

MEMORANDUM #15, 2012

Commonwealth of Massachusetts | Public Employee Retirement Administration Commission
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MEMORANDUM

TO: All Retirement Boards

FROM: Joseph E. Connarton, Executive Director

RE: Procurement Under Chapter 176 of the Acts of 2011

DATE: January 19, 2012

Governor Patrick has signed An Act Providing for Pension Reform and Benefit Modernization (Chapter 176 of the Acts of 2011) that, among other initiatives, sets forth a specific statutory process to be followed by retirement boards when procuring and contracting for certain services. It is important to note that, although this law requires the retirement board to adhere to that specific process in obtaining the enumerated services, under Chapter 32, Section 23(3) board members, as fiduciaries, must meet the standard of a prudent expert in taking all actions related to procurement and contracting. A competitive process which meets that fiduciary duty must be followed in all instances.

Under separate cover we will provide more information about other aspects of Chapter 176, however, due to the importance of these provisions we believe it is crucial to inform boards as soon as possible. PERAC Memo #39 / 2011 reviewed transitional issues relative to existing contractual relationships.

Due to the fact that these provisions come into effect on February 16, 2012, all procurements subject to the new Chapter 32, Section 23B that have not resulted in an executed contract as of that date will be void and retirement boards must commence a new procurement process in compliance with the new law.

Many of the requirements contained in the statute are clear and this memo is not intended to be an exhaustive treatise on implementation. Retirement boards and their advisers should be able to conduct procurements under the new law with little additional effort beyond what has been required for years under the fiduciary duty noted above.

Applicability

The specific provisions of Section 23B of Chapter 32 apply to all contracts and procurements for investment, actuarial, legal and accounting services. There are additional provisions relative to the procurement of services from an "investment service provider". These would include, but are not limited to, managers, partnerships, trusts, custodians, consultants, proxy services, securities litigation services, and services related to the financial information (cash books, pooled fund statements, Annual Statements) retirement boards must file with PERAC.

Paragraph (c) of Section 23B mandates that a contract for procurement of legal, investment, actuarial and accounting services must take place utilizing "...competitive sealed proposals, in accordance with this section."

Procurement File

Under paragraph (d) a retirement board must “maintain a file on each contract” which retains “all written documents required by this section.” In addition, this paragraph addresses the issue of records retention by requiring that these documents “...be retained by the retirement board for at least 6 years from the date of final payment under the contract.”

Request for Proposals (RFP)

For all procurements covered by the statute, the retirement board must “solicit proposals through a request for proposals”. That RFP must include, among other items set forth in paragraph (g) of Section 23B, the following:

- (1) The time and date for receipt of proposals, the address of the office to which the proposals are to be delivered and the maximum time for proposal acceptance by the retirement board;
- (2) The purchase description and all evaluation criteria that may be utilized; and,
- (3) All contractual terms and conditions.

Evaluation

The initial evaluation of the responses to the RFP is the responsibility of the retirement board. However, with respect to investment management services, the investment consultant may conduct the initial evaluation. That evaluation must be in writing and based solely on the criteria set forth in the RFP.

Each proposal is to be rated as highly advantageous, advantageous, not advantageous or unacceptable based on the evaluation criteria. The retirement board or investment consultant, if applicable, must state the reasons for the rating.

Each proposal is to be assigned a composite rating and the retirement board or investment consultant, if applicable, must state the reasons for the rating.

Any revisions to a proposed plan for providing services should be obtained by negotiation prior to awarding the contract. It should be noted that any such revision that is agreed to by the retirement board that diminishes the rights of the retirement board as originally proposed may result in a violation of fiduciary duty.

In the event that the initial evaluation is conducted by the investment consultant, the consultant must review evaluations of all the proposals with the retirement board and provide each member with the initial evaluation of each proposal.

Decision

The retirement board shall determine the most advantageous proposal from a responsible and responsive offeror taking into consideration price and the evaluation criteria. An award may be conditioned on “...successful negotiation of the revisions specified in the evaluation...” Any omission of a revision so specified must be explained in writing.

Negotiation

As noted, the retirement board or its duly designated agent, subject to the approval of the retirement board, may negotiate all terms of the contract not deemed mandatory or non-negotiable. If, after negotiation, the retirement board determines that it is in the best interest of the retirement system not to award the contract to that vendor, it may determine the proposal which is next most advantageous from a responsible and responsive vendor and may negotiate terms of the contract with that vendor.

Disclosures

On or before January 1 of each year and as part of the RFP process all contractors or prospective contractors must file annual disclosures with the retirement board and PERAC. These include disclosure of arrangements for compensation paid or to be paid to the contractor or a related person by others in connection with the services the contractor provides to the retirement board or any other client; disclosure of compensation in whatever form paid or expected to be paid by

the contractor or a related person to others in relation to the services provided to the retirement board or any other client; and disclosure of any conflict of interest that the contractor may have that may interfere with the ability of the contractor to provide unbiased and objective services to the retirement board.

PERAC will be providing notice later in the year reminding retirement boards of this requirement. Vendors participating in an RFP process after February 16, 2012, must submit these disclosures as part of that process. Relevant forms will be available soon.

Cancellation/Rejection

The retirement board may cancel an RFP or reject in whole or in part any and all proposals if it determines that cancellation or rejection serves the best interests of the retirement system. The reason (s) for the cancellation must be stated by the retirement board in writing.

Vendor/Board Forms

In accordance with the new law, proposals submitted to a retirement board must include a Vendor Certification Form by which vendors certify under the pains and penalties of perjury that the proposal "has been made and submitted in good faith and without collusion or fraud with any other person."

In addition, each retirement board member must certify to PERAC under the pains and penalties of perjury "that, to the best of the member's knowledge and belief, this proposal has been made and submitted in good faith and without collusion or fraud with any person." The relevant forms are attached.

Term

No contract may be awarded for a term exceeding five years (including any renewal, extension or option), however, a retirement board may participate in a limited partnership, trust or other entity with a term for a longer period "...as part of an investment of system assets."

It should be noted that, although the vendor selected for the performance of a discrete task such as the completion of an actuarial valuation must be chosen in accordance with the provisions of Section 23B, the contract related to that task generally will not contain a term that would run afoul of the five year rule.

Written Contracts

All contracts must be in writing and no payment may be made for a service rendered prior to execution of a contract.

Penalties

A contract made in violation of these provisions is not valid and the retirement board may not make any payments under such a contract.

Any person conspiring to cause a contract to be solicited or awarded in violation of these provisions will pay to the retirement board not more than \$2,000 for each violation. In addition, such a person will pay the retirement board double the amount of damages sustained by the retirement board as a result of the violation.

Conclusion

As noted above, the provisions of the new law pertaining to procurement are clear, concise, and easily understood. During the course of its educational presentations the Commission will review various aspects of procurement best practices; however, retirement boards, in concert with their attorneys and consultants, should be able to implement the law as written.

Thank you for your continued cooperation and if you have any questions, please contact this office.

Attachments