications and experience.

The owner's representative must certify in writing, under the pains and penalties of perjury, that the owner's representative's sole responsibility is to the Commonwealth and the agency. The owner's representative must be independent of the designer, general contractor and any subcontractor on the project. The owner's representative is explicitly subject to the requirements of M.G.L. c. 268A, the Commonwealth's conflict of interest law.

Clerk of the works. The clerk of the works serves as the public owner's representative at the project site. This individual's general function is to observe and record the progress of the construction. For major projects, the clerk of the works should be a full-time employee or contractor with substantial construction experience. (If you are contracting with a firm to provide construction management, OPM or owner's representative services, the firm may provide a clerk of the works on site.) This individual's responsibilities typically include:

- observing the progress of construction;
- monitoring contractor staffing, equipment and materials deliveries; and
- record-keeping, including preparation of daily logs and progress reports.

The early part of the planning stage is also the time to decide how to manage the relationships among the various parties. Your objective is to complete the project successfully – that is, to build a high-quality facility that meets your needs, on time and within your budget. Although the construction field has traditionally been prone to conflict and litigation, you can take steps to reduce these risks. A well-written contract is the most important protection against unnecessary disputes. But even with a well-written contract, effective professional oversight of the construction project is essential to protect your jurisdiction's interests and to increase the likelihood of a successful outcome.

Partnering is one approach to construction project management that has gained increasing acceptance in the construction field. Partnering is a formal process in which all parties to a construction project voluntarily agree at the outset to adopt a cooperative, team-based approach to project development and problem resolution to eliminate or reduce conflicts, litigation and claims on the project.[8] This approach seeks to avoid conflict and to address conflicts quickly when they arise through the use of specific team-building and dispute resolution techniques. Partnering requires all parties to consider the interests of the other parties and to work toward achieving mutually agreed-upon objectives. It does not, however, require you to give up or undercut your jurisdiction's interests in any way.

Project Record-Keeping

Good record-keeping is essential to efficient and effective contract administration and oversight. Thus, before embarking on a project, it makes sense to institute a centralized project record-keeping system that will ensure thorough, accurate documentation of the project from the planning stages through construction completion. Responsibility for maintaining the project records should be assigned to one project participant, such as the owner's project manager. Examples of project records that must be maintained include all project-related meeting minutes, contracts and amendments, programs and feasibility studies, plans and specifications, shop drawings,[9] change orders,[10] invoices and payment requisitions, correspondence, as-built drawings and warranties.

Authority to Enter Into and Modify Contracts

Any contract signed by an individual who lacks the authority to bind your jurisdiction will be legally unenforceable. If you do not know who within your jurisdiction is authorized to enter into contracts or what kinds of contracts are permissible, you should review your jurisdiction's enabling legislation, charter or local rules. You should also consult

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[8] U.S. General Services Administration. "Partnering." Last reviewed May 12, 2014. www.gsa.gov/portal/content/100822.

[9] Shop drawings are detailed drawings of specific construction components or systems called for in the plans and specifications. The general contractor submits shop drawings to the designer for approval.

[10] Change orders are owner-approved modifications to the construction contract that affect the contract scope, price, and/or schedule.

your jurisdiction's attorney. Your contract should explicitly identify who has the authority to modify or amend the contract, including final authority to approve change orders and claims.

Cost Estimate Requirement

M.G.L. c. 149, § 44J(9), provides that no request for proposals or invitation for bids issued under M.G.L. c. 7C, §§ 44-57, M.G.L. c. 149, §§ 44A-44H, M.G.L. c. 30, § 39M, or M.G.L. c. 25A, § 11C, may be advertised if the awarding authority's cost estimate is greater than one year old. Thus, before advertising contracts for design services subject to the designer selection law, construction services subject to M.G.L. c. 149 or M.G.L. c. 30, § 39M, or energy management services subject to M.G.L c. 25A, you will need to have obtained or prepared a project cost estimate within the past year.

Affirmative Marketing Program

Massachusetts awarding authorities are required to incorporate participation goals for minority business enterprises (MBEs) and women business enterprises (WBEs) into the design and construction procurement process for capital facility projects under the control of DCAMM and on state-assisted building projects that include any funding, including grants and reimbursements, from the Commonwealth. M.G.L. c. 7C, § 6. The current participation goals, guidelines for participation goal reductions or waivers, and a list of certified MBEs and WBEs are available at the website of the Massachusetts Supplier Diversity Office, which can be accessed at www.mass.gov/sdo.

II. The Designer Selection Process

Construction projects typically require the services of registered architects, professional engineers and other professional consultants to plan the work that will ultimately be carried out by construction contractors. The term "designer" is used to refer to the individuals or firms hired to do the architectural and engineering planning and design work for a project.

Selecting a qualified designer is essential to the success of a construction project. For building projects, state law requires a designer selection process that is aimed at obtaining high-quality design services for public buildings, while ensuring that qualified designers have the opportunity to compete for public business through a fair, open process. The selection of designers for public works (non-building) construction projects, with the exception of design-build projects procured under M.G.L. c. 149A,[11] is not subject to the designer selection law.

In the life cycle of a public facility, you may contract with designers for different services at different times. For example, you might contract with a designer to prepare a feasibility study; the study designer or another designer to develop the final design documents to be bid; the final designer to provide construction administration services during construction; a designer to provide construction management services; and various architects and engineers in subsequent years after the facility is opened to identify the need for, and prepare bid documents for, renovations, repairs or replacement.

This chapter presents information on designer selection. Subsequent chapters will cover the sequence of project development from planning through construction project closeout.

The first section of this chapter summarizes the requirements of the designer selection law for design service contracts in connection with building projects. These procedures are found in M.G.L. c. 7C, §§ 44-57, the designer selection law. The next section discusses the requirements of M.G.L. c. 7C, § 58, which applies to procurements of

[11] The design-build procedures required by M.G.L. c. 149A are discussed in Chapter IX.

contracts with designers and other related professionals providing services in connection with public works projects by the Massachusetts Department of Transportation (MassDOT), the Massachusetts Port Authority (Massport) and the Massachusetts Bay Transportation Authority (MBTA). The chapter concludes with a discussion of the best practices that local jurisdictions, as well as other public jurisdictions that are not subject to the requirements of M.G.L. c. 7C, § 58, or the regulations of the Operational Services Division (OSD), should follow when procuring design service contracts in connection with public works construction projects.

Procuring Design Contracts for Building Projects

Designer Selection Law Thresholds and Applicability

M.G.L. c. 7C, §§ 44-57, the designer selection law, contains procedures for selecting designers for building projects through an advertised, competitive, qualifications-based selection (QBS) process. Contracts for the following services in connection with a building project are subject to the designer selection law: preparation of master plans, feasibility and other studies, surveys, soil tests, cost estimates or programs; preparation of drawings, plans and specifications; supervision or administration of a construction contract; and construction management and scheduling. M.G.L. c. 7C, § 44(b).

While the concepts set forth in the following text are relevant to the designer selection process for both state and local governments, the text principally focuses on the procedural requirements of the law that apply to local governments and other local awarding authorities that are not subject to the jurisdiction of the state's Designer Selection Board.[12]

The applicability of the designer selection law to various public owners such as cities and towns, housing authorities, state agencies, charter schools, counties and independent state authorities is briefly summarized below.

[12] The DSB is an independent board, the majority of whose members are architects and engineers. The DSB was created to ensure the professionalism of the selection process and to insulate it from political influence. The DSB members are appointed for a fixed term and serve as volunteers to select designers for larger state building projects as well as county and Commonwealth charter school projects.

Local jurisdictions. Local jurisdictions, including cities, towns, and agencies, boards, commissions, authorities or instrumentalities of cities and towns; regional school districts; and Horace Mann charter schools must follow the designer selection law in awarding any contract for design services for any building construction, reconstruction, alteration, remodeling or repair project with (1) an estimated construction cost of more than $100,000; and (2) according to guidelines issued by the DSB, an estimated design fee of more than $10,000.[13] If there is no estimated cost of construction, we recommend that you follow the designer selection law if the design fee is estimated to cost $10,000 or more. As will be discussed, local jurisdictions are required to adopt their own procedures for selecting designers for building projects.

For school projects seeking funding from the MSBA, designer services must be procured in accordance with the MSBA's designer selection process, which is available at the MSBA's website, www.massschoolbuildings.org.

Executive departments of the Commonwealth of Massachusetts and Commonwealth charter schools. State departments and Commonwealth charter schools are subject to the jurisdiction of the DSB when the design fee is $10,000 or more and the estimated construction cost of the project is $100,000 or more. M.G.L. c. 7C, § 46(e). The DSB carries out a formal, advertised designer selection process following the procedures outlined in M.G.L. c. 7C. For each project, the DSB ranks the applicants according to their qualifications for that project and submits the names of the three highest-ranked designers to the Commissioner of DCAMM. The Commissioner appoints one of these three designers; if the Commissioner does not appoint the highest-ranked designer, the Commissioner must explain the reason in writing.

If the design fee is less than $10,000 or the estimated construction cost is less than $100,000, a state department or Commonwealth charter school may procure its own design services.

[13] See "DSB Guidelines for City and Town Building Projects," published March 28, 2011.

Counties. Counties, like state departments, are subject to the jurisdiction of the DSB for projects with a design fee of $10,000 or more and an estimated construction cost of $100,000 or more. This means that counties present their project requirements to the DSB, and the DSB solicits qualifications, ranks the applicants and submits the names of the three highest-ranked designers to county officials, who then appoint a designer.

Independent state authorities. Most independent state authorities**,** such as the Massachusetts Convention Center Authority and the Massachusetts Port Authority, are subject to DSB jurisdiction but may seek an exemption from DSB jurisdiction by submitting to the DSB a set of procedures that comply with the M.G.L. c. 7C process. In general, independent state authorities have their own architect/engineer selection boards that follow DSB-approved procedures. The Massachusetts State College Building Authority and the University of Massachusetts Building Authority are exempt from the designer selection law.

Housing authorities. Housing authorities must follow the procedures established by the Department of Housing and Community Development (DHCD) for design of state-funded housing. DHCD's procedures follow the M.G.L. c. 7C process and are approved by the DSB. The DHCD procedures prescribe the role of DHCD and of the local housing authority in the selection process. For design of federally funded housing, housing authorities are required by the United States Department of Housing and Urban Development rules to select designers in accordance with the procedures outlined in the Code of Federal Regulations: 24 CFR 85.36(d)(3)(v).

Exempt Design Services for Building Projects

The following types of contracts entailing design services for building projects are exempt from the designer selection law.

Sewer, water, or highway system buildings and structures. Contracts for the design of a building that is appurtenant to a sewer, water or highway system, and is required as an integral part of that system, are exempt from the designer selection law. M.G.L. c. 7C, § 1.

Building demolition projects. Contracts for the design of building demolition projects are exempt from the designer selection law. M.G.L. c. 7C, § 46(e).

Design contracts for building projects estimated to cost less than $100,000. Building projects estimated to cost less than $100,000 are not subject to the designer selection law. To select designers for building projects estimated to cost less than $100,000, we recommend soliciting qualifications and price information from at least three design firms.

Who Can Perform Design Services Under the Designer Selection Law

Design services generally require the participation of registered architects, landscape architects or professional engineers. In such cases, if the designer is an individual, the designer must be registered in the appropriate discipline. If the designer is a partnership, a majority of the partners must be registered in the appropriate discipline. If the designer is a corporation, sole proprietorship, joint stock company or other entity, the chief executive officer, the person in charge of the project and either a majority of directors or a majority of the ownership interest must all be registered in the appropriate discipline. M.G.L. c. 7C, § 44(b).

The designer selection law also applies to contracts with consultants who are not architects and engineers if the consultants provide any of the services that fall within the definition of "design services" set forth in section 44(b) of the designer selection law. For example, because construction supervision is a design service under the designer selection law, a contract of $10,000 or more with a construction management firm to oversee the project scope, budget and schedule during construction of a building project estimated to cost more than $100,000 would be subject to the designer selection law.

Using the Same Designer for Study and Final Design Services

Awarding authorities may contract with the same designer for feasibility study and final design services provided that the original solicitation for feasibility study services indicates that the contract scope may include final design services, or the awarding authority has procured the final design services in accordance with the designer selection law. You may elect to commission an independent review, by a knowledgeable and competent individual or business doing such work, of the feasibility

study to ensure its reasonableness and adequacy before allowing the study designer to continue with the final design work under a contract for study and final design services. M.G.L. c. 7C, § 51(h). The rationale for doing so is that allowing study consultants to recommend the scope and budget of design contracts in which they have a financial interest can undermine sound planning and invite excessive project costs. The reviewer that you select to perform an independent review should have no connection with the study consultant and no vested interest in the study results. The procurement of a contract for an independent review is not subject to the designer selection law.

Selecting Designers for Local Building Projects: The Basic Steps

This section describes the basic steps of the designer selection process for local building projects subject to the designer selection law. Local jurisdictions may deviate in minor respects from the state's designer selection process, provided that the process complies with the requirements set forth in M.G.L. c. 7C, § 54, and the purposes and intent of the designer selection law that applies to the state's designer selection process set forth in M.G.L. c. 7C, §§ 44-57. How much deviation from the state's process is permitted at the local level is subject to legal interpretation. If you wish to deviate from the state's process, we recommend that you consult with your local attorney.

The basic steps of the local designer selection process, which also applies to regional school districts and Horace Mann charter schools, are as follows:

1. Adopt written procedures.
2. Develop the request for qualifications (RFQ) and contract for design services.
3. Advertise the contract.
4. Evaluate applicants and select at least three finalists.
5. Rank the finalists.
6. Finalize the contract.
7. Award and publicize the contract.

Keep in mind that if your building project is estimated to cost $1.5 million or more, you are required to hire or assign an owner's project manager (OPM) to the project before contracting for design services. The OPM requirement was discussed in the previous chapter.

Designer Selection Procedures for State-Funded Housing Projects

Design contracts for state-funded housing are subject to detailed designer selection procedures developed by the state Department of Housing and Community Development (DHCD) under an exemption granted every two years by the state Designer Selection Board. The highlights of the DHCD procedures for awarding design contracts subject to M.G.L. c. 7C are summarized below.

Projects with estimated construction costs of more than $500,000 or of a complex nature

Design fees for these DHCD-funded projects are set by DHCD before initiating the designer selection process. DHCD requires housing authorities to advertise these projects subject to the designer selection law in bidding periodicals of relevant professional associations as well as the *Central Register* and a newspaper of general circulation, at least two weeks before the application deadline. Applicants must have their Master File Brochures on file at DHCD at the time that they submit an application for a specific design project. Applications are sent to the housing authority, which reviews each application for completeness before forwarding the applications and other procurement materials to DHCD. DHCD's independent nine-member Designer Selection Committee (DSC) reviews the application packages and selects three to five finalists based on the required submissions, predefined criteria, and any information provided by the housing authority. Design contracts are subject to minority and women business enterprise participation requirements when the fee established by DHCD is $100,000 or more. Housing authorities have the option of setting up a local or regional screening committee to interview and rank the finalists selected by the DSC. Otherwise, the DSC ranks the finalists for the housing authority. The housing authority must interview the first-ranked finalist and provide a written explanation if the first-ranked finalist is not selected.

Projects with estimated construction costs of between $100,000 to $500,000

DHCD's House Doctor program is utilized for building projects with an estimated construction cost of between $100,000 to $500,000 or with an estimated design fee of more than $10,000. House Doctors are design firms that have successfully submitted their design credentials in response to an RFR issued by DHCD in order to prequalify a pool of designers. The DSC reviews the credentials of each applicant and approves a limited quantity of designers into the program. DHCD then calls upon the House Doctors to perform design services on a case-by-case basis.

Projects with estimated construction costs of less than $100,000 or with design fees of less than $10,000

These projects are not subject to M.G.L. c. 7C. DHCD can assist the housing authority in obtaining a designer for these smaller projects. Standard contract forms are available.

DHCD provides extensive training and technical assistance to housing authorities on contracting for design and construction services. DHCD also provides a standard design services contract that must be used for DHCD-funded projects subject to M.G.L. c. 7C. Additional information and forms for DHCD-funded design services may be found at DHCD's website: www.mass.gov/hed/economic/eohed/dhcd.

Step 1: Adopt written procedures.

Local jurisdictions must adopt written procedures for selecting designers on projects subject to the designer selection law. M.G.L. c. 7C, § 54(a). These procedures must be adopted before selecting a designer for your project. Most cities and towns have already developed and adopted such procedures. To assist municipalities and other local public agencies in developing designer selection procedures, the Office of the Inspector General has developed *Model Designer Selection Procedures for Municipalities and Other Local Public Agencies* ("*Model Procedures*"). This document can be downloaded from our website at www.mass.gov/ig/publications/guides-advisories-other-publications/.

Formal adoption of the designer selection procedures requires appropriate approval at the jurisdiction level, as determined by your local ordinances or by-laws. Your local attorney can provide advice regarding the specific actions required.

This requirement does not apply to housing authorities or to projects for which funding is requested from the Massachusetts School Building Authority.

In developing your local jurisdiction's written designer selection procedures, pay particular attention to the following areas.

Applicability. Specify whether the designer selection procedures will be used for only those building projects covered by the designer selection law or whether they will also be used for other types of local construction projects.

Advertising. The advertising requirements discussed below in Step 3 are mandatory.

Standard designer selection form. Local awarding authorities are required to use a standard designer selection form published by the DSB (discussed below).

Selection of finalists. Specify who will be responsible for reviewing the applications and selecting and ranking the finalists. (On state projects, the DSB performs this function.) The use of a designer selection committee is not required at the local level. You may appoint one or more local officials to undertake the designer selection process. Regardless of whether a committee is established to

evaluate designers, we recommend that the evaluators include trained professionals in addition to lay people to help ensure that the evaluations take account of standards and experience in the design profession. If a committee is to be used, specify who will appoint its members and whether it will be a standing committee for all design projects or an *ad hoc* committee selected for each project. Also note that individuals who have financial or other connections to a design firm applying for a contract may not participate in the selection process for that contract. M.G.L. c. 268A.

Fee negotiations with top-ranked finalist. Your written procedures must include a procedure for the submission of a fee proposal by the top-ranked finalist and negotiation of a fee with the top-ranked finalist when the design fee has not been set. M.G.L. c. 7C, § 54(a)(ii). Specify who will select the top-ranked finalist from among the finalists and conduct the fee negotiations under these circumstances. (Note that you also have the option to set the design fee.)

Emergencies. The law permits expedited designer selections in case of emergency. M.G.L. c. 7C, § 53. An emergency is defined as a situation requiring expedited designer selection procedures to protect the health or safety of any persons or to meet a deadline for action on a project set by a court or a federal agency. Note that not every urgent situation meets the statutory definition of an emergency. We recommend that your emergency procedures identify who has authority to determine that an emergency exists, specify the emergency designer selection procedures to be used and provide for such competition as is reasonably possible under the emergency circumstances.

Step 2: Develop the RFQ and contract for design services.

Developing the RFQ and the contract will require you to undertake some important planning activities, outlined below.

Define the project scope. Before selecting a designer, you need to decide what you want the designer to do. Do you simply want the designer to advise you on the repairs that your 1910 fire station needs, or do you also want the designer to study the feasibility of renovating it to house administrative offices? Such decisions need

to be made before you advertise for design services. The written scope of services you include in the RFQ must conform substantially to the contract that you will ultimately sign. The scope of services may combine design work on different facilities or in different parts of one facility. If you are considering allowing the study designer to compete for the subsequent design contract, you should make this clear in the project scope

If the project does not require an OPM, you should also consider whether it makes sense to contract with the designer to provide construction management services on the project after the design stage is completed. In making this decision, keep in mind that the skills required to design a building or renovations to a building are very different from the skills required to manage a building construction or renovation project. If you plan to contract with a single design firm for both design and construction management services, your evaluation process should focus on both sets of skills. Alternatively, you could hire or contract with a professional construction manager rather than including construction management services in the design contract. Under this scenario, the designer would develop the design and prepare the final plans and specifications. The construction manager would coordinate the construction process, monitor construction schedules and approve contractor payments.

Even when you contract separately with a construction manager, you will generally require the designer to provide services related to construction administration through project completion. It is critical to your interests as the owner to define the specific tasks for which the designer will be responsible during the construction phase and to specify who will be responsible for any tasks that are not included in the designer's contract.

Generally speaking, the scope of work should include defined deliverables and a timetable of milestone dates for producing each deliverable. By including a schedule for deliverables, you help ensure that the design progresses according to your expectations and the project schedule. If you plan to conduct a value engineering

review, this review should be incorporated into the schedule. (Value engineering is discussed in the next chapter.)

Draft the evaluation criteria. The RFQ should state all the criteria that will be used to evaluate designers submitting applications for the project. We recommend that you use the following criteria to evaluate applicants for building design contracts:

Experience	Ensure that the firm and the key personnel proposed for the job have sufficient and appropriate experience on projects similar to the proposed project.
Quality of work	Contact the owners of other projects on which the firm and the key personnel have worked and ask them to evaluate the performance of the firm and the key personnel. You may use your own jurisdiction as a reference if the firm has previously contracted with your jurisdiction.
Public sector knowledge	If the scope of work includes preparation of plans and specifications and assistance during the bidding and construction stages, ensure that the designer is familiar with Massachusetts public construction laws and procedures.
Professional registrations	Ensure that the firm has the professional licenses required for this project.
Subconsultants	Review and rate the qualifications of key subconsultants who will be used by the firm.
Capacity	Ensure that the firm has the capacity to undertake your project in a timely manner, based on its size and the number and volume of current projects.

Include the standard designer application form developed by the DSB. You must ask all designers to provide you with the same information. M.G.L. c. 7C, § 54(a)(ii). All local jurisdictions and other public agencies that are not within the DSB's jurisdiction must use a standard designer application form published by the DSB. M.G.L. c. 7C, § 54(b). This form, entitled "Standard Designer Application Form for Municipalities and Public Agencies Not Within DSB Jurisdiction," can be downloaded from the DSB's website: www.mass.gov/dcamm. Note that the designer selection law does not allow you to solicit fee proposals with the applications or to conduct a fee competition.

Set the fee or not-to-exceed fee limit. You need to decide whether to set the fee for the design contract or to set a not-to-exceed fee limit and negotiate the fee after

selecting a designer. If you set the fee, the fee will be binding for all applicants. If you plan to negotiate the fee, the not-to-exceed fee limit will provide a cost ceiling for the fee negotiations. You should ensure that the design fee or not-to-exceed fee limit for the fee negotiations is reasonable and realistic.

Under the designer selection law, the design fee contained in the contract must be stated as a fixed dollar amount; it may not be expressed as a percentage of the construction cost. M.G.L. c. 7C, § 50G(c). In establishing the design fee, you should take into consideration not only the estimated construction cost, but also the nature and complexity of the project.[14] The contract can provide for equitable adjustments if the scope of services is changed. M.G.L. c. 7C, § 54(c). This means that if, as the contract proceeds, it becomes necessary for the designer to do more or less work than originally contemplated, the fee can be increased or decreased. The adjustment is often determined by a provision set forth in the contract (for example, an hourly rate for principals or other employees).

Develop the contract terms. It is important to develop the design contract before you solicit applications from designers. By making the key decisions concerning the contract scope, terms and conditions, and design fee early in the process, you will increase the likelihood of attracting applicants with the requisite experience. If you do not already have a standard contract for design services, consider asking your attorney to develop one. The contract used by DCAMM is a good model for local awarding authorities. Model contracts issued by the American Institute of Architects (AIA) are commonly used, but we do not recommend them for public projects. The AIA contracts are written to protect the designer's interests and contain insufficient protections for your jurisdiction. Moreover, they do not contain some statutorily required provisions for public contracts in Massachusetts.

Once you have developed a standard contract, you can use it over and over again

[14] The DSB has issued *Designer Selection Board Guidelines for City and Town Building Projects*, which can be downloaded from the DSB's website at www.mass.gov/dcamm. The guidelines list DCAMM's schedule of fees for various design services based on the complexity and estimated construction cost of a project. The fee ranges contained in the guidelines are generally accepted as reasonable in the construction industry.

with only minor modifications for each project. The text box on the following pages provides more detailed information on the components of the design contract.

The Design Contract for Public Building Projects

Every design contract subject to M.G.L. c. 7C: must contain the following elements:

Scope. The contract must clearly define the scope of services to be performed, including a list of all deliverables and other work products to be produced by the designer.

Key personnel. The qualifications of the designer's proposed project team – particularly the designer's proposed project manager, senior staff and subconsultants – should be a key factor in the selection process. To prevent the designer from substituting less experienced personnel after the contract is awarded, the contract should specify the names and time commitments (for example, staff to be committed to the project on a full-time basis) of the key personnel listed in the designer's application. The contract should include a provision stating that no substitutions may be made without your jurisdiction's written approval.

Payment terms. Most designers, particularly on larger projects, will expect to receive periodic payments. It is preferable to link these payments to progress, such as the completion of deliverables at designated milestones, rather than simply paying a certain amount each month. The contract should also specify who will bear the cost of redesign if the plans are unsatisfactory or if the construction bids exceed either the cost estimate or the available appropriation. In addition, the contract must prohibit the designer from receiving any extra payments for additional work that the designer should have anticipated. M.G.L. c. 7C, § 51 (1). You may withhold up to five percent of the design fees as retainage. M.G.L. c. 7C, § 50(d).

Errors and omission insurance. Errors and omission insurance, which protects the awarding authority in the event of errors or negligence on the part of the designer, is required on all design work other than planning studies. M.G.L. c. 7C, § 51(e). The minimum amount of required insurance is ten percent of the estimated construction cost or $1 million, whichever is less. The awarding authority may choose to increase this requirement. Generally, the insurance is obtained by the designer, although some awarding authorities may find it less expensive to obtain the insurance themselves on large projects. The decision concerning who will pay the insurance premiums should be made before a final fee is negotiated. If you are requiring the designer to obtain all or a portion of the insurance coverage, the designer must provide you with a certificate of insurance coverage before you award the contract. You may also require that the designer's subconsultants obtain insurance. If you do so, you should require each subconsultant to provide a certificate of coverage before you award the design contract.

Other statutory requirements. State law contains several certifications and requirements relating to non-collusion in the submission of applications and to financial reports that the designer must file. M.G.L. c. 7C, § 51(d). The following certifications must be included in the design contract:

- the designer or construction manager has not given, offered or agreed to give any person, corporation or other entity any gift, contribution or offer of employment as an inducement for, or in connection with, the award of the contract for design services;
- no consultant to or subcontractor for the designer or construction manager has given, offered or agreed to give any gift, contribution or offer of employment to the designer or construction manager, or to any other person, corporation or entity as an inducement for, or in connection with, the award to the consultant or subcontractor of a contract by the designer or construction manager;
- no person, corporation or other entity, other than a bona fide full-time employee of the designer or construction manager, has been retained or hired by the designer or construction manager to solicit for or in any way assist the designer or construction manager in obtaining the contract for design services upon an agreement or understanding that such person, corporation or other entity be paid a fee or other consideration contingent upon the award of the contract to the designer; and
- the designer has internal accounting controls as required by M.G.L. c. 30, § 39R(c), and the designer has filed and will continue to file an audited financial statement as required by M.G.L. c. 30, § 39R(d). (This certification is required only, for contracts that exceed $10,000 or that are for the design of a building for which the budgeted or estimated construction costs exceed $100,000.)

Note also that any person contracting with a governmental body must certify in writing that the person has complied with state tax laws, reporting of employees and contractors, and withholding and remittance of child support. M.G.L. c. 62C, § 49A.

Right to use documents. It is in your interest to include a provision giving your jurisdiction the right to use all design documents prepared by the designer.

Step 3: Advertise the contract

You must publish notices inviting applications from interested designers in a newspaper of general circulation in the area in which the project is or will be located and in the *Central Register*. The *Central Register* is a weekly publication issued by the Secretary of the Commonwealth containing a variety of notices related to public construction projects and real property transactions in Massachusetts. The necessary online submission forms and information for publishing notices in the *Central Register* are available from the Secretary of the Commonwealth's website at www.mass.gov/sec. The notice must be published at least two weeks before the deadline for receiving applications. M.G.L. c. 7C, § 47.

The published notice must contain detailed project information. The following list may be useful as a guide to preparing the notice:

- Describe the overall project, including the specific designer services that you are seeking, the time period within which the project is to be completed, and the estimated construction cost, if available. M.G.L. c. 7C, § 47(b)(i).
- If a study or program has already been completed, indicate when and where it is available for inspection. If no study or program is available, say so. M.G.L. c. 7C, § 47(b)(ii).
- List any specific professional qualifications required of applicants for the design contract. M.G.L. c. 7C, § 47(b)(iii). Specify any categories of work for which you will require the designer to list the subconsultants that the designer plans to use. M.G.L. c. 7C, § 47(b)(iv). This information is particularly important for those projects for which a significant portion of the work will be done by subconsultants and for which the awarding authority will want to evaluate the qualifications of the subconsultants as well as the designer.
- If a briefing session will be held for potential applicants, indicate when and where. M.G.L. c. 7C, § 47(b)(ii). Although not required, a briefing session is often useful for large or complex projects to provide an opportunity for potential applicants to ask questions and learn more about the project.
- State whether the designer's fee has been set and the amount, or whether the fee will be negotiated. M.G.L. c. 7C, § 47(b)(v).
- Indicate how to obtain the RFQ, where and when to submit completed applications and whom to contact for further information. (Note that this is the only item not required by law, although it is included in the Office's *Model Procedures*).

Step 4: Evaluate applicants and select at least three finalists.

The applications should be evaluated by one or more designated local officials or by a designer selection committee. The law requires you to treat all applicants uniformly and fairly. For example, you should solicit the same information from each applicant and apply the same evaluation criteria and methods to each application. At least three finalists must be selected from among the applicants. M.G.L. c. 7C, § 54(a)(ii).

Local jurisdictions can request that the DSB review applications and select finalists for them. M.G.L. c. 7C, § 54(c). Jurisdictions considering this approach should contact the DSB to determine the time and other requirements of the DSB to conduct such a review.

Step 5: Rank the finalists.

After you have shortlisted the pool of applicants to at least three finalists, you should focus on the finalists' past performance. References from the owners of projects designed by the finalists are the best source of information about the designers' skills and past performance. You may seek additional information from the finalists or request that they appear before the selection body, provided that you treat all finalists equally. M.G.L. c. 7C, § 54(a)(ii). For example, if you give one finalist the opportunity to make an oral presentation, you must give all finalists that opportunity.

If you plan to conduct interviews, decide in advance what information you expect to obtain and which of the design firms' key personnel you wish to interview. Be careful to ensure that you will interview key personnel who will work on your project. And remember that while an interview that showcases a designer's marketing or communication skills may reflect the designer's ability to communicate with local boards and committees, an interview is not likely to reveal the information you need most about the designer's capabilities. For this reason, we encourage you to rely primarily on project references to evaluate designers' past performance.

After evaluating the finalists, you should rank them in order of qualifications and document the reasons for the rankings. These are some additional points to keep in mind concerning the evaluation process:

Open meetings. If a board or committee has been set up to evaluate applications, it is subject to the state's open meeting law. M.G.L. c. 30A, §§ 18-25.

Record-keeping. Local awarding authorities must prepare a written explanation of the reasons for selecting the designer that was awarded the contract. M.G.L. c. 7C, § 54(a)(iii). A permanent file must be maintained for each design contract procurement containing: copies of public notices; the applications received; the evaluations, rankings and reasons for the rankings; the written explanation of the selection decision; the notification of award; and other relevant information describing the selection process. M.G.L. c. 7C, § 55. In addition, if the evaluations and rankings are prepared by a committee, the file should contain the recorded votes of the committee.

Step 6: Finalize the contract.

If you have established a fixed fee, we recommend obtaining the following information from the top-ranked finalist:

- the amount of time to be devoted to each phase of the project by key individuals, such as the designer's project manager;
- the hourly rates the designer will use to calculate prices for additional work that is not included in the initial scope; and
- the markup, if any, that the designer will add to costs, including subconsultant fees, resulting from a change in the scope of work.[15]

When you review this information, you must decide whether you are satisfied with the level of effort devoted to the project by key individuals. If not, you can attempt to negotiate with the designer to increase the time commitment of one or more individuals to the project. Similarly, if you consider the rates for contract changes to be too high, you can attempt to negotiate lower rates.

If you are unable to reach a satisfactory agreement about the commitment of staff to the project or the rates for pricing contract changes, you can terminate the negotiations and begin negotiations with the second-ranked designer. On the other hand, if you are satisfied with the outcome of these negotiations and you have set a fixed fee, you can award the contract to the top-ranked finalist.

If you have set a not-to-exceed fee limit, you should ask the top-ranked designer to submit a fee proposal that includes a proposed lump-sum fixed fee along with the following information:

- the amount of time to be devoted to the project by key individuals, such as the designer's project manager;
- the hourly rates for the designer's personnel and the estimated number of hours each will devote to the project;
- the hourly rates the designer proposes to charge for each subconsultant and the estimated number of hours that each subconsultant will devote to the project;

[15] It is generally unwise to allow the designer to charge on a cost plus a percentage of cost basis for extra work because this cost structure provides the designer with an incentive to incur more costs than necessary.

- an itemized breakdown of all other costs included in the fee proposal; and
- the markup, if any, that the designer will add to costs, including subconsultant fees, resulting from a change in the scope of work.

You will want to determine whether the resources the designer promises to devote to the project (for example, key personnel staff hours and subconsultants) are sufficient and consistent with the fee proposal. You will also consider the reasonableness of the proposed fees. You may negotiate the fee proposal. As is the case with any negotiation, you will need to base your negotiating position on information about what is reasonable in the industry. You should not, through your negotiations, agree to lower the fee by lowering the qualifications of key personnel or subconsultants who will work on your project, nor should you scale back the scope of services. To do so would undermine the basis of your selection of the top-ranked finalist.

If you cannot negotiate a reasonable fee with the top-ranked designer, you should terminate the negotiations and move on to the second-ranked finalist. If you do not reach agreement with the second-ranked finalist, you may attempt to negotiate the fee with the third-ranked finalist. If, for any reason, you do not select the top-ranked finalist, you should document the reasons for your decision in the procurement file. M.G.L. c. 7C, § 50(a).

Step 7: Award and publicize the contract.

The final step is to award the contract to the selected designer and publicize the contract. If you are requiring the designer to obtain all or a portion of the mandatory errors and omission insurance, the designer must provide you with a certificate of insurance coverage before you award the contract.

The name of the designer awarded the contract must be published in the *Central Register*. An online form for this purpose is available at the Secretary of the Commonwealth's website at www.mass.gov/sec.

Emergency Contracts

You may conduct an expedited designer selection process whenever the health or safety of any persons will be endangered because of the time required for the selection under your normal designer selection procedures or when you cannot meet a deadline

for action that a court or federal agency set if you follow the designer selection procedures. M.G.L. c. 7C, § 53. Your emergency procedures should be incorporated into your written designer selection procedures. We recommend that your emergency procedures identify who has authority to determine that an emergency exists and that the procedures provide for as much competition as is reasonably possible under the emergency circumstances.

Procuring Design Contracts for Public Works Projects

The designer selection law does not apply to contracts for the design of public works projects such as highway and sewer projects. The MassDOT, Massport and the MBTA must comply with the provisions of M.G.L. c. 7C, § 58, discussed below, when selecting architects, engineers or related professionals for public works design contracts. All other executive branch departments of the Commonwealth must comply with the procurement policies and procedures of the OSD in procuring these design services. Local awarding authorities and others not within the jurisdiction of the OSD have discretion to decide how to select designers for public works projects.

M.G.L. c. 7C, § 58

M.G.L. c. 7C, § 58, requires the MassDOT, Massport and the MBTA to use a qualifications-based selection process, with no fee competition, to procure contracts for architectural, engineering or related professional services of $25,000 or more that are not subject to the designer selection law, unless the agency determines that a sole-source selection is in the best interest of the agency. A notice of the contract must be published in a professional services bulletin or advertised on the official agency website at least 14 days in advance of the time and place for submissions, set forth the projects and services to be procured, solicit letters of interest and, if required by the agency, request statements of qualifications. If the agency determines that a sole-source selection of a qualified firm is in the best interest of the agency, no public notice is required.

The agency must base the selection on the qualifications of the firm or firms competing for the contract. The agency may not seek formal or informal cost estimates or proposals before selecting a firm for negotiations. If the agency is unable to negotiate a contract at a compensation level that is reasonable and fair to the agency, the agency must formally

terminate negotiations, in writing, with the selected firm and negotiate with the successive ranked firms until an agreement is reached or the agency terminates the contracting process. These procedures do not apply when the agency determines in writing that it is in the best interest of the Commonwealth to select a firm immediately or when immediate services of a firm are required in an emergency as defined by M.G.L. c. 7C, § 58.

Agencies are required to evaluate the performance of each firm when the contract is completed and make the evaluation available to the firm, which may submit a written response. Neither the evaluation nor the response may be made available to any other person or firm, and both are exempt from disclosure under the public records law.

Selecting Designers for Local Public Works Projects

Local jurisdictions, as well as other jurisdictions that are not subject to M.G.L. c. 7C, § 58, or OSD regulations, may solicit prices from designers and use price as a criterion in awarding a contract for design services in connection with a public works project. Although you are not legally required to conduct an advertised competition for public works design contracts, we recommend that you do so for construction projects estimated to cost more than $100,000. The request for proposals (RFP) process outlined in M.G.L. c. 30B is a good model to adopt in developing competitive procurement procedures for a public works design contract.[16] This process calls for establishing evaluation criteria and soliciting separate price and non-price proposals. The non-price proposals are evaluated using the criteria set forth in the RFP. After the proposals have been ranked, the prices are opened. You select the most advantageous proposal by weighing both qualifications and price. Whatever selection method you use, bear in mind that fostering competition among qualified designers through a fair, open process that considers qualifications and price is the best way to obtain high-quality services at a favorable price.

Although no state procurement law applies to local design contracts for public works projects, many of the issues discussed earlier in this chapter regarding the designer selection law are also relevant to these contracts. We encourage you to review the

[16] For more information regarding M.G.L. c. 30B, you can consult *The Chapter 30B Manual*, which is available at our website, www.mass.gov/ig, or the State Bookstore.

previous discussion, keeping in mind that you may alter some of the requirements to meet your needs. For example, we recommend the following best practices:

- adopt written procedures in advance specifying how you will solicit and award these design contracts (Step 1);
- develop the RFP, including a project scope, evaluation criteria (that may, in the case of public works design contracts, include fee proposals) and contract terms, many of which should resemble the terms of a building design contract (Step 2); and
- advertise the contract (Step 3).

You should then receive and evaluate proposals based on the evaluation criteria stated in the RFP and award a contract. The designer with which you contract must certify in writing that the designer has complied with state tax laws, reporting of employees and contractors, and withholding and remittance of child support. M.G.L. c. 62C, § 49A.

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III. The Planning Stage

As is the case with all procurements, care exercised in the early planning stage of a project is a sound investment in the project's success. This chapter discusses the feasibility study, a major planning stage product, and value engineering, a design review technique that can be helpful on larger projects.

The Study

The design work for a construction project often begins with a feasibility study, which is a planning document that:

- confirms and explains the owner's requirements;
- identifies and evaluates alternative solutions;
- recommends and defines a solution;
- summarizes the proposed scope of work; and
- provides a detailed cost estimate.

Local jurisdictions are not legally required to complete a study for every project. As a practical matter, however, you should complete a study for every major construction project. If you have not determined the approximate size and optimal configuration of the new school building or determined the most cost-effective approach to improving the water treatment facility, you are not ready to begin the design stage. Completing a study can address these and other planning issues. In the long run, the problems created by inadequate planning can cost far more than the study.

A feasibility study typically includes the following planning information:

Program. The program is a document that outlines the project requirements in terms of content, time and cost. The program should address the specific functions and requirements that the proposed project must meet, the number of people who will use a facility, the number and types of vehicles that will use a road, the peak demand for the facility, the functions that the facility be required to accommodate, the amount of space those functions require, the performance requirements or standards for each component of the facility and for the facility as a whole, and whether any special equipment or construction is needed. Preparation of a program

for a major construction project usually requires meetings and discussions with public employees and citizens who will use the facility to assess their needs and concerns. Developing a program for either a building project or a public works project often requires meeting with state or federal regulatory or funding agencies and conducting an analysis of generic program specifications or regulations issued by those agencies.

Alternatives. The study may identify the available alternatives for meeting the functional requirements of the project and their relative costs and benefits. For example, the study might review alternate sites or analyze new construction versus renovation.

Surveys and field tests. The study may incorporate tests to obtain data on the cost and feasibility of various sites or design alternatives.

Environmental impacts. The study may review any expected environmental impacts of the project and how to mitigate any negative impacts. For some projects, an environmental impact study will be required under state or federal statutes.

Cost and financing. The study may identify how much the project will cost to build, how much it will cost to operate and maintain and where the money will come from.

Of course, the precise study focus and content will depend on the project under consideration.

A valuable source of information on the study process is a Division of Capital Asset Management and Maintenance (DCAMM) publication entitled *Guidelines for the Preparation of Studies for Building Projects*. This publication may be downloaded from DCAMM's website at www.mass.gov/dcamm.

Value Engineering

Value engineering is a specialized design review technique that analyzes the functions of a facility or project and matches those functions with the most cost-effective design possible. Value engineering is sometimes called value analysis, value management or the value method. Scheduling a value engineering review early in the project design

can identify opportunities to improve the design and reduce the life-cycle costs of the project without sacrificing significant time or investment of resources.

Value engineering focuses on the total life-cycle cost of the facility or project over its useful life, including the initial capital costs for construction or purchase as well as all significant future costs, such as operation, maintenance and energy costs. Accordingly, a value engineering proposal may recommend reducing or increasing expenditures for construction to achieve significant future cost savings over the useful life of the facility. Evaluating the cost of implementing the value engineering proposal against the life-cycle cost savings offered by the proposal can be a useful process that promotes sound public spending decisions, flags wasteful design elements such as unnecessary features or overdesigned components and improves design quality.

Depending upon the project size and complexity, the value engineering review may be conducted by a single value engineering specialist or by a value engineering team led by the value engineering specialist. For most local projects, a value engineering review generally should not take more than two or three days.

For building projects that are subject to the designer selection law, value engineering services must be procured using the designer selection procedures contained in M.G.L. c. 7C (discussed in the previous chapter). For public works projects, we recommend that you solicit competitive quotations or proposals from qualified value engineering specialists. In either case, the value engineering specialist you select should be independent, with no business connection to the project designer or the other project participants. We recommend that you require, at a minimum, that at least one individual with whom you contract be a registered architect or professional engineer with at least five years of direct experience with the type of project you plan to build. For projects requiring an owner's project manager (OPM), the OPM is required to provide value engineering services.

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IV. The Design Stage

The role of the designer during the design stage of a design-bid-build project is to translate the functional requirements established in the program into a set of biddable construction documents. The design stage typically includes the following tasks and final products:

- Surveys and field tests to provide additional information about conditions at the site. The magnitude of this task will depend in part on the amount of field work done during the planning stage.
- Additional consultations with the project's users, abutters and other affected individuals and groups.
- Preparation of sketches and schematic drawings, including site plans, floor plans and façade drawings, all of which show the size and layout of the project.
- Analysis of major building components including foundations; structures; electrical systems; and heating, ventilating and air conditioning (HVAC) systems.
- Preparation of final plans, specifications and other bid documents. The plans are the construction drawings. The specifications are the written materials that prescribe the amount and quality of materials to be furnished, the construction techniques to be used and other construction-related information.
- Updated project cost estimates, based on the final plans and specifications.

The design stage on major projects is often divided into three phases: (1) preliminary or schematic design; (2) design development; and (3) preparation of construction documents. During each phase, the designer is required to prepare and submit specific deliverables for the owner's approval. Major project decisions are made during the preliminary or schematic design phase. After the owner has approved the preliminary or schematic design, the designer proceeds with the detailed design development. After the owner has approved the design development documents, the designer prepares the construction documents.

The construction documents include 100 percent complete plans and specifications that competing contractors will use to prepare their bids and that the selected contractor will follow in constructing the project. A well-developed and complete set of plans and

specifications should generate reliable bid prices and enable the construction process to proceed smoothly and efficiently. Conversely, flawed or incomplete plans and specifications can lead to a host of headaches ranging from excessive and expensive construction change orders to dangerous construction defects.

If you have assigned an owner's project manager to the project, this person will assist you in reviewing the design deliverables produced by the project designer at the end of each design phase. If you plan to hire or contract with a construction manager to oversee the construction stage of the project, we recommend that you bring this person or firm on board before the plans and specifications are finalized and put out to bid. A "constructability review" of the construction documents by a knowledgeable construction manager may identify potential design problems that can and should be corrected or potential design improvements that the designer should consider.

Material Specifications

The bid documents for construction contracts subject to M.G.L. c. 149 and M.G.L. c. 30, § 39M, must contain material specifications that provide for full competition for each item of material to be furnished under the contract. For every item specified, the specifications must either name a minimum of three brands of material or provide a material description that at least three manufacturers or producers can meet. The specifications must also allow for acceptance of items equal to those named or described in the specifications. Under the law, an item is considered equal if it:

- is at least equal in quality, durability, appearance, strength and design;
- will perform the intended function at least equally; and
- conforms substantially, even with deviations, to the detailed requirements contained in the specifications.

The awarding authority makes the determination as to whether a bid item is equal to that named in a specification. M.G.L. c. 30, § 39M(b).

Specifications that restrict competition to fewer than three manufacturers or producers may be used only for "sound reasons in the public interest." M.G.L. c. 30, § 39M(b). After a reasonable investigation, you must document the reasons for using the restrictive or proprietary specifications and provide this documentation to anyone

making a written request for this information. If you use restrictive or proprietary specifications for an item, the specifications for that item must include an "or equal" clause, which is a provision allowing bidders to furnish items that are equal to the specified item.

"Or Equal" Specifications Case

The Massachusetts Appeals Court decided a case dealing with "or equal" specifications under M.G.L. c. 30, § 39M. The case, *E. Amanti & Sons, Inc. v. R.C. Griffin, Inc.*, 53 Mass. App. Ct. 245 (2001), involved specifications for an emergency vehicle exhaust system as part of an invitation for bids issued by a town for construction of a new fire station. The town required that the emergency vehicle exhaust system be as specified by Plymo Vent or equal as approved by the fire department. Amanti, the HVAC sub-bidder, sought approval to use an emergency vehicle exhaust system manufactured by Carmon. The town's architect initially agreed but later found that the alternative exhaust system did not meet the performance requirement in the specifications. Amanti requested that the architect name two additional exhaust systems which were equivalent to the Plymo Vent system. The architect responded with the names of two other manufacturers, but the architect did not know whether their products met the specified safety features. Ultimately, Amanti furnished the Plymo Vent system under protest.

M.G.L. c. 30, § 39M(b), requires that specifications be written "to provide for full competition for each item of material to be furnished under the contract; except, however, that said specifications may be otherwise written for sound reasons in the public interest stated in writing in the public records of the awarding authority or promptly given in writing by the awarding authority to anyone making a written request therefor, in either instance such writing to be prepared after reasonable investigation." M.G.L. c. 30, § 39M(b), further provides that "[f]or each item of material the specifications shall provide for either a minimum of three named brands of material or a description of material which can be met by a minimum of three manufacturers or producers, and for the equal of any one of said name[d] or described materials."

The Superior Court found that the town's specifications were proprietary. Although the town made a reasonable investigation, it did not make a written report in the public record or respond in writing to written requests about the specifications. The Superior Court found the town liable for Amanti's lost profits for having failed to disclose to bidders that Plymo Vent was a sole source.

On appeal, the town contended that its bid specifications complied with M.G.L. c. 30, § 39M, because the statute does not prohibit specifications in the middle ground between specifications that allow for full competition and those that are proprietary. Amanti argued that the town did not comply with M.G.L. c. 30, § 39M, because it required a sole source for the vent system without notifying bidders that it was the only vent system that would meet the town's needs.

The Appeals Court stated that "[p]roviding the name of a single vendor and placing the burden on the bidder to discover alternatives did not constitute competitive specifications." *E. Amanti & Sons, Inc.*, 53 Mass. App. Ct. at 253. The Appeals Court upheld the Superior Court's decision requiring that the town pay Amanti for lost profits.

Estimated Quantities

When it is impossible to pinpoint the exact quantities of the materials or other items to be included in the final plans and specifications, you may use estimated quantities for bidding purposes. For example, if you are bidding pothole repairs to town streets, the designer should estimate the number of cubic yards of bituminous concrete you will need and require bidders to submit both a unit price and a total price based on the designer's estimate. The contract will be awarded to the responsible and eligible bidder with the lowest total price, based on the estimated quantity or quantities. Then, when the work is performed, payments will be based on the actual quantity multiplied by the unit price in the bid. The maximum contract value will be the total bid price.

Prevailing Wage Requirements for all Construction Contracts

The prevailing wage law, M.G.L. c. 149, §§ 26-27, requires contractors performing work for any public construction project to pay prevailing wages, which are special minimum wages established by the Department of Labor Standards (DLS). The DLS sets prevailing wage rates according to collective bargaining agreements that are established by trade unions in geographical areas across the state.

Before soliciting bids for any public construction project an awarding authority must obtain a prevailing wage rate sheet from the DLS. You may request a prevailing wage rate sheet by completing an online prevailing wage request form at www.mass.gov/lwd/labor-standards. Once you receive the prevailing wage rate sheet for a particular project, you should include the rate sheet in your invitation for bids (IFB). If your project does not require an IFB (for example, if the estimated construction cost of the project is less than $10,000), you must make sure that anyone who is providing a price or estimate for the construction project has a copy of the prevailing wage rate sheet for that project. Once a contractor has been selected, the prevailing wage rate sheet is made a part of the contract for that project.

Each prevailing wage rate sheet applies only to the public construction project for which

it is issued. The prevailing wage rates for each construction project are in effect for 90 days from the date of issue. Projects not bid within 90 days of the issued rates will require the awarding authority to request a new prevailing wage rate sheet. Once a project has been bid, the prevailing wage rates will apply for the duration of any contracts which result from that bid, except in the case of multi-year projects. For projects lasting more than one year, you must request annual updates to the wage rate sheets that the DLS issued for those projects. Your contractors must obtain these updated wage rate sheets from you and pay workers covered by the prevailing wage law no less than these rates.

Labor Harmony and OSHA Training Certification Requirements for Construction Contracts Estimated to Cost More Than $10,000

M.G.L. c. 30, § 39S(a), requires any person submitting a bid for, or signing a contract to work on, the construction, reconstruction, alteration, remodeling or repair of any building or public works project undertaken by a public awarding authority in Massachusetts that is estimated to cost more than $10,000 to certify on the bid or contract, under penalties of perjury:

> (1) that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed in the work; (2) that all employees to be employed at the worksite will have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health Administration that is at least 10 hours in duration at the time the employee begins work and who shall furnish documentation of successful completion of said course with the first certified payroll report for each employee; and (3) that all employees to be employed in the work subject to this bid have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health Administration that is at least 10 hours in duration.

M.G.L. c. 30, § 39S(a).

The Attorney General is empowered to enforce this requirement. The Office of the Attorney General has issued an advisory entitled “An Advisory from the Massachusetts Attorney General’s Fair Labor Division on Chapter 306 of the Acts of 2004, An Act Relative to the Health and Safety on Public Construction Projects,” that is available at the website of the Office of the Attorney General, www.mass.gov/ago. You will need to

incorporate these certifications into your solicitations and contracts for all building and public works construction estimated to cost more than $10,000.[17]

Building Contracts Estimated to Cost More Than $100,000: Additional Legal Requirements For Bid Documents

The bid documents prepared by your designer for M.G.L. c .149 contracts estimated to cost more than $100,000 must conform to the following additional legal requirements:[18]

Filed sub-bids. The filed sub-bid process, which is described in detail in the next chapter, applies to the following categories of work if performed under M.G.L. c. 149 contracts:

Acoustical tile	Metal windows
Electrical work[19]	Miscellaneous and ornamental iron
Elevators	Painting
Fire protection sprinkler systems	Plumbing
Glass and glazing	Resilient floors
Heating, ventilating and air conditioning	Roofing and flashing
Lathing and plastering	Terrazzo
Marble	Tile
Masonry work	Waterproofing, damp-proofing and caulking

If the estimated value of the subtrade work in any of these categories exceeds $20,000, the work must be bid separately under the filed sub-bid procedures set forth in M.G.L. c. 149.[20] To accommodate the filed sub-bid process, the designer must prepare separate plans and specifications for each filed sub-bid category. M.G.L. c. 149, § 44F(1)(a).

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[17] For M.G.L. c. 149 contracts estimated to cost more than $100,000, the Form for General Bid and the Form for Sub-Bid incorporate this certification. Both of these forms are in Appendix B.

[18] The next chapter contains detailed information on the bidding requirements for building contracts estimated to cost more than $100,000.

[19] This category includes direct electrical radiation for heating.

[20] The awarding authority may combine marble, tile and terrazzo into a single sub-bid category, provided that the sub-bidders are required to show on their bid forms the amounts for each category separately as well as the total amount. M.G.L. c. 149, § 44F(1)(a).

Note, however, that if a filed sub-bid category constitutes the predominant work on a project, this work may be included as part of the main construction contract and need not be segregated into a separate contract for filed sub-bidding. M.G.L. c. 149, § 44F(3). For example, for a project to repair the roofs of several town buildings, you could require the general contractor to be certified in the category of "roofing and flashing."

To ensure that the sub-bidders on your project are qualified, you may establish your own qualification requirements that all sub-bidders must meet. For example, if the project calls for metal windows to be installed in a building, your bid documents could require that any sub-bidder for metal windows have successfully completed three jobs of similar size and scope to your project within the last five years. If a sub-bidder does not possess the required experience, it is not an eligible sub-bidder on your contract.

Certain classes of sub-trade work are customarily performed by sub-subcontractors. If, in the opinion of the awarding authority, based upon an investigation of the work involved, the work in a sub-trade is customarily performed by sub-subcontractors and is estimated to cost more than $10,000, your specifications must identify this work, and the sub-bidders for that sub-trade must list all sub-subcontractors they plan to use and their bid prices in Paragraph E of the standard Form for Sub-Bid (discussed in the next chapter). Sub-bidders may choose to list themselves to do Paragraph E work, leaving off the price, if they can demonstrate to your satisfaction that they customarily perform that class of work with employees on their own payroll and that they are qualified to do the work. M.G.L. c. 149, § 44F(1)(a).

Certification. General contractors and subcontractors bidding on M.G.L. c. 149 contracts estimated to cost more than $100,000 must be certified by the Division of Capital Asset Management and Maintenance (DCAMM).[21] (The certification process is discussed in more detail in the next chapter.) The bid package must specify the

[21] DCAMM certification is also required for construction management at risk (CM at risk) firms and trade contractors competing for M.G.L. c. 149A contracts. Chapter IX of this manual provides additional information on procuring CM at risk contracts under M.G.L. c. 149A.

category of work in which general contractors bidding on the contract must be certified. DCAMM certifies general contractors in the following 28 categories of work:

General building construction	Historical masonry
Alarm systems	Historical roofing
Asbestos removal	Historical painting
Deleading	HVAC
Demolition	Masonry
Doors and windows	Mechanical systems
Electrical	Modular construction/Prefabrication[22]
Electronic security systems	Painting
Elevators	Plumbing
Energy management systems	Pumping stations
Exterior siding	Roofing
Fire protection sprinkler systems	Sewage and water treatment plants
Floor covering	Telecommunications systems
Historical building restoration	Waterproofing

If you determine that your project will require the use of a certification category that is not one of the 28 standard categories of work listed above in which DCAMM certifies general contractors, you will need approval from DCAMM for a special category. This issue should be discussed with DCAMM as early in the design process as possible.

DCAMM certifies filed sub-bidders in the 18 subtrades listed earlier in this chapter. Each filed sub-bidder must be certified by DCAMM in the category of subtrade work for which the sub-bidder is submitting a sub-bid.

Minimum scale. M.G.L. c. 149, § 44B(1), establishes a minimum scale for printed plans of 1/8 inch = 1 foot. This requirement does not apply to site plans.

Alternates. Alternates are options for which the bidders must submit separate prices that the awarding authority may choose to include in a bid package. The awarding authority reserves the right to select or reject the optional work, based on the prices received. For M.G.L. c. 149 contracts, you may include alternates in the

[22] Modular buildings may be procured using a request for proposals process set forth in M.G.L. c. 149, § 44E. Chapter VII of this manual provides detailed guidance on modular construction procurement procedures.

bid package only if they are ranked numerically in order of priority. Later, when evaluating the bids, you may select a specific alternate only after all of the higher-ranking alternates have been selected. M.G.L. c. 149, § 44G(B).

Prohibition on allowances. Allowances are sometimes used in construction bidding to cover items for which the design has not been completed. Use of allowances is not permitted for building contracts subject to M.G.L. c. 149. If design work is not complete on a particular item, it must be deleted from the scope of work and procured under a separate contract at a later date. M.G.L. c. 149, § 44G(A).

Evaluating the Designer's Performance

Public agencies in Massachusetts, including state agencies, cities, towns, charter schools and other public jurisdictions, must complete and submit a designer evaluation form to DCAMM and the Designer Selection Board upon completion of a building project under their control.[23] M.G.L. c. 7C, § 48. A copy of the completed evaluation form must also be mailed to the designer. Upon completion of the schematic design phase of the project, the public owner is required to provide the designer with a preliminary, informational written evaluation of the designer's performance on the project. DCAMM has developed designer evaluation forms pertaining to the design and construction phases of a project for use by public agencies. These forms, which must be used to fulfill the designer evaluation requirement, can be downloaded from DCAMM's website at www.mass.gov/dcamm.

M.G.L. c. 7C, § 48, provides qualified immunity to individuals responsible for completing designer evaluations on behalf of public owners. If a designer initiates a lawsuit in response to a completed evaluation, the awarding authority is required to provide legal representation and indemnification for the individual completing the evaluation on behalf of the awarding authority.

Any public agency that fails to complete the required designer evaluation form and submit it, together with any written response by the designer, to DCAMM within 70 days of completing a building project will be ineligible to receive any state funds for public building projects or public works projects. M.G.L. c. 7C, § 48.

[23] The MBTA is exempt from this requirement.

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V. Procuring Building Construction Under M.G.L. c. 149

M.G.L. c. 149, §§ 44A-44M, governs contracts for the construction, reconstruction, installation, demolition, maintenance or repair of a building. Although these provisions do not define "building," court decisions have indicated that the word is to be taken in its common and ordinary sense. If a structure has walls and a roof and encloses space that is to be used for some purpose, it is a building. Building construction services must be procured under M.G.L. c. 149 unless they fall within the following exceptions:

- If a sewer or water supply project includes buildings whose sole function is to house pumps and related equipment, the project may be bid under M.G.L. c. 30, § 39M. M.G.L. c. 149, § 44A(2).
- Energy-saving improvements to public buildings may be procured using procurement procedures set forth in M.G.L. c. 25A.[24] If you contract with a designer to assist with the solicitation, the design contract will be subject to M.G.L. c. 7C, §§ 44-57, the designer selection law.
- Modular buildings may be procured using a request for proposals (RFP) process set forth in M.G.L. c. 149, § 44E(4). If you contract with a designer to prepare the RFP, the design contract will be subject to the designer selection law. Additional information on procuring modular buildings can be found later in this manual.
- Awarding authorities have the option of using the construction management at risk delivery method set forth in M.G.L. c. 149A for building construction contracts estimated to cost $5 million or more. Additional information on M.G.L. c. 149A can be found later in this manual.

Note also that M.G.L. c. 149 applies to contracts for maintenance or repair work as well as construction. For example, painting, plumbing repair and asbestos removal contracts are subject to the requirements of M.G.L. c. 149, as are most contracts for

[24] The Division of Capital Asset Management and Maintenance (DCAMM) manages and oversees all state agency and building authority energy management services contracts under M.G.L. c. 25A. Information on DCAMM's energy performance contracting program is available at DCAMM's website: www.mass.gov/dcamm. The Department of Energy Resources (DOER) provides technical assistance in contracting for energy management services under M.G.L. c. 25A to governmental bodies that are not state agencies or building authorities, including local jurisdictions. Information regarding the requirements of the law as well as model documents are available at the DOER's website: www.mass.gov/doer.

elevator maintenance, boiler maintenance and security system maintenance. Although major repair contracts are bid based on detailed specifications prepared for a particular project, contracts for maintenance materials and services can generally be bid on an annual basis. It may make sense, for example, to award an annual interior painting contract for all public school buildings in a town, based on estimated quantities of the required labor and materials.

The specific procedural requirements that apply to each M.G.L. c. 149 contract depend on the estimated contract cost. The following section summarizes the required procurement procedures corresponding to contract cost estimates within the dollar thresholds specified in M.G.L. c. 149.

Building Contracts Estimated to Cost Less Than $10,000

If the estimated contract cost is less than $10,000, you are required to use sound business practices in selecting the contractor and to keep a record of each procurement, including the name and address of the contractor. M.G.L. c. 149, § 44A(2)(A). Although "sound business practices" are not defined in M.G.L. c. 149, we recommend that your sound business practices include ensuring that the selected contractor possesses the necessary qualifications, experience and capacity to perform the work and that the contract price reflects the fair market value of the work. For some contracts, you should consider soliciting competitive quotes from qualified contractors. We also recommend that your procurement record include the date, price and scope of the work in addition to the contractor's name and address. Keep in mind that the contract is subject to the prevailing wage law. Therefore, you should provide the prevailing wage rate sheet for the project to all contractors from which you solicit prices for the contract work.

Building Contracts Estimated to Cost Between $10,000 and $25,000

If the estimated contract cost is between $10,000 and $25,000, you are required to seek written responses from contractors through public notification of the contract at least two weeks before the deadline for receiving responses. The solicitation must include a scope of work statement that defines the work to be performed and provides prospective offerors with sufficient information regarding your jurisdiction's objectives

and requirements as well as the time period in which the work is to be completed. Your solicitation should include the labor harmony and OSHA training certifications discussed in the previous chapter and the prevailing wage rate sheet for the project.

You are required to advertise the solicitation in the *Central Register* and on COMMBUYS and to post the solicitation on your jurisdiction's website and in a conspicuous place in or near your jurisdiction's primary office.[25] You must award the contract to the responsible contractor offering to perform the contract at the lowest price. Under M.G.L. c. 149, "responsible" means:

> [D]emonstrably possessing the skill, ability and integrity necessary to faithfully perform the work called for by a particular contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of section forty-four D of this chapter[.]

M.G.L. c. 149, § 44A(1).

Building Contracts Estimated to Cost Between $25,000 and $100,000

M.G.L. c. 149, § 44A(2)(C), requires building contracts estimated to cost between $25,000 and $100,000 to be bid in accordance with the procedures set forth in M.G.L. c. 30, § 39M, the bid law that applies to contracts for public works construction services and to contracts for construction materials. M.G.L. c. 149, § 44A(2)(C). This bidding procedure is summarized below, and a more detailed discussion of M.G.L. c. 30, § 39M, requirements and procedures is provided in Chapter VI.

For building contracts estimated to cost between $25,000 and $100,000, you are required to solicit competitive sealed bids by advertising a notice inviting bids in the *Central Register* and in a newspaper of general circulation in the locality of the project at least two weeks prior to the deadline for submitting bids. The notice must also be posted in your jurisdiction's office at least one week prior to the deadline. Your invitation for bids (IFB) must include a certification of good faith, to be signed by bidders under penalties of perjury, and should also include the labor harmony and OSHA training certifications discussed in the previous chapter and the prevailing wage rate

[25] COMMBUYS is the Commonwealth's electronic procurement system. Any public agency in Massachusetts can post solicitations on COMMBUYS. For additional information, you may visit the COMMBUYS website at www.commbuys.com.

sheet for the project. Bidders must submit a five percent bid deposit with their bids. A bid deposit guarantees the bid price submitted by each vendor. If the low bidder will not honor its bid price, you may collect all or part of the bid deposit. The bid deposit may be in the form of a certified, treasurer's or cashier's check from a responsible bank or trust company payable to the awarding authority; cash; or a bid bond from a surety company. Construction bids are publicly opened and read at the time they are due. You must award the contract to the lowest responsible and eligible bidder. Under M.G.L. c. 30, § 39M, the "lowest responsible and eligible bidder" is defined as:

> [T]he bidder (1) whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary for the faithful performance of the work; (2) who shall certify, that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed in the work; (3) who shall certify that all employees to be employed at the worksite will have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health Administration that is at least 10 hours in duration at the time the employee begins work and who shall furnish documentation of successful completion of said course with the first certified payroll report for each employee; who, where the provisions of section eight B of chapter twenty-nine[26] apply, shall have been deemed qualified thereunder; and (4) who obtains within ten days of the notification of contract award the security by bond required under section twenty-nine of chapter one hundred and forty-nine; provided that for the purposes of this section the term "security by bond" shall mean the bond of a surety company qualified to do business under the laws of the commonwealth and satisfactory to the awarding authority; provided further, that if there is more than 1 surety company, the surety companies shall be jointly and severally liable.

M.G.L. c. 30, § 39M(c).

If the low bidder satisfies the requirements, you make an award to that bidder. If not, you reject that bidder and proceed to evaluate and award to the next lowest bidder.

For a M.G.L. c. 149 contract that exceeds $25,000 but does not exceed $100,000, the contractor must furnish a payment bond in the amount of at least 50 percent of the

[26] M.G.L. c. 81, § 8B, formerly M.G.L. c. 29, § 8B, established a contractor prequalification process for contracts awarded by the Massachusetts Highway Department (now the Massachusetts Department of Transportation Highway Division) and the Metropolitan District Commission (now the Department of Conservation and Recreation).

contract price.[27] M.G.L. c. 149, § 29. The contractor obtains a payment bond from a surety company, to guarantee payment to subcontractors and/or materials suppliers if the contractor fails to pay the subcontractors and/or materials suppliers. The contractor has ten days from the date of notification of the contract award to obtain the payment bond. You are not required to obtain a performance bond, although you may decide to do so. If the selected contractor fails to execute the contract or to furnish the required bond or bonds, you should award the contract to the next lowest responsible and eligible bidder.

Building Contracts Estimated to Cost More Than $100,000

Building contracts estimated to cost more than $100,000 are subject to two unique requirements that do not apply to smaller building contracts or to public works construction contracts: filed sub-bidding and certification. Building contracts estimated to cost $10 million or more are subject to additional requirements for prequalification of general contractors and subcontractors submitting filed sub-bids. The steps for bidding building contracts estimated to cost more than $100,000 are discussed later in this chapter, after the section on contractor and subcontractor prequalification.

Filed Sub-Bidding

For many years Massachusetts has used the "filed sub-bid" system for selecting certain subcontractors on certain public building construction projects subject to M.G.L. c. 149. A subcontractor must be selected through the filed sub-bid system if the following three conditions are met:

1. the estimated construction cost of the M.G.L. c. 149 contract exceeds $100,000;
2. the subcontractor's work falls under a filed sub-bid category of work listed in Chapter IV; and
3. the estimated cost of the subcontract is greater than $20,000.

M.G.L. c. 149, § 44F(1)(a).

[27] As will be discussed, M.G.L. c. 149 contracts estimated to cost more than $100,000 require the contractor to furnish the awarding authority with both a performance bond and a payment bond, each in the amount of 100 percent of the contract price.

Subcontractors must submit sub-bids for the work in each filed sub-bid category directly to the awarding authority, using the standard Form for Sub-Bid contained in Appendix B of this manual. Subcontractors may submit unrestricted sub-bids, meaning that their sub-bids are available for use by any general contractor, or they may restrict their sub-bids to or from the use of specific general contractors.

In addition, you may have identified certain classes of work which, in your opinion based upon an investigation of the work involved, are estimated to cost in excess of $10,000 and which are customarily performed by sub-subcontractors. If your specifications have included this work, sub-bidders must also list all sub-subcontractors they plan to use and their bid prices. This sub-sub-bid work is often referred to as "Paragraph E work," since such work is listed under Paragraph E on the standard bid form.

After screening the sub-bidders, the public owner provides a list of eligible sub-bidders and their sub-bid prices to all interested contractors. This list is called a filed sub-bid tabulation sheet. Each general contractor must select, in each sub-bid category, the subcontractor it wishes to use (provided that the subcontractor did not restrict its sub-bid from a specific general contractor's use). The general contractor must list in its general bid the names of the selected subcontractors and the respective sub-bid amounts. General contractors are not required to take the lowest sub-bid in each category.

A general contractor may also submit a filed sub-bid, provided that the general contractor has been certified by DCAMM in the sub-bid category of work, customarily performs the work covered by the sub-bid category with its own employees and is qualified to perform the work. A general contractor that has been certified by DCAMM in a sub-bid category of work may list itself for that subtrade work on its general bid or may list the lowest responsible and eligible sub-bidder on its general bid if:

1. the other sub-bid is lower than the general bidder's sub-bid;
2. the other sub-bid is available for the general bidder's use; and
3. the other sub-bid is not restricted to the general bidder's use alone or the general bidder's use and the use of another general bidder or other general bidders.

M.G.L. c. 149, § 44F(5).

Additional information on filed sub-bidding is provided in Chapter IV.

Certification

M.G.L. c. 149 requires general contractors and subcontractors bidding on public building construction contracts estimated to cost more than $100,000 to be certified by DCAMM.[28] (The categories of work for which DCAMM's Contractor Certification Office certifies contractors to bid on public projects are listed in the previous chapter.) The purpose of contractor certification is to identify through a rigorous review process those contractors qualified to work on public building construction projects and disqualify those contractors that pose an unacceptable risk to awarding authorities, thereby preventing such contractors from bidding on public building projects.

Each bidder must submit with its bid a Certificate of Eligibility issued by DCAMM. M.G.L. c. 149, § 44D. To obtain a Certificate of Eligibility, a contractor must submit a standard form application to DCAMM containing information regarding the contractor's qualifications, past performance, financial condition, bonding capacity and other relevant issues. The statutory certification period is for one year. It generally takes approximately three months for DCAMM to process an application. New applicants should submit their applications to DCAMM with this time frame in mind in order to meet a bid due date. Renewal applicants are required to submit their renewal applications at least three months prior to the expiration date of their current Certificates of Eligibility; failure to submit completed applications on a timely basis may result in a gap or lapse of certification.

To evaluate contractors applying for contractor certification, DCAMM determines whether the contractor qualifies for certification through a review of the required forms and information (such as audited financial statements and bonding information) contained in the contractor's application. DCAMM also considers the contractor's past performance by reviewing the standard contractor evaluation forms, which contain

[28] DCAMM certification is also required for construction management at risk (CM at risk) firms and trade contractors competing for M.G.L. c. 149A contracts. Chapter IX of this manual provides additional information on procuring CM at risk contracts under M.G.L. c. 149A.

numerical ratings submitted by public and private owners of projects[29] completed by the contractor within the past five years. DCAMM also performs third-party checks with agencies that can include the Department of Unemployment Assistance, the Department of Industrial Accidents, the Joint Task Force on the Underground Economy and Employee Misclassification, the U.S. Occupational Safety and Health Administration, the Department of Revenue and state and federal lists of debarred contractors. DCAMM then assigns ratings to other criteria pertaining to the applicant's experience and work history over the past five years. Finally, an overall numerical score is calculated by assigning a weight of 70 percent to the average project rating based on the contractor evaluation forms submitted by public and private owners and 30 percent to the other criteria. If either the average project rating or the overall numerical rating for an applicant is below 80, the applicant is denied certification.

Each Prime/General Certificate of Eligibility contains four important pieces of information: (1) the category or categories of work for which the contractor is qualified; (2) the Single Project Limit, which represents the maximum bid that the bidder may submit on a single project;[30] (3) the Aggregate Work Limit, which represents the maximum annual value of all work the bidder may perform, including the annual value of the contract for which the bid is submitted; and (4) information on whether the contractor is certified by the Supplier Diversity Office.

For each M.G.L. c.149 contract estimated to cost at least $100,000, the awarding authority must designate the category or categories of work for which the general contractor must be certified and include this information in the IFB. Awarding authorities may request that DCAMM establish a special category of work if there is good reason to limit bidding to contractors possessing skills or abilities not covered by the standard categories listed in Chapter IV. If DCAMM establishes a special category of work, the

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[29] Chapter VIII contains a discussion of this contractor evaluation requirement.

[30] In certain instances, when contractors are certified in general building construction as well as in a specialized certification category, DCAMM may assign a separate project limit for general building construction. This separate "General Building Construction Limit" will appear on the contractor's certificate above the contractor's Single Project Limit.

awarding authority must formulate a bid schedule that allows interested contractors to seek and obtain certification in the special category of work before the date that general bids are due. 810 CMR 4.03(3).

In addition to a Certificate of Eligibility, each general bidder and filed sub-bidder must complete and submit an Update Statement[31] listing recent and current projects, any significant changes in financial position, relevant litigation involving the bidder, and the names and qualifications of the supervisors proposed for the project. As will be discussed, you will use the references listed on the Update Statement as a source of information in evaluating the qualifications of general bidders and determining bidder responsibility. A valid Certificate of Eligibility indicates that a bidder on a public building project has been certified by DCAMM for a certain category of work, but the final determination of bidder responsibility is always in your hands.

The certification and evaluation requirements for subcontractors are similar to the contractor certification and evaluation requirements summarized above. However, DCAMM's evaluation of subcontractors' past performance is based on projects completed by subcontractors within the last three years rather than the last five years, and the Certificates of Eligibility issued to subcontractors do not include a Single Project Limit or Aggregate Work Limit. Subcontractors apply for certification in the 18 subtrade categories of work listed in Chapter IV.

Contractor and Subcontractor Prequalification Requirements for Building Contracts Estimated to Cost $10 Million or More

For M.G.L. c. 149 building contracts estimated to cost $10 million or more, general bidders and filed sub-bidders must be prequalified by your jurisdiction in accordance with the detailed prequalification procedures contained in M.G.L. c. 149. Awarding authorities may elect to institute these prequalification procedures for building contracts

[31] The Update Statement submitted by a general bidder or filed sub-bidder is not a public record and must be removed from bid documents before these documents are offered for public inspection. 810 CMR 8.06. Blank Update Statement forms for general bidders and filed sub-bidders may be downloaded from DCAMM's website at www.mass.gov/dcamm.

estimated to cost between $100,000 and $10 million.[32] On M.G.L. c. 149 contracts for which prequalification procedures are required or adopted, you will solicit bids only from prequalified general bidders and filed sub-bidders.

The following agencies are exempt from the mandatory contractor and subcontractor prequalification requirements contained in M.G.L. c. 149 but may elect to follow them: DCAMM, the Massachusetts Port Authority, the Massachusetts Water Resources Authority, the Massachusetts State College Building Authority and the University of Massachusetts Building Authority.

The detailed legal requirements for prequalifying general bidders and filed sub-bidders on these larger building construction contracts are found in M.G.L. c. 149, §§ 44D½ and 44D¾, and in DCAMM regulations, 810 CMR 9.00 and 10.00. These requirements are summarized below but the following summary is not comprehensive. Awarding authorities embarking on a prequalification process should consult the relevant provisions of M.G.L. c. 149 and the DCAMM regulations cited above.

The basic steps for prequalifying contractors and subcontractors to bid on public building contracts estimated to cost $10 million or more are as follows:

1. Establish a prequalification committee.
2. Prepare the request for qualifications (RFQ).
3. Advertise the RFQ and receive statements of qualifications.
4. Evaluate and prequalify contractors or subcontractors.
5. Notify applicants; post and publish public notice of prequalified contractors or subcontractors.
6. Solicit bids or filed sub-bids from prequalified contractors or subcontractors.

Step 1: Establish a prequalification committee.

Before issuing the RFQ for general bidders or filed sub-bidders, you must establish a prequalification committee consisting of one representative of the project designer and

[32] If you elect to use a prequalification process on a building contract estimated to cost between $100,000 and $10 million, you are not required to prequalify subcontractors in all subtrade categories. However, if you elect to prequalify subcontractors in a particular subtrade category, then all subcontractors submitting filed sub-bids for that subtrade category must be prequalified. 810 CMR 10.03(4).

three representatives of your jurisdiction, one of whom will be the owner's project manager (OPM), if an OPM is required.[33] The representative of the project designer must either have prepared the design documents or be the designer's designated representative for the building project. If the OPM is a consultant, the scope of services of your contract with the OPM must include the prequalification committee services and related costs. At its initial meeting, the prequalification committee must designate one of the three representatives of your jurisdiction to serve as chairperson. The chairperson will be responsible for coordinating the committee meetings and managing the evaluation process. 810 CMR 9.04. If you are prequalifying both general bidders and filed sub-bidders for a construction contract, the prequalification committee members for each prequalification process should be the same to the extent possible.

Step 2: Prepare the RFQ.

The RFQ must include an RFQ Interest Form in a form consistent with the RFQ Interest Form prescribed by DCAMM in two documents available at www.mass.gov/dcamm: *Standard Forms for General Contractor Prequalification* and *Standard Forms for Subcontractor Prequalification*. You are required to maintain a list of all firms that have submitted an RFQ Interest Form with their responses to the RFQ and to provide notice of any addenda or other communications regarding the prequalification process to all firms that have submitted the RFQ Interest Form. 810 CMR 9.05, 10.05.

The RFQ must also include a standard Statement of Qualifications (SOQ) in a form consistent with the Statement of Qualifications prescribed by DCAMM in the *Standard Forms for General Contractor Prequalification* and the *Standard Forms for Subcontractor Prequalification*. Your jurisdiction may customize the SOQ to include project-specific information pertaining to the evaluation criteria listed below, but the standard SOQ may not otherwise be modified or changed. You are required to make the SOQ available in both electronic and paper form to interested general contractors and subcontractors. The general contractor or subcontractor submitting the SOQ in response to the RFQ must sign the SOQ under pains and penalties of perjury.

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[33] An OPM will be required on all building projects estimated to cost $1.5 million or more.

In preparing the RFQ, you must use only the evaluation criteria, information requirements and point rating system that are specified in M.G.L. c. 149 and are listed below. Different requirements for contractors and subcontractors are noted.

1. **Management experience (50 points; minimum of 25 points required for approval)**
    - Business owners: Name, title and years with firm of the owner(s) of the business.
    - Management personnel: Names, title, education and construction experience, years with firm and list of projects completed by all management personnel who will have any direct or indirect responsibility for the building project.
    - Similar project experience: Project name(s), description, original contract sum, final contract sum with explanation and date completed of similar projects. Your jurisdiction has the discretion to include in the RFQ a description of what you consider a "similar project."
    - Terminations: A list of any projects on which the firm was terminated or failed to complete the work, including an explanation for each instance listed.
    - Legal proceedings (general contractors): A list of all legal or administrative proceedings currently pending against the general contractor or concluded adversely to the general contractor within the past five years that relate to the procurement or performance of any public or private construction contract.
    - Legal proceedings (subcontractors): A list of all legal or administrative proceedings currently pending against the subcontractor or concluded adversely to the subcontractor within the past three years that relate to the procurement or performance of any public or private construction contract. Legal proceedings do not include any actions that primarily involve personal injury or workers' compensation claims, or where the sole cause of action involves the subcontractor's exercise of its rights for direct payment under M.G.L. c. 30, § 39F.
    - Safety record: The three-year history of the firm's workers' compensation experience modifier.
    - Compliance record (general contractors): Information on, and evidence of, the firm's compliance record with respect to minority business enterprise and women business enterprise inclusion goals and workforce inclusion goals, if applicable, on building projects within the past five years.
2. **References (30 points; minimum of 15 points required for approval)**
    - Project references: A list of references from owners and architects for all "similar projects" provided in response to the third item listed under "Management Experience" (above), including project names and names of

the owners and architects, with a current address, telephone and fax number, and contact person for each project.

- Credit references: A list of at least five credit references, including the telephone and fax numbers of contact persons from key suppliers, vendors and banks.
- Public project records: A list of all public building construction projects subject to M.G.L. c. 149 completed during the past three years, including the owner's name, current address, telephone number, fax number and contact person for each project.

3. Capacity to complete projects (20 points; minimum of 10 points required for approval)

- General contractors: An audited financial statement for the most recent fiscal year.[34]
- Subcontractors: Annual revenue for the prior three fiscal years.[35] (Note that the RFQ for subcontractors may not require submission of financial statements.)
- Revenue under contract for the next three fiscal years.

4. Mandatory requirements for which no points are assigned

- A commitment letter, issued by a surety company licensed to do business in the Commonwealth and whose name appears on United States Treasury Department Circular 570, for payment and performance bonds indicating that the contractor or subcontractor is bondable for 100 percent of the estimated contract or subcontract value.[36] If the commitment letter is written by another

[34] To preserve the confidentiality of this information and the information regarding the general contractor's revenue under contract for the next three years, interested general contractors may submit the required information in a sealed envelope that is stapled to the SOQ package, labeled with the general contractor's name, the project name, the project number and a notation stating that the envelope contains confidential financial information. 810 CMR 9.05(4).

[35] To preserve the confidentiality of this information and the information regarding the subcontractor's revenue under contract for the next three years, interested subcontractors may submit the required information in a sealed envelope that is stapled to the SOQ package, labeled with the subcontractor's name, the project name, the project number and a notation stating that the envelope contains confidential financial information. 810 CMR 10.05(4).

[36] This commitment letter constitutes a written determination by the surety that, based on the information known at the time, it would approve the issuance of payment and performance bonds for 100 percent of the estimated contract or subcontract value.

party on behalf of a surety company, the commitment letter must be accompanied by an authorized power of attorney from a surety company.

- General contractors: A Certificate of Eligibility issued by DCAMM showing single and aggregate capacity ratings sufficient for the project, and a completed Update Statement.
- Subcontractors: A Certificate of Eligibility issued by DCAMM and a completed Update Statement.

The RFQ must identify the specific point allocation for each category and subcategory of information. Within each category of information, the prequalification committee may use discretion in allocating points among the subcategories, consistent with the total points for the category.

For prequalification of both general contractors and subcontractors, the RFQ and the public notice must include the following information:

1. For general contractors, the RFQ must include a statement that the RFQ will be used to prequalify general contractors that will be invited to submit bids pursuant to M.G.L. c. 149, § 44E. For subcontractors, the RFQ must include a statement indicating that the RFQ will be used to prequalify subcontractors that will be invited to submit filed sub-bids pursuant to M.G.L. c. 149, §§ 44E-44F.
2. The location(s) where interested general contractors or subcontractors can obtain a full copy of the RFQ, including the actual and electronic addresses where copies may be obtained.
3. The time and date for receipt of responses to the RFQ, which must be at least two weeks after the date of the advertisement.
4. The mailing and physical addresses of the office to which responses are to be delivered.
5. The time frame in which the public agency will respond to the responses.
6. A general description of the building project, including a description of the physical location of the project and work to be performed.
7. The anticipated schedule for the building project from the time a notice to proceed is issued by your jurisdiction.
8. The estimated construction cost for the project and estimated construction cost for each and every subtrade for which subcontractors will be prequalified to submit filed sub-bids.
9. A listing of the project team, including the awarding authority, the designer and the awarding authority's OPM, if applicable.

10. A detailed description of the evaluation procedure and criteria for prequalification of general contractors or subcontractors, including the point rating system and specific point allocations for each evaluation category and subcategory, and the anticipated schedule for the start and completion of the evaluation process.
11. A prohibition against any unauthorized communication or contact with your jurisdiction outside of the official pre-bid meetings.
12. Any limitations desired by your jurisdiction on the size of and number of pages to be included in the response to the RFQ.

If inclusion of all of the above information in the text of the public notice is not practicable due to space and cost limitations, you must include items 1 through 9 above. You may state in the public notice that all further required information, including the prequalification evaluation criteria and selection process, is included in the RFQ. 810 CMR 9.07, 10.07.

Step 3: Advertise the RFQ and receive statements of qualifications.

At least two weeks before the deadline for submitting responses to the RFQ, you must advertise the RFQ in a newspaper of general circulation in the area in which the building project is located, in the *Central Register* and on COMMBUYS.[37] If you so choose, you may also post the public notice on your jurisdiction's website.

The SOQs are not opened publicly but must be opened in the presence of one or more witnesses at the time specified in the RFQ. The opening of the SOQs by the prequalification committee will satisfy this requirement.

The prequalification committee is required to prepare a register of responders that includes the name of each general contractor or subcontractor that submitted a SOQ in response to the RFQ. The register of responders must be open for public inspection. After the SOQs have been evaluated by the prequalification committee, the SOQs must be made available to the public with the exception of the financial information they contain, which is not a public record. M.G.L. c. 149, § 44D½(g).

[37] COMMBUYS is the Commonwealth's electronic procurement system. Any public agency in Massachusetts can post solicitations on COMMBUYS free of charge. For additional information, you may visit the COMMBUYS website at www.commbuys.com.

Step 4: Evaluate and prequalify contractors or subcontractors.

After opening the responses to the RFQ, the prequalification committee is required to review the register of responders and obtain copies of each SOQ and all supporting documentation. The prequalification committee may delegate the checking of references to individuals that are not committee members provided that the prequalification committee develops a written reference check form with uniform questions to be asked by those checking general contractor and subcontractor references. The chairperson of the prequalification committee may delegate additional administrative tasks necessary to facilitate the prequalification process. 810 CMR 9.08, 10.08.

The prequalification committee is responsible for evaluating each SOQ submitted in response to the RFQ, using only the evaluation criteria contained in the RFQ. After prequalification committee members have completed their individual reviews of the SOQs, the prequalification committee must collectively evaluate the responses to the RFQ. The prequalification committee may consult with other representatives of your jurisdiction, the designer, client or user agency (if applicable) or legal counsel as necessary to expedite the evaluation process. The prequalification committee may also contact interested general contractors and subcontractors to clarify or verify timely information submitted by an interested general contractor or subcontractor in its SOQ. After the evaluation process is completed, the chairperson must complete a Prequalification Evaluation Report in a form consistent with the Prequalification Evaluation Report prescribed by the DCAMM *Guidelines for Prequalification*. This report must reflect the consensus of the prequalification committee regarding the score received by the general contractor or subcontractor for each evaluation category and subcategory and must indicate the total points awarded. The report may be customized by the prequalification committee only to reflect project-specific information. 810 CMR 9.08, 10.08.

Only general contractors and subcontractors receiving the minimum number of points in each of the four general evaluation categories as set forth in the RFQ, as well as a total minimum score of 70 points, may be prequalified to submit bids and filed sub-bids. All

general contractors and subcontractors that fulfill these requirements must be invited to submit bids and filed sub-bids. 810 CMR 9.08, 10.08.

The prequalification committee must select at least three qualified general contractors to submit bids on the construction contract. If the prequalification committee prequalifies fewer than three general contractors for a M.G.L. c. 149 construction contract estimated to cost $10 million or more (for which contractor prequalification is mandatory), your jurisdiction must reject all responses and issue at least one new RFQ. If that RFQ produces fewer than three prequalified general contractors, you have two options: (1) you may solicit general bids pursuant to M.G.L. c. 149, §§ 44B-44E; or (2) if at least two general bidders have been prequalified, you may invite bids from those prequalified general bidders.

If your jurisdiction chose to use the prequalification process for a M.G.L. c. 149 construction contract estimated to cost between $100,000 and $10 million, and if the prequalification committee prequalifies fewer than three general contractors, you have three options: (1) you may reject all responses and issue a new RFQ; (2) you may solicit general bids pursuant to M.G.L. c. 149; or (3) if at least two general contractors have been prequalified, you may invite general bids from those prequalified general contractors. If you reissue an RFQ for general bidders, your RFQ may stipulate that a general contractor that was prequalified for a particular project during the first RFQ process will remain prequalified for that project, without any further submissions by the general contractor or review by your jurisdiction. This prequalification will last for up to 120 days from the due date of responses to the first RFQ. M.G.L. c. 149, § 44D½(i).

Similarly, the prequalification committee must select at least three qualified subcontractors to submit filed sub-bids for each category of work subject to the filed sub-bidding requirements of M.G.L. c. 149. If the prequalification committee prequalifies fewer than three subcontractors for a particular trade in connection with a M.G.L. c. 149 construction contract estimated to cost $10 million or more (for which subcontractor prequalification is mandatory), you must reject all responses and issue at least one new RFQ. If that RFQ produces fewer than three prequalified subcontractors, you have two options: (1) you may solicit filed sub-bids pursuant to M.G.L. c. 149, §§

44B-44E; or (2) if at least two sub-bidders have been prequalified, you may invite bids from those prequalified subcontractors.

If your jurisdiction chose to use the prequalification process for a M.G.L. c. 149 construction contract estimated to cost between $100,000 and $10 million, and the prequalification committee prequalifies fewer than three contractors, you have three options: (1) you may reject all responses and issue a new RFQ; (2) you may solicit filed sub-bids pursuant to M.G.L. c. 149; or (3) if at least two subcontractors have been prequalified, you may invite filed sub-bids from the two prequalified subcontractors. If you reissue an RFQ for subcontractors, your RFQ may stipulate that a subcontractor that was prequalified for a particular project during the first RFQ process will remain prequalified for that project, without any further submissions by the subcontractor or review by your jurisdiction. This prequalification will last for up to 120 days from the due date of responses to the first RFQ. M.G.L. c. 149, § 44D¾(i).

Step 5: Notify applicants; post and publish public notice of prequalified contractors and subcontractors.

Within 14 days of the completion of the prequalification committee's evaluation process, your jurisdiction is required to send via first class mail, postage prepaid:

- written notices to all contractors and subcontractors that were not prequalified, advising them that they did not achieve a sufficient score from the prequalification committee to be prequalified; and
- written notices to all prequalified contractors and subcontractors, advising them that they have been prequalified by the prequalification committee to submit bids or filed sub-bids on the project.

Also within 14 days of the completion of the prequalification committee's evaluation process, your jurisdiction is required to publish a public notice listing all general contractors or subcontractors that have been prequalified for the building project and stating that only prequalified general contractors or subcontractors are eligible to submit bids or filed sub-bids. The notice must be posted in your jurisdiction's bid room or place of business where general bids are customarily received for building projects and on COMMBUYS. You may also post the public notice on your jurisdiction's website.

General contractors and subcontractors submitting SOQs in response to an RFQ may obtain their scores upon written request to your jurisdiction. M.G.L. c. 149, §§ 44D½ and 44D¾ provide that the decisions of the prequalification committee shall be final and shall not be subject to appeal except on grounds of arbitrariness, capriciousness, fraud or collusion.

Step 6: Solicit bids or filed sub-bids from prequalified contractors or subcontractors.

A copy of the public notice referenced in Step 5 must be sent via first class mail, postage prepaid, to all prequalified general contractors or subcontractors along with an invitation to bid. The invitation to bid must state where prequalified general contractors and subcontractors can obtain copies of the plans and specifications for the project and must specify the deadlines for submitting bids and filed sub-bids. The invitation to bid must be issued at least two weeks before the deadlines for submitting bids and filed sub-bids. Any other parties interested in obtaining the plans and specifications may do so by providing a deposit designated by your jurisdiction. You must refund the deposit when the documents are returned. 810 CMR 9.10, 10.10.

For contracts estimated to cost $10 million or more, or for contracts estimated to cost between $100,000 and $10 million for which you have elected to prequalify the general bidders and filed sub-bidders, you will solicit bids and filed sub-bids only from general bidders and filed sub-bidders that have been prequalified by your jurisdiction using the procedures summarized above.

The Construction Bidding Process for Building Contracts Estimated to Cost More Than $100,000

The basic steps for bidding M.G.L. c. 149 contracts estimated to cost more than $100,000 are as follows:

1. Prepare the invitation for bids (IFB).
2. Advertise and post the IFB.
3. Receive, open, and review sub-bids.
4. Distribute the filed sub-bidder list to everyone who received the IFB.
5. Receive, open and review general bids.
6. Award the contract to the lowest responsible and eligible bidder.

7. Obtain bonds and execute the contract.
8. Return bid deposits and publicize the contract.

Step 1: Prepare the IFB.

The IFB consists of the package of materials, distributed to interested bidders, that form the basis for their bids. The major components of and requirements for the IFB are as follows:

Plans and specifications. The IFB must include the plans and specifications, which are the construction drawings and related written materials, prepared by the project designer, which describe in detail how the project is to be built.

Certification category. The IFB must indicate the category of work in which general bidders must be certified and the category of work in which filed sub-bidders for each subtrade must be certified. The general bidder's Certificate of Eligibility will list all categories of work in which the general bidder is certified by DCAMM. Each filed sub-bidder's Certificate of Eligibility will list the category of work in which the sub-bidder is certified by DCAMM.

For general bidders, you will typically require a Certificate of Eligibility in the category of work that is predominant in the contract. For example, for a floor installation project that also entails some incidental painting of the building, it probably makes sense to require the general contractor to be certified in the category of floor covering. You can then solicit filed sub-bids for the painting work, if necessary. In cases where you have no dominant trade, you might want to require certification in the General Building Construction category to ensure that the contractor is capable of overseeing multiple subcontractors.

Standard forms. The IFB must contain several standard, blank forms for general bidder and filed sub-bidders to complete: the Form for General Bid, to be completed by general bidders; the Form for Sub-Bid, to be completed by filed sub-bidders; and Update Statement forms for the general bidders and filed sub-bidders to complete. Appendix B contains copies of the Form for General Bid and the Form for Sub-Bid. The Update Statement forms for general bidders and filed sub-bidders can be downloaded from the DCAMM website at www.mass.gov/dcamm.

Prevailing wage rate sheet. You must request a prevailing wage rate sheet from the Department of Labor Standards and reference it in the IFB or the advertisement. Since you are required to provide the prevailing wage rate sheet to anyone who requests it, it makes sense to include the prevailing wage rate sheet in the IFB.

Bid deposit requirement. The IFB must state that each bidder must submit with its bid a bid deposit equal to five percent of the amount of the bid. The bid deposit may be in the form of a certified, treasurer's or cashier's check payable to the awarding authority from a responsible bank or trust company; cash; or a bid bond from a licensed surety. M.G.L. c. 149, § 44B(2).

Terms and conditions. The IFB should also contain the various business and legal terms and conditions to which the contractor must agree. By necessity, the contract will be a lengthy and complex document, and a discussion of all the terms and conditions is beyond the scope of this manual. However, a brief section at the end of this chapter lists some particular provisions of which you should be aware.

We recommend that you develop a standard construction contract, which can then be used repeatedly with only minor modifications for each individual project. DCAMM's standard contract for state projects can be used as a guide in developing a contract, although some changes are needed to reflect the slightly different legal requirements at the local level. As with any legal document, you should consult your local attorney when developing a standard construction contract.

Step 2: Advertise and post the IFB. [38]

At least two weeks before the deadline for submitting bids,[39] a notice inviting bids must appear in the *Central Register*, published by the Secretary of the Commonwealth, and in a newspaper of general circulation in the locality of the project. The Secretary of the Commonwealth's website at www.mass.gov/sec contains information on submitting notices to the *Central Register*.

[38] M.G.L. c. 149 requires this step to be completed even when you have prequalified the bidders and sub-bidders for the contract.

[39] If the project entails filed sub-bids, this deadline will be the date by which sub-bids are due.

A notice must also be posted in a conspicuous place in or near your jurisdiction's office at least one week prior to the deadline.[40]

The public notice must include the following information:

- when and where the IFB may be obtained;
- when and where general bids and sub-bids must be submitted;
- when and where general bids and sub-bids will be opened; and
- sufficient facts regarding the nature and scope of the project and other information to assist bidders in deciding whether or not to bid on the contract.

M.G.L. c. 149, § 44J(2).

We recommend that the public notice include the contractor certification category or categories in which bidders must be certified by DCAMM, the filed sub-bid categories of work (when required) and a reference to the payment of prevailing wages.[41]

The IFB must be made available to all who request it. Keep a full record of the names and addresses of all who receive the IFB. If it becomes necessary to issue an addendum to the IFB, send the addendum to all who have obtained the original bid documents[42]. The statutory bid forms submitted by general bidders and sub-bidders contain a space for acknowledgment of all addenda received by the general bidder or sub-bidder. The Office of the Attorney General has adopted the position that addenda that include substantive changes to the bid documents should be issued no later than two business days before the bid opening date.

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[40] The public notice requirements for projects subject to both M.G.L. c. 149 and M.G.L. c. 30, § 39M, are contained in M.G.L. c. 149, § 44J.

[41] Your public notice or IFB must reference the payment of prevailing wages, and you must make the prevailing wage rate sheet available to all who request it. M.G.L. c. 149, § 27. As a practical matter, the most efficient approach to fulfilling these requirements is to include the prevailing wage sheet in the IFB.

[42] Before the bid opening, any changes or corrections to the plans, specifications or contract terms and conditions must be distributed in an addendum.

Each person requesting the IFB is entitled to one free set of bid documents.[43] The list of people who have requested the IFB must be updated daily, posted in your jurisdiction's office and sent weekly to the *Central Register*. M.G.L. c. 149, § 44B(1).

For larger or more complex projects, it may make sense to schedule a prebid conference, which may include a tour of the site or facility. If you do so, your IFB should state clearly whether the prebid conference is optional or mandatory. If it is mandatory, a bidder's failure to attend will likely require rejection of the bidder's bid. Your IFB should also state the date, time and location of the prebid conference. Be sure to record the names of firms in attendance, the questions asked by attendees and the answers provided by your representatives at the conference. This information should then be distributed to all firms receiving the IFB.

Step 3: Receive, open, and review sub-bids.

The deadline for receipt of filed sub-bids is at least four and one-half business days before the day on which general bids are opened.[44] M.G.L. c. 149, § 44F(3). However, it is advisable to allow one week or more between the filed sub-bid deadline and the general bid deadline. Filed sub-bids are subject to the same requirement for bid deposits as are general bids (see Step 1, above). The sub-bids are publicly opened and read. You should check each sub-bid to ensure that it contains the required Certificate of Eligibility and completed Update Statement from the sub-bidder. According to DCAMM regulations, awarding authorities must consider the information submitted in each filed sub-bidder's Update Statement and must review the filed sub-bidder's certification file maintained by DCAMM. 810 CMR 8.11.

M.G.L. c. 149 does not specify when a sub-bidder may withdraw its bid. As a practical matter, if the sub-bids have not been opened, you should obtain a written request and return the sub-bid and bid deposit unopened.

[43] You may require a deposit, which must be refunded in full when the bid documents are returned.

[44] M.G.L. c. 149 provides that sub-bids must be filed before noon at least four business days before the general bid opening.

Generally, you must reject a sub-bid that contains no bid deposit; does not conform with any other statutory bidding requirement in matters of substance; is on a form not completely filled in; is incomplete, conditional, or obscure; or contains any addition not called for. M.G.L. c. 149, § 44F(3).

Generally, you may, at your discretion, reject a sub-bid if you determine that a sub-bidder is not competent to perform the work or if the sub-bid includes only a minor or trivial deviation from a statutory requirement.[45]

Filed Sub-Bids: Special Circumstances

If you reject all sub-bids in a filed sub-bid category:

If you have no sub-bids left in a particular category after rejecting sub-bids for any of the reasons discussed in this text, you have two options. First, you may delay the general bid opening and resolicit sub-bids for that sub-bid category only, following all the same procedures. Alternatively, you may issue an addendum to the general bidders instructing them to carry a specific dollar amount for that subtrade on the general bid form. You then open the general bids and solicit new sub-bids from three or more qualified subcontractors through a written quotation process. You open these sub-bids publicly and read them aloud at the time and place specified in the solicitation. You then select the lowest responsible and eligible sub-bidder to which the winning general contractor has no objection and adjust the general contract price to reflect the difference between the amount the general bidders carried and the actual subcontract cost. The general contractor is not entitled to overhead and profit on the incremental difference between the amount carried and the amount of the new sub-bid. M.G.L. c. 149, § 44F(4)(a)(2).

If you receive no sub-bids, or only sub-bids restricted to the use of one or more general bidders, in a particular category:

In this case, you have two options. First, you may delay the general bid opening and resolicit sub-bids for that sub-bid category only, following all the same procedures. Alternatively, you may issue a directive to the general bidders to include that subtrade work within the general bidder's scope of work. The winning general contractor can then select a subcontractor, subject to the approval of the awarding authority. If you determine that the proposed subcontractor is unqualified, the general contractor is obligated to substitute a different subcontractor (again, subject to your approval), but the price of the contract is not adjusted because of the substitution. M.G.L. c. 149, § 44F(4)(a)(1).

[45] Chapter 193 of the Acts of 2004 deleted a provision of M.G.L. c. 149 allowing rejection of sub-bids when fewer than three available sub-bids are received in a subtrade category and the prices are not reasonable without further competition.

When considering sub-bidder competence, you should consult with your project designer. Your determination of a sub-bidder's competence will not be overturned unless your determination was made in an illegal or arbitrary manner. [46]

Step 4: Distribute the filed sub-bidder list to everyone who received the IFB.

Provide the list of the sub-bidders and their sub-bid amounts to everyone on record as having received the IFB. This list, which is often called a "filed sub-bid tabulation sheet," must be sent out at least two business days before the general bids are opened. We recommend that you send out the filed sub-bid tabulation sheet at least one week before the general bid opening. M.G.L. c. 149, § 44F(3).

> It is acceptable practice to mail, email or fax the filed sub-bid tabulation sheet.

Step 5: Receive, open, and review general bids.

All bids must be publicly opened and read at the time at which they are due. M.G.L. c. 149, § 44J(4). All bid documents except for the Update Statements are open for public inspection.[47]

You review the apparent low bid to verify that the bidder has submitted a current Certificate of Eligibility for the appropriate category of work and a completed Update Statement. You also verify that the amount of the bid, including all alternates,[48] does not exceed the appropriate

> M.G.L. c. 149 does not specify when a bidder may withdraw its bid. As a practical matter, if bids have not been opened, you should obtain a written request and return the bid and bid deposit unopened.

[46] As discussed in the previous chapter, you may establish qualifications for sub-bidders in the bid documents.

[47] The Update Statement is not a public record and must be removed from the bid documents before these documents are offered for public inspection. 810 CMR 8.06.

[48] This requirement applies even if you choose not to accept some or all of the alternates. 810 CMR 8.06.

project limit (General Building Construction Limit or Single Project Limit) listed on the Certificate of Eligibility and that the bidder will not exceed the Aggregate Work Limit listed on the Certificate of Eligibility if the bidder is awarded the contract.[49]

Generally, you must reject a general bid that does not contain the required bid deposit; does not conform with any other statutory bidding requirement in matters of substance; is on a form not completely filled in; is incomplete, conditional or obscure; or contains any addition not called for. M.G.L. c. 149, § 44E(3). Generally, you may, at your discretion, reject a general bid when the bid includes only a minor or trivial deviation from a statutory requirement.

You also have an obligation to determine whether the apparent low bidder is responsible. A responsible bidder possesses the skill, ability and integrity necessary for faithful performance of the work called for by the contract. A valid Certificate of Eligibility indicates that a general bidder or filed sub-bidder on a M.G.L. c. 149 contract has been certified by DCAMM for a certain category of work, but the final determination of bidder responsibility is always in your hands. Even if a contractor has been certified by DCAMM, you may determine that the bidder is not qualified for your specific project or that the bidder has performed poorly on recent projects that were undertaken or completed since the bidder was certified by DCAMM. You may request any information from the bidder needed to determine if the bidder is responsible.

You must consider the information submitted by the bidders in their Update Statements, which include contact information for reference checking. When checking a bidder's references, keep in mind that specific, factual questions regarding the contractor's performance on completed projects that are similar in size and scope to the contract you are awarding are most likely to elicit accurate, objective information that can assist you in determining if the bidder has the necessary skill, ability and integrity to faithfully perform the work called for by your contract. For example:

- Did the contractor perform the work in accordance with the plans and specifications?

[49] The Update Statement includes detailed instructions to awarding authorities on how to determine whether the low bidder is within its Aggregate Work Limit.

- Did the contractor provide sufficient oversight of the work performed by subcontractors?
- Did the contractor adhere to the contract schedule? If not, were schedule delays attributable to the contractor?
- Did the contractor request change orders on the project? How many, and for what purpose? Of the change order requests, how many were determined to be justified by unforeseen conditions or other circumstances external to the contractor?

You may also use the questions listed in the contractor evaluation form (available from DCAMM's website at www.mass.gov/dcamm) to conduct reference checks. During the course of your reference checks, if you obtain reliable information indicating that the apparent low bidder is not responsible, you have the right and the obligation to reject that bid and select the next lowest responsible and eligible bidder.

According to DCAMM regulations, before awarding a building contract an awarding authority must inspect DCAMM's certification files for any general contractor and sub-bidder under consideration for the purpose of establishing the qualifications of the general contractor and sub-bidders to perform the construction work. DCAMM will make these files available when the awarding authority certifies in writing that it shall use all non-public or proprietary information obtained from this examination solely for the purpose of determining the qualifications of the general contractor and subcontractors and that it shall not make public any of the non-public or proprietary information.[50] 810 CMR 8.08, 8.15.

If you determine that the low bidder is not responsible or eligible, you are required to reject the bidder and evaluate the next lowest bidder. You are also required to notify DCAMM of this action. M.G.L. c. 149, § 44D(6).

The following are some additional issues to consider in reviewing construction bids:

Debarments. A debarred contractor is not eligible for the award of public contracts during the period of its debarment. Debarments may be made for violations of the

[50] The contractor and subcontractor evaluations submitted by awarding authorities to DCAMM are public records. Although other records and information contained in the DCAMM certification files of contractors and subcontractors are not public records, they are accessible to awarding authorities.

public contracting statutes or other laws, or for repeatedly deficient performance. Links to websites listing the names of contractors debarred by the federal government, DCAMM, the Department of Industrial Accidents, the Office of the Attorney General and the Massachusetts Department of Transportation are at DCAMM's website: www.mass.gov/dcamm.

Rejection of bids. An awarding authority has the right to reject all general bids under limited circumstances, such as when all bids are significantly higher than the awarding authority's budget.

Substitution of sub-bidders. The awarding authority may require the winning general contractor to use a different sub-bidder than one listed on the general contractor's bid form unless the general contractor objects to the change and has a reasonable basis for its objection. The substituted sub-bidder must appear on the list of eligible sub-bidders distributed by the awarding authority. If a switch in sub-bidders is made, the total contract price is adjusted to reflect the difference in the sub-bid prices. This situation most often arises when the awarding authority wants to substitute a sub-bidder with a lower price than the one listed on the general contractor's bid. For the unusual case where an awarding authority wants to substitute a sub-bidder with a higher price than the one named on the general contractor's bid, the statutorily mandated procedure could result in the award of the general contract to a different general bidder. M.G.L. c. 149, § 44F(4)(b). Because this substitution process interferes with the general contractor's selection of eligible sub-bidders for the subtrade work and can change the outcome of the selection process, we recommend against substituting a sub-bidder for a sub-bidder carried by the selected general contractor unless you have a compelling reason to do so.

Step 6: Award the contract to the lowest responsible and eligible bidder.

You must award the contract within 30 business days after the general bid opening. If the contract award must be approved by an officer, board or agency of the federal government, you must make the award within 30 business days of receiving that approval. M.G.L. c. 149, § 44A(3). However, if the general bidder you first select fails to execute the contract or obtain the required performance and payment bonds

(discussed below), the 30-day rule does not apply, provided that the second lowest general bidder consents to accepting the contract after the 30-day deadline from the general bid opening to the contract award.

Step 7: Obtain bonds and execute the contract.

After the lowest responsible and eligible bidder is notified of the contract award, this bidder must provide you with a performance bond and a payment bond, each in the full amount of the contract price. The contractor obtains a performance bond from a surety company. The performance bond is payable to the awarding authority if the contractor fails to perform the contracted work. In addition, the contractor obtains a payment bond from a surety company. The payment bond is payable to subcontractors and/or material suppliers if the contractor fails to pay the subcontractors and/or material suppliers. Note that performance and payment bonds must be issued by a surety that is qualified to do business under the laws of the Commonwealth of Massachusetts and satisfactory to the awarding authority. M.G.L. c. 149, § 44E(2). This means that you must accept performance and payment bonds only from sureties licensed by the Massachusetts Division of Insurance. Check with the Division of Insurance at www.mass.gov/doi if you have any concerns about the legitimacy or reliability of a particular surety.

The general contractor has five business days after receiving the contract from you to furnish the required payment and performance bonds and execute the contract. M.G.L. c. 149, § 44E(2). If the selected bidder on the general contract fails to execute a contract or furnish the necessary bonds within that time, you should select the next lowest responsible and eligible bidder. M.G.L. c. 149, § 44A(3).

The selected general bidder must present a subcontract to each selected filed sub-bidder. These subcontracts must be executed within five business days of presentation. The subcontract form is specified at M.G.L. c. 149, § 44F(4)(c). The general contractor may request that subcontractors furnish performance and payment bonds. M.G.L. c. 149, § 44F(3).

However, if the subcontractors have been prequalified in accordance with the prequalification procedures discussed earlier in this chapter, each prequalified

subcontractor must furnish the general contractor with performance and payment bonds in the full amount of the subcontract price.

If a subcontractor fails to execute the subcontract or to furnish the necessary bonds, the general bidder and the awarding authority must select from the other non-rejected filed sub-bidders the lowest responsible and eligible sub-bidder to which the general bidder has no objection. The contract price is adjusted by the difference between the amount of the new sub-bid and the amount of the original sub-bid. M.G.L. c. 149, § 44F(4)(c).

A list of required and recommended contract provisions for both M.G.L. c. 149 contracts and M.G.L. c. 30, § 39M, contracts is provided at the end of this chapter.

Step 8: Return bid deposits and publicize the contract.

Bid deposits from general bidders must be returned within five business days after the bid opening, except that the deposits from the three lowest responsible and eligible bidders must be retained until a contract is executed or, if no award is made, until the expiration of the time for making an award. If a low bidder fails to sign a contract or provide the necessary bonds, you are required to keep that bidder's deposit as damages unless the contractor's failure was due to death, disability, a *bona fide* clerical or mechanical error of a substantial nature, or other similar unforeseen circumstance. Note, however, that the amount you retain may not exceed the difference between the original bidder's price and the bid price of the next lowest responsible and eligible bidder. M.G. L. c. 149, §44B(3).

You must keep the following sub-bid deposits until the general contract is executed and delivered:

- all sub-bidders named on the bids of the three lowest responsible and eligible general bidders; and
- the bid deposits of the three lowest responsible and eligible sub-bidders in each sub-bid category.

M.G.L. c. 149, § 44B(3).

The remaining bid deposits from sub-bidders must be returned within five business days of the general bid opening.

Finally, the name of the firm or firms awarded the contract must be published in the *Central Register*. M.G.L. c. 9, § 20A. An online form for this purpose is available at the Secretary of the Commonwealth's website at www.mass.gov/sec.

Emergencies

For M.G.L. c. 149 projects, you may dispense with the normal bidding procedures for work needed to preserve the health or safety of people or property, or to alleviate an imminent security threat. The prior approval of DCAMM is required unless the urgency of the situation makes it impossible to contact DCAMM in advance. In such a case, you may start the emergency work, but you must contact DCAMM as soon as possible to request approval. If DCAMM subsequently disapproves the emergency request, work must be stopped immediately, although the contractor is still entitled to payment for the fair value of the labor and materials provided prior to the stop work order. M.G.L. c. 149, § 44A(4). If DCAMM determines that an emergency waiver is warranted, DCAMM may waive the public notice and public bidding requirements for the work. The waiver must be obtained in writing. M.G.L. c. 149, § 44J(6).

Although formal bidding may not be required in an emergency, you should solicit as many informal quotations or bids as is possible under the circumstances. Note also that other M.G.L. c. 149 requirements, including prevailing wage requirements, will still apply to the contract.

You may not artificially create an emergency simply by putting off normal maintenance and repair work. If you knew or should have known that a roof needed repair, and you had time to fix it using the normal bidding procedures, you may have difficulty justifying the use of emergency procedures when it starts leaking.[51]

[51] See *Safford v. Lowell*, 225 Mass. 220 (1926).

The Public Building Construction Contract

In developing a public building construction contract, you should be aware of statutory requirements and sound business practices. The following is a list of required and recommended contract provisions

Employment. The contract must contain various provisions relating to wages and employment conditions, including but not limited to, the payment of prevailing wage rates as set by the DLS, hiring preferences for veterans and residents of Massachusetts, and workers' compensation coverage. M.G.L. c. 149, §§ 26-27. Note that you must obtain the prevailing wage rates applicable to the project from the DLS in advance of the bidding process.

Change orders and adjustments. The contract must contain provisions requiring the awarding authority to adjust the price if field conditions differ substantially or materially from the plans or if the awarding authority suspends or delays the work for 15 days or more. M.G.L. c. 30, §§ 39N-39O. The contract should also include terms governing the adoption and pricing of change orders. Finally, the contract should clearly specify who is authorized to approve change orders on behalf of the awarding authority, and should state that the awarding authority is not obligated to pay for change orders that are not approved in writing. M.G.L. c. 44, § 31C; M.G.L. c. 30, § 39I.

Performance and payment bonds. The contract should include the requirements for performance and/or payment bonds.

Labor harmony and OSHA training certifications. Any person submitting a bid for, or signing a contract to work on, the construction, reconstruction, alteration, remodeling or repair of any building or public works project undertaken by a public awarding authority in Massachusetts and estimated to cost more than $10,000 must provide specific certifications in the bid or contract regarding labor harmony and training approved by the U.S. Occupational Safety and Health Administration to be completed by all employees to be employed at the worksite. M.G.L. c. 30, § 39S(a).

Foreign corporations. Contractors and subcontractors that are incorporated outside of Massachusetts must certify compliance with certain corporation laws. You are required to notify the Secretary of the Commonwealth and the Department of Revenue whenever awarding a contract or subcontract to an out-of-state corporation. M.G.L. c. 30, § 39L.

Payment procedures. The contract must contain statutory language governing payment procedures. M.G.L. c. 30, §§ 39F, 39G, 39K.

Weather protection. M.G.L. c. 149 contracts must require the contractor to provide weather protection during winter months. M.G.L. c. 149, § 44G(D).

Financial reporting. Contractors must agree to keep certain financial records, make them available for inspection by certain state agencies and file periodic financial reports. M.G.L. c. 30, § 39R.

Auditor's certification. For cities and towns, the contract must contain a certification by the municipal auditor or accountant stating that appropriated funds are available for the contract and that the official signing the contract has been authorized to do so. The certification should also identify any other municipal officials who have been authorized to make decisions under the contract, such as approval of change orders and invoices. M.G.L. c. 44, § 31C.

Interpretations and approvals. The contract must contain provisions requiring prompt decisions by the awarding authority on interpretations of the specifications and other approvals. M.G.L. c. 30, § 39P.

Liability insurance. You may either require the general contractor to provide project insurance covering both the contractor and your jurisdiction, or insure your jurisdiction separately.

Tax compliance. Any person contracting with the Commonwealth of Massachusetts or any subdivision of the Commonwealth, including a city, town or district, must certify in writing that the person has complied with all state laws relating to taxes, reporting of employees and contractors and child support. M.G.L. c. 62C, § 49A.

Liquidated damages. You may want to include a provision for imposing liquidated damages on the contractor for late completion. Liquidated damages represent the dollar damages your jurisdiction will incur in the event of a breach of contract.

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VI. Procuring Public Works Construction Under M.G.L. c. 30, § 39M

M.G.L. c. 30, § 39M, governs contracts for construction, reconstruction, alteration, remodeling or repair that do not include work on a building when the estimated cost of the contract exceeds $10,000. These contracts generally fall into the category of public works projects, or "horizontal construction" projects. Public works projects include not only the construction and repair of roads, bridges, water mains, sewers and the like, but also work on improvements to public land such as public parks, outdoor swimming pools and parking lots.[52]

In addition, M.G.L. c. 149, § 44A(2)(C), requires building contracts estimated to cost between $25,000 and $100,000 to be bid in accordance with the procedures set forth in M.G.L. c. 30, § 39M. (The M.G.L. c. 149 procurement procedures that apply to building contracts at various dollar thresholds are summarized in Chapter V.)

M.G.L. c. 30, §39M, allows local jurisdictions that are subject to M.G.L. c. 30B[53] to use the bid procedures contained in M.G.L. c. 30B, § 5, for public works construction work estimated to cost more than $10,000 but not more than $25,000. M.G.L. c. 30, § 39M(d). Unlike M.G.L. c. 30, § 39M, M.G.L. c. 30B, §5, contains no bid deposit requirement.

M.G.L. c. 30, § 39M, also governs the purchase of construction materials for either public works or public building projects when the estimated cost of the contract exceeds $10,000. For example, M.G.L. c. 30, § 39M, applies to a $200,000 purchase of guard rail or a $15,000 purchase of wall partitions (without labor).[54] Local jurisdictions that are

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[52] Awarding authorities have the option of using the design-build delivery method set forth in M.G.L. c. 149A for public works construction contracts estimated to cost $5 million or more. Additional information on M.G.L. c. 149A can be found later in this manual.

[53] Jurisdictions subject to M.G.L. c. 30B include cities, towns, regional school districts, counties, Horace Mann charter schools and local authorities.

[54] Note, however, that if the purchase of wall partitions included installation services, the entire contract would be subject to M.G.L. c. 149 rather than M.G.L. c. 30, § 39M.

subject to M.G.L. c. 30B may instead use the bid procedures contained in M.G.L. c. 30B, § 5, for contracts for construction materials if the purchase entails no labor. M.G.L. c. 30, § 39M(d).

Public works construction contracts estimated to cost $10,000 or less are not subject to the competitive provisions of M.G.L. c. 30, § 39M. We recommend that you solicit at least three informal quotations from qualified contractors for such contracts and select the qualified contractor offering to perform the contract at the lowest price.

In addition, governmental units may enter into contracts for the inspection, maintenance, repair or modification of a water storage facility to maintain adequate services to users and to ensure that the water storage facility is in compliance with federal, state and local laws. All such contracts must be awarded in accordance with M.G.L. c. 30B, § 6, and must be approved by a two-thirds vote of the local legislative body of the governmental unit. M.G.L. c. 40, § 62.

Bidding Public Works Construction Contracts and Construction Materials Contracts Under M.G.L. c. 30, § 39M

The seven steps to bidding under M.G.L. c. 30, § 39M, are as follows:

1. Prepare the invitation for bids (IFB).
2. Advertise and distribute the IFB.
3. Receive, open, and review bids.
4. Award the contract to the lowest responsible and eligible bidder.
5. If the contract price exceeds $25,000, obtain payment bond.
6. Execute the contract.
7. Return bid deposits and publicize the contract award.

Step 1: Prepare the IFB.

The IFB is the package of materials distributed to interested bidders. The major components of the IFB package are as follows:

Plans and specifications. The plans and specifications are the construction drawings and related written materials, prepared by the project designer, that explain in detail how the project is to be built.

Standard forms and requirements. There is no prescribed form for submitting M.G.L. c. 30, § 39M, bids. We recommend that you develop your own bid forms that include all of the information and certifications required by M.G.L. c. 30, § 39M, and your jurisdiction. You should provide instructions for submitting price information and a price form in your IFB to enable you to compare prices and identify the low bidder.

When you solicit bids for construction materials, your IFB should tell bidders whether you are awarding one contract or multiple contracts. You may award one contract to the lowest total price bid for all items listed in the IFB, or you may award multiple contracts: one contract to the low bidder for each item listed in the IFB.

Every M.G.L. c. 30, § 39M, bid must contain the following certification, signed by the bidder, that the bid has been made without collusion or fraud.

> The undersigned certifies under penalties of perjury that this bid is in all respects bona fide, fair and made without collusion or fraud with any other person. As used in this paragraph the word "person" shall mean any natural person, joint venture, partnership, corporation or other business or legal entity.

Before soliciting bids, you must request a prevailing wage sheet from the Department of Labor Standards (DLS) and include the sheet – or reference it – in the bid documents. As you are required to provide the prevailing wage sheet at no cost to anyone who requests it, it makes sense to include it in the IFB.

Under M.G.L. c. 30, § 39M, you as the public owner are required to determine whether the apparent low bidder is responsible and eligible. Accordingly, we recommend that you include in your IFB a requirement that bidders submit a comprehensive list of ongoing projects, projects completed within the past two or three years and project contact names and telephone numbers. You can then check project references. It is a good idea to require bidders to certify under the penalties of perjury that the project information contained in the bids is accurate and complete. We also recommend that you consider including experience or quality requirements that the contractor must meet. For example, if you are procuring a contract for pipe

repair using trenchless technology, you may want to require that the contractor have at least five years of experience in performing this type of service.

For Massachusetts Department of Transportation (MassDOT) projects, all contractors must be prequalified with the Highway Division before bidding on projects with an estimated construction cost of $50,000 or more. M.G.L. c. 81, § 8B; 720 CMR 5.00. This includes all projects meeting this monetary threshold and when:

- MassDOT is the awarding authority;
- the awarding authority receives State Aid funds under M.G.L. c. 6C, § 4(b) (the "Chapter 90" program); or
- the work is on a state road, regardless of whether the awarding authority receives funds under M.G.L. c. 6C, § 4(b).

Additional information on Chapter 90 projects is available at: www.mhd.state.ma.us/ch90FY.asp?c=15a. The website includes apportionment information by municipality as well as contact information for MassDOT.

Bid deposit requirement. Each bidder must submit with its bid a bid deposit equal to five percent of the amount of the bid. The bid deposit may be a certified treasurer's or cashier's check payable to the awarding authority from a responsible bank or trust company, cash or a bid bond. M.G.L. c. 30, § 39M(a).

Terms and conditions. The IFB should contain the various business and legal terms and conditions to which the contractor must agree in the contract. By necessity, the contract will be a lengthy and complex document, and a discussion of all the terms and conditions is beyond the scope of this manual. However, a brief section at the end of this chapter lists some particular provisions of which you should be aware.

> We recommend that you develop a standard public works construction contract, which can then be used repeatedly with only minor modifications for each individual project. As with any legal document, you should consult your local attorney when developing a standard construction contract.

Step 2: Advertise and distribute the IFB.

The second step is to advertise and distribute the IFB. The IFB must be advertised in the *Central Register* and a newspaper of general circulation in the locality of the project at least two weeks before the bid deadline. A notice must also be posted in your jurisdiction at least one week prior to the bid deadline.[55]

Your advertisement must include the following information:

- when and where the IFB may be obtained;
- when and where general bids and sub-bids must be submitted;
- when and where general bids and sub-bids will be opened; and
- sufficient facts regarding the nature and scope of the project to assist bidders in deciding whether or not to bid on the contract.

M.G.L. c. 149, § 44J(2).

The IFB should be made available to all who request it. Keep a full record of the names and addresses of all who receive the documents. If it becomes necessary to issue an addendum to the bid package, send the addendum to all who have obtained the original IFB.[56] To avoid misunderstandings or protests, you should require bidders to acknowledge in their bid forms that they have received all addenda to the original IFB.

For larger or more complex projects, it may make sense to schedule a prebid conference, which may include a tour of the site or facility. If you do so, your IFB should state clearly whether the prebid conference is optional or mandatory. If it is mandatory, a bidder's failure to attend would likely require rejection of the bidder's bid. Your IFB should also state the date, time and location of the prebid conference. Be sure to record the names of firms in attendance, the questions asked by

M.G.L. c. 30, § 39M, does not specify when a bidder may withdraw its bid. As a practical matter, if bids have not been opened, you should obtain a written request and return the bid and bid deposit unopened.

[55] The public notice requirements for contracts M.G.L. c. 149 building contracts estimated to cost $25,000 or more and M.G.L. c. 30, § 39M, contracts are contained in M.G.L. c. 149, § 44J.

[56] Before bid openings, any changes or corrections to the plans, specifications or contract terms and conditions must be distributed in an addendum.

attendees and the answers provided by your representatives at the conference. The questions and answers should then be distributed as an addendum to all firms receiving the IFB.

Step 3: Receive, open, and review bids.

All bids must be publicly opened and read at the time at which they are due. M.G.L. c. 149, § 44J(4). All bid documents are open for public inspection.

M.G.L. c. 30, § 39M, requires that public construction contracts be awarded to the lowest responsible and eligible bidder, defined as follows:

> The term "lowest responsible and eligible bidder" shall mean the bidder: (1) whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary for the faithful performance of the work; (2) who shall certify, that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed in the work; (3) who shall certify that all employees to be employed at the worksite will have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health Administration that is at least 10 hours in duration at the time the employee begins work and who shall furnish documentation of successful completion of said course with the first certified payroll report for each employee; (4) who, where the provisions of section 8B of chapter 29[57] apply, shall have been determined to be qualified thereunder; and (5) who obtains within 10 days of the notification of contract award the security by bond required under section 29 of chapter 149; provided that for the purposes of this section the term "security by bond" shall mean the bond of a surety company qualified to do business under the laws of the commonwealth and satisfactory to the awarding authority; and provided further, that if there is more than 1 surety company, the surety companies shall be jointly and severally liable.

M.G.L. c. 30, § 39M(c).

On M.G.L. c. 30, § 39M, projects, you review the qualifications of the apparent low bidder after the bids are opened and reject the bid if the bidder does not meet the

[57] M.G.L. c. 81, § 8B, formerly M.G.L. c. 29, § 8B, established a contractor prequalification process for contracts awarded by the Massachusetts Highway Department (now the Massachusetts Department of Transportation Highway Division) and the Metropolitan District Commission (now the Department of Conservation and Recreation).

qualifications that you have specified in the IFB. You may request any information from the bidder needed to determine if the bidder is responsible.

In checking the references of the apparent low bidder, you will find that specific, factual questions regarding the contractor's performance on completed contracts that are similar in size and scope to the contract you are awarding are most likely to elicit accurate, objective information that can assist you in determining if the contractor has the necessary skill, ability and integrity to faithfully perform the work called for by your contract. For example:

- Did the contractor perform the work in accordance with the plans and specifications?
- Did the contractor provide sufficient oversight of the work performed by subcontractors?
- Did the contractor adhere to the contract schedule? If not, were schedule delays attributable to the contractor?
- Did the contractor request change orders on the project? How many, and for what purpose? Of the change order requests, how many were determined to be justified by unforeseen conditions or other circumstances external to the contractor?

If, during the course of your reference checks, you obtain reliable information indicating that the apparent lowest bidder is not responsible, you have both the right and the obligation to reject that bid and select the next lowest responsible and eligible bidder.

The following are some additional issues to consider in reviewing construction bids:

Debarments. A debarred contractor is not eligible for the award of public contracts during the period of its debarment. Debarments may be made for violations of the public contracting statutes or other laws, or for repeatedly deficient performance. Links to websites listing the names of contractors debarred by the federal government, DCAMM, the Division of Industrial Accidents, the Office of the Attorney General and the MassDOT are on DCAMM's website: www.mass.gov/dcamm.

Rejection of bids. An awarding authority has the right to reject all bids under limited circumstances, such as when all bids are significantly higher than the awarding authority's budget.

Step 4: Award the contract to the lowest responsible and eligible bidder.

M.G.L. c. 30, § 39M, sets no specific time limits for the contract award.

Step 5: If the contract price exceeds $25,000, obtain payment bond.

After you award the contract to the lowest responsible and eligible bidder, your next step is to obtain the required payment bond in the amount of at least 50 percent of the contract price if the contract price exceeds $25,000. M.G.L. c. 149, § 29. The contractor obtains a payment from a surety company. The payment bond guarantees payment to subcontractors and/or materials suppliers in the event that the general contractor fails to pay the subcontractors and/or materials suppliers.

M.G.L. c. 30, § 39M, contracts do not require performance bonds, but, you may choose to require a performance bond on such contracts. A contractor obtains a performance bond from a surety company. The performance bond is payable to the awarding authority in the event that the contractor fails to perform the contract.

Payment and performance bonds must be issued by a surety that is qualified to do business under the laws of the Commonwealth of Massachusetts and satisfactory to the awarding authority. This means that you must accept performance and payment bonds only from sureties licensed by the Massachusetts Division of Insurance. Check with the Division of Insurance if you have any concerns about the legitimacy or reliability of a particular surety.

The contractor has 10 days from the date of notification of contract award to obtain the payment bond. M.G.L. c. 30, § 39M, sets no specific time limits for the execution of the contract. If the selected bidder fails to execute a contract or furnish the necessary bonds, you should select the next lowest responsible and eligible bidder.

Step 6: Execute the contract.

A list of required and recommended contract provisions for M.G.L. c. 30, § 39M, contracts is provided at the end of this chapter

Step 7: Return bid deposits and publicize the contract award.

Your last step is to return bid deposits and publicize the contract award. M.G.L. c. 30, § 39M, sets no specific time limits for the return of bid deposits. The name of the firm or firms awarded the contract must be published in the *Central Register*. M.G.L. c. 9, §

20A. An online form for this purpose may be downloaded from the Secretary of the Commonwealth's website at www.mass.gov/sec.

Emergencies

For M.G.L. c. 30, § 39M, projects, you may dispense with the normal bid process only in cases of "extreme emergency caused by enemy attack, sabotage, other such hostile actions or resulting from an imminent security threat, explosion, fire, flood, earthquake, hurricane, tornado or other such catastrophe." Only work necessary for "temporary repair and restoration to service of any and all public work in order to preserve the health and safety of persons or property" may be performed under an emergency contract. M.G.L. c. 30, § 39M(a). You must obtain a written waiver of the public notice requirements from DCAMM. M.G.L. c. 149, § 44J(6).

Although formal bidding may not be required, you should solicit three or more quotations or bids if possible under the circumstances. Note also that you may not artificially create an emergency simply by putting off normal maintenance and repair work.

Bidding Smaller Public Works Construction Contracts and Construction Materials Contracts Under M.G.L. c. 30B, § 5

Pursuant to M.G.L. c. 30, § 39M(d)(4), local jurisdictions may award contracts estimated to cost more than $10,000 but not more than $25,000 for public works construction, or contracts of any amount for construction materials, either by following the M.G.L. c. 30, § 39M, procedures summarized earlier in this chapter or by following the bid procedures contained in M.G.L. c. 30B, § 5. There is one difference between the two procedures: M.G.L. c. 30, § 39M, requires you to obtain a bid deposit from the bidder totaling five percent of the bid amount; M.G.L. c. 30B, § 5, does not. For more information on M.G.L. c. 30B, § 5, bid procedures, we recommend that you consult the Office of the Inspector General's manual entitled *The Chapter 30B Manual*, available at www.mass.gov/ig or the Massachusetts State Bookstore.

Whether you choose to procure a public works construction contract under M.G.L. c. 30, § 39M, or M.G.L. c. 30B, § 5, the bidding process must comply with the legal requirements that apply to contracts for construction-related work, such as applicable

prevailing wage and payment bond requirements. In addition, the *Central Register*'s statute and regulations require all contracts of $10,000 or more for construction services or materials to be advertised in the *Central Register*. As a result, you will need to advertise in the *Central Register* even when you use the M.G.L. c. 30B, § 5, bid process. M.G.L. c. 9, § 20A; 950 CMR 21.00.

The Public Works Construction Contract

In developing a public works construction contract, you should be aware of statutory requirements and sound business practices. The following is a list of required and recommended contract provisions:

Employment. The contract must contain various provisions relating to wages and employment conditions including, but not limited to, the payment of prevailing wage rates as set by the DLS, hiring preferences for veterans and residents of Massachusetts and workers' compensation coverage. M.G.L. c. 149, §§ 26-27. Note that you must obtain the prevailing wage rates applicable to the project from the DLS in advance of the bidding process.

Change orders and adjustments. The contract must contain provisions requiring the awarding authority to adjust the price if field conditions differ substantially or materially from the plans or if the awarding authority suspends or delays the work for 15 days or more. M.G.L. c. 30, §§ 39N-39O. The contract should also include terms governing the adoption and pricing of change orders. Finally, the contract should clearly specify who is authorized to approve change orders on behalf of the awarding authority and should state that the awarding authority is not obligated to pay for change orders that are not approved in writing. M.G.L. c. 44, § 31C; M.G.L. c. 30, § 39I).

Payment and performance bonds. The contract should include the requirements for payment and/or performance bonds.

Labor harmony and OSHA training certifications. Any person submitting a bid for, or signing a contract to work on, the construction, reconstruction, alteration, remodeling or repair of any building or public works project undertaken by a public awarding authority in Massachusetts and is estimated to cost more than $10,000 must provide specific certifications in the bid or contract regarding labor harmony and training approved by the U.S. Occupational Safety and Health Administration for all employees at the worksite. M.G.L. c. 30, § 39S(a).

Foreign corporations. Contractors and subcontractors that are incorporated outside of Massachusetts must certify compliance with certain corporation laws. You are required to notify the Secretary of the Commonwealth and the Department of Revenue whenever awarding a contract or subcontract to an out-of-state corporation. M.G.L. c. 30, § 39L.

Payment procedures. The contract must contain statutory language governing payment procedures. M.G.L. c. 30, §§ 39F, 39G, 39K.

Financial reporting. Contractors must agree to keep certain financial records, make them available for inspection by certain state agencies and file periodic financial reports. M.G.L. c. 30, § 39R.

Auditor's certification. For cities and towns, the contract must contain a certification by the municipal auditor or accountant stating that appropriated funds are available for the contract and that the official signing the contract has been authorized to do so. The certification should also identify any other municipal officials who have been authorized to make decisions under the contract, such as approval of change orders and invoices. M.G.L. c. 44, § 31C.

Interpretations and approvals. The contract must contain provisions requiring prompt decisions by the awarding authority on interpretations of the specifications and other approvals. M.G.L. c. 30, § 39P.

Liability insurance. You may either require the general contractor to provide project insurance covering both the contractor and your jurisdiction, or you may insure your jurisdiction separately.

Tax compliance. Any person contracting with the Commonwealth of Massachusetts or any subdivision of the Commonwealth, including a city, town or district, must certify in writing that the person has complied with all state laws relating to taxes, reporting of employees and contractors, and child support. M.G.L. c. 62C, § 49A.

Liquidated damages. You may want to include a provision for imposing liquidated damages on the contractor for late completion. Liquidated damages represent the dollar damages your jurisdiction will incur in the event of a breach of contract.

VII. Procuring Modular Construction

Public agencies may procure modular buildings by following an alternative procurement process contained in M.G.L. c. 149, § 44E(4). These procedures apply to the acquisition and installation of modular buildings, including the solicitation and evaluation of proposals, the award of contracts, and the installation of modular units. Generally, modular construction involves the manufacture and transport of sectional units from a factory to another site where the units are connected. Site preparation work, construction of foundations and attachment of modular buildings to utilities can be included as part of the modular building procurement or can be bid separately through the conventional construction bidding procedures.

Projects Covered by the Modular Procurement Law

The modular procurement law defines a modular building as a predesigned building or units of a predesigned building assembled and equipped with internal plumbing, electrical or similar systems before movement to the site where the units are attached to each other and the modular building is affixed to a foundation and connected to external utilities. The modular procurement law also applies to any portable structure with walls, a floor and a roof, designed or used for the shelter of persons or property, transportable in one or more sections, affixed to a foundation and connected to external utilities. M.G.L. c. 149, § 44 A(1). However, repair and maintenance services for an existing modular building are subject to the designer selection and construction bid laws discussed in previous chapters of this manual unless the work is performed under a warranty agreement procured under the original contract.

Overview of the Modular Construction Process

The modular construction procurement process differs from the design-bid-build process described in the previous chapters. Instead of selecting a designer to prepare detailed plans and specifications for the construction work, you issue a request for proposals (RFP) for modular construction that describes the project requirements in detail, lists all criteria that will be used to compare competing proposals, and states all of the terms and conditions that will apply to the procurement. An outline and recommended contents of a modular construction RFP are provided at the end of this chapter and a

model RFP is provided in Appendix C. These materials can be adapted to suit your jurisdiction's needs. Each responsive offeror submits a proposal to provide a predesigned building (or buildings) that meets the stated requirements, in accordance with the terms set forth in the RFP. You then select a proposal through the evaluation process described in this chapter. Because design and construction of the prefabricated modular units are combined in the manufacturing process and specialized subtrade work may be done by the manufacturer, there is no separate filed sub-bid procedure.

Planning for Modular Construction

Modular buildings are usually considered for one or more of the following reasons: portability, speed of construction, low initial cost and availability of financing options such as lease-purchase financing. In addition to these factors, however, you should also weigh possible trade-offs, such as energy efficiency, maintenance costs, durability and community acceptability.

The best way to evaluate the benefits of modular construction is to undertake a study that assesses all of the feasible alternatives, including both conventional and modular construction, and other options such as leasing space until new construction can be completed. (Chapter III of this manual provides detailed information on preparing a study.) The study will also define the program requirements of the project and provide you with cost estimates. It is generally advisable to contract with a design professional to prepare the study. In addition, you will likely need to contract with a design professional to prepare the RFP and evaluate the proposals. These design services must be procured in accordance with the designer selection law, M.G.L. c. 7C, §§ 44-57. (The procurement process required by the designer selection law is discussed in Chapter II of this manual.)

Emergencies

As in the case of nonmodular building construction services, you may make an emergency modular procurement only for the work that is necessary to preserve the health or safety of persons or property, or to alleviate an imminent security threat. Under the emergency provisions of the law, you may award the emergency contract on

the basis of such competitive bids or proposals as you are able to obtain in time to address the extreme emergency, without a public opening of the bids or proposals. The prior approval of the Division of Capital Asset Management and Maintenance (DCAMM) is required unless the urgency of the situation makes it impossible to contact DCAMM in advance. In that event, emergency work can be started, but DCAMM must be notified as soon as possible. DCAMM must also waive the public notice requirement. M.G.L. c. 149, §§ 44J(1)-(6). Not every urgent situation will meet the legal definition of an emergency. (Chapter V of this manual contains more information on emergency construction contracting under M.G.L. c. 149).

Modular Construction Project Oversight

Like a conventional construction project, a modular construction project requires oversight of every stage, including the site preparation work, the construction of foundations, the installation and assembly of the modular units, and the attachment to utilities. If the estimated cost of the project is $1.5 million or more, you are required to hire or assign a qualified owner's project manager (OPM) to the project before contracting for design services. The OPM will serve as your jurisdiction's agent during the planning, design and implementation of the contract. Additional information regarding the OPM qualifications and role, as well as the required procedures for procuring OPM services, is provided in Chapter I. Even if the estimated project cost is less than $1.5 million, you may want to hire or contract with a professional project manager who is knowledgeable and experienced in modular construction.

Modular Procurement: The Basic Steps

This section describes the basic steps in the modular procurement process:

1. Document your decision to replace a modular building (if required).
2. Prepare the RFP.
3. Provide public notice of the RFP.
4. Distribute the RFP.
5. Designate the individual(s) responsible for evaluating proposals.
6. Receive the sealed price and non-price proposals.
7. Open and register the proposals.
8. Evaluate the non-price proposals

9. Evaluate the price proposals.
10. Identify the most advantageous proposal.
11. Negotiate changes (if any) to the proposal.
12. Award the contract.

Step 1: Document your decision to replace a modular building (if required).

If you are procuring a modular building to replace another modular building, M.G.L. c. 149, § 44E(4), requires you to certify that such a replacement is necessary, cost-effective over the long term and not detrimental to public policy. You are also required to provide a detailed written explanation of your reasons for such certification.

Step 2: Prepare the RFP.

A modular building RFP should provide a detailed description of the proposed project, including all program and preliminary design requirements. The level of design detail contained in the RFP will typically consist of plans and specifications that resemble schematic design documents. These technical specifications should be prepared by a qualified design professional. You may want to involve the same design professional in the evaluation of proposals to ensure that the proposal you choose meets your technical requirements. Chapter II provides more information on procuring design services under the designer selection law.

In addition to the technical specifications, the RFP should specify the criteria that will be used to evaluate and rate the proposals. The evaluation criteria should focus primarily on the offeror's past performance and on the performance of similar modular buildings fabricated by the same manufacturer.

Offerors must be certified by DCAMM in either Modular Construction/Prefabrication or General Building Construction. In addition to requiring a Certificate of Eligibility and a completed Update Statement from each offeror, you should obtain information about the offeror's past performance and the performance of the proposed manufacturer's buildings from references provided by each offeror. The references should be from public and private owners of comparable modular building projects.

M.G.L. c. 149, § 44E(4), lists the information that must be contained in the RFP. The RFP must require proposals to be submitted in two parts, in separate, sealed

envelopes: (1) a non-price proposal; and (2) a price proposal. A detailed listing of the RFP contents is provided at the end of this chapter and a model RFP for modular construction is provided in Appendix C of this manual.

Step 3: Provide public notice of the RFP.

You must publish the RFP advertisement at least once in the *Central Register* and in a local newspaper not less than two weeks prior to the proposal deadline. In addition, you must post the advertisement in the offices of the awarding authority at least one week prior to the deadline. M.G.L. c. 149, § 44J. The advertisement must describe the overall project in sufficient detail to allow potential offerors to determine whether they are qualified and wish to submit proposals. It must also state when and where the RFP can be obtained, the deadline and place for submission of proposals, and the time and place for the opening of proposals. If a preproposal meeting will be held, the advertisement should list the time and place of that meeting.

Step 4: Distribute the RFP.

You must make the RFP available on an equal basis to all who request a copy. If you charge a fee for copies of the RFP, you must charge all vendors the same fee. Keep a record of all vendors who receive the RFP. If you later issue an addendum to the RFP, send the addendum to all those who have already received the RFP. To avoid misunderstandings or protests, include a requirement in the RFP that vendors acknowledge in writing their receipt of all addenda to the original RFP. Also, if vendors are likely to require additional time to respond to the addendum, extend the proposal due date.

Step 5: Designate the individual(s) responsible for evaluating proposals.

You must select one or more individuals to evaluate the non-price proposals. The evaluators should include a qualified design professional.

Step 6: Receive the sealed price and non-price proposals.

You must maintain a register of proposals received. It is good practice to note on the sealed price and non-price proposal packages the date and time they were received, and to provide offerors with receipts for their proposals upon request.

Prior to opening the non-price proposals, an offeror may correct, modify or withdraw its non-price or price proposal. Any correction or modification to a proposal must be submitted in writing. Any corrections or modifications must also be submitted in writing and sealed.

You may not accept a late proposal. If you do receive a late proposal, you should note the time of receipt and return the proposal unopened to the offeror.

You may not accept a late correction or modification to a proposal. If you do receive a late correction or modification, you should treat it as a late proposal, and evaluate only the original proposal that was received by the deadline.

Step 7: Open and register the proposals.

You may not open the proposals publicly. The proposal contents must be kept confidential and not disclosed to competing offerors until the evaluation process is completed or until the time for acceptance specified in the RFP, whichever occurs first.

You must separate the price and non-price proposals. The non-price proposals must be opened at the time specified in the RFP in the presence of one or more witnesses. At the time of the opening, you must prepare and make available for public inspection a register of proposals, which includes the name of each offeror and the number of proposal modifications submitted by each offeror. You should also record the name(s) of the witness(es) to the opening.

You may open the price proposals immediately after opening the non-price proposals or at a later time. However, be sure that you do not disclose the price proposals to the non-price proposal evaluator(s) until they have completed the evaluation. The separation of non-price and price proposals is an important element of the RFP process. The process is structured to allow an orderly, fair comparison of the proposals.

A proposal may be withdrawn after it has been opened only if a mistake is clearly evident on the face of the document, but the intended correct answer is not evident.

Step 8: Evaluate the non-price proposals.

After opening the non-price proposals, the evaluators should first examine each proposal to determine whether it is responsive to the RFP requirements. A proposal should include specifications for a modular building or buildings that meet all of the requirements set forth in the RFP, as well as the required Certificate of Eligibility and completed Update Statement. A proposal that does not meet requirements specified in your RFP is nonresponsive and should be rejected.

In determining the responsiveness of a proposal, you must waive or allow the offeror to correct minor informalities. Minor informalities are errors of form that do not cast doubt on the intended meaning of the proposal or the qualifications of the offeror. If a mistake and the intended offer are both clearly evident in a proposal, you must correct the mistake to reflect the intended correct offer and notify the offeror in writing of the correction. In the event that a mistake is evident but the correct intended offer is not, you may permit the offeror to withdraw the proposal.

After rejecting the nonresponsive non-price proposals, the evaluators then evaluate and rate the responsive proposals. The law requires evaluators to:

- Assign each proposal a rating of highly advantageous, advantageous, not advantageous or unacceptable for each evaluation criterion, and specify the reasons for each rating.
- Assign each proposal a composite rating and specify the reasons for this rating.
- Note any recommendations for revisions to the proposed plan for providing modular buildings, to be obtained by negotiation before awarding a contract.
- Verify whether the modular buildings were or will be manufactured within the Commonwealth, and if not, whether they were or will be manufactured within the United States.

The rating system embodied in M.G.L. c. 149, § 44E discourages assigning numerical values to ratings. The ratings are expressed in qualitative terms because they reflect your evaluators' qualitative judgments. The evaluators have the discretion to determine whether changes in the offeror's proposal would render it more advantageous; if so, the evaluators should note the necessary changes in the written evaluation. If your evaluators recommended changes to a proposal, the award of the contract may be

conditioned on the negotiation of those changes, provided the offeror agrees to make these revisions without increasing the cost. M.G.L. c. 149, § 44E(4).

Once ratings have been assigned on each criterion, evaluators assign an overall rating to each proposal and explain in writing their reasons for their composite rating of each proposal. The reasons should reflect the relative importance of the evaluation criteria.

Step 9: Evaluate the price proposals.

You will evaluate the price proposals following the method you specified in the RFP to determine the best proposal price. The price evaluation can be performed while non-price proposals are being evaluated as long as the prices are not disclosed to the individuals responsible for evaluating the non-price proposals. Evaluators will first determine whether each price proposal meets the submission requirements and includes the required bid deposit. Evaluators will then compare the proposal price with the Single Project Limit and Aggregate Work Limit listed on the offeror's Certificate of Eligibility to ascertain whether the offeror is eligible for the contract award. (Chapter V provides additional information on the Single Project Limit and Aggregate Work Limit.)

As in the case of the non-price proposals, you must waive or allow the offeror to correct minor informalities. For example, the omission of a unit price figure is a minor informality that must be waived if the intended figure is readily ascertainable from other figures in the proposal. If a mistake and the intended offer are both clearly evident in a proposal, you must correct the mistake to reflect the intended correct offer and notify the offeror in writing of the correction. In the event that a mistake is evident but the correct intended offer is not, you may permit the offeror to withdraw the proposal. For example, an offeror might incorrectly multiply unit prices by estimated quantities and then add the incorrect subtotals to arrive at a total price. In this case, the mistakes are evident but the intended offer is not.

Step 10: Identify the most advantageous proposal.

You must identify the most advantageous proposal, taking into consideration the proposal evaluations and the proposal prices. The decision may be easy when, for example, the lowest-priced proposal receives the highest overall ratings, or all proposals receive the same rating and the differences are so insignificant that you decide to select the lowest-priced proposal.

In other cases, you will have to carefully consider whether it is worthwhile for your jurisdiction to spend more money for a better proposal. For example, if one proposal is rated "highly advantageous" and has a higher price than the lowest-priced "advantageous" proposal, you need to determine which proposal best meets the needs of your jurisdiction.[58] The extra benefits afforded by the "highly advantageous" proposal may or may not be worth the cost premium you would incur by selecting that proposal. There is no mechanical process for making the tradeoff.

Step 11: Negotiate changes (if any) to the proposal.

The awarding authority may condition the award on successful negotiation of any revisions recommended in the evaluation, but these negotiations are limited in scope. The only items that are subject to negotiation are the specific revisions noted by the evaluators during the evaluation process. If any of the proposal revisions recommended by the evaluators are not included in the contract, the reasons for omitting them must be stated in writing. Contract terms, scope of work and price are *not* subject to negotiation. You may not agree to pay more than the offeror's proposal price for changes needed to make the proposal comply with the RFP requirements, nor is it permissible to adjust the price indirectly (for example, reducing the scope of work or the contractor's responsibilities or quality of the product). To allow one offeror to change a proposal price or any other term of the RFP would violate the precepts of fair competition.

Step 12: Award and publicize the contract.

You must give written notice of the award decision to the selected offeror within the time for acceptance that you specified in the RFP. The time for acceptance may be extended by agreement of the parties.

If you do not award the contract to the offeror who submitted the lowest price, you must explain the reasons for the award in writing and retain this written explanation in your files for at least six years from the date of final payment under the contract.

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[58] If revisions to a proposal's plan for providing the modular buildings would result in its selection as most advantageous, taking into consideration the proposal evaluations and prices, you may select the proposal conditioned upon satisfactory negotiations to incorporate the recommended revisions.

Finally, the name of the firm awarded the contract should be published in the *Central Register*. A form for this purpose may be downloaded from the Secretary of the Commonwealth's website at www.mass.gov/sec.

Modular Construction RFP: Recommended Outline and Contents

Part I. General Information

It is appropriate to include the following information:

- A description of the project in general terms. The building program[59] should be summarized in this section and the program itself should be appended to the RFP. The program summary will include, at a minimum, a description of the space needed, its function and minimum area. The program or study will generally include site drawings showing the proposed location of the modular buildings in relationship to existing buildings and to existing utility services to which the new work can be connected, as well as the results of any surveys or tests performed on the site.
- A brief explanation of the procedure for evaluating responsive proposals and statement that the evaluation will consider only the criteria contained in the RFP.
- The rules for modification or withdrawal of proposals. Under the modular procurement law, an offeror may correct, modify or withdraw a proposal in writing prior to the time set for opening proposals. After the proposals have been opened, an offeror may not change the price or any other provisions of the proposal in a manner that is prejudicial to the awarding authority or to fair competition. M.G.L. c. 149, § 44E(4).
- A statement that all terms and conditions of the procurement are contained in the RFP and that the contract awarded will be subject to these terms.
- A statement that the awarding authority reserves the right to reject all proposals if it is in the public interest to do so.
- The deadline for the submission of proposals, the maximum time for acceptance of a proposal and the maximum number of days for the completion of the required work by the selected contractor upon execution of the contract.
- Information on where to direct questions about the RFP and the deadline for submitting questions.

[59] The development of the program is part of the planning stage of a building project. The program is discussed in more detail in Chapter III.

Part II. Proposal Submission Requirements

Instructions for proposal submission should include:

- The place where proposals are to be delivered, the time and date by which proposals must be received, the time set for opening proposals and the maximum time for proposal acceptance by the awarding authority. M.G.L. c. 149, § 44E(4).
- A statement that late proposals will not be considered.
- The times, dates and places of any preproposal informational meetings and site visits, and a statement clarifying whether these meetings and site visits are required for all offerors.
- A statement that every proposal must be in two parts, submitted in clearly marked, separate, sealed envelopes: (1) non-price proposal; and (2) price proposal. M.G.L. c. 149, § 44E(4).
- A list of all documents that must be included in the envelopes containing the non-price and price information. To facilitate the evaluation of the proposals, you may want to provide standard formats for the submission of the non-price proposal and the price proposal.

Non-Price Proposal Submission Requirements

The RFP should require proposers to include the following information in the non-price proposal:

- A Certificate of Eligibility in the required category of work (the RFP should specify either Modular Construction/Prefabrication or General Building Construction), and a completed Update Statement. M.G.L. c. 149, § 44E(4).
- Proof of certification by the State Board of Building Regulations and Standards. This certification shows that the manufacturer meets state building code requirements.
- Plans and specifications for the proposed modular buildings. Each offeror should be required to submit drawings that show: the architectural floor plans and factory details of the buildings; their interconnecting areas such as corridors, passageways, stairs and ramps; the proposed installation plan; and all manufacturer specifications governing the materials, equipment and fixtures used in the buildings.
- A complete description of all warranties that apply to the building, its equipment and components, and the installation work.
- Non-collusion certification, which is the offeror's certification that the proposal is made without collusion or fraud. A standard form should be included in the RFP for such certification.

- Labor certification. If the contractor is required to perform any work in connection with the site preparation, site assembly or installation of modular units, the offeror must certify that the offeror is able to furnish labor that can work in concert with other elements of labor employed at the installation site. M.G.L. c. 149, § 44E(4).
- Tax certification. Each offeror must certify compliance with state tax laws, reporting of employees and contractors, and withholding and remitting of child support. M.G.L. c. 62C, § 49A.
- Labor harmony and OSHA training certifications. Any person submitting a bid for, or signing a contract to work on, the construction, reconstruction, alteration, remodeling or repair of any building or public works project undertaken by a public awarding authority in Massachusetts and estimated to cost more than $10,000 must provide specific certifications in the bid or contract regarding labor harmony and training approved by the U.S. Occupational Safety and Health Administration to be completed by all employees to be employed at the worksite. M.G.L. c. 30, § 39S(a).
- Foreign corporation registration. Any out-of-state corporation must submit a certificate of registration from the Massachusetts Secretary of the Commonwealth. M.G.L. c. 30, § 39L.
- A statement that the offeror will complete the project by a stated deadline. Alternatively, each offeror can be required to submit a proposed project timetable that ensures completion by the deadline.
- The offeror's certification of where the proposed modular units are or will be manufactured: within Massachusetts; outside Massachusetts but within the U.S.; or outside the U.S. M.G.L. c. 149, § 44E(4).
- Certification of compliance with building codes. Each offeror should certify that the proposed plans comply with all applicable building codes.
- Letter of transmittal. Each offeror should submit a statement signed by an individual certifying that the individual is authorized to bind the offeror contractually and that if the offeror is selected for a contract award, the offeror will execute a contract in accordance with all terms stated in the RFP and will furnish to the awarding authority a performance bond and a payment bond, each in the sum of the contract price, as required by M.G.L. c. 149, § 44E(4).

Price Proposal Submission Requirements

The RFP should require offerors to include the following information in the price proposal:

- A firm price proposal that states a total fixed project price. This proposal should contain the offeror's name, address and telephone number as well as the title of the person submitting the proposal. It must be signed by an individual authorized to bind the offeror.

- Bid deposit. Although a bid deposit is not mandated by law, the awarding authority may choose to require a bid deposit. If you choose to do so, you must require the bid deposit from all offerors. The RFP must specify the amount or percentage of the contract price required and the form of the deposit (*e.g.*, surety bond, cash, certified check or cashier's check). If the bid deposit is based on a percentage of the contract price, you should require offerors to submit the bid deposit with the price proposal rather than with the non-price proposal.

Part III. Purchase Description/Scope of Services

This section should include preliminary plans and specifications and the scope of services. Preliminary plans and specifications should describe the proposed project in sufficient detail to permit offerors to submit meaningful, competitive proposals. The level of design detail will likely resemble a schematic design. The specifications should avoid the use of proprietary brand names or other unnecessarily restrictive terms. Whenever possible, specifications for construction materials, fixtures and systems should be stated in terms of testing standards that measure qualities such as strength, durability, capacity, flammability and R-value.

This section of the RFP should also specify the scope of services to be included in the modular construction contract. You will have to decide at the outset whether to include site preparation and installation work in the RFP, to contract separately for some or all of this work under the construction bid laws or to have the work performed by qualified employees. This section of the RFP should fully describe the contractor's responsibilities with respect to preparing the site; constructing foundations, ramps, stairs and connecting corridors; assembling and installing the modular units at the site; attaching the units to existing utilities; obtaining all necessary plan approvals and permits, including building permits, permits required for transporting modular units from the factory to the site and occupancy permits; removing all debris from the site upon completion; and any other required services. If the RFP calls for the lease of modular buildings, the scope of services should include the contractor's responsibilities for removal of the units at the end of the lease term and restoration of the site to its original condition.

Part IV. Evaluation Criteria

This section must include criteria for determining the acceptability of a proposal based on quality of materials, workmanship, results of inspections and tests, suitability for a particular purpose and all other measures to be used in the evaluation process.

In developing your evaluation criteria, avoid the use of vague standards like "general quality of construction and appearance" or "reasonableness of technical approach," which provide little guidance to offerors or to evaluators. Proposals should be compared and evaluated on the basis of specific and concrete factors that are closely related to your project requirements. We recommend using evaluation criteria such as the following:

- the contractor's qualifications to perform the work, to be evaluated on the basis of the contractor's performance on other modular projects; and
- the quality of the proposed modular building.

Part V. Contract Terms

The RFP must contain all of the contract terms and provisions applicable to the modular procurement. Your attorney can assist you in developing a modular construction contract, which will resemble a conventional construction contract in most respects. The contract will be a complex document, and a discussion of all of the terms is beyond the scope of this manual. Nevertheless, you should be aware of the following terms:

- **Prevailing wages and hiring preferences**. The modular procurement law exempts the work involved in the manufacture of modular buildings from the state laws requiring payment of prevailing wage rates and hiring preferences for veterans and residents of Massachusetts. M.G.L. c. 149, §§ 26-27. However, these exemptions do not apply to the work performed on modular buildings at the building site. Any contract that includes site work (such as construction of foundations, attachment to utilities, or installation and assembly of modular units) must contain provisions regarding these legal requirements. Note that the awarding authority must obtain the prevailing wage rates applicable to the project from the Department of Labor Standards before issuing the RFP, and these rates should be included in the RFP.
- **Adjustments**. The contract is subject to certain statutory provisions governing price adjustment. M.G.L. c. 30, §§ 39N-39O. The contract should also include terms governing the adoption and pricing of change orders.
- **Performance and payment bonds**. The contract must include a provision requiring the selected offeror to furnish the awarding authority with a

performance bond and a payment bond, each in the sum of the contract price, issued by a surety qualified to issue bonds in the Commonwealth and satisfactory to the awarding authority. M.G.L. c. 149, § 44E.

- **Labor harmony and OSHA training certifications**. Any person submitting a bid for, or signing a contract to work on, the construction, reconstruction, alteration, remodeling or repair of any building or public works project undertaken by a public awarding authority in Massachusetts and estimated to cost more than $10,000 must provide specific certifications in the bid or contract regarding labor harmony and training approved by the U.S. Occupational Safety and Health Administration to be completed by all employees to be employed at the worksite. M.G.L. c. 30, § 39S(a).
- **Foreign corporations**. Any contractor incorporated outside of Massachusetts must certify compliance with certain corporation laws. The awarding authority must notify the Secretary of the Commonwealth and the Department of Revenue whenever a contract is awarded to an out-of-state corporation. M.G.L. c. 30, § 39L.
- **Payment procedures**. The contract must contain statutory language governing payment procedures. M.G.L. c. 30, § 39K.
- **Financial reporting**. Contractors must agree to keep certain financial records, make them available for inspection by certain state agencies and file periodic financial reports. M.G.L. c. 30, § 39R.
- **Auditor's certification**. For a city or town, the contract must contain a certification by the municipal auditor or accountant stating that appropriated funds are available for the contract and that the official signing the contract has been authorized to do so. The certification should also identify any other municipal officials who have been authorized to make decisions under the contract, such as approval of change orders and invoices. M.G.L. c. 44, § 31C.
- **Liability insurance**. The awarding authority may either require the contractor to provide project insurance, covering both the contractor and the awarding authority, or it may insure itself separately.
- **Tax compliance**. Any person contracting with the Commonwealth or any subdivision of the Commonwealth, including a city, town or district, must certify in writing that the person has complied with state tax laws, reporting of employees and contractors, and withholding and remitting of child support. M.G.L. c. 62C, § 49A.
- **Liquidated damages**. You may want to include a provision for imposing liquidated damages on the contractor for late completion. [60]

[60] Liquidated damages represent the dollar amount of damages your jurisdiction will incur in the event of a breach of contract.

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VIII. The Construction Stage

Once the building or public works contract is awarded, the general contractor will mobilize its work force and begin construction. The general contractor's job is to complete the project in accordance with the plans and specifications prepared by the designer.

Navigating the Requirements

For the reader's convenience, we have provided symbols at the beginning of each section and subsection of this chapter, indicating whether the text contained in the section or subsection relates exclusively to contracts subject to M.G.L. c. 149, exclusively to contracts subject to M.G.L. c. 30, § 39M, or to both categories of contracts. The symbol 149 designates contracts subject to M.G.L. c. 149; the symbol 30 designates contracts subject to M.G.L. c. 30, § 39M.

149 30

Payment Procedures

You must comply with specific payment procedures on all public building contracts.[61] Although the procedures covering building and public works contracts are similar, they differ in several important respects. Rules and procedures for making final payments to contractors on building and public works contracts are discussed later in this chapter.

For building contracts costing more than $2,000,[62] M.G.L. c. 30, § 39K, provides that the contract must contain specific provisions regarding periodic estimates and payments to contractors. These provisions also detail the amounts the awarding authority must withhold[63] and how arithmetic errors in contractor invoices must be handled.

The payment procedures for public works contracts bid under M.G.L. c. 30, § 39M, are somewhat different. Those procedures are found in M.G.L. c. 30, § 39G.

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[61] Payments made by local housing authorities on projects funded by the Department of Housing and Community Development (DHCD) are subject to DHCD approval. Local housing authorities should contact DHCD for further information on these procedures.

[62] For contracts awarded by the Commonwealth, this threshold is $5,000.

[63] The owner is entitled to withhold from its periodic payments up to five percent of their dollar value (referred to as "retainage"), the value of all claims by the owner against the contractor, and the total of all outstanding claims for direct payment.

149 30 Payroll Records

During the construction project, the awarding authority is responsible for receiving weekly certified payroll reports from all contractors and subcontractors. Weekly certified payroll reports must be kept on file for all projects subject to the prevailing wage law. A weekly certified payroll report form is available at the website of the Department of Labor Standards (DLS): www.mass.gov/lwd/labor-standards. The weekly certified payroll reports must be maintained by the awarding authority for three years following completion of the construction project. As discussed in Chapter IV, you are required to obtain annual updates of the prevailing wage rate sheets for multi-year projects from the DLS. Your contractors must obtain these updated wage rate sheets from you and pay workers covered by the prevailing wage law no less than these rates.

149 30 Substitutions

The general contractor will often submit requests to substitute particular items as being "equal" to those required in the specifications. Your obligation is to assure that the proffered item does, in fact, meet the specifications. Your designer should review substitution requests and approve or make recommendations to you regarding such requests.

Whenever you are required to interpret specifications or approve substitutions of equipment, materials or construction methods for those specified in the contract, you must make a decision within 30 days of the contractor's written submission. If extended investigation or study is required, then you must give the contractor written notice within 30 days of the reason that the decision cannot be made and the date by which the decision will be made. M.G.L. c. 30, § 39P.

149 30 Change Orders

A change order is an amendment to the construction contract that alters one or more items specified in the original contract documents, such as construction materials, methods or equipment; the services provided by the contractor, subcontractors or suppliers; or the contract schedule. A change order may have no effect on the contract cost, may increase the contract cost or may decrease the contract cost through a credit from the contractor. Similarly, a change order may have no effect on the contract

schedule, may extend the schedule or may accelerate the schedule. Change orders must be in writing.

The contractor must perform all of the construction work in conformity with the contract plans and specifications. However, changes to the construction plans and specifications may be necessary or warranted for a variety of reasons, including:

- site conditions that differ from those shown in the construction plans;
- circumstances requiring the awarding authority to suspend, delay or interrupt all or part of the work; or
- requests by the awarding authority or the contractor for changes to the plans and specifications.

Within 30 days after a change order is issued, the awarding authority must issue a certificate, signed under penalties of perjury, containing the following information:

- an explanation of why the change is needed;[64]
- a statement that any substitute work is of the same cost and quality, or that the contract price has been equitably adjusted; and
- a statement that the change will not significantly hurt the project and that it is in the best interest of the awarding authority.

M.G.L. c. 30, § 39.

149 30 Change Order Approval Procedures

The construction contract should include detailed change order management and approval procedures. The procedures should spell out the responsibilities of the parties, specify who is authorized to approve change orders on behalf of the awarding authority and establish a claims resolution process that avoids project delays. The procedures should also specify all pricing requirements such as bonds, insurance and administrative markups. If the change order work will impact the project schedule, the change order should specify the revised date for substantial completion of the project.

[64] If the change involves any substitution or elimination of materials, fixtures or equipment, the certificate must state the reasons why such items were included in the first instance and the reasons for substitution or elimination.

Each type of change order requires specific change order approval procedures. Several common types of change orders are summarized below.

Unforeseen site conditions. The contract must contain a specific provision in its entirety, found in M.G.L. c. 30, § 39N, for adjusting the contract price where site conditions differ substantially or materially from the conditions indicated in the construction plans or contract documents. The provision states that either the awarding authority or the contractor may request an equitable adjustment in the contract price after discovery that the hidden physical conditions on the site differ from the construction plans or contract. The request must be in writing and must be made as soon as possible after discovery of the condition. The awarding authority must investigate the site conditions and make an equitable adjustment in the contract price and modify the contract in writing if the conditions cause an increase or decrease in the cost of the work. M.G.L. c. 30, § 39N.

Suspension, delay, interruption or failure to act by the awarding authority. The contract must also contain specific provisions in their entirety, found in M.G.L. c. 30, § 39O, that allow the awarding authority, at its convenience, to suspend, delay or interrupt the work. The provisions state that the general contractor must be informed in writing. If there is a suspension, delay or interruption to the project of 15 days or more, or if the awarding authority fails to act in a timely manner as required by the contract, the awarding authority must make an adjustment in the contract price to cover increased costs of the general contractor. However, the price increases may not include profit to the general contractor.[65] M.G.L. c. 30, § 39O.

The contractor must submit the amount of the claim for increased costs to the awarding authority in writing as soon as practicable after the end of the suspension, delay, interruption or failure to act by the awarding authority. This claim must be submitted no later than the date of the final payment under the contract. The awarding authority may not approve any costs in the claim, except for costs due to a suspension order, that

[65] Note that the contractor is not entitled to increased costs for suspension, delay, interruption or failure to act under this provision if the contractor is entitled to such increased costs under another provision of the contract.

were incurred more than 20 days before the general contractor notified the awarding authority in writing of the awarding authority's act or failure to act. M.G.L. c. 30, § 39O.

Changes to plans and specifications. Changed circumstances may warrant owner-generated design changes, and incomplete or flawed plans and specifications may warrant contractor-generated design changes. Keep in mind that work performed under a change order will almost always cost more than the same work would have cost if it had been included in the original plans and specifications that were put out to bid. Two factors contribute to the high cost of change orders: noncompetitive pricing of the work and contractually required administrative markups.[66] If change orders are not carefully controlled, they can cause substantial project cost overruns. Requests from future users of the facility for design changes during the construction stage should be closely reviewed to determine whether the value to the project of the proposed changes exceeds their estimated construction cost.

You may not use change orders to make substantial changes to the project scope. Massachusetts courts have held that amendments to publicly bid contracts must be incidental to the original contract scope. If the parties to the contract could negotiate major changes to the contract scope and price after the contract was signed, one of the purposes of the construction bid laws – to promote fair competition on a level playing field – would be undermined. Similarly, a competitively bid contract cannot later be renegotiated to incorporate fundamentally different business terms. We urge you to consult your attorney with any questions about the legality of specific change order proposals.

149 30 Change Order Pricing

If the contract sets forth a basis for payment, such as an hourly rate for millwork or a unit price for gravel, that rate or unit price will be used to compute the price of the change order. If the contract contains no basis for payment, you will have to negotiate the change order price with the contractor. For some items or services, you may want

[66] Construction contracts often permit the contractor and subcontractor to charge overhead costs fees based on a percentage of the cost of every service and item procured under a change order.

to require the contractor to obtain competitive quotations. You may also want to obtain market prices independently to verify the reasonableness of the prices requested by the contractor. For all change order work, you should require the contractor to provide full documentation for each component of the work. For a city or town project, if a change order results in an increase in the contract price, the municipal auditor or accountant must also sign the change order, certifying that appropriated funds are available to cover the increased cost. M.G.L. c. 44, § 31C. If the change order work will be funded by an external organization, you should confirm that the change order will be approved by that organization before authorizing the change order. If the change order will result in a credit to your jurisdiction, you should ensure that the dollar amount of the credit reasonably reflects the cost of the work being deleted from the construction contract.

149 30 Project Closeout

As the construction project nears an end, the general contractor will notify you that the work is substantially complete. At this point the designer should inspect the project to verify that the project has reached substantial completion. For building contracts, "substantial completion" refers to the point at which either the value of the remaining work to be done is less than one percent of the original contract price or the awarding authority takes possession of the building for occupancy, whichever comes first. M.G.L. c. 30, § 39K. For public works contracts, "substantial completion" refers to the point at which either the value of the remaining work to be done is less than one percent of the total contract price, including change orders, or substantially all of the work has been completed, except for minor incomplete or unsatisfactory work items that do not materially impair the usefulness of the work required by the contract, and you have opened the space to public use. M.G.L. c. 30, § 39G.

The next step is to prepare a punch list detailing all of the remaining items that must be completed by the contractor before release of the final contract payment. Upon completion of the punch list items, the contractor will submit an invoice for final payment that includes any amounts that have been withheld from prior invoices.

149 Building Contracts

State law requires the following final payment procedures for building contracts:

- You must make payment on the contractor's final invoice within 65 days after the contract is 99 percent completed (or even earlier, if the contractor substantially completes the work and you as the awarding authority take possession). The designer will certify when the work is complete. This certification should be in writing.
- You must continue to hold back funds to cover items you believe have not been satisfactorily completed, funds equal to your outstanding claims against the contractor, and funds for direct payment to subcontractors.[67]
- Your contract must contain specific provisions, found in M.G.L. c. 30, § 39K, detailing these final payment procedures. You have some recourse when a general contractor fails to complete a punch list after receiving a written notice. After a specific notice period, you may terminate the contract, complete the work and charge the original general contractor for the cost of the work.

30 Public Works Contracts

For public works contracts, state law requires a more complex process for project closeout and final payment procedure:

- Upon substantial completion of the contract, the contractor must present written certification that the work is substantially complete. Within 21 days, you must respond to this certification by sending the contractor either a written declaration that the work is substantially complete or an itemized list of incomplete or unsatisfactory items. If you choose to send an itemized list, you may also include a date by which the items must be completed, as long as that date is not before the contractual completion date. If you do not respond within 21 days, the contractor's certification that the work is complete becomes the effective declaration of substantial completion.
- Within 15 days of the effective declaration of substantial completion, you must send the contractor by certified mail, return receipt requested, a complete list of all incomplete or unsatisfactory work items. Unless delayed for reasons beyond the contractor's control, the contractor must complete the items listed within 45 days after receipt of the list (or by the contractual completion date, whichever is later). If the contractor fails to complete the work by then, you may provide the contractor written notice by certified mail, return receipt requested, of your intent to terminate the contract. Once seven days have

[67] M.G.L. c. 30, § 39F, specifies a procedure under which a subcontractor may seek direct payment from the owner if the subcontractor does not receive the contractually required payments from the general contractor.

passed, you may cancel the contract, complete the incomplete or unsatisfactory work items, and charge the contractor for the cost of the work.

- Within 65 days after the effective declaration of substantial completion, you must send the contractor a substantial completion estimate. This estimate will be the balance of the contract price minus a one percent retention for final completion, amounts to cover any outstanding claims, any amounts estimated to cover incomplete or unsatisfactory work and the sum of all demands for direct payment made by subcontractors.[68] If you fail to send a substantial completion estimate within 65 days, the amount owed to the contractor may be subject to interest charges.
- The contractor will send a notice when work is completed. Within 30 days after you receive the notice, you must send the contractor a final estimate for the contract balance due. If you determine that incomplete or unsatisfactory work remains, continue to hold back an amount you estimate would cover that work. If you fail to send the contractor a final estimate within 30 days, the amount may be subject to interest charges.

M.G.L. c. 30, § 39G.

149 Evaluating Contractor and Subcontractor Performance on Building Contracts Estimated to Cost More Than $100,000

An awarding authority must complete a standard contractor evaluation form for the general contractor and all subcontractors performing filed sub-bid work on a M.G.L. c. 149 building contract that is under their control and is estimated to cost more than $100,000.[69] M.G.L. c. 149, § 44D(7), (16); 810 CMR 8.00. The evaluation form contains written comments as well as numerical ratings reflecting the contractor's performance on the project. The standard contractor evaluation form may be downloaded from the Division of Capital Asset Management and Maintenance (DCAMM) website at www.mass.gov/dcamm.

Under DCAMM regulations, the owner's project manager (OPM) is required to complete the contractor and subcontractor evaluations pertaining to all building contracts estimated to cost $1.5 million or more. The OPM and the awarding authority must sign

[68] M.G.L. c. 30, § 39F, specifies a procedure under which a subcontractor may seek direct payment from the owner if the subcontractor does not receive the contractually required payments from the general contractor.

[69] This threshold is not found in the statute or in the regulations of the Division of Capital Asset Management and Maintenance (DCAMM); it represents an interpretation of the law by DCAMM and the Office of the Attorney General.

the evaluation. The awarding authority, designer representing the awarding authority or any other party responsible for project oversight must complete the contractor and subcontractor evaluations pertaining to building contracts estimated to cost between $100,000 and $1.5 million. 810 CMR 8.02, 8.09. An awarding authority or OPM may seek input from the general contractor in evaluating a subcontractor's performance. 810 CMR 8.09.

The awarding authority must certify the accuracy of the contents of each completed evaluation form and may not negotiate the contents of the evaluation form or the project rating with the contractor, subcontractor or their representatives for any reason. 810 CMR 8.02, 8.09. The completed evaluation is then sent to DCAMM for use in deciding whether to certify the contractor to bid, or whether to certify the subcontractor to file sub-bids, on future public building projects. A copy of the completed evaluation form must also be mailed to the contractor or subcontractor, who has 30 days to submit a written response to DCAMM. M.G.L. c. 149, § 44D(7).

When the project is approximately 50 percent complete, you are required to provide the general contractor with a preliminary, informational, written evaluation of the contractor's performance on the project. Within 70 calendar days of project completion, your jurisdiction must submit to DCAMM a properly completed standard contractor evaluation form for the general contractor. Any public agency that fails to complete the required contractor evaluation and submit it to DCAMM, together with any written response by any contractor, within 70 days of completing a project will be ineligible to receive any state funds for public building or public works projects. M.G.L. c. 149, § 44D(7).

M.G.L. c. 149, § 44D, provides qualified immunity to individuals responsible for completing contractor and subcontractor evaluations on behalf of public owners. If a contractor initiates a lawsuit in response to a completed evaluation, the awarding authority is required to provide legal representation and indemnification for the individual completing the evaluation on behalf of the awarding authority.

Your jurisdiction must submit to DCAMM a properly completed standard contractor evaluation form for each subcontractor performing filed sub-bid work on the project

within 90 days of contract completion or termination. Although you are not required to provide a preliminary, informational, written evaluation to each subcontractor when the project reaches the 50 percent project completion stage, we strongly recommend that you do so. Any public agency that fails to complete a required subcontractor evaluation and submit it to DCAMM, together with any written response by the subcontractor, within 90 days of completing a project will be ineligible to receive any state funds for public building or public works projects. M.G.L. c. 149, § 44D(16).

149 30 Invoking the Performance Bond

If the contractor fails to complete the project in a satisfactory manner, you may need to invoke the contractor's performance bond.[70] In such cases, the surety that issued the bond is responsible for completing the work at the contract price. You should seek assistance from your attorney as early in the process as possible because invoking a performance bond will usually involve extensive negotiations with the contractor and the surety. Note that the performance bond must remain in effect for at least one year after the project's completion, and longer if necessary, to cover guarantees or pending claims. M.G.L. c. 30, § 40.

[70] M.G.L. c. 30, § 39M, contracts do not require performance bonds, but you may choose to require a performance bond.

IX. Using Alternative Project Delivery Methods Under M.G.L. c. 149A

Construction projects typically involve three phases: planning, design and construction. On a design-bid-build project, these phases run sequentially: first, a designer prepares a fully detailed design for the project, then construction bids are solicited on the 100 percent complete bidding documents, and finally, the selected contractor – the lowest eligible and responsible bidder – begins construction. The contractor has no involvement in the process until the construction stage.

M.G.L. c. 149A, enacted in July 2004, permits Massachusetts awarding authorities to use two alternative delivery methods that differ substantially from the design-bid-build process, subject to specific conditions. For building construction contracts estimated to cost $5 million or more, awarding authorities have the option of using the construction management at risk (CM at risk) delivery method. For public works construction contracts estimated to cost $5 million or more, awarding authorities have the option of using the design-build delivery method. This chapter summarizes the requirements for using these alternative delivery methods under M.G.L. c. 149A.

Optional CM At Risk Delivery Method for Building Construction Contracts Estimated to Cost $5 Million or More

On a CM at risk project undertaken pursuant to the requirements of M.G.L. c. 149A, a CM at risk firm is hired early in the design stage of the project. During the preconstruction period, the CM at risk firm acts as a construction manager, advising the owner on issues such as the project budget, the project schedule and development of the project design. At a predetermined point during design development, the owner and the CM at risk firm agree on a guaranteed maximum price (GMP) for the construction work. During the construction stage of a CM at risk project, the CM at risk firm – which has until this point acted as a construction manager – takes on the role of the project's general contractor and assumes the risk of constructing the project in accordance with the owner's specifications for an amount not to exceed the GMP. Because of the dual construction manager and general contractor roles assumed by the CM at risk firm, the CM at risk delivery method is sometimes called CM/GC.

The CM at risk contract is structured as a cost-plus contract with a GMP. In other words, the awarding authority pays the CM at risk firm the actual cost of the agreed-upon work plus an agreed-upon construction management fee. The sum of these payments cannot exceed the GMP. However, the GMP may be increased by change orders if there are changes to the project scope or requirements, or if unforeseen conditions are encountered on the project. The awarding authority is responsible for monitoring and auditing all project costs.

As in the case of a design-bid-build project, on a CM at risk project the owner holds separate contracts with the designer and the CM at risk firm. The CM at risk firm holds the subcontracts and is responsible for ensuring that all construction work is completed on schedule and in accordance with the specifications. CM at risk projects are sometimes fast-tracked so that portions of the design that are completed early, such as the site work, can be bid and built and items with long lead times can be purchased while the rest of the design is being completed. The CM at risk firm assumes the role of general contractor on the construction work for the fast-tracked package while continuing to provide construction management input on the design work that is still underway.

It is important to keep in mind that the role of the CM at risk firm on a CM at risk project is very different from the role of a construction manager hired for a fee to serve as your jurisdiction's agent, helping to manage the project budget, schedule and quality on a design-bid-build project. A CM at risk firm does not represent the owner and has no obligation to protect the owner's interests on a CM at risk project.

Obtaining Approval to Use CM at Risk

Public awarding authorities are required to obtain the prior approval of the Office of the Inspector General (Office) before using CM at risk for a public building project. The Division of Capital Asset Management and Maintenance (DCAMM), the Massachusetts Port Authority (Massport), the Massachusetts Water Resources Authority (MWRA), the Massachusetts State College Building Authority (MSCBA) and the University of Massachusetts Building Authority (UMBA) are exempt from the requirement to obtain prior approval from our Office for each CM at risk project. However, these exempt

agencies are required to submit their CM at risk procedures to our Office for review and approval on an annual basis.

Before submitting an application to our Office, you are required to procure or otherwise employ the services of an owner's project manager (OPM) who will assist you in procuring the design contract. Under M.G.L. c. 149A, the individual assigned by the OPM to provide the project management services for the project must either be a registered architect or professional engineer with at least five years of experience in the construction and supervision of construction of buildings of similar size and complexity, or have at least seven years of experience in the construction and supervision of construction of buildings of similar size and complexity.[71] A member of your staff may serve as the OPM if that person meets these required qualifications. If you elect to contract for the services of the OPM, you are required to use a qualifications-based selection (QBS) process. This means that the OPM must be competitively selected on the basis of qualifications, without price competition. The Office of the Attorney General and our Office recommend that you procure OPM services by following the designer selection law, which also requires a QBS process.[72] The designer selection law is discussed in Chapter II.

You are also required to procure the services of a designer in accordance with the requirements of the designer selection law before submitting an application to the Office. Under M.G.L. c.149A, the OPM, the designer and the CM at risk firm must be independent of one another.

To receive approval from our Office, your application must demonstrate the following:

- The public agency has authorization from its governing body to contract with a CM at risk firm;

[71] These experience requirements differ slightly from those that apply to an OPM hired or assigned to a M.G.L. c. 149 building project with an estimated construction cost of $1.5 million or more.

[72] For projects seeking funding from the MSBA, OPM services must be procured in accordance with the MSBA's OPM selection guidelines, which are available at the MSBA's website, www.massschoolbuildings.org.

- The public agency has the capacity, a plan and procedures to effectively procure and manage a CM at risk contract for the specific project and has retained the services of a qualified OPM;
- The public agency has in place procedures to ensure fairness in competition, evaluation and reporting of results at every stage of the procurement process;
- The building project has an estimated construction value of $5 million or more; and
- The public agency has determined that the use of CM at risk services is appropriate for the building project and has stated in writing the reasons for the determination.

M.G.L. c. 149A, § 4(a).

Our Office has issued *Procedures Relative to Receiving a Notice to Proceed to Use Construction Management at Risk Services*. This document, which is available at www.mass.gov/ig, contains the Construction Management at Risk Application to Proceed as well as detailed instructions for completing the application.

Procuring the CM at Risk Contract

M.G.L. c. 149A requires a two-phase process to select the CM at risk firm. The major steps in the selection and contracting process are as follows:

1. Establish a prequalification committee.
2. Prepare and advertise the request for qualifications (RFQ) for CM at risk services.
3. Evaluate the statements of qualifications (SOQs) and prequalify at least three CM at risk firms.
4. Establish a selection committee.
5. Prepare the request for proposals (RFP) and distribute it to prequalified CM at risk firms.
6. Receive, evaluate and rank the CM at risk proposals.
7. Negotiate non-fee contract terms with the selected proposer and award the CM at risk contract.

Step 1: Establish a prequalification committee.

The prequalification committee's role will be to review and evaluate responses to the RFQ that you will issue for CM at risk services. The prequalification committee must be

comprised of a representative of the designer, the OPM and at least two representatives of your jurisdiction.

Step 2: Prepare and advertise the RFQ for CM at risk services.

You will prepare the RFQ and advertise for SOQs from CM at risk firms, following the procedures set forth in M.G.L. c. 149A. The RFQ and public notice must include the following information:[73]

- the time and date for receipt of RFQ responses, the address of the office to which the responses must be delivered and the time frame in which the public agency will respond to the responses;
- a general description of the project, including preliminary concept designs and key factors important to the final selection;
- the evaluation procedure and criteria for selection, including any rating system;
- a specific description of the scope of services expected of the selected CM at risk firm during the design, preconstruction and construction phases of the project;
- a general description of the anticipated schedule and estimated construction cost for the building project;
- a listing of the project team, including the public agency, the designer and the public agency's OPM;
- the criteria for the selection of the CM at risk firm, including minimum experience, requirements for presentations and the schedule for the selection process;
- a prohibition against any unauthorized communication or contact with the public agency outside of official preproposal meetings;
- if desired by the public agency, a limitation on the size and number of pages to be included in the response to the RFQ; and
- a statement indicating that the RFQ will be used to prequalify CM at risk firms that will be invited to submit proposals in response to a request for proposals issued pursuant M.G.L. c. 149A, § 6.

M.G.L. c. 149A, § 5(c).

If space considerations make it difficult to include the evaluation procedures and criteria in the public notice, we recommend that you reference this information in the public

[73] As will be discussed, this information must also be included in the RFP.

notice. However, essential information such as the submission requirements, scope of services and project description must be included in the public notice as well as the RFQ.

Your RFQ must inform interested CM at risk firms of the required contents of their statements of qualifications. M.G.L. c. 149A requires the following information to be included in each SOQ submitted by a CM at risk firm:

- a cover letter or executive summary detailing the key elements and factors that differentiate the firm from other responders;
- a completed qualifications application similar in form to AIA Document A305, 1986 edition, listing general business information and financial capacity;
- a list of lawsuits and arbitrations to which the firm is a party in regard to construction contracts within the past three years, including a list of all convictions or fines for violations of state or federal law;
- a project organization chart with specific information on key project personnel or consultants;
- an audited financial statement for the most recent fiscal year[74] and a letter from the firm's surety company confirming its ability to provide performance and payment bonds for the building project under consideration;
- information on the firm's safety record, including its workers' compensation experience modifier, for the past three years;
- information on and evidence of the firm's compliance record with respect to minority and women business enterprise (MBE/WBE) inclusion and workforce inclusion goals, if applicable;
- information regarding the firm's experience on similar building projects, including references from the owners and architects of those projects;
- information regarding the firm's experience on similar projects that used the CM at risk delivery method, including references from the owners and architects of those projects;
- information on any projects where the firm was terminated, failed to complete the work or paid liquidated damages;
- specific examples of the firm's project management reports or other illustrations of the company's operating philosophy;
- a Certificate of Eligibility issued by DCAMM, showing a capacity rating sufficient for the project, and an Update Statement;[75] and

[74] "[T]he financial information submitted shall remain confidential and shall not be a public record to the fullest extent permissible under the law." M.G.L. c. 149A, § 5(d)(5).

- any other relevant information that the public agency deems desirable.

M.G.L. c. 149A, § 5(d).

The CM at risk firms responding to the RFQ must sign their SOQs under the pains and penalties of perjury.

The RFQ must be advertised at least two weeks before the deadline for submitting responses to the RFQ in a newspaper of general circulation in the area in which the building project is located, in the *Central Register* and on COMMBUYS.[76]

Step 3: Evaluate the statements of qualifications and prequalify at least three CM at risk firms.

The prequalification committee will evaluate the statements of qualifications received from CM at risk firms on the basis of the evaluation criteria set forth in the RFQ. The prequalification committee is required to select at least three qualified CM at risk firms to receive the RFP. If the prequalification committee is unable to identify at least three qualified CM at risk firms, you are required to readvertise the RFQ following the procedures outlined above. Alternatively, you may elect to procure the construction work in accordance with the bidding requirements of M.G.L. c. 149 (discussed in Chapter V of this manual). The decision of the prequalification committee shall be final and shall not be subject to appeal except on grounds of fraud or collusion. M.G.L. c. 149A, § 5(f).

Step 4: Establish a selection committee.

Before issuing the RFP for CM at risk services to the prequalified CM at risk firms, you are required to establish a selection committee that will review and evaluate responses to the RFP. The membership requirements for this committee are identical to those for the prequalification committee, and you may appoint the same individuals to both committees.

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[75] Your RFQ should require CM at risk firms to be certified in the category of General Building Construction.

[76] COMMBUYS is the Commonwealth's electronic procurement system. Any public agency in Massachusetts can post solicitations on COMMBUYS free of charge. For additional information, you may visit the COMMBUYS website at www.commbuys.com.

Step 5: Prepare the RFP and distribute it to prequalified CM at risk firms.

The following information must be included in the RFP:

- all information required by M.G.L. c. 149A to be included in the RFQ and public notice (listed under the previous Step 2);
- the date, time and place for submission of proposals;
- a clear description of the submission requirements, including separate price and technical components;
- detailed information concerning the project scope, including any preliminary design information, geotechnical reports, existing conditions surveys, and specifications;
- specific information on the project schedule, including the schedule for design deliverables, site availability and occupancy expectations;
- a detailed description of the scope of work and deliverables expected from the CM at risk firm during the preconstruction phase;
- the MBE/WBE inclusion goals and workforce inclusion goals for the building project;
- a clear description of the communication guidelines to be followed during the procurement process, including any measures to ensure that the selection process will be open and fair;
- the form of the contract and general and supplemental conditions, including any incentive provisions and any damages for delay provisions;
- the project budget;
- a fully developed schedule of cost items listing the public agency's determination of what will be considered fee, cost of the work and general conditions items;
- specific information on the evaluation criteria, including any point scale or measurement system;
- the timetable and process for establishing a guaranteed maximum price, including the status of design and limitations on the amount and use of contingency; and
- a list of the trade contractor classes of work to be required in the trade contractor prequalification plan.[77]

M.G.L. c. 149A, § 6(b).

[77] On a CM at risk contract, trade contractors are subcontractors that perform work in subtrade categories that are subject to filed sub-bidding on a M.G.L. c. 149 contract. The required procedures for procuring trade contracts are discussed later in this chapter.

Each CM at risk proposal must contain a price component and a technical component. M.G.L. c. 149A prescribes the contents of these proposal components, and these requirements should be incorporated into the RFP.

The price component of each CM at risk proposal must include:

- the fee for preconstruction services with appropriate detail;
- the fee for construction services with explanation of the basis; and
- the estimated cost of general conditions with appropriate detail.

M.G.L. c. 149A, § 6(c)(1).

The technical component of each CM at risk proposal must include:

- a detailed project approach, including preconstruction services;
- supplemental, relevant project references;
- a listing of the project team members with position descriptions and relevant time commitments of these team members during the project;
- the construction management plan indicating approach to control of cost, schedule, quality, documents and claims;
- preliminary definition of trade contractor and subcontractor bid packages and scopes of work;
- an affidavit of prevailing wage compliance pursuant to M.G.L. c. 149, §§ 26-27;
- a commitment letter from a surety licensed to do business in the Commonwealth and whose name appears on United States Treasury Department Circular 570 stating the surety's willingness to bond the building contract in the full sum of the contract at 110 percent of the budget for the building project;
- a technical challenges and solutions plan; and
- any qualifications or exceptions to the terms of the form of contract or supplemental conditions as included in the RFP.

M.G.L. c. 149A, § 6(c)(2).

If your jurisdiction has received a notice to proceed from our Office, each proposal must also contain a Certificate of Eligibility issued by DCAMM and a completed Update Statement.

Step 6: Receive, evaluate and rank the CM at risk proposals.

The selection committee is required to evaluate the CM at risk proposals in accordance with the evaluation criteria contained in the RFP. The selection committee may conduct interviews as long as all firms submitting proposals are interviewed. Based on the evaluations, the selection committee must rank the CM at risk proposals.

Step 7: Negotiate non-fee contract terms with the selected proposer and award the CM at risk contract.

The selection committee will begin non-fee negotiations with the highest-ranked CM at risk firm. If the selection committee determines that these negotiations will not result in an acceptable contract for your jurisdiction, it will terminate these negotiations and begin non-fee negotiations with the next highest-ranked CM at risk firm. This process will continue until the selection committee reaches agreement on an acceptable contract with and awards the contract to one of the prequalified CM at risk firms. The list of prequalified CM at risk firms and the selection committee's rankings of the firms' proposals will be public records after the contract award. M.G.L. c. 149A, § 6(e). M.G.L. c. 149A provides that the decision of the selection committee shall be final and shall not be subject to appeal except on grounds of fraud or collusion. M.G.L. c. 149A, § 6(d).

Negotiating the GMP

The agreed-upon GMP for the construction work will be an amendment to your contract with the CM at risk firm. You will negotiate the GMP with the CM at risk firm when the design reaches the level of completion specified in your RFP. The design documents must be no less developed than 60 percent construction documents. M.G.L. c. 149A, § 7(b)(1).

The GMP amendment to the contract is required to include:

- a detailed line-item cost breakdown by trade, including cost of pre-GMP work;
- dollar amounts for the CM at risk firm's contingency;
- dollar amounts for the CM at risk firm's general conditions and fees, including for pre-GMP work;
- a list of all drawings, specifications and other information on which the GMP is based;

- a list of allowances and statement of their basis;
- a list of any assumptions or clarifications on which the GMP is based;
- the dates for substantial and final completion on which the GMP is based; and
- a schedule of applicable alternates and unit prices.

M.G.L. c. 149A, § 7(b)(4).

Within five business days of the date on which the GMP amendment is executed, the CM at risk firm is required to furnish you with performance and payment bonds in the full amount of the GMP.

If you are unable to negotiate an acceptable GMP at this point, the selection committee may begin negotiations with the next highest-ranked proposer. If a contract and GMP cannot be successfully negotiated with the second CM at risk firm, you must terminate the procurement process and procure the construction work in accordance with the requirements of M.G.L. c. 149. After terminating a CM at risk procurement process, a public agency may not reapply for approval to use the CM at risk delivery method on this same building project unless the building project has been materially changed in form or function. M.G.L. c. 149A, § 7(c).

Procuring Trade Contracts Estimated to Cost More Than $20,000

There will be two types of subcontractors on a CM at risk project: (1) trade contractors, which perform subtrade work that would be subject to filed sub-bidding on a M.G.L. c. 149 contract, and (2) other subcontractors. Based on information provided by the CM at risk firm regarding scope of each trade contract, your jurisdiction will conduct a two-phase trade contractor selection process for all sub-bid classes of work that meet or exceed $20,000. The steps of the trade contractor selection process are summarized below:

1. Establish a trade contractor prequalification committee.
2. Prepare and advertise the RFQ for trade contractor services for each trade contract.
3. Evaluate responses and prequalify trade contractors receiving a point score of 70 or higher.
4. Prepare the request for bids (RFB) and distribute it to prequalified trade contractors.

5. Receive, open and review trade contract bids.
6. The CM at risk firm executes the trade contractor agreement.

Step 1: Establish a trade contractor prequalification committee.

The trade contractor prequalification committee must be comprised of a representative of the designer, a representative of the CM at risk firm and two representatives of your jurisdiction.

Step 2: Prepare and advertise the RFQ for trade contractor services for each trade contract.

M.G.L. c. 149A contains detailed provisions governing the RFQ evaluation criteria, information requirements and point rating system to be used in prequalifying trade contractors. You are required to advertise the RFQ in a newspaper of general circulation in the area in which the building project is located, in the *Central Register* and on COMMBUYS not less than two weeks prior to the deadline for responses to the RFQ. The following information must be included in the trade contractor RFQ and the public notice of the RFQ:

- the date, time and place for submission of responses to the RFQ;
- relevant information about the project and the bidding process;[78]
- the specific criteria for trade contractor prequalification and selection;[79]
- a statement indicating that the RFQ will be used to prequalify trade contractors that will be invited to submit bids on subtrade work; and
- a statement indicating that the responders' names are to be posted but that the responses will not be opened publicly. M.G.L. c. 149A, § 8(c).

M.G.L. c. 149A, § 8(c).

[78] We recommend that you include the estimated value of the subcontract because, as will be discussed, trade contractors responding to the RFQ are required to submit a commitment letter for performance and payment bonds in the amount of 110 percent of the estimated trade contract value.

[79] If space considerations make it difficult to include this information in the public notice, we recommend that you reference this information instead. However, essential information such as the submission requirements and project description should be included in the public notice as well as the RFQ.

The RFQ must require only the specific information prescribed by M.G.L. c. 149A and must identify the specific point allocation for each category and subcategory of information. Within each category, the public agency may use its discretion in allocating points among subcategories, consistent with the total points for each category. The evaluation criteria and corresponding point ratings required by M.G.L. c. 149A are as follows:

1. **Management experience (50 points; minimum of 25 points required for approval).**
    - Business owners: Name, title and years with firm of the owner(s) of the business.
    - Management personnel: Names, title, education and construction experience, years with firm and list of projects completed by all management personnel.
    - Similar project experience: Project name(s), description of scope, original trade contract sum, final trade contract sum with explanation and date completed of similar projects.
    - Terminations: A list of any projects on which the trade contractor was terminated or failed to complete the work.
    - Lawsuits: A list of commercial lawsuits in which the trade contractor is a defendant or defendant-in-counterclaim with regard to construction contracts within the last three years. The lawsuits shall not include any actions that primarily involve personal injury or workers' compensation claims, or where the sole cause of action involves the trade contractor's exercise of its rights for direct payment under M.G.L. c. 30, § 39F.
    - Safety record: The three-year history of the trade contractor's workers' compensation experience modifier.
2. **References (30 points; minimum of 15 points required for approval).**
    - Client references: A list of client references for all projects listed under "similar project experience" (as described in the third bullet under "management experience"), including the project name, client's name, address, telephone and fax numbers, and contact person.
    - Credit references: A list of a minimum of five credit references, including the telephone and fax numbers of contact persons from key suppliers, vendors and banks.
    - Public project record: A list of all public building construction projects subject to M.G.L. c. 149 completed during the past three years, including the client's name, address, telephone and fax numbers, and contact person for each project.

3. **Capacity to complete projects (20 points; minimum of 10 points required for approval).**
    - Annual revenue for the prior three fiscal years. (Note that the RFQ may not require trade contractors to submit financial statements.)
    - Revenue under contract for the next three fiscal years.
4. **Mandatory commitment letter (no points are assigned).** The trade contractor must submit a mandatory commitment letter for payment and performance bonds in the amount of 110 percent of the estimated trade contract value, issued by a surety company licensed to do business in the Commonwealth and whose name appears on United States Treasury Department Circular 570.

M.G.L. c. 149A, § 8(e).

If your jurisdiction has received a notice to proceed from our Office, each response must contain a Certificate of Eligibility issued by DCAMM and a completed Update Statement.

Each response to the RFQ must be signed under pains and penalties of perjury.

Step 3: Evaluate responses and prequalify trade contractors receiving a point score of 70 or higher.

The trade contractor prequalification committee will review and score the responses using the evaluation criteria listed above. All trade contractors receiving a point score of 70 or higher must be prequalified to bid. M.G.L. c. 149A permits five points to be added to the total score of each minority business enterprise and women business enterprise, consistent with your jurisdiction's MBE/WBE participation goals for the project. M.G.L. c. 149A, § 8(a).

After the trade contractor prequalification process has been completed, you are required to notify all prequalified trade contractors that they have received approval to bid and to inform them of the schedule for the request for bids (RFB) process, discussed below. You must make each trade contractor's score available to the trade contractor itself, but M.G.L. c. 149A states that the score will not be a public record and will not be open to public inspection "to the fullest extent possible under the law." M.G.L. c. 149A also provides that the decision of the trade contractor prequalification committee shall be final and not subject to appeal except on the grounds of fraud or collusion. M.G.L. c. 149A, § 8(f).

Step 4: Prepare the RFB and distribute it to prequalified trade contractors.

The next step is to send each prequalified trade contractor the RFB, which must include the following information:

- the date, time and place for submission of bids;
- fully detailed drawings and specifications by class of work in accordance with the filed sub-bid categories set forth in M.G.L. c. 149, § 44F(1);[80]
- a detailed definition of the trade contractor's scope of work, including alternates and allowances, if any, within that scope of work;
- a project schedule indicating the planned sequence and duration of each trade contractor's work;
- a list of prequalified trade contractors;
- a trade contractor bid form requiring a listing of price, addenda, alternates and allowances, if any, for the trade work; certification that the trade contractor will perform the complete trade work with employees on its own payroll except for work customarily performed by sub-trade subcontractors within the trade; and the names of all sub-trade subcontractors to be used if awarded the trade contract and each sub-trade contract sum;
- an affidavit stating that all sub-trade subcontractors named on the bid form have been prequalified by the trade contractor using criteria similar to the criteria for the prequalification of trade contractors;
- an affidavit of tax compliance;
- an affidavit of prevailing wage compliance pursuant to M.G.L. c. 149, §§ 26-27;
- an affidavit of non-collusion;
- a requirement for the bidder to furnish a five percent bid bond from a surety company licensed to do business in the Commonwealth and whose name appears on U.S. Treasury Department Circular 570;[81]
- the budget for the project and the budget amount for the trade contract scope of work as provided in the project GMP, if available, or as provided in the most recent project budget;
- a trade contractor agreement form as set forth in M.G.L. c. 149A, including all exhibits; and

[80] The materials specifications must conform to the requirements for full competition contained in M.G.L. c. 30, § 39M (discussed in Chapter IV of this manual in the section entitled "Material Specifications").

[81] The bid bond must be returned to the bidder if the bidder is not selected for the trade contract. M.G.L. c. 149A, § 8(g)(11).

- a statement that the bidder must furnish a Certificate of Eligibility in the appropriate trade and a completed Update Statement.

M.G.L. c. 149A, § 8(g); 801 CMR 8.11.

Step 5: Receive, open, and review trade contract bids.

Trade contractors must submit their bids in accordance with the requirements contained in the RFB package. The bids must be opened publicly by your jurisdiction. Any bid that does not include the required bid bond or affidavits or that is incomplete, conditional, obscure or contains additions not required in the RFB must be rejected. In addition, DCAMM regulations require you to review the information in the Update Statements and the contents of the DCAMM certification files for all trade contractors under consideration. 801 CMR 8.11. You have the right to reject the bid of a trade contractor based on your determination that the trade contractor is not a responsible bidder.[82]

Step 6: The CM at risk firm executes the trade contractor agreement.

Each trade contract must be awarded to the lowest prequalified bidder in that category whose bid has not been rejected under Step 5 above. However, if your jurisdiction receives fewer than three responsive bids and the lowest bid exceeds the estimated cost of the trade contract work, the CM at risk firm must attempt to negotiate an acceptable price with the lowest prequalified bidder. If the CM at risk firm is unsuccessful in doing so, the CM at risk firm must terminate negotiations with the lowest prequalified bidder and initiate negotiations with the second-lowest prequalified bidder. If the CM at risk firm is unable to negotiate an acceptable price for the trade contract with either the lowest or the second-lowest prequalified bidder, the CM at risk firm must then solicit additional bids for the work on behalf of and with the consent of your jurisdiction. In soliciting these additional bids, the CM at risk firm must use the procedures required by M.G.L. c. 149A for selecting subcontractors that are not trade contractors on the CM at risk project. These subcontractor selection procedures are discussed later in this section.

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[82] See, for example, *In re: Middle and High School Project, Town of Rockland*, AGO BLB Op. 3/23/11. www.bpd.ago.state.ma.us/

The selected trade contractor must return the signed trade contractor agreement to the CM at risk firm within ten business days of receiving the trade contractor agreement from the CM at risk firm. Along with the executed trade contractor agreement, the trade contractor must provide the CM at risk firm with performance and payment bonds in the full amount of the contract and insurance certificates required by the trade contractor agreement.[83] M.G.L. c. 149A, § 8(i).

Procuring Other Subcontracts Estimated to Cost More Than $20,000

The CM at risk firm is responsible for managing the procurement of subcontracts that are not trade contracts, in collaboration with your jurisdiction, when those subcontracts are estimated to cost more than $20,000. The CM at risk firm is first required to draw up a list of the required qualifications for each subcontract and to select three subcontractors that meet the qualifications. The CM at risk firm then submits the required qualifications and list of three subcontractors to your jurisdiction for approval. You are allowed to eliminate subcontractors or to add subcontractors to the list, provided that any subcontractor added to the list is acceptable to the CM at risk firm.

After your jurisdiction has approved the list of subcontractors for a subcontract, the CM at risk firm invites bids from the approved subcontractors. The bids must be based on detailed bidding information developed by the CM at risk firm. For each subcontract, the CM at risk firm selects a subcontractor and presents the bids and the selection decision(s) to your jurisdiction, along with a written explanation of the reason for the subcontract award. M.G.L. c. 149A, § 8(j).

For subcontracts estimated to cost $20,000 or less, the CM at risk firm may use any subcontractor selection method that has been approved by your jurisdiction. M.G.L. c. 149A, § 8(j).

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[83] The trade contractor agreement requires the trade contractor, upon execution of the agreement and before commencing any work, to provide the CM at risk firm with "evidence of workers' compensation insurance as required by law and evidence of public liability and property damage insurance of the type and in limits required to be furnished to the Public Agency by the Construction Management at Risk Firm." M.G.L. c. 149A, § 8(k).

Undertaking Construction Work Before Execution of the GMP Amendment

M.G.L. c. 149A sets forth the specific conditions under which you may undertake portions of the construction work before your jurisdiction has executed the GMP amendment to the contract with the CM at risk firm. For any such work, you must execute a separate amendment to your contract with the CM at risk firm detailing the scope of the fast-tracked work and dollar amount of the amendment, which must include the cost of construction, the general conditions and any additional fee to be paid to the CM at risk firm. Also, any work performed before the GMP amendment is executed is subject to the trade contractor selection process discussed earlier in this chapter. You should require the CM at risk firm to select the nontrade subcontractors using the selection procedures for nontrade subcontractors discussed above.

If you undertake construction work under such a contract amendment and subsequently fail to negotiate a GMP amendment with the CM at risk firm, any trade contracts between the CM at risk firm and trade contractors for work scheduled to begin before execution of the GMP amendment may be assigned to your jurisdiction or to another CM at risk firm designated by your jurisdiction without the consent of the trade contractors. In this case, your jurisdiction or the designated CM at risk firm and the trade contractors will be bound by the terms of the trade contractor agreements. M.G.L. c. 149A, § 7(b)(3).

CM at risk projects are subject to the statutory provisions that apply to other public construction contracts in Massachusetts governing:

- Payment of prevailing wages. M.G.L. c. 149, §§ 26-27D.
- Payment bonds. M.G.L. c. 149, § 29.
- Prohibition on subcontractor indemnification. M.G.L. c. 149, § 29C.
- Workers' compensation insurance. M.G.L. c. 149, § 34A.
- Subcontractor rights to payment, including direct payment. M.G.L. c. 30, § 39F.
- Finality of decisions on construction contracts. M.G.L. c. 30, § 39J.
- Rights of contractors to payment. M.G.L. c. 30, § 39K.
- Equitable contract adjustments for differing site conditions. M.G.L. c. 30, § 39N.

- Delays and suspensions by owner and additional costs for contractors and subcontractors. M.G.L. c. 30, § 39O.
- Timing of owner decisions. M.G.L. c. 30, § 39P.
- Contractor record-keeping. M.G.L. c. 30, § 39R.[84]
- Labor harmony and OSHA training certifications. M.G.L. c. 30, § 39S.

Awarding authorities considering the CM at risk option should consult M.G.L. c. 149A and our Office's website at www.mass.gov/ig for additional information on CM at risk project requirements. Our Office's 2009 report, *Experience of Public Agencies With Construction Management at Risk Under M.G.L. c.149A*, is also available at the same website.

Evaluating the CM at Risk Firm and the Trade Contractors

An awarding authority must complete a standard contractor evaluation form for the CM at risk firm and all trade contractors on a CM at risk project undertaken under M.G.L. c. 149A. 810 CMR 8.00. The evaluation form contains written comments as well as numerical ratings reflecting the performance of the CM at risk firm or the trade contractor on the project. The standard contractor evaluation form may be downloaded from the DCAMM website at www.mass.gov/dcamm.

M.G.L. c. 149, § 44D, provides qualified immunity to individuals responsible for completing contractor and subcontractor evaluations on behalf of public owners. If a contractor initiates a lawsuit in response to a completed evaluation, the awarding authority is required to provide legal representation and indemnification for the individual completing the evaluation on behalf of the awarding authority.

Under DCAMM regulations, the OPM is required to complete the required evaluations pertaining to all building contracts for which an OPM is required. 810 CMR 8.02, 8.09. An awarding authority or OPM may seek input from the general contractor in evaluating a subcontractor's performance. However, the awarding authority or its representative must complete and sign the evaluation form. 810 CMR 8.09.

The awarding authority must also certify the accuracy of the contents of each completed evaluation form and may not negotiate the contents of the evaluation form or the project

[84] See M.G.L. c. 149A, § 10.

rating with the CM at risk firm or trade contractor, or its representative, for any reason. 810 CMR 8.02, 8.09. The completed evaluation is then sent to DCAMM for use in deciding whether to certify the CM at risk firm or the trade contractor on future public building projects. A copy of the completed evaluation form must also be mailed to the CM at risk firm or trade contractor, who has 30 days in which to submit a written response to DCAMM. M.G.L. c. 149, § 44D(7).

When the project is approximately 50 percent complete, you are required to provide the CM at risk firm with a preliminary, informational, written evaluation of the CM at risk firm's performance on the project. Within 70 calendar days of project completion, your jurisdiction must submit to DCAMM a properly completed standard contractor evaluation form for the CM at risk firm.

Your jurisdiction must also submit to DCAMM a properly completed standard contractor evaluation form for each trade contractor on the project within 90 days of contract completion or termination. Although you are not required to provide a preliminary, informational evaluation to each trade contractor when the project reaches the 50 percent completion stage, we strongly recommend that you do so.

Optional Design-Build Delivery Method for Public Works Construction Contracts Estimated to Cost $5 Million or More

On a design-build project, the owner selects and executes a single contract with a single entity (*e.g.*, a design-build firm, joint venture or contractor that subcontracts with a designer) to design and construct the project. Thus, design and construction are combined into a single stage, with no separate bid for construction based on complete plans and specifications. Instead, design-build contracts are procured based on a scope of work statement and performance requirements.

Contracting for project design and construction from a single design-build entity enables construction schedules to be accelerated by beginning construction work before the design is complete and eliminating the time required to solicit competitive construction bids. This contractual arrangement also enables single-point accountability for the project and because the designer is a member of the contractor's team, facilitates collaboration and communication between the designer and the contractor.

However, because the designer represents the design-build entity rather than the owner on a design-build project, the owner cannot rely on the designer to detect and report construction defects or otherwise act on behalf of the owner. In other words, the designer is not the owner's agent and has no responsibility for protecting the owner's interests.

Obtaining Approval to Use Design-Build

Public awarding authorities are required to obtain the prior approval of our Office before using design-build for a public works project. The Massachusetts Department of Transportation Highway Division, Massport and the MWRA are exempt from the requirement to obtain prior approval from our Office for design-build contracts. However, these exempt agencies are required to submit their design-build procedures to our Office for review and approval on an annual basis.

To receive approval from our Office, your application must demonstrate the following:

- the awarding authority has authorization from its governing body to enter into a design-build contract;
- the awarding authority has the capacity, a plan and procedures in place, and approval by the governing body when appropriate, to effectively procure and manage a design-build entity for the specific project;
- the awarding authority has procedures in place to ensure fairness in competition, evaluation and reporting of results in the procurement process;
- the public works project has an estimated construction value of $5 million or more; and
- the awarding authority has determined that the use of design-build is appropriate for the public works project and has stated in writing the reasons for the determination.

M.G.L. c. 149A, § 16(a).

Our Office has issued *Procedures Relative to Receiving a Notice to Proceed to Use Design-Build Services*. This document, which is available at www.mass.gov/ig, contains the Design-Build Application to Proceed as well as detailed instructions for completing the application.

Owner's Representative Requirement

M.G.L. c. 149A requires you to obtain the services of an owner's representative if the design-build contract is a "major contract," defined as "a contract by which the commonwealth or any of its public agencies is to procure the construction of a highway, railway, bridge, tunnel or aviation facility or any component thereof and for which the certified estimate of cost exceeds $50,000,000." M.G.L. c. 149A, §15½(a). The owner's representative provides professional project oversight, conducts peer reviews of engineering, serves as the primary manager of cost recovery and value engineering, and files annual reports on the project with our Office, the Secretary of Transportation, the House and Senate chairs of the joint committee on transportation and the Office of the State Auditor.

Before engaging an owner's representative, the agency or authority must prepare an estimate of the anticipated total cost of the owner's representative services. The owner's representative must be selected before the award of any major contract because any major contract awarded before the selection of an owner's representative is "null and void as against public policy." M.G.L. c. 149A, § 15½(g).

The owner's representative must be a registered engineer with at least five years of experience in the construction and supervision of construction "of the type which is the subject of the pertinent major contract in nature, scope and complexity." M.G.L. c. 149A, § 15½(a). The owner's representative may be an employee of the agency or authority or it may be a contracted individual. If the agency or authority plans to contract with the owner's representative, it must select the owner's representative using a documented process that is competitive and evaluates qualifications and experience.

To this end, the owner's representative must certify in writing under the pains and penalties of perjury that the owner's representative's sole responsibility is to the Commonwealth and the agency. The owner's representative must be independent of the designer, general contractor and any subcontractor on the project. The owner's representative is explicitly subject to the requirements of M.G.L. c. 268A, the Commonwealth's conflict of interest law.

Procuring the Design-Build Contract

M.G.L. c. 149A requires you to select the design-build entity by prequalifying and soliciting proposals from design-build entities. The major steps in the process are as follows:

1. Contract with or assign a design professional.
2. Solicit letters of interest from design-build entities.
3. Prepare the RFQ for design-build services.
4. Develop a scope of work statement defining the project.
5. Develop and issue a draft RFP (optional).
6. Distribute the RFQ.
7. Designate individuals responsible for evaluating responses to the RFQ.
8. Evaluate and rate the responses, and shortlist at least two design-build entities.
9. Prepare the RFP and distribute it to the prequalified design-build entities.
10. Evaluate the proposals, negotiate with the selected proposer and award the contract.
11. Execute the contract and notify the unsuccessful design-build entities.

Step 1: Contract with or assign a design professional.

You are required to contract with or assign a design professional[85] to provide technical advice and professional expertise to your jurisdiction during the selection process. If you contract for these services, you are required to select the design professional in accordance with M.G.L. c. 7C, §§ 44-57, the designer selection law. (The procurement process required by the designer selection law is discussed in Chapter II of this manual.) This design professional is ineligible to participate in any way as a member of any design-build entity competing for the contract. You are required to contract with or assign the design professional before you issue the RFQ discussed in Step 3 below, and you must also use the services of the design professional for the duration of the design-build selection process. M.G.L. c. 149A, § 18. You may also choose to expand the design professional's role by, for example, assigning the design professional to serve as your OPM during the design-build contract period. The design professional

[85] M.G.L. c. 149A, § 15, states that "design professional" has the same meaning as "designer," as defined in M.G.L. c. 7, § 38A½, which is now M.G.L. c. 7C, § 44.

that you select should be familiar with and experienced in the design-build delivery method.

Step 2: Solicit letters of interest from design-build entities.

You are required to advertise for letters of interest in a newspaper of general circulation in the area in which the project is located and in the *Central Register* not less than two weeks before the deadline for submitting the letters of interest. M.G.L. c. 149A, § 17(b). The public notice and solicitation must include the following information:

- the time and date for receipt of letters of interest;
- the address of the office to which the responses are to be delivered;
- the time frame for your jurisdiction's response to the letters of interest;
- a general description of the project, including the estimated construction cost and the schedule for completion of the construction work;
- the evaluation criteria that will be used to identify qualified design-build entities; and
- a statement indicating that a RFQ will be used to identify qualified design-build entities to submit proposals for the design-build contract.

M.G.L. c. 149A, § 17(a).

Step 3: Prepare the RFQ for design-build services.

The RFQ, which you will provide to all design-build entities submitting letters of interest, must solicit the following information from each "major participant," which M.G.L. c. 149A defines as a private entity that would have a major role in the design or construction of the project as a member of the design-build entity:

- work experience on projects similar in size and scope for the past three years;
- any terminations from work or failure to complete work in the past three years;
- any lawsuits filed against any of the major participants within the past three years;
- any prior business record of the officers or principals of the major participants for the past three years;
- the safety record of the major participants for the past three years;
- a complete public project record for the three years preceding the RFQ response;

- references, including references from previous clients, bank references and surety references;
- bonding capacity, as evidenced by a commitment letter from an approved surety; and
- any other performance measures that will be used as a basis for evaluating responses to the RFQ.

M.G.L. c. 149A, §§ 15, 17(c), 17(d).

The RFQ must state the date by which responses to the RFQ are due, and should also specify the time and place for submission of responses. You may not accept late responses.

Step 4: Develop a scope of work statement defining the project.

With the assistance of the design professional, you are required to develop a scope of work statement that defines the public works project and provides prospective design-build entities with sufficient information regarding your jurisdiction's objectives and requirements. The scope of work statement must include criteria and preliminary design, general budget parameters and general schedule requirements. M.G.L. c. 149A, § 18.

Step 5: Develop and issue a draft RFP (optional).

After the scope of work statement has been completed, your jurisdiction may elect to develop a draft RFP and issue the draft RFP at the same time and in the same manner as the issuance of the RFQ. Design-build entities responding to the RFQ may simultaneously submit written comments to your jurisdiction regarding the draft RFP. Your jurisdiction has the sole discretion to decide whether to incorporate any of these comments into the final RFP issued to prequalified design-build entities.

Step 6: Distribute the RFQ.

You must provide the RFQ to every design-build entity that submitted a letter of interest.

Step 7: Designate individuals responsible for evaluating responses to the RFQ.

The individuals you designate to evaluate the responses must have design-build experience. M.G.L. c. 149A, § 17(d).

Step 8: Evaluate and rate the responses, and shortlist at least two design-build entities.

The responses submitted by design-build entities must include all information required by the RFQ. The designated evaluators are required to evaluate the responses solely on the basis of the information solicited by and evaluation criteria contained in the RFQ. All information received in the responses must be investigated and verified. "All financial information, trade secrets or other information customarily regarded as confidential business information shall not be deemed to be public information and shall remain confidential to the extent permissible under current law." M.G.L. c. 149A, § 17(e).

The evaluators will rate each response and prepare written evaluations that specify in writing:

- for each evaluation criterion, a rating of each response as advantageous, not advantageous or unacceptable, and the reasons for the rating; and
- a composite rating of each response as advantageous not advantageous, or unacceptable, and the reasons for the rating.

M.G.L. c. 149A, § 17(d).

Design-build entities whose responses received a composite rating of advantageous will be eligible to receive the RFP for design-build services. Your jurisdiction may select any number of design-build entities to receive the RFP, but if you select fewer than two, you are required to readvertise the contract and restart the RFQ process. M.G.L. c. 149A, § 17(f).

Step 9: Prepare the RFP and distribute it to the prequalified design-build entities.

The RFP must contain:

- **Detailed scope of work.** The scope of work must include design concepts; technical requirements; performance criteria; construction requirements; time constraints; and all other requirements that have been determined by your jurisdiction to have a substantial impact on the cost, schedule and quality of the project and the project development process. M.G.L. c. 149A, § 19(1).

- **Cost basis (low bid or best value) and submission requirements.** There are two options for evaluating design-bid proposals: low bid or best value.[86] (The evaluation procedures for each option are discussed below.) If the basis for award will be low bid, proposers will submit one complete, sealed proposal package that includes price information. If the basis for award will be best value, proposers must simultaneously submit two separate, sealed proposals: a sealed technical proposal and a sealed price proposal. M.G.L. c. 149A, § 20.
- **Evaluation criteria.** The RFP must include all criteria to be used in evaluating and scoring proposals. For best value procurements, the RFP must specify the scoring process, quality criteria and relative weight of each criterion. The RFP must also state the method by which an "overall value rating" for each proposal will be calculated. The overall value rating must be calculated either by dividing the total price by the quality score or by using another objective formula clearly detailed in the RFP. M.G.L. c. 149A, § 20(b)(2).
- **Bid deposit requirement.** The bid deposit must be in the form of a bid bond; cash; or certified check, treasurer's check or cashier's check issued by a responsible bank or trust company, payable to your jurisdiction, in the amount of five percent of the value of the bid. M.G.L. c. 149A, § 19(6).
- **Non-collusion certification.** Each design-build entity submitting a proposal must certify as follows on the proposal: "The undersigned certifies under penalties of perjury that this bid is in all respects bona fide, fair and made without collusion or fraud with any other person. As used in this paragraph, the word 'person' shall mean any natural person, joint venture, partnership, corporation or other business or legal entity." The statement must be signed by the person signing the proposal, accompanied by the company name. M.G.L. c. 149A, § 19(6).
- **Proposal submission information.** The RFP must specify the date by which proposals must be submitted to your jurisdiction; it should also specify the time and place for proposal submissions. M.G.L. c. 149A, § 19. For best value procurements, the RFP must also designate the time and place at which price proposals will be publicly opened after the evaluation of the technical proposals is completed. M.G.L. c. 149A, § 20(b)(2).

The RFP may provide for a stipend, or honorarium, to unsuccessful proposers that submit responsive proposals. If you choose to pay a stipend, the RFP should specify the terms under which the stipend will be paid. An awarding authority must pay a

[86] "If the scope of work requires substantial engineering judgment, the quality of which may vary significantly as determined by the awarding authority, then the basis of award shall be best value." M.G.L. c. 149A, § 20.

stipend to an unsuccessful proposer if the awarding authority uses ideas and designs contained in the unsuccessful proposer's proposal. M.G.L. c. 149A, § 19(6).

If you so choose, your RFP may provide for a process to review conceptual technical submittals from proposers before the full proposals are submitted for the purpose of identifying defects that would cause proposals to be rejected as nonresponsive. All such technical submittals and responses must be treated as confidential until after the contract is awarded. M.G.L. c. 149A, §§ 19(4)-19(5).

Step 10: Evaluate the proposals, negotiate with the selected proposer, and award the contract.

The evaluation procedures required by M.G.L. c. 149A depend upon whether the basis for the contract award will be low bid or best value.

Low bid. If the basis for the contract award is low bid, you will open the proposals publicly on the date and at the time and location stated in the RFP. You will then enter into non-fee negotiations with the responsible proposer submitting a responsive proposal at the lowest price. M.G.L. c. 149A, § 20(a).

Best value. If the basis for the contract award is best value, you are required to establish a selection committee that will first open, evaluate and score each technical proposal from a responsible proposer based on the quality criteria and using the relative weights contained in the RFP. The price proposals must remain sealed during this technical proposal evaluation process and the technical proposals must be treated as confidential.

After the technical proposals have been evaluated, your jurisdiction is required to open the sealed price proposals publicly at the place and time designated in the RFP. At this public opening, you are required to calculate the overall value rating for each proposal using the method detailed in the RFP. (See the previous Step 9.) You will then enter into good-faith negotiations with the responsible proposer offering the lowest price per quality score point. If two or more proposers have offered the same lowest price per quality score point, you will enter into good-faith negotiations with the responsible proposer that offered the lowest price. M.G.L. c. 149A, § 20(b)(2).

Step 11: Execute the contract and notify the unsuccessful design-build entities. After completing successful negotiations with the selected proposer, you will execute the design-build contract. You are required to provide written notification to all other proposers informing them that their proposals were not accepted. M.G.L. c. 149A, § 20(c).

Design-build projects are subject to the statutory provisions that apply to other public works construction contracts in Massachusetts governing:

- Payment of prevailing wages. M.G.L. c. 149, §§ 26-27D.
- Payment bonds. M.G.L. c. 149, § 29.
- Prohibition on subcontractor indemnification. M.G.L. c. 149, § 29C.
- Workers' compensation insurance. M.G.L. c. 149, § 34A.
- Subcontractor rights to payment, including direct payment. M.G.L. c. 30, § 39F.
- Payment of sums due contractors after completion of certain public works projects. M.G.L. c. 30, § 39G.
- Finality of decisions on construction contracts. M.G.L. c. 30, § 39J.
- Equitable contract adjustments for differing site conditions. M.G.L. c. 30, § 39N.
- Delays and suspensions by owner and additional costs for contractors and subcontractors. M.G.L. c. 30, § 39O.
- Timing of owner decisions. M.G.L.. c. 30, § 39P.
- Contractor record-keeping. M.G.L. c. 30, § 39R.[87]
- Labor harmony and OSHA training certifications. M.G.L. c. 30, § 39S.

Awarding authorities considering the design-build option should consult M.G.L. c. 149A and our Office's website at www.mass.gov/ig for additional information on the requirements for using this method to deliver public works projects.

[87] See M.G.L. c. 149A, § 20(d).

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Appendix A: Additional Sources of Assistance

This directory lists some major state agencies and offices that are involved in the public construction process. Feel free to contact them or visit their websites for further information and advice.

Board of Building Regulations and Standards (BBRS) The BBRS regulates state building code requirements; maintains current lists of Massachusetts certified producers of manufactured buildings and of licensed Third Party Inspection Agencies for Massachusetts Manufactured Building Program.	Board of Building Regulations and Standards One Ashburton Place, Room 1301 Boston, MA 02108 Telephone: 617-727-3200 Fax: 617-227-1754 Website: www.mass.gov/bbrs
Department of Energy Resources (DOER) The DOER provides technical assistance on energy management contracts to local jurisdictions and other governmental bodies other than state agencies and building authorities.	Department of Energy Resources 100 Cambridge Street, Suite 1020 Boston, MA 02114 Telephone: 617-626-7305 Fax: 617-727-0030 Website: www.mass.gov/doer
Department of Housing and Community Development (DHCD) DHCD oversees and funds certain public housing projects.	Department of Housing and Community Development 100 Cambridge Street, Suite 300 Boston, MA 02114 Telephone: 617-573-1100 Fax: 617-573-1285 Website: www.mass.gov/dhcd

Department of Labor Standards (DLS) The DLS administers the prevailing wage law; registered apprenticeship training programs; and other programs to protect workers' safety, health, wages, and working conditions.	Department of Labor Standards 19 Staniford Street, 2nd floor Boston, MA 02114 Telephone: 617-626-6975 Website: www.mass.gov/lwd/labor-standards
Designer Selection Board (DSB) The DSB issues standard application forms and guidelines for design contracts for building projects. The DSB also selects designers for state, county and Commonwealth charter school building projects	Designer Selection Board One Ashburton Place, Room 1004 Boston, MA 02108 Telephone: 617-727-4046 Fax: 617-727-0112 Website: www.mass.gov/dcamm/dsb Email: info@dsb@mass.mail.state.ma.us
Division of Capital Asset Management and Maintenance (DCAMM) DCAMM is responsible for overseeing major state public building projects, certifying general bidders and filed sub-bidders for public building projects, issuing emergency waivers to public awarding authorities and providing guidance and support to state agencies on maintenance and management strategies for the preservation of capital assets.	Division of Capital Asset Management and Maintenance One Ashburton Place, 15th Floor Boston, MA 02108 Telephone: 617-727-4050 Fax: 617-727-5363 Website: www.mass.gov/dcamm Email: info.dcamm@state.ma.us

Division of Professional Licensure (DPL) The DPL includes boards of registration that license professionals in numerous areas, including architects, registered engineers, professional land surveyors and landscape architects.	Division of Professional Licensure 1000 Washington Street, Suite 710 Boston, MA 02118 Telephone: 617-727-3074 Fax: 617-727-1944 Website: www.mass.gov/dpl
Massachusetts School Building Authority (MSBA) Through its grant program, the MSBA works with local communities to identify school facility needs, develop fiscally responsible and educationally appropriate solutions and create safe, sound, and sustainable learning environments.	Massachusetts School Building Authority 40 Broad Street, Suite 500 Boston, MA 02109 Telephone: 617-720-4466 Fax: 617-720-5260 Website: www.massschoolbuildings.org Email: webmaster@massschoolbuildings.org
Massachusetts Department of Transportation (MassDOT) MassDOT oversees, funds and prequalifies contractors for certain highway construction projects.	MassDOT 10 Park Plaza, Suite 4160 Boston, MA 02116 Telephone: 857-368-4636 Fax: 857-368-0601 Website: www.mass.gov/massdot
Office of the Attorney General The Fair Labor Division of the Office of the Attorney General interprets and enforces the public construction laws and the prevailing wage law.	Office of the Attorney General Fair Labor Division One Ashburton Place Boston, MA 02108 Telephone: 617-727-3465 Fax: 617-722-3066 Website: www.mass.gov/ago

Office of the Inspector General (OIG) The OIG investigates complaints and allegations of wrongdoing, conducts analyses of legislation, provides training to and certifies public purchasing officials through the MCPPO program, reviews M.G.L. c. 149A applications and procedures and interprets M.G.L. c. 30B.	Office of the Inspector General One Ashburton Place, Room 1311 Boston, MA 02108 Telephone: 617-727-9140 Fax: 617-723-2334 MCPPO: 617-722-8835 Hotline: 800-322-1323 Website: www.mass.gov/ig Email: MA-IGO-General-Mail@massmail.state.ma.us
Secretary of the Commonwealth The Secretary of the Commonwealth administers the Public Records Law and publishes the *Central Register* and the *Goods and Services Bulletin*.	Secretary of the Commonwealth Public Records Division One Ashburton Place, Room 1719 Boston, MA 02108 Telephone: 617-727-2832 Fax: 617-723-5851 Website: www.mass.gov/sec Email: pre@sec.state.ma.us *Central Register* *Goods and Services Bulletin* State Publications and Regulations Division One Ashburton Place, Room 1613 Boston, MA 02108 Telephone: 617-727-2831 Fax: 617-742-4822 Website: www.mass.gov/sec Email: regs@sec.state.ma

State Ethics Commission The State Ethics Commission administers and enforces financial disclosure and conflict of interest laws. It also renders written advisory opinions upon request.	State Ethics Commission One Ashburton Place, Room 619 Boston, MA 02108 Telephone: 617-371-9500 Fax: 617-723-5851 Website: www.mass.gov/ethics
Supplier Diversity Office (SDO) The SDO is responsible for establishing and monitoring an affirmative marketing program to ensure fair participation of minority and women business enterprises on state-assisted building projects.	Supplier Diversity Office One Ashburton Place, Room 1313 Boston, MA 02108 Telephone: 617-720-3300 Fax: 617-502-8841 Website: www.mass.gov/sdo

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Appendix B: Statutory Forms

Forms

Form for General Bid B-3

Form for Sub-Bid B-5

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FORM FOR GENERAL BID

To the Awarding Authority:

A. The Undersigned proposes to furnish all labor and materials required for _____(project) in _____, Massachusetts, in accordance with the accompanying plans and specifications prepared by _____ (name of architect or engineer) for the contract price specified below, subject to additions and deductions according to the terms of the specifications.

B. This bid includes addenda numbered _____

C. The proposed contract price is _____ dollars ($_____).

For alternate No._____ Add $_____; Subtract $_____

(Repeat preceding line for each alternate)

D. The subdivision of the proposed contract price is as follows:

Item 1. The work of the general contractor, being all work other than that covered by Item 2. $_____

Item 2. Sub-bids as follows: –

Sub-trade	Name of Sub-bidder	Amount	Bonds required, indicated by "Yes" or "No"
_____	_____	$_____	_____
_____	_____	$_____	_____
	Total of Item 2	$_____	

The undersigned agrees that each of the above named sub-bidders will be used for the work indicated at the amount stated, unless a substitution is made. The undersigned further agrees to pay the premiums for the performance and payment bonds furnished by sub-bidders as requested herein and that all of the cost of all such premiums is included in the amount set forth in Item 1 of this bid.

The undersigned agrees that if he is selected as general contractor, he will promptly confer with the awarding authority on the question of sub-bidders; and that the awarding authority may substitute for any sub-bid listed above a sub-bid filed with the awarding authority by another sub-bidder for the sub-trade against whose standing and ability the undersigned makes no objection; and that the undersigned will use all such finally selected sub-bidders at the amounts named in their respective sub-bids and be in every way as responsible for them and their work as if they had been originally named in this general bid, the total contract price being adjusted to conform thereto.

FORM FOR GENERAL BID – PAGE 2

E. The undersigned agrees that, if he is selected as general contractor, he will within five days, Saturdays, Sundays and legal holidays excluded, after presentation thereof by the awarding authority, execute a contract in accordance with the terms of this bid and furnish a performance bond and also a labor and materials or payment bond, each of a surety company qualified to do business under the laws of the commonwealth and satisfactory to the awarding authority and each in the sum of the contract price, the premiums for which are to be paid by the general contractor and are included in the contract price; provided, however, that if there is more than 1 surety company, the surety companies shall be jointly and severally liable.

The undersigned hereby certifies that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work; that all employees to be employed at the worksite will have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health Administration that is at least 10 hours in duration at the time the employee begins work and who shall furnish documentation of successful completion of said course with the first certified payroll report for each employee; and that he will comply fully with all laws and regulations applicable to awards made subject to section 44A.

The undersigned further certifies under the penalties of perjury that this bid is in all respects bona fide, fair and made without collusion or fraud with any other person. As used in this subsection the word “person” shall mean any natural person, joint venture, partnership, corporation or other business or legal entity. The undersigned further certifies under penalty of perjury that the said undersigned is not presently debarred from doing public construction work in the commonwealth under the provisions of section twenty-nine F of chapter twenty-nine, or any other applicable debarment provisions of any other chapter of the General Laws or any rule or regulation promulgated thereunder.

Date _____

_____
(Name of General Bidder)

By_____
(Name of Person Signing Bid and Title)

_____
(Business Address)

_____
(City and State)

FORM FOR SUB-BID

To all General Bidders Except those Excluded:

A. The undersigned proposes to furnish all labor and materials required for completing, in accordance with the hereinafter described plans, specifications and addenda, all the work specified in Section No. _____ of the specifications and in any plans specified in such section, prepared by _____ (name of architect or engineer) for _____ (project) in _____ (city or town), Massachusetts, for the contract sum of _____ dollars ($_____).

   For Alternate No._____; Add $_____ Subtract $___

   [Repeat preceding line for each alternate]

B. This sub-bid includes addenda numbered _____

C. This sub-bid

   ☐ may be used by any general bidder except:

   _____
   _____

   ☐ may only be used by the following general bidders:

   _____
   _____

   [To exclude general bidders, insert "X" in one box only and fill in blank following that box. Do not answer C if no general bidders are excluded.]

D. The undersigned agrees that, if he is selected as a sub-bidder, he will, within 5 days, Saturdays, Sundays and legal holidays excluded, after presentation of a subcontract by the general bidder selected as the general contractor, execute with such general bidder a subcontract in accordance with the terms of this sub-bid, and contingent upon the execution of the general contract, and, if requested so to do in the general bid by the general bidder, who shall pay the premiums therefor, or if prequalification is required pursuant to section 44D 3/4, furnish a performance and payment bond of a surety company qualified to do business under the laws of the commonwealth and satisfactory to the awarding authority, in the full sum of the subcontract price.

FORM FOR SUB-BID – PAGE 2

E. The names of all persons, firms and corporations furnishing to the undersigned labor or labor and materials for the class or classes or part thereof of work for which the provisions of the section of the specifications for this sub-trade require a listing in this paragraph, including the undersigned if customarily furnished by persons on his own payroll and in the absence of a contrary provision in the specifications, the name of each such class of work or part thereto and the bid price for such class of work or part thereof are:

Name	Class of Work	Bid price

[Do not give bid price for any class or part thereof furnished by undersigned.]

F. The undersigned agrees that the above list of bids to the undersigned represents bona fide bids based on the hereinbefore described plans, specifications and addenda and that, if the undersigned is awarded the contract, they will be used for the work indicated at the amounts stated, if satisfactory to the awarding authority.

G. The undersigned further agrees to be bound to the general contractor by the terms of the hereinbefore described plans, specifications, including all general conditions stated therein, and addenda, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the owner.

H. The undersigned offers the following information as evidence of his qualifications to perform the work as bid upon according to all the requirements of the plans and specifications: –

1. Have been in business under present business name _____ years.

2. Ever failed to complete any work awarded?_____

3. List one or more recent buildings with names of the general contractor and architect on which you served as a sub-contractor for work of similar character as required for the above-named building.

	Building	Architect	General Contractor	Amount of Contract
(a)				
(b)				
(c)				

4. Bank reference _____

FORM FOR SUB-BID – PAGE 3

I. The undersigned hereby certifies that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work; that all employees to be employed at the worksite will have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health Administration that is at least 10 hours in duration at the time the employee begins work and who shall furnish documentation of successful completion of said course with the first certified payroll report for each employee; and that he will comply fully with all laws and regulations applicable to awards of subcontracts subject to section forty-four F.

The undersigned further certifies under penalties of perjury that this sub-bid is in all respects bona fide, fair and made without collusion or fraud with any other person. As used in this subsection the word "person" shall mean any natural person, joint venture, partnership, corporation or other business or legal entity. The undersigned further certifies under penalty of perjury that the said undersigned is not presently debarred from doing public construction work in the commonwealth under the provisions of section twenty-nine F of chapter twenty-nine, or any other applicable debarment provisions of any other chapter of the General Laws or any rule or regulation promulgated thereunder.

Date_____

_____
(Name of Sub-bidder)

By _____
(Title and Name of Person Signing Bid)

_____
(Business Address)

_____
(City and State)

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Appendix C: Model RFP for Modular Construction

This appendix includes a model RFP that you may tailor to your jurisdiction's needs. Chapter VII of this manual contains additional information on procuring modular construction.

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Model Request for Proposals for Modular Building Construction

Part I. General Information

Pursuant to M.G.L. c. 149, § 44E(4), _____ requests proposals from qualified contractors for the design, prefabrication, site assembly/installation and all services required to complete and deliver _____ modular building units ready for use and occupancy.

[This section will include a description of the space needed, its function, minimum area, and any special requirements. This section will also refer to the program, which should be appended to the RFP.]

All proposals are to be submitted no later than the deadline stated in Part II, "Proposal Submission Requirements," and the non-price proposals will be opened at that time. Every proposal must be in two parts, submitted in two separate, clearly marked, sealed envelopes: 1) non-price proposal, and 2) price proposal, in accordance with all submission requirements set forth in Part II of this RFP. **Late proposals will not be accepted**.

Each proposal submitted in response to this RFP is subject to all of the contract terms set forth in Part V, "Contract Terms," and any contract awarded will incorporate all of these contract terms.

_____ will consider only responsive proposals from responsible contractors for a contract award. A responsive proposal is a proposal that complies with requirements stated in Part II and Part III of this Request for Proposals (RFP). A responsible contractor is a contractor that demonstrably possesses the skill, ability and integrity necessary to faithfully perform the work called for in this procurement.

Each responsive proposal from a responsible contractor will be evaluated solely according to the criteria set forth in Part IV of this RFP, "Evaluation Criteria." Each non-price proposal will be assigned a rating of *highly advantageous, advantageous, not advantageous* or *unacceptable* with respect to each criterion, and the reasons for each rating will be set forth in writing. A composite rating for each non-price proposal will be set forth in writing, along with the reasons for the rating. The evaluation committee will

determine the most advantageous proposal from a responsible and responsive offeror, taking into consideration the non-price proposal ratings and proposal price. If the contract is awarded to an offeror that did not submit the lowest price, the evaluation committee will set forth a written explanation of the reasons for the award.

In determining the most advantageous proposal, _____ shall give preference, other considerations being equal, first to modular buildings manufactured within Massachusetts, and second to modular buildings manufactured outside of Massachusetts but within the United States.

Proposals will not be opened publicly, but will be opened in the presence of one or more witnesses at the time stated below. The contents of proposals shall remain confidential, and shall not be disclosed to competing offerors until the completion of the evaluation or until the maximum time for acceptance, as stated below. At the opening of proposals, _____ shall prepare a register of proposals for public inspection.

An offeror may correct, modify or withdraw a proposal by written notice received in the office designated herein for proposal submission prior to the time set for the opening of proposals. After the opening, a contractor may not change the price or any other provision of the proposal in a manner prejudicial to the interest of _____ or to fair competition. _____ shall waive minor informalities or allow the offeror to correct them. If a mistake and the intended offer are clearly evident on the face of the document, _____ shall correct the mistake to reflect the intended correct offer and so notify the offeror in writing, and the offeror may not withdraw the offer. _____ may permit an offeror to withdraw an offer if a mistake is evident on the face of the document but the intended correct offer is not similarly evident.

_____ reserves the right to cancel this procurement at any time before a contract is executed and approved, in which event _____ will reject all proposals received in response to this RFP.

_____ shall award a contract by written notice to the selected offeror by no later than _____, unless the time for contract award is extended by mutual agreement between _____ and the selected offeror.

Work is to start ___ days from the date of notification of award under this RFP, and the contractor's performance under the contract must be completed within ___ days from the date of notification of award.

All inquiries from prospective offerors concerning this RFP must be submitted in writing and addressed to _____. Inquiries must be received no later than _____. All responses to questions shall be in writing, will be simultaneously distributed to all recipients of the RFP, and will be made available to all interested parties.

Part II. Proposal Submission Requirements

[This section will include instructions for submitting a responsive proposal. It should list all documents and information that each proposal must contain.]

All proposals are to be delivered to _____, no later than ___ a.m. on _____. Non-price proposals will be opened at that time. _____ will select a contractor no later than _____. **Late proposals will not be accepted**.

[If a mandatory pre-proposal meeting and/or site visit is required, the following information must be provided.]

A pre-proposal meeting will be held at _____ on _____ at __a.m.

Attendance at this pre-proposal meeting is mandatory, and any proposal submitted by an offeror who was not present at this meeting will be rejected as nonresponsive.

All offerors are required to visit the site before submitting a proposal. Submission of a proposal constitutes an acknowledgement that the offeror has examined the site and is familiar with existing conditions.

Every proposal must be in two parts, submitted in separate, clearly marked, sealed envelopes: 1) non-price proposal; and 2) price proposal.

The following information must appear on each envelope:

Contractor's Name:
Project Name:
Either "Non-Price Submission" or "Price Submission"

The **non-price proposal** must consist of the following documents:

1. Current Certificate of Eligibility for [specify either Modular Construction/Prefab or General Building Construction].
2. Completed Contractor Update Statement.
3. Certification by the State Board of Building Regulations and Standards that the manufacturer of the modular buildings meets state building code requirements.
4. A set of detailed plans and specifications for the proposed modular buildings. Proposals must include all manufacturer's specifications governing the materials and equipment used in the modular buildings. The plans submitted with each proposal must provide all drawings necessary to portray to _____ all pertinent design details of the modular buildings and the passageways connecting them to existing buildings, including:
   - an installation plan showing the proposed accurate location of the modular buildings on the property; an indication of the locations on the modular buildings at which utility service connections are proposed; and locations of existing utility services to which the proposed modular buildings can be connected.
   - mounting plans and details.
   - architectural type floor plans.
   - factory plans and details of passageway elements and entrance ramps.
   - factory plans and details of manufacture of structural elements including floors, walls, and roof.
   - factory plans and details of service appurtenances including electrical, plumbing, HVAC, fire protection, and communications systems. Such details must include all light fixtures, outlets, switches, controls, smoke detectors, and location and capacity/rating of all equipment, fixtures, and appliances.
   - factory details of windows and doors.
   - factory finish details for wall finishes, floor finishes, exterior skin finish, and trim.
5. The complete terms of all warranties provided by the manufacturer or by the offeror relative to the design, manufacture, and installation of the modular buildings, including both general warranties and special warranties associated with particular components and equipment.
6. Certification of financial interest disclosure and of non-collusion, signed and submitted on Form _____ appended to this RFP.
7. Certification that the offeror is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed in the work, signed and submitted on Form _____ appended to this RFP.

8. Certification that all employees to be employed at the worksite will have successfully completed a course in construction safety and health approved by the United States Occupational Safety and Health Administration that is at least ten hours in duration at the time the employee begins work and shall furnish documentation of successful completion of such course with the first certified payroll report for each employee, signed and submitted on Form _____appended to this RFP.
9. Certification of compliance with the registration requirements for foreign corporations, under M.G.L. c. 30, § 39L, signed and submitted on Form _____ appended to this RFP.
10. Certification of compliance with state tax laws, reporting of employees and contractors, and withholding and remitting of child support, as required by M.G.L. c. 62C, § 49A, signed and submitted on Form _____ appended to this RFP.
11. Certification that the proposed modular buildings will be either (1) manufactured within Massachusetts; or (2) manufactured outside of Massachusetts but within the United States, or (3) manufactured outside of the United States, signed and submitted on Form _____ appended to this RFP.
12. Certification that the proposed modular building plans comply with all building codes.
13. Letter of transmittal, signed by an individual authorized to bind the offeror contractually, certifying that the offeror will, if accepted for a contract award, execute a contract in accordance with the terms of this proposals within ___ working days of the notice of award and will furnish to _____ a payment bond and a performance bond, each in the sum of the contract price, as required by M.G.L. c. 149, § 44E, signed and submitted on Form _____ appended to this RFP.
14. Certification that the offeror, if awarded a contract, will guarantee completion of all work required within ___ days from the date of notification of award, signed and submitted on Form _____appended to this RFP.

The **price proposal** must consist of the following documents:

1. A firm, fixed price that includes the furnishing of all materials, services, labor, performance and payment bonds, insurance and other costs incurred in the performance of the contract, signed by an individual authorized to bind the offeror contractually, and submitted on Form _____appended to this RFP.
2. A bid deposit, in the amount of ___% of the total contract price, in the form of _____ [if required by the awarding authority].

Part III. Purchase Description/Scope of Services

The contractor's responsibilities will include all of the following:

[This section will refer to the preliminary plans and specifications, which should be appended to the RFP. This section will also completely describe the scope of the work under the contract, which may include some or all of the following work:]

- design and fabrication of modular units in accordance with all specifications set forth in this RFP and all program requirements and applicable building codes.
- site design in accordance with all specifications set forth in this RFP and all program requirements and applicable building codes.
- all site clearance and site preparation work, including grading, tree and stump removal, and relocation of power lines and underground utilities, if required.
- all excavation work and construction of foundations in accordance with the plans and specifications set forth in this RFP.
- delivery of all modular units and construction materials to the construction site.
- acquisition of all permits required for the transportation of modular units from the factory to the construction site.
- acquisition of all required building permits.
- complete installation and assembly of modular units in accordance with all plans and specifications set forth in this RFP and all applicable building codes.
- connection of all electrical, telecommunication, water and sanitary service in accordance with the plans and specifications set forth in this RFP.
- acquisition of all use and occupancy permits.
- finish grading and removal of all debris from the site.
- all repairs and corrective work required by applicable warranties.

Specifications should be prepared with close attention to the RFP requirements and state building code requirements for:

- foundations, or concrete footings, anchoring and skirting.
- exterior stairs, entrance ramps and corridors.
- floors: joists, bottom board, insulation, subflooring, weight load capacity and floor coverings.
- walls: studs, insulation, composition, siding, weight load capacity, wind load capacity, ceiling height, sound proofing and interior finishes.
- roof: composition, sheathing, framing, weight load capacity, pitch, insulation, eaves and downspouts and ceiling materials.

- doors: number, size, construction of frames, materials, weatherstripping, and lockset and hardware details.
- windows: number, size, construction of frames, glazing, weatherstripping, screens, and lock and hardware details.
- HVAC systems: functional requirements for and description of heating, ventilation and cooling systems.
- plumbing: requirements for supply, waste, and vent lines, and fittings; size, type, and capacity of water heaters; and description of plumbing fixture requirements, including sinks, water closets and water fountains.
- electrical systems: service requirements, capacity and outlets.
- lighting: illumination requirements and type of fixtures.
- fire protection: alarms, smoke detectors and sprinkler systems.
- miscellaneous: communication systems, exit signs, tack boards, chalkboards and special features.

Part IV. Evaluation Criteria

Non-price proposals that meet all of the submission requirements in Part II of this RFP will be evaluated and rated solely on the basis of the evaluation criteria contained in this section. Each responsive non-price proposal will be assigned a rating for each of the following evaluation criteria:

[This section must include all criteria by which proposals will be evaluated. The following categories of criteria are recommended for a typical modular procurement.]

1. The offeror's qualifications to perform the work, to be evaluated on the basis of performance on past and current projects. Projects will be evaluated according to:
    - quality of work and compliance with construction specifications.
    - adherence to project budget.
    - compliance with project schedule.
2. The quality of the proposed manufactured building, to be evaluated on the basis of the specifications contained in the proposal and references from owners or users of similar buildings fabricated by the same manufacturer.

In evaluating each non-price proposal, the evaluation committee shall assign a rating of *highly advantageous, advantageous, not advantageous* or *unacceptable* for each of the criteria. The evaluation committee may identify any revisions necessary to change a

rating on a criterion from *unacceptable* to *advantageous* and shall specify such changes in writing.

The evaluation committee shall assign a composite rating of *highly advantageous, advantageous, not advantageous or unacceptable* for each non-price proposal. Each composite rating shall be justified in writing. After a composite rating has been assigned for each proposal on the basis of the evaluation criteria in this section, the evaluation committee shall review the price proposals and determine the most advantageous proposal, taking into consideration the non-price proposal ratings and the price. If the evaluation committee selects a proposal other than the lowest-priced proposal, the evaluation committee shall explain in writing why the added benefits of the proposal justify its higher price. The award of a contract to any offeror whose non-price proposal was rated *unacceptable* with respect to one or more criteria will be conditioned on the negotiation of the revisions recommended by the evaluation committee at no increase in the proposed price.

Part V – Contract Terms

[All contract terms and conditions must be included in the RFP. We recommend that your local attorney develop a standard modular construction contract for your jurisdiction, incorporating the contract provisions discussed earlier in this appendix. You may not negotiate material changes to substantive contract terms.]

Any contract awarded on the basis of this RFP will be subject to the contract terms in this section.

Appendix D: Code of Conduct for Public Employees

The Office of the Inspector General has developed the following Code of Conduct, which sets standards of conduct for public employees engaged in official business relationships. We recommend that public jurisdictions adopt the Code to preserve the integrity of business relationships and to maintain the highest level of public confidence in the impartial operation of government. You can obtain information and advice regarding the requirements of the Massachusetts conflict of interest law, M.G.L. c. 268A, at the website of the State Ethics Commission, www.mass.gov/ethics.

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CODE OF CONDUCT FOR PUBLIC EMPLOYEES

INTRODUCTION

The Massachusetts Office of the Inspector General has developed this Code for use by public agencies throughout the Commonwealth. Five major areas are addressed by this Code: gifts and gratuities, reimbursement of travel expenses, honoraria, testimonial and retirement functions, and groundbreaking and dedication ceremonies. This Code is not all-inclusive. It does not regulate every conceivable situation in which a public employee may be offered gifts or other items of monetary value. It does not address other activities prohibited by the conflict of interest law, such as bribery, participation in official matters affecting one's financial interests or those of one's family or business and misuse of one's official position. (Applicants for employment by the Commonwealth must disclose all persons who are related to the applicant who are also state employees.) Information and advice on the Massachusetts conflict of interest law, M.G.L. c. 268A, may be obtained from the State Ethics Commission at www.mass.gov/ethics. As used in this Code, "we" and "our" refer to the agency adopting this Code; "you" refers to the agency's employees or members.

revised August 2014

CODE OF CONDUCT

I. GIFTS AND GRATUITIES

A. General Restrictions

You may not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan or other item of monetary value from a person, public agency or private entity you know or have reason to know:

1. Has had, has, or is seeking to obtain contractual or other business or financial relations with us;

2. Conducts or is seeking to conduct business or other activities that are regulated or monitored by us; or

3. Has interests that may be or may give the reasonable impression of being substantially affected by the performance or nonperformance of your official duties.

Example: *You may not accept a restaurant lunch from a consultant employed by a firm under contract to us.*

Example: *You may not accept a Christmas gift from a vendor seeking business with us.*

Example: *You may not accept a ticket to a sporting event from an individual whose business we regulate.*

B. Exceptions

1. You may accept gifts in cases involving a family or personal relationship when the circumstances make clear that the relationship is the motivation for the gift.

2. You may accept nonalcoholic beverages, such as coffee or tea, from public or private entities.

3. You may attend and accept food and beverages at seasonal or celebratory functions, such as Christmas, birthday or retirement parties, hosted by public entities.

4. You may accept food and beverages in connection with attendance at working meetings held in the office of a public entity.

5. You may accept food and beverages in connection with attendance at widely attended meetings or gatherings held by a private trade or professional association in an office or other business setting when you are attending the meeting or gathering in your official capacity for informational, educational or other similar purposes.

Example: *You may accept a modest meal served in a restaurant function room in conjunction with an informational, widely attended meeting hosted by a professional association.*

Example: *You may not accept food and beverages at a hospitality suite hosted by one or more private firms.*

6. You may accept loans from banks or other financial institutions to finance proper and usual customer activities, such as home mortgage loans and automobile loans. If the bank or financial institution is an entity with which you have or might reasonably expect to have dealings in your official capacity, you must be able to demonstrate that the loan has been granted on current customary terms. You must also provide written disclosure of the loan to your supervisor. The previous sentence does not apply if your duties or anticipated duties with respect to the bank are limited to obtaining third-party records.

7. You may accept unsolicited advertising or promotional materials of nominal value.

Example: *You may accept an unsolicited, inexpensive promotional pen or calendar.*

Example: *You may not accept a leather portfolio.*

II. REIMBURSEMENT OF TRAVEL EXPENSES

A. General Restrictions

You may not accept reimbursement for travel expenses from a person or entity who falls within the scope of Section IA, above.

B. Exceptions

1. If you deliver a speech or participate in a conference, we may elect to accept reimbursement from the sponsor of the speech or conference for your actual and necessary travel expenses. In this case, we – not the sponsor – will pay or reimburse you in accordance with our travel policy, and bill the sponsor for the appropriate amount.

2. If we determine that employee travel is a necessary component of a vendor evaluation process, we may elect to require competing vendors to reimburse us for actual and necessary travel expenses incurred in connection with the evaluation. In this case, we – not the vendors – will pay or reimburse you in accordance with our travel policy. The publicly advertised request for proposals or bids must set forth our procedures for calculating and billing all competing vendors for the appropriate amounts.

III. HONORARIA

A. General Restrictions

You may not accept honoraria or other monetary compensation from an outside source in return for a public appearance, speech, lecture, publication or discussion unless all of the following conditions are met:

1. Preparation or delivery of the public appearance, speech, lecture, publication or discussion is not part of your official duties;

2. Neither the sponsor nor the source, if different, of the honorarium is a person or entity who falls within the scope of Section IA, above;

3. You do not use office supplies or facilities not available to the general public in the preparation or delivery of the public appearance, speech, lecture, publication or discussion; and

4. You do not take office time for the preparation or delivery of the public appearance, speech, lecture, publication or discussion.

Example: *You may accept an honorarium for a magazine article prepared outside working hours.*

Example: *You may not accept an honorarium for delivering a speech in your official capacity.*

B. Exceptions

1. You may accept awards, certificates or other items of nominal value given for a speech, participation in a conference, or a public contribution or achievement.

Example: *You may accept a framed certificate of appreciation.*

Example: *You may not accept an engraved pewter bowl.*

IV. TESTIMONIAL AND RETIREMENT FUNCTIONS

A. General Restrictions

1. You may not solicit contributions, sell tickets or otherwise seek or accept payment for a testimonial or retirement function, or any function having a similar purpose, held for yourself or any other employee, if the contributor is a person or entity who falls within the scope of Section IA, above, and the admission price or payment exceeds the actual per-person cost of food and beverages served at the function.

Example: *You may not offer or sell tickets to a testimonial dinner to contractors doing business with us if the ticket price includes a contribution toward a gift.*

2. You may not accept food, beverages or gifts at any testimonial or retirement function, or any function having a similar purpose, if such food, beverages or gifts are paid for or subsidized by a person or entity who falls within the scope of Section IA, above.

Example: *You may not accept a free admission to a retirement luncheon if the cost of your admission is paid, directly or indirectly, by one or more contractors doing business with us.*

Example: *You may not accept a retirement gift if the gift was paid for with the proceeds of tickets purchased by contractors doing business with us.*

B. Exceptions

None.

V. GROUNDBREAKING AND DEDICATION CEREMONIES

A. General Restrictions

1. You may not request or require any person or entity who falls within the scope of Section IA, above, to sponsor or contribute to any groundbreaking ceremony, dedication ceremony, or similar occasion involving a public works project. If we determine that a groundbreaking or dedication ceremony for a public works project serves a legitimate public purpose, we may elect to fund such a ceremony. We may plan and pay for the ceremony. Alternatively, we may include the ceremony-related services in the construction bid specifications for the public works project.

2. You may not accept food, beverages or gifts at any groundbreaking ceremony, dedication ceremony, or similar occasion involving a public works project if the food, beverages, or gifts are paid for or subsidized by a person or entity who falls within the scope of Section IA, above.

B. Exceptions

None.

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