

FREQUENTLY ASKED QUESTIONS REGARDING THE NEW PUBLIC CONSTRUCTION REFORM LAW*

Chapter 193 of the Acts of 2004, entitled "*An Act Further Regulating Public Construction In the Commonwealth*" was signed into law on July 19, 2004. Chapter 193 and a subsequent amendment to the law made by Chapter 507 of the Acts of 2004 changed public construction statutes, thresholds, and procedures to be followed for public construction projects. Highlights of the new law include: new higher thresholds for general and filed sub-bidders; DCAM certification requirements for filed sub-bidders; prequalification requirements for both general bidders and filed sub-bidders on certain public building projects; an owner's project manager requirement for certain projects; an MBE/WBE program requirement for state funded municipal projects; and a new statute, M.G.L. c. 149A, created to permit the use of the construction manager at risk alternative delivery method on larger public building construction projects. In addition, the new law permits the use of the design build construction delivery method for larger public works projects.

****PLEASE BE ADVISED THAT THE INFORMATION PROVIDED ON THIS WEBSITE WILL BE UPDATED REGULARLY. THEREFORE, PLEASE BE SURE TO CHECK THIS WEBSITE FREQUENTLY AND CONSULT WITH YOUR LEGAL COUNSEL FOR ADDITIONAL INFORMATION.***

GENERAL INFORMATION

1. When does the new public construction reform law take effect?

ANSWER: Chapter 193 of the Acts of 2004, the new public construction reform law, was signed into law on July 19, 2004. The new law is effective immediately, with the exception of Sections 18 and 27, pertaining to the new requirements for sub-bidder certification and alternative procurement delivery methods, respectively, which do not become effective until January 1, 2005 with sub-bidder Certificates of Eligibility and Update Statements required to accompany filed sub-bid submittals on January 1, 2006.

2. If I am an awarding authority and have already commenced or undertaken a public building construction project, will the new law apply to my project?

ANSWER: Depending on the status of your project, at least certain portions of the new law will apply to your project. You are advised to seek an opinion of your legal counsel to ensure that you are in compliance with the new requirements.

3. Where can I obtain a copy of the new law?

ANSWER: You can access a copy of the new law on the following link to The General Court of Massachusetts' website:

<http://www.mass.gov/legis/laws/seslaw04/sl040193.htm>

4. What are the most significant changes in the new law?

ANSWER: The reform law contains some of the most significant revisions to the public construction process in nearly a quarter century. Since it would be difficult to list all the changes here, we have listed the most significant changes. The reform law:

- increases the threshold requiring individual filed sub-bids for designated trade work from \$10,000 to \$20,000;
- increases the threshold for projects requiring filed sub-bids and DCAM contractor certification from \$25,000 to \$100,000;
- requires an owner's project manager for projects valued at \$1.5 million or more;
- requires DCAM certification of subcontractors submitting filed sub-bids after January 1, 2006;
- requires "prequalification" of general contractors and filed sub-bid subcontractors by awarding authorities (on a project-by-project basis) for all projects with estimated construction costs of \$10 million or more;
- provides awarding authorities with the option to utilize an owner initiated "prequalification" process for either or both general bidders and filed sub-bidders where estimated construction costs are \$100,000 or more, but less than \$10 million (prequalification is mandatory for \$10 million or more);
- filed sub-bid subcontractors must furnish payment and performance bonds on projects where prequalification is required or utilized by the awarding authority;
- requires municipal awarding authorities to incorporate an Affirmative Marketing Program with design and construction participation goals for

minority business enterprises and women business enterprises (MBE/WBE) on state assisted building projects;

- provides awarding authorities with the option to use CM at Risk on building projects over \$5 million (with the prior approval from the Office of the Inspector General) effective January 1, 2005;
- provides awarding authorities with the option to use Design Build on non-building public works projects estimated to cost \$5 million or more (with the prior approval of the Office of the Inspector General) effective January 1, 2005;
- modifies the procurement process for building projects with estimated construction costs of \$100,000 or less and separates them into three categories: less than \$10,000; \$10,000 to \$25,000; and \$25,000 to \$100,000;
- allows the designer on municipal projects who conducted the feasibility study to continue with the design of the project without mandatory peer review;
- requires municipalities to utilize the standard designer selection form issued by the Designer Selection Board ("DSB").

Please be advised that this is just a summary of some of the most significant changes in the law and you should always consult with your legal counsel for any specific questions regarding the changes implemented in Chapter 193.

5. How are smaller building construction project procurements estimated to cost \$100,000 or less conducted under the new law?

ANSWER: The procurement process for smaller building construction projects estimated to cost \$100,000 or less is divided into three (3) categories under the new law as follows:

- If the estimated building construction cost of the project is less than \$10,000 an awarding authority must seek no fewer than three written quotes and award the contract to the person offering the lowest written price quotation.
- If the estimated building construction project cost is not less than \$10,000 but is not more than \$25,000 the contract must be advertised via a public notification process for at least 2 weeks and an award

must be made to the responsible person offering the lowest price via written submission.

- If the estimated building construction project cost is not less than \$25,000 but is not more than \$100,000 an advertised sealed bid process must occur and award must be made to the lowest responsible and eligible bidder in accordance with M.G.L. c. 30, §39M.

For projects with estimated construction costs of less than or equal to \$100,000, DCAM certification is not required for either general contractors or filed sub-bidders.

6. Does the new law affect emergency waiver requests?

ANSWER: No, although the thresholds have changed for bidding of public building work, an awarding authority must still seek written approval of DCAM if any variance with the new bidding and/or advertising requirements is necessary because an extreme emergency exists involving the health, safety or security of persons or property.

7. Were there any changes to the procedure for the selection of a designer for municipal projects?

ANSWER: Yes. The designer who conducted the feasibility study for a municipality may now continue with the design of the project. An independent review of a feasibility study is now optional rather than mandatory. The Designer Selection Board ("DSB") has developed a standard designer selection form to be used by all cities, towns, and public agencies not within the jurisdiction of the designer selection board. A copy of this form is available at the following link: http://www.mass.gov/cam/DSB/fe_dselectboard_ct.html.

Also, be advised that for any municipal design project that includes funding provided by the Commonwealth, in whole or in part (such as reimbursements, grants, and the like), awarding authorities must have MBE and WBE goals incorporated into the design procurement which are consistent with the participation goals established by DCAM in consultation with SOMWBA.

8. What are the advertising or public notice requirements if I want to use the same designer for both the feasibility study and the final design of my building project?

ANSWER: Massachusetts General Laws, chapter 7, section 38D governs the advertising requirements for the procurement of design services and provides that "a description of the project, including the specific designer services sought and other information must be included in the public notice". If the scope of work specified in the advertisement for the feasibility study also states that the scope may include final design then you do not have to readvertise for the final design work if you elect to use the same designer. Otherwise, even if you plan to use the same designer for both the feasibility study and the final design, you will need to re-advertise.

9. What is "COMM-PASS" and how can we get access to it?

ANSWER: "Comm-PASS" is the acronym for Commonwealth's Procurement Access & Solicitation System located on the internet at <http://www.comm-pass.com/>. Over 2000 Massachusetts public awarding authorities utilize Comm-PASS to post public notice of their procurements on the internet. Awarding authorities have access to post their procurements on Comm-PASS FREE OF CHARGE upon completion of FREE training offered by the Commonwealth's Operational Services Division (OSD). You should contact OSD directly for information on coordinating training.

Access to Comm-PASS to review both current and closed solicitations is available free of charge to vendors and the public. By regularly reviewing Comm-PASS vendors desiring to do business with public entities in the Commonwealth are able to easily access information on potential projects as they are advertised. For a small annual subscription fee vendors that choose to subscribe can also get enhanced services such as instant notification when new postings are added to Comm-PASS for the types of procurements they are interested in.

10. What is an owner's project manager?

ANSWER: Under the new law, an "owner's project manager" is defined as "an individual, corporation, partnership, sole proprietorship, joint stock company, joint venture, or other entity engaged in the practice of providing project management services for the construction and supervision of construction of buildings." The new law requires awarding authorities to contract for the services of an owner's project manager prior to contracting for design services where the project is estimated to cost \$1.5 million or more. The owner's project manager must have certain minimum experience requirements and is prohibited

from having any affiliation with the designer, contractor, or any other party having an interest in the project. An agency or municipal employee may serve as the owner's project manager, providing he or she meets the required minimum qualifications.

DCAM has published guidelines pertaining to the role of the owners project manager on its website which are available at the following link:

http://www.mass.gov/cam/Creform/Own_PM_Guide.pdf

11. What is the process for selecting an owner's project manager?

ANSWER: While the new law provides that "[t]he public agency shall use a qualifications based selection process to procure the services of an owner's project manager," it does not provide any guidance on how that selection process should be conducted. Under the circumstances, it seems reasonable to assume that utilizing a qualifications based selection process consistent with the process defined in Chapter 7 sections 38A through 38O of the General Laws for the procurement of design services would be a sufficient manner in which to procure the owner's project manager services.

12. Does a public agency have to hire an "owner's project manager" for an ongoing building construction project of \$1.5 million or more?

ANSWER: It depends on what stage the project was in when the new law took effect on July 19, 2004. An awarding authority is not required to hire an owner's project manager if the project was already in the construction phase and the construction contracts were executed prior to that date.