

TO: Cities and Towns

FROM: Designer Selection Board

SUBJECT: Designer Selection Board Guidelines for a City and Town Building Projects

DATE: September 3, 2015

It is the intention of this memorandum to briefly explain the relationship between local authorities and the State Designer Selection Board and to provide local authorities with answers to a number of common and recurring questions regarding the proper application of designer selection statutes and procedures to the planning and design of local building projects.

Local authorities should be thoroughly familiar with the following provision of Chapter 7C, Section 54 (a) of the General Laws:

“Every contract for design services for any building construction, reconstruction, alteration, remodeling, or repair estimated to exceed one hundred thousand dollars (\$100,000) by any city, town or agency, board, commission, authority or instrumentality thereof, other than housing authorities and projects requesting funding from the MSBA shall be awarded only after a selection procedure adopted in writing, prior to publication requesting applications, complying with the purposes and intent of sections 44 - 58, inclusive, and the following requirements.”

The remainder of Section 54 (a) explains the specific minimum procedural requirements that must be satisfied to properly obtain proposals from designers. The State Designer Selection Board is responsible for publishing guidelines to assist public agencies not within the Board’s direct jurisdiction (cities and towns) in the establishment of a professional and independent designer selection procedure consistent with the provisions and intent of the State designer selection statutes.

To carry out this advisory role, the State Designer Selection Board has issued the enclosed guidelines. They are revised as necessary, to all cities and towns. **This issue updates the most recent issue (March 28, 2011).**

If you have any questions, please contact this office at (617) 727-4046 or our website at www.mass.gov/dcam/dsb. You may also contact the Inspector General’s Office for additional information at One Ashburton Place, Room 1311, Boston, MA 02108, (617) 727-9140, Internet address is www.mass.gov/ig.

Enclosure(s)

The Designer Selection Board receives a large number of questions from local authorities related to the adoption or application of designer selection procedures to various situations. The following questions and answers represent those issues that are most often raised by cities and towns. The Board hopes that the answers will provide you with either specific or general direction in your efforts to properly comply with the designer selection requirements.

1. Is the employment of an educational programmer or planner considered a design service requiring public advertisement in accordance with approved designer selection guidelines?

ANSWER: No, unless the scope of services originally contemplates or develops into an evaluation of an existing facility or a new facility to determine the feasibility and costs of renovation, and/or to determine the feasibility and costs of constructing an addition or new facility. Where the services include what is conventionally termed an “architectural” program, the designer selection procedures apply.

2. Is there a minimum dollar threshold that must be exceeded before a formal designer selection procedure must be followed?

ANSWER: The law requires that whenever the design fee is estimated to cost \$10,000 or more, and whenever the estimated construction cost of a project is \$100,000 or more and design services are required, a designer selection procedure must be followed.

3. Is a feasibility study required prior to the employment of a designer to prepare development plans and specifications and/or construction documents?

ANSWER: A study is not required on local building projects. However, it is highly recommended that a study be completed before designing any project of substantial magnitude. The advantage of obtaining a comprehensive evaluation of the existing facility and/or proposed scope of work including consideration of feasible alternatives and related estimated costs cannot be understated. Without the benefit of this basic information, hiring a designer to prepare final contract documents at a fixed limit cost of construction for a pre-designated lump sum design fee is seldom prudent.

4. What is a reasonable fee to establish for the study, the design of construction documents and the administration of construction?

ANSWER: Chapter 7C, Section 50 (c) states:

“All fees shall be stated in designer’s contracts and in any subsequent amendment thereto as a total dollar amount. Contracts may provide for equitable adjustments in the event of changes in scope of services.”

The standard method of payment for design contracts is via lump sum – a predetermined amount, normally based upon a percentage of the total or estimated construction cost. Common practice does allow the establishment of a ceiling amount in the designer’s contract often referred to as an “upset amount”, with actual payments being made for design services rendered on an hourly basis. In this method, the designer is paid on an hourly basis, with total compensation not to exceed the upset limit. This method of payment is normally used on “study projects” where the extent and difficulty of the work effort is unknown. A designer may charge whatever hourly rate they see fit as long as the total billing does not exceed the upset amount. For additional Services, hourly rates are capped at \$150/hour in the DCAMM Study and Design Contract, although Additional Services payments may be negotiated as lump sum as well.

5. Can the firm that completes the study also be employed to complete the design and administer the construction contract?

ANSWER: Yes, Chapter 7C, Section 51 (h) of the designer selection law permits municipalities to Contract with the same designer for both the study and the subsequent final design provided that both scopes of work are included in the original solicitation or that the awarding authority has advertised for final design services in accordance with the designer selection law. However, where an awarding authority elects to allow a designer who conducted a feasibility study to continue with the design of a project; the awarding authority may elect to commission an independent review, by a knowledgeable and competent individual or business doing such work, of the feasibility of the designer's work to insure its reasonableness and its adequacy before allowing the designer to continue on the project.

6. Can cities and towns use donated services or in-house staff for design or/or construction?

ANSWER: It appears that there are no legal restrictions against town employees or citizens from donating design services for public projects. Serious ramifications could develop, however, if any injury to an individual or property developed and that injury was due to errors or omissions in the design of the project. Furthermore, a designer should not be permitted to "donate services" during an early stage of a project and then be continued by the awarding authority, on a fee basis, to a later stage of the design.

7. Can a building project be subdivided into its component parts with provisions for donated time and materials to be combined with a general contractor's bid and construction of other major components?

ANSWER: Although a public authority may accept donated time and materials, the administration and coordination of different building components, i.e., roofing, electrical, plumbing, heating, etc. should be coordinated by a professional architect or engineer possessing the experience and expertise of providing contract documents that are in conformance with the new Massachusetts State Building Code and also Mass. General Laws, Chapter 149, Section 44A to 44H, Section 44M, and Chapter 30, Section 39M, commonly known as the "bidding statutes". Dividing projects into smaller components, merely to avoid threshold limits that trigger enactment of competitive bidding statutes, is prohibited by law. Awarding authorities should proceed cautiously whenever a proposal is made to divide responsibilities for design and construction of a project by individual construction of building components on building projects.

8. Can cities and towns request applicants for building projects to submit a fee proposal?

ANSWER: While there are no express provisions in the designer statutes that prohibits cities and towns from receiving competitive fee proposals from designers proposing to perform services related to a building project, there is a specific procedure to follow when an awarding authority intends to negotiate a fee. An argument can be made that the receipt of competitive fee proposals, prior to evaluating applicants, is contrary to the statutory provisions governing both the criteria for selecting designers and the method for determining the appropriate amount of a design fee. The Ward Commissions Final Report concluded that the receipt of competitive fee proposals was not in the overall public interest. The Inspector General adopted the position that public agencies are prohibited from receiving competitive fee proposals from designers.

Chapter 7C, Section 50 (b) states:

"all fees must be stated in designer's contracts and in any subsequent amendment thereto as a total dollar amount. Contracts may provide for equitable adjustments in the event of changes in scope of services."

The total dollar fee amount may be set by the awarding authority prior to the receipt of applications from interested designers, or it may be negotiated. Designers should be reviewed and ranked on the basis of qualifications not on the basis of the fee proposals.

If the public agency determines that the fee is to be negotiated, the awarding authority must first establish a maximum fee, which cannot be exceeded during negotiations. The awarding authority should then negotiate with the first ranked designer and if that negotiation fails then initiate negotiations with the second ranked designer and if again unsuccessful, proceed to the third ranked designer. The procedures as outlined in Mass. General Laws Chapter 7C, 50 (b) should be followed, which provides in part:

“The Commissioner (or Public Agency) may require a finalist with whom a fee is being negotiated to submit a fee proposal and include with it such information as the Commissioner (or Public Agency) requires to provide current cost and pricing data on the basis of which designer’s fee proposal may be evaluated.”

The public agency remains under an obligation to attempt to negotiate a satisfactory design fee with the first ranked designer before proceeding to negotiate with the next highest ranked designer.

9. Can cities and towns procure a standing list of designers/engineers to be on-call to perform projects to be identified after selection?

ANSWER: Yes, for smaller design service tasks, including study and/or design services for small repair or renovation projects, the Designer Selection law allows for the selection of a standing list of consultants for “on-call” or “house doctor” services through the DSB process. These firms would be on-call to perform a variety of tasks as-needed after selection, but on a not-to-exceed total contract amount, which amount must be identified in the advertisement for services. Besides the convenience of a quicker turn-around time in obtaining the services, this allows for the hiring of specialized services such as commissioning, energy modeling, and cost estimating, which should be procured through the designer selection process if the work will involve a public building project. It also allows for the direct hiring of specialized sub consultant design services such as structural or mechanical. The Designer may be hired to continue from study to design services if the amount of the remaining design services is within the original amount of the appointment authorized by the DSB. An example is a \$200,000 original appointment, tasks 1-5 amount to \$50,000 with a remaining \$150,000. The design fee for task 6 is \$130,000. This total of \$180,000 will not exceed the original appointment of \$200,000.