

SENATE NO. 1847

AN ACT PROVIDING FOR REFORM IN PUBLIC CONSTRUCTION

*Be it enacted by the Senate and House of Representatives in General Court assembled,
And by the authority of the same, as follows:*

1 SECTION 1. Chapter Thirty of the General Laws is hereby amended by adding after Section
2 39M the following new section:

3 Section 39M1/2 Requirement of Independent Owner's Representative

4 (a) Definitions – The words defined herein shall have the meaning stated below whenever
5 they appear in this Section:

6 (1) “Major Contract” shall mean any contract by which the Commonwealth or any of its
7 public agencies is to procure the construction of a highway, railway, bridge, tunnel or aviation
8 facility or any component thereof and for which the certified estimate of cost exceeds fifty
9 million dollars.

10 (2) “Certified Estimate of Cost” shall mean a good-faith estimate, based on the best
11 available information and made by the most senior official in the agency responsible for the
12 contract, accounting for all expenses which could be reasonably foreseen, including but not

13 limited to those involving design, construction, management, acquisition and disposition of
14 rights of way, and contingency costs.

15 (3) “Owner’s Representative” shall mean an individual registered by the commonwealth as
16 a professional engineer, who has not less than five years of experience in the construction and
17 supervision of construction of the type which is the subject of the pertinent major contract in
18 nature, scope and complexity.

19 (4) “Cost-plus” basis shall mean a form of compensation in which a premium is added to the
20 actual cost of service to determine a total amount to be paid.

21 (5) “Oversight Cost Estimate” shall mean an estimate developed by the Commonwealth or
22 any agency thereof, prior to the engagement of an owner’s representative, of the anticipated
23 total cost of the services of that representative.

24 (b) Owner’s Representative Required – The Commonwealth or any agency or authority
25 thereof shall engage and maintain an owner’s representative to provide professional project
26 oversight with regard to any major contract. Said representative shall be an individual employed
27 by a corporation, partnership, sole proprietorship, joint stock company, joint venture or other
28 entity engaged in the practice of providing project management services for public construction
29 of the nature, scope and complexity which is the subject of the contract. A public agency may
30 designate an existing employee as owner’s representative subject to the conditions set forth in
31 subsection (c).

32 (c) Public Employee as Owner’s Representative – An existing employee of a public agency
33 may act as its owner’s representative if the following conditions are met:

34 (1) The employee meets or exceeds the qualifications set forth in subsection (b).

35 (2) The employee has suitable experience in the construction and supervision of projects of
36 the nature, scope and complexity of the relevant major contract.

37 (3) The employee and his employer have entered into a memorandum of understanding,
38 contract or other comparable document establishing the independence of the employee as being
39 equal to that of an owner's representative contracted from the private sector.

40 (d) Independence of Owner's Representative – An owner's representative shall certify in
41 writing, under the pains and penalties of perjury, that his sole responsibility shall be to the
42 Commonwealth and the agency which has retained his services. The independent owner's
43 representative shall be wholly independent of the designer, general contractor or any sub-
44 contractor involved in the public works project, and shall attest to such in a sworn statement.

45 (e) Conflicts of Interest Prohibited – An owner's representative shall be subject to the
46 provisions of Chapter 268A of the General Laws.

47 (f) Selection – An owner's representative shall be selected and retained prior to the award
48 of a major contract by any public agency, provided that such agency shall select and procure the
49 services of the owner's representative through a process which is documented in writing,
50 incorporates the evaluation of qualifications and experience, and is competitive in nature. Said
51 process shall utilize a system of written applications which shall be retained for inspection for a
52 period of not less than six months following the selection of an owner's representative. Said
53 process shall also be promulgated in writing by the Office of the Inspector General prior to the
54 commencement of any hiring process pursuant to this Section.

55 (g) Nullity of contract – Any major contract executed prior to the selection of an owner's
56 representative shall be null and void as against public policy. Prior to the award of any major

57 contract, the public agency seeking to award the contract shall certify in writing to the Inspector
58 General that an owner's representative has been selected.

59 (h) Release of Information – Any individual, organization or agency eligible to receive
60 information from an owner's representative shall do so in a form and manner approved and
61 promulgated by the Inspector General. Upon receipt of such request, the owner's representative
62 shall respond within sixty days. Such response shall either contain the requested information,
63 indicate why it is not available to the party requesting it, or indicate a date certain when the
64 information will be available, and that it will be provided upon that date.

65 A party denied information pursuant to this section may appeal such denial to the Inspector
66 General.

67 (i) The owner's representative shall conduct a peer review of engineering elements on its
68 projects.

69 (j) The owner's representative shall be the primary manager of cost recovery and value
70 engineering on the project.

71 (k) The owner's representative shall enjoy unfettered access to project work sites, documents,
72 and correspondence.

73 (l) The owner's representative shall file sworn reports on the project, due on December 31 of
74 each years in which their contract is in effect, to the Office of the Inspector General, the
75 Executive Office of Transportation, the Joint Committee on Transportation, and the Auditor of
76 the Commonwealth.

77 (m) The inspector general shall promulgate regulations governing the operations and actions of
78 owner's representatives, which shall include, but not be limited to, sanctions for misfeasance,

79 malfeasance and the failure to adhere to any contracts or agreements executed pursuant to this
80 section.

81 (n) Financial Remuneration – In no instances may an awarding agency execute a contract that
82 pays the independent owner’s representative on a cost-plus basis. Rather, awarding agencies
83 shall establish an oversight cost estimate for the work of an owner’s representative prior to the
84 hiring of the owner’s representative.

85 SECTION 2: Chapter One Hundred Forty-Nine A of the General Laws is hereby amended by
86 adding after Section 15, the following section(s):-

87 Section 15 ½: Requirement of Independent Owner’s Representative

88 (a) Definitions – The words defined herein shall have the meaning stated below whenever
89 they appear in this Section:

90 (1) “Major Contract” shall mean any contract by which the Commonwealth or any of its
91 public agencies is to procure the construction of a highway, railway, bridge, tunnel or aviation
92 facility or any component thereof and for which the certified estimate of cost exceeds fifty
93 million dollars.

94 (2) “Certified Estimate of Cost” shall mean a good-faith estimate, based on the best
95 available information and made by the most senior official in the agency responsible for the
96 contract, accounting for all expenses which could be reasonably foreseen, including but not
97 limited to those involving design, construction, management, acquisition and disposition of
98 rights of way, and contingency costs.

99 (3) “Owner’s Representative” shall mean an individual registered by the commonwealth as
100 a professional engineer, who has not less than five years of experience in the construction and

101 supervision of construction of the type which is the subject of the pertinent major contract in
102 nature, scope and complexity.

103 (4) “Cost-plus” basis shall mean a form of compensation in which a premium is added to the
104 actual cost of service to determine a total amount to be paid.

105 (5) “Oversight Cost Estimate” shall mean an estimate developed by the Commonwealth or
106 any agency thereof, prior to the engagement of an owner’s representative, of the anticipated
107 total cost of the services of that representative.

108 (b) Owner’s Representative Required – The Commonwealth or any agency or authority
109 thereof shall engage and maintain an owner’s representative to provide professional project
110 oversight with regard to any major contract. Said representative shall be an individual employed
111 by a corporation, partnership, sole proprietorship, joint stock company, joint venture or other
112 entity engaged in the practice of providing project management services for public construction
113 of the nature, scope and complexity which is the subject of the contract. A public agency may
114 designate an existing employee as owner’s representative subject to the conditions set forth in
115 subsection (c).

116 (c) Public Employee as Owner’s Representative – An existing employee of a public agency
117 may act as its owner’s representative if the following conditions are met:

118 (1) The employee meets or exceeds the qualifications set forth in subsection (b).

119 (2) The employee has suitable experience in the construction and supervision of projects of
120 the nature, scope and complexity of the relevant major contract.

121 (3) The employee and his employer have entered into a memorandum of understanding,
122 contract or other comparable document establishing the independence of the employee as being
123 equal to that of an owner’s representative contracted from the private sector.

124 (d) Independence of Owner's Representative – An owner's representative shall certify in
125 writing, under the pains and penalties of perjury, that his sole responsibility shall be to the
126 Commonwealth and the agency which has retained his services. The independent owner's
127 representative shall be wholly independent of the designer, general contractor or any sub-
128 contractor involved in the public works project, and shall attest to such in a sworn statement.

129 (e) Conflicts of Interest Prohibited – An owner's representative shall be subject to the
130 provisions of Chapter 268A of the General Laws.

131 (f) Selection – An owner's representative shall be selected and retained prior to the award
132 of a major contract by any public agency, provided that such agency shall select and procure the
133 services of the owner's representative through a process which is documented in writing,
134 incorporates the evaluation of qualifications and experience, and is competitive in nature. Said
135 process shall utilize a system of written applications which shall be retained for inspection for a
136 period of not less than six months following the selection of an owner's representative. Said
137 process shall also be promulgated in writing by the Office of the Inspector General prior to the
138 commencement of any hiring process pursuant to this Section.

139 (g) Nullity of contract – Any major contract executed prior to the selection of an owner's
140 representative shall be null and void as against public policy. Prior to the award of any major
141 contract, the public agency seeking to award the contract shall certify in writing to the Inspector
142 General that an owner's representative has been selected.

143 (h) Release of Information – Any individual, organization or agency eligible to receive
144 information from an owner's representative shall do so in a form and manner approved and
145 promulgated by the Inspector General. Upon receipt of such request, the owner's representative
146 shall respond within sixty days. Such response shall either contain the requested information,

147 indicate why it is not available to the party requesting it, or indicate a date certain when the
148 information will be available, and that it will be provided upon that date.

149 A party denied information pursuant to this section may appeal such denial to the Inspector
150 General.

151 (i) The owner's representative shall conduct a peer review of engineering elements on its
152 projects.

153 (j) The owner's representative shall be the primary manager of cost recovery and value
154 engineering on the project.

155 (k) The owner's representative shall enjoy unfettered access to project work sites, documents,
156 and correspondence.

157 (l) The owner's representative shall file sworn reports on the project, due on December 31 of
158 each years in which their contract is in effect, to the Office of the Inspector General, the
159 Executive Office of Transportation, the Joint Committee on Transportation, and the Auditor of
160 the Commonwealth.

161 (m) The inspector general shall promulgate regulations governing the operations and actions of
162 owner's representatives, which shall include, but not be limited to, sanctions for misfeasance,
163 malfeasance and the failure to adhere to any contracts or agreements executed pursuant to this
164 section.

165 (n) Financial Remuneration – In no instances may an awarding agency execute a contract that
166 pays the independent owner's representative on a cost-plus basis. Rather, awarding agencies
167 shall establish an oversight cost estimate for the work of an owner's representative prior to the
168 hiring of the owner's representative.

169 SECTION 3: This act shall take effect upon its passage

