

PUBLIC CONSTRUCTION REFORM 2004

Table of Contents

| | Page |
|---|------|
| Reform Forged from Widespread Support <i>Banker & Tradesman article, September 2004</i> | i |
| Construction Reform Legislation, Overview | 2 |
| Subcontractor Prequalification | 4 |
| Subcontractor Certification | 8 |
| Construction Management at Risk | 9 |
| Design Build | 13 |
| Where to Get More Information | 14 |

Associated Subcontractors of Massachusetts, Inc.
One Washington Mall, 5th floor
Boston, MA 02108
TEL 617-742-3412 · FAX 617-742-2331
www.associatedsubs.com

BANKER & TRADESMAN

THE REAL ESTATE, BANKING AND COMMERCIAL WEEKLY FOR MASSACHUSETTS

ESTABLISHED 1872

Construction Legislation

Reform Forged From Widespread Support

BY MONICA LAWTON

Massachusetts Lt. Gov. Kerry Healey signed historic legislation on July 19 that makes sweeping changes to the state's public construction laws – the first in more than 20 years. It was an event many thought would never happen. But it happened with the support of everyone with a stake in the public construction process – including our organization, the Associated Subcontractors of Massachusetts (ASM).



For years, there had been calls for “construction reform” in Massachusetts, but time and again, the efforts failed due largely to opposition from the ASM and related industry groups. Not that subcontractors were against change. On the contrary, we had long called for better design, better project oversight, and better screening of contractors, including subcontractors, to assure quality performance. But to many others, “reform” usually meant one thing: the repeal of the filed sub-bid law and the elimination of competitive bidding for subcontractors. Naturally, subcontractors protested. Even legislators recognized that eliminating competition did not make sense and would not save millions of dollars, as proponents claimed.

Then in 2003, circumstances changed. With municipalities facing fiscal crises, there was growing pressure to save money on school construction. Once again, there were calls to repeal filed sub-bidding. But this time, the Legislature responded by setting up a special commission to determine a course of action. Unlike past commissions, this one

MONICA LAWTON is executive director of the Associated Subcontractors of Massachusetts.



Massachusetts Lt. Gov. Kerry Healey signed into law this summer sweeping changes to the state's construction regulations. The bill had widespread support from politicians and many in the construction industry.

was balanced, with both supporters and opponents of the present bidding system. It was chaired by Sen. Dianne Wilkerson, D-Boston, Rep. Martin Walsh, D-Dorchester, and Christopher Gordon of Massport. The commission included Division of Capital Asset Management (DCAM) Commissioner David Perini as well as the Inspector General of the Commonwealth, Gregory Sullivan. ASM was named to the 20-member commission to represent subcontractors, while other organizations represented general contractors, architects, municipalities, unions, open shop companies, and minority- and women-owned businesses. For the first time, all interested parties were at the table.

At the start, last December, there was the usual finger pointing. But commission members quickly realized that everyone shared the blame for problems in public construction – contractors, architects and public owners alike. There was no single cause and no simple fix. From that point, commission members resolved to look at the entire system, and achieve consensus on ways to improve it. After six months of marathon weekly meetings and negotiations, commission members signed off on nearly 100 pages of reform recommendations. As Sen. Wilkerson said at a press conference, “This is not a tweaking. This is a major reform of our pub-

continued on page 2

lic construction laws.”

With unanimous support from the commission, and bipartisan support in both branches of the Legislature, the construction reform package quickly made its way to the governor's desk, where it was signed amid much fanfare. Like most good legislation, it is a compromise, fairly balancing all interests. It preserves the best features of the present system – including competitive filed sub-bidding – while instituting major improvements to every stage of the procurement process, from design through construction.

The new law improves the design process by streamlining designer selection procedures and eliminating the two-step peer review requirements. It strengthens project oversight, by requiring cities and towns to hire “owners’ project managers” on all projects that cost more than \$1.5 million, instead of relying on volunteer building committees. It promotes quality by requiring annual DCAM certification of subcontractors as well as project-by-project prequalification of both general contractors and subcontractors on all projects that cost more than \$10 million. It also allows optional prequalification on smaller projects. Numerous other provi-

sions raise the bar higher for contractors, while promoting the broadest inclusion of qualified firms.

Most significantly, the new law allows the use of “alternative methods” of construction for the first time in Massachusetts, modeled on private sector practice: construction management at risk delivery for buildings, and design-build for roads and bridges, on projects over \$5 million.

ASM is particularly proud of the CM at risk language. It was drafted jointly by our organization, by the Associated General Contractors, and by the Boston Society of Architects, in a collaborative effort that started well before the commission was established. Under CM at risk, the CM is selected on quality as well as price, starts early to ensure that design plans are good, and is responsible for costs that exceed a guaranteed maximum price. At the same time, trade contractors must be pre-qualified to bid and contracts are awarded to the lowest prequalified bidder, assuring quality work at the lowest possible price.

The new law took effect immediately, except for the provisions on CM at risk, design-build, and subcontractor certification, which

have been delayed until January 1, 2005, to allow time for proper implementation. DCAM and the Inspector General's office are working together on regulations, and have put together fact sheets on the new legislation which should soon be available on their Websites.

For ASM, it was an honor to work with the administration, municipal officials and other industry groups to create legislation that is reform in the true sense of the word, addressing the concerns of public owners, while remaining fair to contractors. The new law gives public owners more control over their projects and the selection of contractors, and holds contractors more accountable for their work. The result should be smoother projects and minimal change orders and delays. In other words, better construction at lower cost, which was the goal from the start.

The legislation not only signals a new era in Massachusetts public construction, but also serves as a model for the rest of the nation, showing how public construction should be done. The challenge over the next several months will be to achieve a smooth transition for the new procedures, so that the legislation lives up to its great promise. ■

Reprinted with permission of Banker & Tradesman.

This document may constitute advertising under the rules of the Supreme Judicial Court of Massachusetts.

Construction Reform Legislation

Chapter 193 of the Acts of 2004

Overview of Key Provisions

Changes to designer selection process

- Speeds up the designer selection process by allowing municipal awarding authorities to hire the same designer used for the feasibility study to complete the final design, eliminating the old “peer review” requirement.
- Requires uniform designer selection procedures to be used by all municipalities, including standard application form, standard fee guidelines and uniform procedures for evaluation of applicants and fee negotiation – all as a way to streamline and upgrade the selection process, and invite more competition.

Changes to bidding thresholds

- Trade threshold for filed sub bidding is doubled from \$10,000, up to \$20,000.
- Threshold for projects subject to filed sub bidding is increased 400% from \$25,000 to \$100,000.
- Projects between \$25,000 and \$100,000 are subject to the competitive sealed bid process of Ch.30,39M, with no filed sub bids.
- For projects between \$10,000 and \$25,000, there must be public notification and written bids; a formal sealed bid process is no longer required.
- Projects up to \$10,000 must solicit a minimum of three written price quotes; previously, no laws applied.
- DCAM’s authority to grant “emergency waivers” from the bidding laws is expanded to allow waivers for narrowly defined “security projects,” such as those at Massport to alleviate terrorist threats.

Improvements to project oversight: Owner’s Project Manager (OPM)

- Before hiring a designer, public agencies must hire an “owner’s project manager” on any project over \$1.5 million to advise the owner on selection of designer, value engineering and cost estimating, prequalification of general contractors and subcontractors, scheduling, construction oversight, and project evaluation.

Changes to improve qualifications of contractors

- Annual DCAM certification is now required of subcontractors, and certification of general contractors is tightened, with passing “score” increased from 70 to 80 points.
- Prequalification of general contractors and subcontractors is mandatory on all projects over \$10 million, and optional on projects under that amount.

Changes to improve qualifications of contractors *(continued)*

- Subcontractor performance and payment bonds are required on all projects where there has been prequalification of subcontractors.
- Evaluation of subcontractors is now required as it is for general contractors and all evaluation forms submitted to DCAM by public agencies (and any contractor/subcontractor responses) are now a public record. Public agencies that fail to complete subcontractor evaluations will be ineligible to receive public funds.
- Debarment is now mandatory in situations where debarment is required by law – for example, in cases of criminal conviction for violations of wage or workers' comp statutes, or cases where contractors have been debarred by the federal government or in other states.
- Contractors who mis-classify employees are now subject to criminal and civil remedies, including debarment.

New authorization to use Alternative Delivery Methods, Chapter 149A

- The use of CM at Risk is allowed on all building projects costing \$5 million or more, with the approval of the Inspector General.
- The use of Design Build is allowed on all Ch. 30 public works projects (roads and bridges) costing \$5 million or more, subject to the approval of the Inspector General.

Changes to broaden the inclusion of minority and women owned businesses

- DCAM in consultation with SOWMBA will establish an “affirmative marketing program” to ensure participation of MBE & WBE businesses on state-owned, state-funded, and state-assisted building projects. Unlike past programs, the requirements will extend to municipalities, on projects that have state support.
- Under the program, DCAM and SOWMBA will establish annual regional participation goals, based on availability of MBE and WBE businesses. Procedures will also be established for good faith waivers.
- There are no provisions to extend the requirements to subcontractors to any greater extent than required in the past.

Miscellaneous changes

- The UMass enabling act is amended to clarify the definition of “nongovernmental sources of funding” to mean private donations and gifts, or certain commercial or federal grants or contracts. Student tuitions and fees will no longer qualify as “nongovernmental sources” of funding that make projects eligible for exemptions from the bid law.
- MSCBA enabling act is likewise amended to limit the definition of “nongovernmental sources of funding” and to restrict the use of alternative methods to a single method similar to CM at Risk on building projects costing \$1 million or more – which is currently the method of choice at MSCBA. MSCBA will still be able to procure the designer and the CM as a team, but must then follow the provisions of CM at Risk, particularly with respect to prequalification and selection of trade contractors.

Subcontractor Prequalification

What is prequalification?

- Prequalification is the new first phase in a 2-phase procurement process that allows public awarding authorities to limit the “bidding pool” to general bidders and sub-bidders who are qualified to do the work. It has several advantages:
 - ✓ Assures that only qualified contractors are in the bidding pool
 - ✓ Raises the bar for quality of work
 - ✓ Assures that price is no longer the only deciding factor in winning a contract
- In the second phase, the awarding authority invites bids only from prequalified bidders. The remainder of the bidding process and award of contracts is unchanged, and follows the existing procedures under Ch. 149.
- The subcontractor prequalification requirements can be found in Section 19 of Chapter 193 of the Acts of 2004. Section 19 establishes a new section in Ch.149: Section 44D3/4.

When is it required?

- Prequalification of general contractors and subcontractors by public awarding authorities is **mandatory** on all Ch. 149 projects over \$10 million, and **optional** on projects between \$100,000 and \$10 million. It is also mandatory on *all* CM at Risk projects. In general, the new requirements apply to all projects put out to bid after July 19, 2004.
- Prequalification is **discretionary** for five “exempt” state agencies: DCAM, Massport, MWRA, Mass. State College Building Authority, and UMass Building Authority.
- With minor differences, the prequalification process is the same for both GCs & subs.

Steps in the process

- **Prequalification Committee:** The Awarding Authority begins the process by establishing a four-person prequalification committee, which consists of one representative of the designer and 3 representatives of the awarding authority, including the Owner’s Project Manager if there is one. The State College Building Authority is allowed to have a 5-person committee. The Prequalification Committee can be the same individuals as on the CM prequalification committee.
- **Public Notice/ Request for Qualifications:** The awarding authority must give public notice that prequalification is required, and solicit responses to a “Request for Qualifications” (RFQ). The public notice must appear in the newspaper, in the Central Register and on Comm-Pass, at least two weeks before the date for responses. **The public notice and RFQ must include:**
 - (1) **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 subcontractor submissions;
 - (2) **The evaluation procedure** and the criteria for the prequalification of subcontractors, including the point rating system, and the schedule for the evaluation process;
 - (3) **A general description of the project** and the subcontractor’s class of work;

- (4) **The anticipated schedule and estimated construction cost** for the project, as well as estimated cost of the subcontractor's class of work;
- (5) **A listing of the project team** including the awarding authority, designer, and awarding authority's owner's project manager, if applicable;
- (6) **A statement indicating that the RFQ will be used to prequalify subcontractors** who will be invited to submit a bid pursuant to sections 44E and 44F;
- (7) **A prohibition against any unauthorized communication** or contact with the awarding authority outside of official pre-bid meetings; and if desired,
- (8) **A limitation on the size** and number of pages to be sent in response to the RFQ.



- **Statement of Qualifications:** The RFQ requires subcontractors to submit a "Statement of Qualifications" signed under pains & penalties of perjury, providing information in four major categories only:

- (1) Management experience;
- (2) References;
- (3) Financial capacity to complete projects; and
- (4) Mandatory documentation of bonding capacity and DCAM certification.

In each category, subcontractors can be asked to provide only the information outlined below – nothing more. The RFQ must state the specific points for each major category and sub-category of information. The points for each major category are mandated by statute, but within each of the four major categories, the awarding authority can use discretion in allocating points among the subcategories, consistent with the total points for the category.

(1) Management Experience (50 points; minimum of 25 required for approval):

- (i) **Business Owners** – name, title, years with firm.
- (ii) **Management Personnel** – names, title, education and construction experience, years with firm, list of projects.
- (iii) **Similar Project Experience** – project name(s), description, description of scope, original trade contract sum, final trade contract sum with explanation, date completed.
- (iv) **Terminations** – list of any projects on which the subcontractor was terminated or failed to complete the work.
- (v) **Legal Proceedings** – All legal or administrative proceedings currently pending against the subcontractor or concluded adversely to the subcontractor within the past three years relating to the procurement or performance of any public or private construction contract. Legal proceedings shall not include any actions that primarily involve personal injury or workers' compensation claims, or where the sole cause of action involves the subcontractor's exercise of its rights for direct payment under Chapter 30, section 39F.
- (vi) **Safety Record** – three year history of the subcontractor's workers' compensation experience modifier
- (vii) **Compliance Record** – General contractors *only* are required to submit information on and evidence of their compliance with MBE and WBE inclusion goals and workforce inclusion goals. This requirement does NOT apply to subcontractors.

