

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 or interior designer from receiving any extra payments for additional work that the designer or interior 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 or interior 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 or interior 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 or interior 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, interior 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, interior designer or construction manager has given, offered or agreed to give any gift, contribution or offer of employment to the designer, interior 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, interior designer or construction manager;
- no person, corporation or other entity, other than a bona fide full-time employee of the designer, interior designer or construction manager, has been retained or hired by the designer, interior designer or construction manager to solicit for or in any way assist the designer, interior 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 or interior designer; and
- the designer or interior designer has internal accounting controls as required by M.G.L. c. 30, § 39R(c), and the designer or interior 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 \$30,000 or that are for the design of a building for which the budgeted or estimated construction costs exceed \$300,000.)

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.