

FREQUENTLY ASKED QUESTIONS REGARDING THE NEW PUBLIC CONSTRUCTION REFORM LAW*

Chapter 193 of the Acts of 2004, entitled "An Act Further Regulating Public Construction In the Commonwealth" was signed into law on July 19, 2004. Chapter 193 changed public construction statutes, thresholds, and procedures to be followed for public construction projects. Highlights of the new law include: new higher thresholds for general and filed sub-bidders; DCAM certification requirements for filed sub-bidders; prequalification requirements for both general bidders and filed sub-bidders on certain public building projects; an owner's project manager requirement for certain projects; an MBE/WBE program requirement for state funded municipal projects; and a new statute, M.G.L. c. 149A, created to permit the use of the construction manager at risk alternative delivery method on larger public building construction projects. In addition, the new law permits the use of the design build construction delivery method for larger public works projects.

*** PLEASE BE ADVISED THAT THE INFORMATION PROVIDED ON THIS WEBSITE WILL BE UPDATED REGULARLY. THEREFORE, PLEASE BE SURE TO CHECK THIS WEBSITE FREQUENTLY AND CONSULT WITH YOUR LEGAL COUNSEL FOR ADDITIONAL INFORMATION.**

GENERAL INFORMATION

1. When does the new public construction reform law take effect?

ANSWER: Chapter 193 of the Acts of 2004, the new public construction reform law, was signed into law on July 19, 2004. The new law is effective immediately, with the exception of Sections 18 and 27, pertaining to the new requirements for sub-bidder certification and alternative procurement delivery methods, respectively, which do not become effective until January 1, 2005.

2. If I am an awarding authority and have already commenced or undertaken a public building construction project, will the new law apply to my project?

ANSWER: Depending on the status of your project, at least certain portions of the new law will apply to your project. You are advised to seek an opinion of your legal counsel to ensure that you are in compliance with the new requirements.

3. Where can I obtain a copy of the new law?

ANSWER: You can access a copy of the new law on the following link to The General Court of Massachusetts' website:

<http://www.mass.gov/legis/laws/seslaw04/sl040193.htm>

4. What are the most significant changes in the new law?

ANSWER: The reform law contains some of the most significant revisions to the public construction process in nearly a quarter century. Since it would be difficult to list all the changes here, we have listed the most significant changes. The reform law:

- increases the threshold requiring individual filed sub-bids for designated trade work from \$10,000 to \$20,000;
- increases the threshold for projects requiring filed sub-bids and DCAM contractor certification from \$25,000 to \$100,000;
- requires an owner's project manager for projects valued at \$1.5 million or more;
- requires DCAM certification of subcontractors submitting filed sub-bids after January 1, 2005;
- requires "prequalification" of general contractors and filed sub-bid subcontractors by awarding authorities (on a project-by-project basis) for all projects with estimated construction costs of \$10 million or more;
- provides awarding authorities with the option to utilize an owner initiated "prequalification" process for either or both general bidders and filed sub-bidders where estimated construction costs are \$100,000 or more, but less than \$10 million (prequalification is mandatory for \$10 million or more);
- filed sub-bid subcontractors must furnish payment and performance bonds on projects where prequalification is required or utilized by the awarding authority;
- requires municipal awarding authorities to incorporate an Affirmative Marketing Program with design and construction participation goals for

minority business enterprises and women business enterprises (MBE/WBE) on state assisted building projects;

- provides awarding authorities with the option to use CM at Risk on building projects over \$5 million (with the prior approval from the Office of the Inspector General) effective January 1, 2005;
- provides awarding authorities with the option to use Design Build on non-building public works projects estimated to cost \$5 million or more (with the prior approval of the Office of the Inspector General) effective January 1, 2005;
- modifies the procurement process for building projects with estimated construction costs of \$100,000 or less and separates them into three categories: less than \$10,000; \$10,000 to \$25,000; and \$25,000 to \$100,000;
- allows the designer on municipal projects who conducted the feasibility study to continue with the design of the project without mandatory peer review;
- requires municipalities to utilize the standard designer selection form issued by the Designer Selection Board ("DSB") and the DSB will be providing fee guidelines for use by municipalities.

Please be advised that this is just a summary of some of the most significant changes in the law and you should always consult with your legal counsel for any specific questions regarding the changes implemented in Chapter 193.

5. How are smaller building construction project procurements estimated to cost \$100,000 or less conducted under the new law?

ANSWER: The procurement process for smaller building construction projects estimated to cost \$100,000 or less is divided into three (3) categories under the new law as follows:

- If the estimated building construction cost of the project is less than \$10,000 an awarding authority must seek no fewer than three written quotes and award the contract to the person offering the lowest written price quotation.
- If the estimated building construction project cost is not less than \$10,000 but is not more than \$25,000 the contract must be advertised

via a public notification process for at least 2 weeks and an award must be made to the responsible person offering the lowest price via written submission.

- If the estimated building construction project cost is not less than \$25,000 but is not more than \$100,000 an advertised sealed bid process must occur and award must be made to the lowest responsible and eligible bidder in accordance with M.G.L. c. 30, §39M.

For projects with estimated construction costs of less than or equal to \$100,000, DCAM certification is not required for either general contractors or filed sub-bidders.

6. Does the new law affect emergency waiver requests?

ANSWER: No, although the thresholds have changed for bidding of public building work, an awarding authority must still seek written approval of DCAM if any variance with the new bidding and/or advertising requirements is necessary because an extreme emergency exists involving the health, safety or security of persons or property.

7. Were there any changes to the procedure for the selection of a designer for municipal projects?

ANSWER: Yes. The designer who conducted the feasibility study for a municipality may now continue with the design of the project. An independent review of a feasibility study is now optional. The Designer Selection Board ("DSB") will develop a standard designer selection form and fee guidelines to be used by all cities, towns, and public agencies not within the jurisdiction of the designer selection board. For any municipal design project that includes funding provided by the Commonwealth, in whole or in part (such as reimbursements, grants, and the like), awarding authorities will need to have MBE and WBE goals incorporated into the design procurement consistent with the participation goals to be established by DCAM in consultation with SOMWBA.

8. What is an owner's project manager?

ANSWER: Under the new law, an "owner's project manager" is defined as "an individual, corporation, partnership, sole proprietorship, joint stock company, joint venture, or other entity engaged in the practice of providing project management services for the construction and supervision of construction of buildings." The new law requires awarding authorities to contract for the services of an owner's project manager prior to contracting for design services

where the project is estimated to cost \$1.5 million or more. The owner's project manager must have certain minimum experience requirements and is prohibited from having any affiliation with the designer, contractor, or any other party having an interest in the project. An agency or municipal employee may serve as the owner's project manager, providing he or she meets the required minimum qualifications.

9. Does a public agency have to hire an "owner's project manager" for an ongoing building construction project of \$1.5 million or more?

ANSWER: It depends on what stage the project was in when the new law took effect on July 19, 2004. An awarding authority is not required to hire an owner's project manager if the project was already in the construction phase and the construction contracts were executed prior to that date.

PREQUALIFICATION AND CERTIFICATION

10. What is the difference between "Prequalification" and "Certification" under the new law?

ANSWER: "*Prequalification*" is a new process for both general contractors and subcontractors which is mandatory on all public construction projects with estimated construction costs of \$10 million or more (unless the project is undertaken by an exempt agency). Prequalification is optional at the discretion of the awarding authority where the estimated construction costs are less than \$10 million but greater than \$100,000. As set forth in Section 19 of Chapter 193, the prequalification process is administered by the awarding authority on a project-by-project basis. DCAM is in the process of promulgating regulations and guidelines to implement the new prequalification process. You should regularly check the DCAM website at <http://www.mass.gov/cam/> for updated information on the status of the prequalification regulations, guidelines and the implementation schedule. In the meantime, however, Section 19 provides detailed guidance on the required process and criteria.

"*Certification*" is a screening process conducted only by DCAM to determine whether a contractor or subcontractor meets certain minimum criteria to perform work on public building contracts estimated to cost \$100,000 or more procured under Chapter 149, §44A. Under the prior law, only general contractors were required to be certified by DCAM. The new law now also requires that as of January 2005, trade contractors who are filed sub-bidders must become certified in order to bid public building construction work. The new certification process for filed sub-bidders is set forth in Section 18 of Chapter 193. Upon a firm's

submission of the required application and supporting documents to DCAM, DCAM will review and determine whether the firm meets the certification standards and, if warranted, issue a "Certificate of Eligibility" evidencing DCAM certification. DCAM is in the process of implementing a program for sub-bidder certification. Upon completion of that effort, regulations and guidelines pertaining to certification of both general bidders and filed sub-bidders under the new law will be published in the *Central Register* and on DCAM's website at <http://www.mass.gov/cam>.

11. How do the new immediate prequalification requirements impact the procurement of public building construction contracts?

ANSWER: As set forth in Section 19 of Chapter 193, amendments to M.G.L. c. 149 now specify that it is mandatory for awarding authorities to prequalify general bidders and filed sub-bid subcontractors for public building construction projects where the total construction cost is estimated at \$10 million or more. In addition, an awarding authority may prequalify general contractors and filed sub-bidders for projects with an estimated construction cost of \$100,000, but not to exceed \$10 million. It should also be noted that certain state agencies are exempt from mandatory prequalification, but may elect to require it at their sole option. The exempt agencies are as follows: (a) DCAM; (b) the Massachusetts Port Authority; (c) the Massachusetts Water Resources Authority; (d) the Massachusetts State Colleges Building Authority; and (e) the University of Massachusetts Building Authority.

12. How does prequalification work?

ANSWER: Prequalification is a "two phase" procurement process.

- In the first phase, the awarding authority issues by public notice a *Request for Qualifications* ("RFQ") seeking statements of qualification from prospective general bidders and filed sub-bidders. Upon receipt of applications for qualification, the awarding authority reviews the submissions and qualifications of prospective contractors in accordance with the legal criteria and makes a determination as to which firms meet the prequalification standard. Only firms deemed prequalified may then participate in the second phase of the procurement.
- In the second phase, the awarding authority invites bids from only those general bidders and filed sub-bidders identified by the awarding authority as "qualified" to bid. The remainder of the bidding process and the award of the contract will then be conducted in accordance with the existing procedures set forth in Chapter 149.

13. As an awarding authority, why should I consider mandating prequalification where the project is below the required threshold of \$10 million?

ANSWER: An awarding authority may elect to require prequalification for general bidders and filed sub-bidders as an additional assurance that the pool of participating bidders has the requisite experience and qualifications to perform the work.

14. What is a Request for Qualifications ("RFQ")?

ANSWER: An RFQ is issued by the awarding authority to initiate the prequalification process for general bidders and filed sub-bidders. The RFQ is made by public notice and details the following information regarding the public building project:

- the time and date for receipt of responses to the RFQ, the address of the office to which the responses are to be delivered, and the timeframe in which the public agency will respond to said responses;
- a general description of the project and, for prequalification of filed sub-bid subcontractors, a general description of the subcontractor's class of work;
- the evaluation procedure and the criteria for prequalification of general bidders and filed sub-bidders, including the point rating system and the schedule for the evaluation process;
- the anticipated schedule and construction costs for the building project;
- a listing of the project team, including the awarding authority, the designer, and awarding authority's owner's project manager, if applicable;
- a statement that the RFQ will be used to prequalify general bidders and filed sub-bidders who will be invited to submit a bid pursuant to sections 44E and 44F;
- a prohibition against any unauthorized communication or contact with the public agency outside of official pre-bid meetings, and if desired;

- any limitation on the size and number of pages to be included in the response to the RFQ desired by the public agency.

15. What information must be included in a statement of qualifications submitted in response to an RFQ?

ANSWER: Under Section 19 of Chapter 193, amendments to M. G. L. c. 149 specify that awarding authorities can require only four categories of information in the statement of qualifications from prospective general bidders and sub-bidders. Generally, these categories of information are: (1) management experience; (2) references; (3) capacity to complete the project; and (4) written commitment of bonding company to issue payment and performance bonds for the full value of the project. The financial information submitted with the RFQ application shall not be considered a public record.

The criteria and weight given to each of these categories of information supplied by the prospective bidder is set forth in more detail in Section 19. In addition, DCAM is in the process of promulgating regulations and guidelines to implement the prequalification process. You should regularly check the DCAM website at <http://www.mass.gov/cam/> for updated information on the status of the prequalification regulations, guidelines and implementation schedule.

16. What is the evaluation process for determining prequalification?

ANSWER: Under Section 19 of Chapter 193 amendments to M.G.L. c. 149, an awarding authority is first required to establish a *Prequalification Committee* for each public building construction project where prequalification is mandated or elected by the awarding authority. The prequalification committee consists of one representative from the designer and three representatives from the awarding authority. The prequalification committee is required to evaluate and weigh the qualifications of each applicant firm in accordance with the criteria specified in the RFQ and make a determination as to whether the applicant is qualified to bid on the project. Be advised that according to the statute, the decision of the *Prequalification Committee* is final and is not subject to appeal unless there is evidence of fraud or collusion.

DCAM is in the process of promulgating regulations and guidelines to implement the new prequalification process. You should regularly check the DCAM website at <http://www.mass.gov/cam/> for updated information on the status of the prequalification regulations, guidelines and the implementation schedule. In the meantime, however, Section 19 provides detailed guidance on the process and criteria.

