

945 CMR: OFFICE OF THE INSPECTOR GENERAL

945 CMR 4.00: OWNER'S REPRESENTATIVE FOR MAJOR CONTRACTS UNDER M.G.L. c. 30, § 39M½

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4.01: Purpose

The purpose of 945 CMR 4.00 is to establish standardized policies and procedures for a) procuring the services of an Owner's Representative and b) the Owner's Representative's professional project oversight responsibilities on Major Contracts as defined in M.G.L. c. 30, § 39M½.

4.02: Scope and Applicability

945 CMR 4.00 applies to the Commonwealth and any of its public agencies or authorities when procuring 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 when entering into a contract or lease 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 and for which the certified estimate of cost exceeds \$50,000,000.

4.03: Computation of Time

Unless otherwise specifically provided by 945 CMR 4.00 or by other applicable law, computation of any time period referred to in 945 CMR 4.00 shall begin with the first day following the act which initiates the running of the time period. When the last day of the period is a Saturday, Sunday, or legal holiday or any other day on which the offices of the Commonwealth are closed, the period shall run until the end of the following business day.

4.04: Definitions

The following terms used in 945 CMR 4.00 have the meanings given in 945 CMR 4.04, unless the context clearly requires another meaning:

Applicant, an individual who submits a response to a Public Agency's solicitation for an Owner's Representative for a Major Contract.

Architectural and Engineering Services, as defined in M.G.L. c. 7C, § 58(a).

Certified Estimate of Cost, as defined in M.G.L. c. 30, § 39M½(a).

Cost Recovery, the process by which a Public Agency pursues the recovery of costs or damages it has incurred or will incur because of errors, omissions, or other deficient or unsatisfactory performance by design and construction management professionals in connection with a Major Contract.

Designer, an individual, firm, partnership, corporation, association or other legal entity that provides Architectural and Engineering Services.

Employee Owner's Representative, an individual, employed by a Public Agency, designated to act as that Public Agency's Owner's Representative on a Major Contract, who a) is registered by the Commonwealth as a professional engineer and has no fewer than 5 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; b) is engaged in the practice of providing project management services for public construction of the nature, scope and complexity which is the subject of the pertinent Major Contract; c) has entered into an Employer-Employee Oversight Services Agreement; and d) has met any additional qualifications specified by the Public Agency.

Employer-Employee Oversight Services Agreement, a memorandum of understanding, contract or other comparable document signed by a signatory of the Public Agency and the Employee Owner's Representative establishing the independence of the employee as equal to that of an Owner's Representative contracted from the private sector, the duties to be performed by the Employee Owner's Representative, and other terms and conditions.

Inspector General, the Office of the Inspector General of Massachusetts established pursuant to M.G.L. c. 12A.

Major Contract, as defined in M.G.L. c. 30, § 39M½(a).

Malfeasance, intentional conduct by an Owner's Representative that is wrongful or unlawful.

Misfeasance, reckless, negligent or improper performance of an otherwise lawful act by an Owner's Representative.

Oversight Services Contract, a contract for services between a Public Agency and a Private Sector Owner's Representative that is subject to 945 CMR 4.00 and M.G.L. c. 30, § 39M½.

Owner's Representative, as defined in M.G.L. c. 30, § 39M½(a).

Peer Review, additional Architectural and Engineering Services provided to a Public Agency to confirm that the key elements of the professional engineering and architectural design provided by the Designer are in conformance with the applicable standard of care.

Private Sector Owner's Representative, an individual selected to act as a Public Agency's Owner's Representative on a Major Contract, who a) is registered by the Commonwealth as a professional engineer and has no fewer than 5 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; b) is engaged in the practice of providing project management services for public construction of the nature, scope and complexity which is the subject of the pertinent Major Contract; c) has entered into an Oversight Services Contract; and d) has met any additional qualifications specified by the Public Agency.

Project, a major contract as defined in M.G.L. c. 30, § 39M½(a).

Public Agency, a department, agency, board, commission, authority, or other instrumentality of the Commonwealth or political subdivision of the Commonwealth, or two or more subdivisions thereof.

Value Engineering, a specialized design review technique aimed at analyzing the functions of a project and matching those functions with the most cost-effective design possible.

4.05: Owner's Representative Requirement for Major Contract

Prior to the award of a Major Contract under M.G.L. c. 30, § 39M½, a Public Agency must either select a Private Sector Owner's Representative pursuant to 945 CMR 4.06 or designate an Employee Owner's Representative pursuant to 945 CMR 4.07. A Major Contract shall be null and void if an Owner's Representative is not selected or designated prior to its execution.

4.06: Competitive Selection of a Private Sector Owner's Representative

If a project requires an Owner's Representative under M.G.L. c. 30, § 39M½, and the Public Agency chooses to utilize a Private Sector Owner's Representative, the Public Agency shall select the Private Sector Owner's Representative using a competitive, qualifications-based selection process that complies with this section.

(1) A Public Agency may procure a single Owner's Representative for a specific project or utilize a group procurement process to prequalify multiple Applicants as Owner's Representatives for a set period of time, not to exceed five years, during which each Owner's Representative may serve on one or more projects being undertaken by the Public Agency. A Public Agency that prequalifies multiple Owner's Representatives may assign a project to one of the prequalified Applicants without a further publicly advertised selection process.

(2) A Public Agency that chooses to utilize a Private Sector Owner's Representative must advertise a solicitation in the Central Register published by the Secretary of the Commonwealth no fewer than 14 days in advance of the deadline for submitting responses.

(3) The solicitation shall include, at a minimum, the following information:

(a) the deadline for submitting responses to the solicitation, the address to which the responses are to be delivered, and the timeframe in which the Public Agency will respond;

(b) a list of all projects for which the Applicant may be selected to serve as an Owner's Representative, the anticipated schedule for each project, and the Certified Estimate of Cost for each project;

(c) a specific description of the scope of services expected of the selected Owner's Representative;

(d) the evaluation procedure and criteria for the selection of the Owner's Representative, including any rating system, and the schedule for the selection process;

(e) the minimum experience required of the Owner's Representative and any presentation, interview or other qualification requirements; and

(f) a prohibition against any unauthorized communication or contact with the Public Agency.

(4) The Public Agency shall make the solicitation available to anyone who requests it.

(5) Responses submitted by Applicants must identify any potential conflicts of interest. Additionally, all Applicants must, at a minimum, certify to the following:

(a) that the Applicant is not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any state or federal agency;

(b) that, within the 10-year period preceding the date upon which the Applicant submits a response, the Applicant has not been convicted of or had a civil judgment rendered against them for any of the following: commission of fraud or a criminal

offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) contract or subcontract; violation of federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion or receiving stolen property;

(c) that the Applicant is not presently indicted for, or otherwise criminally or civilly charged by a governmental entity with, commission of any of the offenses enumerated in subsection (4)(b) of this section; and

(d) if applicable, that the Applicant's firm, partnership, corporation or association has not, within a seven-year period preceding the date upon which the Applicant signs the response, had one or more contracts terminated by default by any federal, state or local agency.

(6) An Owner's Representative shall be selected in the following manner:

(a) In evaluating the responses, the Public Agency shall use the criteria set forth in the solicitation. The Public Agency may opt to engage in post-submission discussions with one or more Applicants that meet the minimum criteria. The Public Agency may request additional information regarding an Applicant's qualifications, approach to the project, and ability to furnish the required services from Applicants that the Public Agency deems the most qualified based on the Public Agency's preliminary review of the applications.

(b) The procedures that a Public Agency creates for the screening and selection of Owner's Representatives must comply with M.G.L. c. 30, 39M½ and this section, but otherwise shall be within the discretion of the Public Agency and may be adjusted to accommodate the Public Agency's scope, schedule and budget objectives for a particular project.

(c) After evaluating and ranking all Applicants based on their qualifications, the Public Agency may negotiate compensation with the highest-ranked Applicant. The compensation paid to an Owner's Representative shall be reasonable and fair to the Public Agency as determined solely by the Public Agency.

(d) If the Public Agency is unable for any reason to negotiate a contract with the highest-ranked Applicant that is reasonable and fair to the Public Agency, the Public Agency shall, in writing, formally discontinue negotiations with the highest-ranked Applicant. The Public Agency may opt to either terminate the Owner's Representative selection process or negotiate with the next highest-ranked Applicant. The process shall continue in this manner through successive-ranked Applicants until the Public Agency reaches an agreement with an Applicant or the Public Agency terminates the Owner's Representative selection process.

(7) Following the selection of an Owner's Representative, a Public Agency shall retain all applications received, including any related evaluation and ranking sheets, for at least six months.

4.07: Designation of an Employee Owner's Representative

(1) A Public Agency may designate an existing employee as its Owner's Representative if the employee is registered by the Commonwealth as a professional engineer and has no fewer than 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; is engaged in the practice of providing project management services for public construction of the nature, scope and complexity which is the subject of the pertinent Major Contract; and has met any additional qualifications specified by the Public Agency.

(2) Upon making this designation, the Public Agency and the Employee Owner's Representative must enter into an Employer-Employee Oversight Services Agreement.

4.08: Certifications Required of an Owner's Representative

(1) Upon or before entering into an Oversight Services Contract or Employer-Employee Oversight Services Agreement with a Public Agency, the selected or designated Owner's Representative shall certify to the Public Agency in writing, under the pains and penalties of perjury, that:

(a) the Owner's Representative's sole responsibility shall be to the Commonwealth and the Public Agency; and

(b) the Owner's Representative shall be wholly independent of the project's Designer, general contractor or any subcontractor involved in the Major Contract.

(2) The Public Agency must submit to the Inspector General the certifications required under this section, and must include the Owner's Representative's name, title, and employer, if any.

4.09: Certification Required of a Public Agency

Prior to the award of any Major Contract, the Public Agency shall certify to the Inspector General in writing, under the pains and penalties of perjury, that it has selected or designated an Owner's Representative for the Major Contract in accordance with all applicable laws and regulations. If there is a change to the Owner's Representative over the course of the project, or if there are multiple Owner's Representatives assigned to a single project, the Public Agency shall submit a certification for each individual Owner's Representative assigned.

The Public Agency must submit to the Inspector General the certification required under this section, and must include the Owner's Representative's name, title, and employer, if any.

4.10: Owner's Representative Duties

(1) For each project to which an Owner's Representative is assigned, the Owner's Representative shall, pursuant to M.G.L. c. 30, § 39M½, perform the following duties:

- (a) conduct a peer review of engineering elements on the project;
- (b) serve as primary manager of Value Engineering and participate in evaluation of overall design to determine if any Value Engineering options are feasible for the project;
- (c) serve as primary manager of all Cost Recovery activities on the project; and
- (d) file an annual report on the project, under oath, not later than December 31 of each year in which the Major Contract is in effect, to the Inspector General, the Secretary of Transportation, the House and Senate Chairs of the Massachusetts Joint Committee on Transportation, and the State Auditor.

(2) The Public Agency may require the Owner's Representative to perform additional duties, including, but not limited to, the following:

(a) Design Phase.

- (i) Review cost estimates prepared by the Designer.
- (ii) Review construction schedules prepared by the Designer.
- (iii) Review design for constructability issues.
- (iv) Review design for risk analysis considerations.
- (v) Notify the Public Agency of any concerns related to cost estimates, construction schedules, constructability issues, and risk analysis as soon as reasonably possible.
- (vi) Monitor the Designer's progress to help ensure the project advances on schedule and remains on budget and notify the Public Agency of any significant deviations from the approved schedule and budget.
- (vii) Prepare monthly progress reports on design and budget.
- (viii) Participate in project development meetings.

(b) Bid Phase.

- (i) Monitor the assembly of bid documents, and if directed by the Public Agency, assist Designers and the Public Agency in determining the necessary bid documents.

(ii) Monitor the responses to written questions from bidders, the issuing of addenda and the review of bids to determine responsiveness.

(c) Construction Phase.

(i) Monitor compliance with pre-construction activities and notify the Public Agency of any significant deviations from approved pre-construction activities.

(ii) Review applications for extra work orders, time extensions and other contract modifications, and make recommendations on whether such modifications should be granted.

(iii) Monitor the timely resolution of issues impacting schedule and cost.

(iv) Review the contractor's schedule of operations (contract progress schedule) and notify the Public Agency of any significant deviations from the approved schedule.

(v) Prepare monthly progress reports on construction and budget for the Public Agency and notify the Public Agency as soon as reasonably possible of any significant deviations from the approved budget.

(vi) Issue final reports compiling all monthly reports and information.

4.11: Conduct of an Owner's Representative

An Owner's Representative shall be subject to M.G.L. c. 268A.

4.12: Owner's Representative's Access

Any Public Agency utilizing an Owner's Representative shall ensure that the Owner's Representative has unfettered access to project work sites, as well as all relevant documents and correspondence, which may include, but are not necessarily limited to, copies of executed agreements between parties to the Major Contract, copies of performance and payment bonds, a master list of permits, certificates of insurance, licenses and approvals for the project, daily reports, payment records, shop drawings, submittals, project schedules, requests for information, change orders or amendments, change directives, and meeting minutes.

4.13: Requests for Information

The Owner's Representative shall provide information related to the Major Contract to parties eligible to receive it in accordance with M.G.L. c. 30, § 39M½(h) and M.G.L. c. 4, § 7, cl. 26.

A party requesting information must do so in writing and include a reasonable description of the information requested and the address to which the Owner's

Representative may send a response. The Owner's Representative must notify the Public Agency of any such requests received.

An Owner's Representative must respond in writing to requests for information from any individual, organization or agency eligible to receive such information within 60 days of the date of the request. The Owner's Representative's response must contain the requested information, indicate why it is not available to the party requesting it, or indicate when the information will be available and the date on which the Owner's Representative will provide that information to the party. The Owner's Representative may require the requesting party to pay a reasonable fee for costs associated with responding to the request.

If the Owner's Representative denies the party's request for information, the Owner's Representative shall inform the party of the right to appeal the denial in writing to the Inspector General within 30 days of receiving notification of the denial. The appeal must include a copy of the original request and the written response received from the Owner's Representative. If the Inspector General determines that the Owner's Representative improperly denied the request, the Owner's Representative must respond to the information request no more than 30 days after receiving notification of the Inspector General's decision.

4.14: Sanctions

By entering into an Oversight Services Contract or Employer-Employee Oversight Services Agreement, an Owner's Representative is subject to the following sanctions that may be imposed by the Inspector General pursuant to M.G.L. c. 30, § 39M½(m):

(1) an Owner's Representative's acts of misfeasance, including, but not limited to, (a) any reckless or negligent act that results in a violation of a federal or state law or regulation, or (b) any other act that results in the failure of the Owner's Representative to carry out any duties required by M.G.L. c. 30, § 39M½ or 945 CMR 4.00, may result in termination of the Oversight Services Contract or Employer-Employee Oversight Services Agreement, referral to the appropriate state agency for the possible suspension of the Owner's Representative's professional engineering license, and the imposition of a fine not to exceed \$5,000 per violation;

(2) an Owner's Representative's acts of malfeasance, including, but not limited to, (a) any misrepresentation, (b) any false claim, or (c) any other intentional misconduct that results in a violation of a federal or state law or regulation may result in termination of the Oversight Services Contract or Employer-Employee Oversight Services Agreement, referral to the appropriate state agency for the possible suspension of the Owner's Representative's professional engineering license, the imposition of a fine not to exceed \$10,000 per violation, and, if appropriate, referral for criminal prosecution;

(3) an Owner's Representative's failure to adhere to the Oversight Services Contract, the Employer-Employee Oversight Services Agreement, or any related contract or agreement may result in termination of the Oversight Services Contract or Employer-Employee Oversight Services Agreement, referral to the appropriate state agency for the possible suspension of the Owner's Representative's professional engineering license, the

imposition of a fine not to exceed \$10,000 per violation, and, if appropriate, referral for criminal prosecution.

4.15: Notice of Sanction

If the Inspector General deems it appropriate to sanction an Owner's Representative in accordance with 945 CMR 4.14, the Inspector General shall send a Notice of Sanction to the Owner's Representative, which shall detail the Inspector General's findings relating to the Owner's Representative's conduct and the associated sanction imposed by the Inspector General against the Owner's Representative. The Notice of Sanction shall, at a minimum, state the reason(s) for the action and specify in numbered paragraphs the specific facts relied upon as the basis for the action, the statute or regulation authorizing the Inspector General to take action, and the Owner's Representative's right to appeal the action at an adjudicatory proceeding.

An Owner's Representative who receives a Notice of Sanction from the Inspector General under this section shall have the right to appeal in the manner specified in 945 CMR 4.16.

4.16: Adjudicatory Proceedings

An Owner's Representative who receives a Notice of Sanction from the Inspector General may appeal by filing a written notice of claim for an adjudicatory proceeding with the Inspector General within 30 days of the date upon which the Owner's Representative received the Notice of Sanction.

All written correspondence should be addressed to and filed with the Office of the Inspector General, One Ashburton Place, Room 1311, Boston, MA 02108.

4.17: Severability

The provisions of 945 CMR 4.00 are severable. If any section, paragraph, sentence, clause, phrase, word or other component of 945 CMR 4.00 is declared invalid or unconstitutional for any reason, that decision shall not affect the validity of any other portion of 945 CMR 4.00.

REGULATORY AUTHORITY

945 CMR 4.00: M.G.L. c. 30, § 39M½(m).