

Chapter 25A § 11C.
Contracts for procurement of energy management services.

Section 11C. (a) A public agency may, in the manner provided by this section, contract for the procurement of energy management services. Such contracts may include terms of ten years or less. Contracts that include cogeneration projects shall have terms of twenty years or less. The public agency shall solicit competitive sealed responses through a request for responses. At least one week prior to soliciting responses for a contract pursuant to this section, a public agency shall notify the commissioner of energy resources in writing, in such form and including such information as the commissioner shall prescribe by regulation, of the agency's intent to solicit responses. Such notification shall include, at a minimum, a complete copy of the agency's request for responses. An acknowledgment of receipt, in such form and by including such information as the commissioner shall prescribe by regulation, shall be issued to the public agency upon successful compliance with the requirements of this paragraph.

Requests for responses for an energy management services contract to be entered into on behalf of a state agency or a building authority, shall be developed jointly by the division of capital asset management and maintenance and the using agency. Such responses shall only be solicited by the division of capital asset management and maintenance after the commissioner of said division has given his prior written approval, and no contract for energy management services shall be valid unless approved and signed by said commissioner. Said commissioner may delegate to state agencies and building authorities the authority to enter into such contracts with an estimated construction cost of less than two hundred thousand dollars. Such delegation shall be in writing from the commissioner to the regulating agency or building authority.

The request for responses published by a public agency under this section shall include: (1) the time and date for receipt of responses and the address of the office to which the responses are to be delivered; (2) a description of the services to be procured, including specific requirements and all evaluation criteria that will be utilized by the state agency or building authority; and (3) proposed contract terms and conditions and an identification of such terms and conditions which shall be deemed mandatory and non-negotiable. The request for responses may incorporate documents by reference, if the request for responses specifies where prospective offerors may obtain the documents. The public agency shall make copies of the request for responses available to all persons on an equal basis. Public notice of the request for responses shall conform to the procedures set forth in subsection (1) of section forty-four J of chapter one hundred and forty-nine. Responses shall be opened publicly, in the presence of two or more witnesses, at the time specified in the request for responses, and shall be available for public inspection.

The provisions of sections forty-four A, forty-four B and forty-four E through forty-four H, inclusive, of chapter one hundred and forty-nine shall not apply to contracts procured pursuant to this section. The provisions of section forty-four D of chapter one hundred and forty-nine shall apply as appropriate to responses submitted for contracts under this section, and every such response shall be accompanied by (1) a copy of a certificate of eligibility issued by the commissioner of the division of capital asset management and maintenance, and (2) by an update statement. The division of capital asset management shall evaluate the offeror's qualifications and maintenance in a manner designated by the commissioner of said division. If the public agency determines that any offeror is not responsible or eligible, the public agency shall reject the offeror, and shall give written notice of such action to the division of capital asset management and maintenance.

State agencies and building authorities shall award contracts under this section to the lowest offeror demonstrably possessing the skill, ability, and integrity necessary to perform faithfully energy management services.

Payments under a contract for energy management services may be based in whole or in part on any cost savings attributable to a reduction in energy and water consumption due to the contractor's

performance or revenues gained due to the contractor's services that are aimed at energy and water cost savings.

(b) The provisions of this subsection shall apply to a governmental body, as defined in this section, procuring contracts under this section.

Unless no other manner of description suffices, and the governmental body so determines in writing, setting forth the basis for the determination, all requirements shall be written in a manner which describes the requirements to be met without having the effect of exclusively requiring a proprietary supply or service, or a procurement from a sole source.

Subject to a governmental body's authority to reject, in whole or in part, any and all responses, as provided in this section, a governmental body shall unconditionally accept a response without alternation or correction, except as provided in this paragraph. An offeror may correct, modify, or withdraw a response by written notice received in the office designated in the request for responses prior to the time and date set for opening the responses. After response opening, an offeror may not change any provisions of the response in a manner prejudicial to the interests of the governmental body or fair competition. The governmental body shall waive minor informalities or allow the offeror to correct them. If a mistake and the intended response are clearly evident on the face of the response document, the governmental body shall correct the mistake to reflect the intended correction and so notify the offeror in writing, and the offeror may not withdraw the response. An offeror may withdraw a response if a mistake is clearly evident on the face of the response but the intended correction is not similarly evident.

The governmental body shall evaluate each response and award each contract based solely on the criteria set forth in the request for responses. Such criteria shall include, but not be limited to, all standards by which the governmental body will evaluate responsiveness, responsibility, and qualifications of the offeror, technical merit, and cost to the governmental body. The request for responses shall specify the method for comparing responses to determine the response offering the lowest overall cost to the governmental body, taking into consideration comprehensiveness of services, energy or water cost savings, costs to be paid by the governmental body, and revenues to be paid to the governmental body. If the governmental body awards the contract to an offeror who did not submit the response offering the lowest overall cost, the governmental body shall explain the reason for the award in writing.

The evaluations shall specify revision, if needed, to each response obtained by negotiation before awarding the contract to the offeror of the response. The governmental body may condition an award on successful negotiation of the revisions specified in the evaluation, and shall explain in writing the reasons for omitting any such revision from a plan incorporated by reference in the contract.

(c) The public agency may cancel a request for responses, or may reject in whole or in part any and all responses when the public agency determines that cancellation or rejection serves the best interests of the public agency. The public agency shall state in writing the reason for a cancellation or rejection. The public agency shall promptly publish in the central register notice of the offeror awarded the contract.

The public agency shall file, within thirty days, a copy thereof with the commissioner of energy resources.

The commissioner of energy resources, in consultations with the commissioner of the division of capital asset management and maintenance, shall promulgate regulations for the procurement of energy management services under this section, provided however, that the commissioner of the division of capital asset management and maintenance shall promulgate regulations for services to be procured for state agencies and building authorities, and further provided, that regulations affecting the operations of housing authorities within the jurisdiction of the department of housing and community development shall be promulgated in consultation with the director of housing and community development. Such regulations may limit the scope of services procured and the duration of contracts, and shall include any requirements that the commissioner of energy resources or commissioner of the

division of capital asset management and maintenance deems necessary to promote prudent management of such contracts at the appropriate facilities. Such regulations shall require the submission, at least annually, of such information as the commissioner of energy or commissioner of the division of capital asset management and maintenance may deem necessary in order to monitor the costs and benefits of contracts for energy management services.

(d) The commissioner of energy resources shall enforce the requirements of this section and regulations promulgated hereunder as they relate to public agencies except for state agencies and building authorities and shall have all the necessary powers to require compliance therewith. The commissioner of the division of capital asset management and maintenance shall enforce all such regulations as they relate to state agencies and building authorities. Any order of the commissioner of energy resources under this subsection shall be effective and may be enforced according to its terms, and enforcement thereof shall not be suspended or stayed by the entry of an appeal therefrom. The superior court for Suffolk county shall have jurisdiction over appeals of orders of the commissioner of energy resources under this subsection, and shall also have jurisdiction upon application of said commissioner to enforce all orders of said commissioner under this subsection. The burden of proof shall be upon the appealing party to show that the order of said commissioner is invalid. An aggrieved person shall not be required to seek an order from said commissioner as a condition precedent to seeking any other remedy.

(e) As used in this section, the following words and terms shall have the following meanings:

"Building authority", the University of Massachusetts Building Authority, the Southeastern Massachusetts University Building Authority, the University of Lowell Building Authority or any other building authority which may be established for similar purposes.

"Eligible", able to meet all requirements for offerors or bidders set forth in this section and section forty-four D of chapter one hundred and forty-nine and not debarred from bidding under section forty-four C of said chapter one hundred and forty-nine or any other applicable law, and who shall certify that he or she is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work.

"Governmental body", a city, town, district, regional school district, county, or agency, board, commission, authority, department or instrumentality of a city, town, district, regional school district or county, and all other public agencies which are not a state agency or building authority.

"Minor informalities", minor deviations, insignificant mistakes, and matters of form rather than substance of the response or contract document which can be waived or corrected without prejudice to other offerors, potential offerors, or the public agency.

"Person", any natural person, business, partnership, corporation, union, committee, club, or other organization, entity or group of individuals.

"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.

"Responsible", demonstrably possessing the skill, ability and integrity necessary to faithfully perform the work called for by a particular contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of this section and section forty-four D of chapter one hundred and forty-nine.

"Responsive offeror", a person who has submitted a response which conforms in all respects to the requests for responses.

"State agency", a state agency, board, bureau, department, division, section, or commission of the commonwealth.