

**CM at Risk for Public Building Projects
as part of the
Public Construction Reform Legislation**

July 19, 2004

SECTION 27. The General Laws are hereby amended by inserting after chapter 149 the following CHAPTER 149A. PUBLIC CONSTRUCTION ALTERNATIVE DELIVERY METHODS: --

CHAPTER 149A PUBLIC CONSTRUCTION ALTERNATIVE DELIVERY METHODS.

Section 1. For each contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building estimated to cost not less than five million dollars, a public agency, as defined pursuant to section 44A of chapter 149, may elect to use the construction management at risk delivery method, pursuant to sections 1 to 13, inclusive; provided that, prior to using the construction management at risk delivery method, the public agency shall seek the approval of the inspector general pursuant to section 4 of this chapter.

Section 2. The words defined in this section shall have the meaning as set forth below whenever they appear in sections 1 through 9, inclusive, of this chapter unless indicated otherwise or unless the context in which they are used clearly requires a different meaning.

“Building project”, shall mean the construction, reconstruction, installation, demolition, maintenance or repair of any building;

“Construction management at risk” or “Construction management at risk services” or “Construction management at risk delivery method”, shall mean a construction method wherein a construction management at risk firm provides a range of preconstruction services and construction management services which may include cost estimation and consultation regarding the design of the building project, the preparation and coordination of bid packages, scheduling, cost control, and value engineering, acting as the general contractor during the construction, detailing the trade contractor scope of work, holding the trade contracts and other subcontracts, prequalifying and evaluating trade contractors and subcontractors, and providing management and construction services, all at a guaranteed maximum price, which shall represent the maximum amount to be paid by the public agency for the building project, including the cost of the work, the general conditions and the fee payable to the construction management at risk firm.

“Construction manager at risk” or “Construction management at risk firm” shall mean a sole proprietorship, partnership, corporation, or other legal entity that provides construction management at risk services;

“Designer”, shall have the same meaning as found in section 38A of chapter 7, and shall be independent of the construction management at risk firm and the owner’s project manager.

"Governing body", shall mean the person or group of persons who have the power to enter into and approve of a contract between a public agency and a construction management at risk firm;

“Guaranteed Maximum Price”, or “GMP”, shall mean the agreed total dollar amount for the construction management at risk services, including the cost of the work, the general conditions and the fees charged by the construction management at risk firm.

“Owner’s Project Manager” shall mean an individual, corporation, partnership, sole proprietorship, joint stock company, joint venture, or other entity engaged to provide project management services on behalf of a public agency relative to the construction and supervision of construction of a building project; provided that, any individual assigned by the Owner’s Project Manager to provide the project management services for the building project shall be a person who is registered by the commonwealth as an architect or professional engineer and has at least five years experience in the construction and supervision of construction of buildings of similar size and complexity; or a person who is not so registered and has at least seven years experience in the construction and supervision of construction of buildings of similar size and complexity; provided further that a public agency may utilize a member or members of its staff as owner’s project manager provided such staff meets the required qualifications.

"Public Agency" shall have the same meaning as found in section 44A of chapter 149;

“Two-phase selection process”, shall mean a procurement process in which the first phase consists of creating a short list of prequalified firms as determined by responses to a request for qualifications and in which the second phase consists of inviting firms prequalified in the first phase to submit responses to a request for proposals or a request for bids.

Section 3. (a) Prior to procuring the services of a designer pursuant to paragraph (b) of this section and prior to submitting an application to use the construction management at risk delivery method pursuant to section 4, the public agency shall procure the services of an owner’s project manager pursuant to the provisions of section 44A1/2 of chapter 149; provided that the owner’s project manager may assist the public agency in the procurement of the designer; and provided further, that the owner’s project manager shall be independent of the designer and the construction management at risk firm.

(b) Prior to submitting an application to use the construction management at risk delivery method pursuant to section 4, the public agency shall procure the services of a designer for the building project; provided that in procuring the services of a designer, the public agency shall do so in a manner consistent with the provisions of sections 38A1/2 to 39O, inclusive, of chapter 7; and provided further, that the designer procured by the public agency shall be independent of the owner's project manager and the construction management at risk firm.

Section 4. (a) Prior to undertaking a building project using construction management at-risk services, a public agency shall notify and submit a detailed application to proceed to the office of the inspector general; provided that, said detailed application shall conform to regulations and procedures promulgated by the inspector general as may be amended from time to time. In order to receive a notice to proceed from the office of the inspector general, the public agency shall demonstrate the following:

- (1) The public agency has authorization from its governing body to enter into a contract with a construction management at risk firm. Said authorization shall include the results of any public vote if applicable.
- (2) The public agency has the capacity, a plan and procedures in place and approved of by the governing body, where appropriate, to effectively procure and manage construction management at-risk services for the specific project and has retained the services of a qualified owner's project manager.
- (3) The public agency has in place procedures to ensure fairness in competition, evaluation and reporting of results at every stage in the procurement process.
- (4) The building project has an estimated construction value of \$5 million or more.
- (5) The public agency has determined that the use of construction management at-risk services is appropriate for the building project and states in writing the reasons for said determination.

(b) A public agency that meets all requirements established by the inspector general shall be issued a notice to proceed to use the construction management at risk delivery method for the construction of a building project. If the inspector general declines to issue a notice to proceed to a public agency, the inspector general shall provide in writing to said public agency the reason or reasons for the decision. A public agency not receiving a notice to proceed from the inspector general may re-submit a detailed application upon correcting or responding to the reason or reasons provided to the public agency by the inspector general. The inspector general shall review the resubmitted application and, if the application meets the requirements established by the inspector

general, the inspector general shall issue a notice to proceed.

(c) Applications submitted to the inspector general for approval to use construction management at risk services shall be considered in a timely manner; provided that all decisions shall be rendered by the inspector general to a public agency in not less than sixty days from the date the application is submitted to the inspector general,

(d) Notwithstanding the provisions of paragraph (a) of this section, the division of capital asset management and maintenance, the Massachusetts port authority, the Massachusetts water resources authority, the Massachusetts state college building authority, and the university of Massachusetts building authority, hereinafter, "exempt agencies", shall not be subject to said paragraph (a); provided that each exempt agency shall submit its procedures for the procurement and use of construction management at risk services to the inspector general, and so long as the inspector general determines that said procedures of an exempt agency comply with the provisions of sections 1 to 10, inclusive, the inspector general shall approve the procedures and each exempt agency, so approved, may use the construction management at risk delivery method consistent with the procedures so approved on building projects; provided further that each said exempt agency shall annually submit its procedures to the inspector general for review and approval by the inspector general; and, provided further that should an exempt agency modify or amend the procedures so approved, said exempt agency shall immediately submit the amended procedures to the inspector general for approval. The inspector general shall have sixty days from the time an exempt agency submits its procedures to approve or disapprove the procedures. An exempt agency whose procedures have been disapproved may correct the deficiency or deficiencies contained therein and re-submit the corrected procedures to the inspector general for review and approval; provided that the inspector general shall conduct an expedited review of corrected procedures.

(e) A public agency after receiving a notice to proceed or an exempt agency after having its procedures approved may use the construction management at risk delivery method; provided, that the public agency or exempt agency shall procure a construction management at risk firm in accordance with a two-phase process in a manner consistent with the provisions of section 5.

Section 5. (a) The public agency shall utilize a two-phase selection process as provided in paragraph (c) of this section, section 6 and section 7, inclusive, for the selection of a construction management at risk firm with whom to enter into a contract to provide construction management at risk services; provided that each contract between a public agency and a construction management at risk firm shall be secured by a performance and payment bond in the full sum of the guaranteed maximum price by a surety company licensed to do business in the commonwealth and whose name appears on the United States Treasury Department Circular 570.

(b) Prior to issuing an RFQ, hereinafter "RFQ", the public agency shall establish a prequalification committee for the purpose of reviewing and evaluating responses submitted to the RFQ issued pursuant to paragraph (c) of this section; provided that said

prequalification committee shall be comprised of a representative of the designer, the owner's project manager, and at least two representatives of the public agency.

(c) Phase one of the two-phase selection process shall begin once the public agency gives public notice of the building project and solicits responses to a request for qualifications from construction management at risk firms; provided that said public notice and solicitation shall 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 said responses;
- (2) a general description of the project including preliminary concept designs and key factors important to the final selection;
- (3) the evaluation procedure and criteria pursuant to paragraph (f) of this section, including any rating system;
- (4) a specific description of the scope of services expected of the selected construction management at risk firm during both the design (preconstruction) and construction phases of the project;
- (5) a general description of the anticipated schedule and estimated construction cost for the building project;
- (6) a listing of the project team including the public agency, the designer, and the public agency's owner's project manager;
- (7) the criteria for the selection of the construction management at risk firm, including minimum experience, requirements for presentations, and the schedule for the selection process;
- (8) a prohibition against any unauthorized communication or contact with the public agency outside of official pre-proposal meetings; and if desired,
- (9) a limitation on the size and number of pages to be included in the response to the RFQ; and,
- (10) a statement indicating that the RFQ will be used to prequalify construction management at risk firms that will be invited to submit a proposal in response to a request for proposal issued pursuant to section 6 of this chapter.

(d) The public agency shall require interested construction management at risk firms to submit a statement of qualifications in response to the RFQ issued pursuant to paragraph (c). Said statement of qualifications shall include, at a minimum, the following:

- (1) a cover letter or executive summary detailing the key elements and factors that differentiate the firm from other responders;
- (2) completion of a qualifications application similar in form to AIA Document A305 (1986 edition) listing ~~the~~ general business information and financial capacity;

- (3) a list of lawsuits and arbitrations to which the firm is a party in regard to construction contracts within the last three years, including a list of all convictions or fines for violations of state or federal law;
- (4) submission of a project organization chart with specific information on key project personnel and/or consultants;
- (5) submission of an audited financial statement for the most recent fiscal year and a letter from the surety company of the firm confirming the ability to provide performance and payment bonds for the building project under consideration; provided that financial information submitted shall remain confidential and shall not be a public record to the fullest extent permissible under the law;
- (6) submission of information on the firm's safety record including its workers' compensation experience modifier for the prior three years;
- (7) submission of information on and evidence of the firm's compliance record with respect to minority business enterprise and women business enterprise inclusion goals and workforce inclusion goals, if applicable;
- (8) submission of information regarding the firm's experience on similar building projects including references from the owners and architects of such building projects;
- (9) submission of information on the experience of the firm on similar projects that used the construction management at risk delivery method, including references from the owners and architects of such projects;
- (10) submission of information on any projects where the firm was terminated, failed to complete the work, or paid liquidated damages;
- (11) submission of specific examples of the firm's project management reports and/or other illustrations of the company's operating philosophy;
- (12) a Certificate of Eligibility as issued by the division of capital asset management and maintenance pursuant to section 44D of chapter 149, showing a capacity rating sufficient for the project, and an update statement; and
- (13) any other relevant information that the public agency determines desirable.

The statement of qualifications shall be signed under pains and penalties of perjury.

(e) The public notice and solicitation required in paragraph (c) shall be advertised in a newspaper of general circulation in the area in which the building project is located, in the central register pursuant to section 20A of chapter 9, and within the COMPASS system, so-called. Said public notice and solicitation shall be given not less than two weeks prior to the deadline for submitting responses to the RFQ.

(f) Upon receipt of the statement of qualifications submitted by construction management at risk firms, the prequalification committee established pursuant to paragraph (b) of this section, shall evaluate each statement of qualifications using the criteria as provided in the RFQ. Only construction management at risk firms achieving an acceptable rating as defined pursuant to paragraph (c)(4) of this section will be

selected to proceed to phase two of the two-phase selection process and receive a request for proposals issued pursuant to section 6; provided that the prequalification committee shall select a minimum of three qualified construction management at risk firms to receive the request for proposals; provided further, that if the prequalification committee is not able to identify a minimum of three qualified construction management at risk firms, the public agency shall re-advertise the building project using the procedures herein, or may procure the building project pursuant to the provisions of sections 44A to 44J, inclusive, of chapter 149. The decision of the prequalification committee shall be final and shall not be subject to appeal except on grounds of fraud or collusion.

Section 6. (a) Prior to issuing a request for proposals, hereinafter referred to as "RFP", the public agency shall establish a selection committee for the purpose of reviewing and evaluating responses submitted to the RFP issued pursuant to paragraph (b) of this section; provided that said selection committee shall be comprised of a representative of the designer, the owner's project manager, and at least two representatives of the public agency; provided further, that nothing herein shall prohibit the public agency from appointing the same individual(s) who served as the prequalification committee to serve as the selection committee.

(b) The public agency shall issue an RFP to each construction management at risk firm that has been prequalified to receive an RFP pursuant to this section. The RFP shall include each of the elements of the RFQ identified in paragraph (c) of section 5 and further shall include:

- (1) the date, time and place for submission of proposals;
- (2) a clear description of the submission requirements including separate price and technical components;
- (3) detailed information concerning the project scope including any preliminary design information, geotechnical reports, existing condition surveys and specifications;
- (4) specific information on the project schedule including design deliverables, site availability and occupancy expectations;
- (5) a detailed description of the scope of work and deliverables expected from the construction management at risk firm during the preconstruction phase;
- (6) the minority business enterprise and women business enterprise inclusion goals and workforce inclusion goals for the building project;
- (7) a clear description of the communication guidelines to be followed during the procurement process including any measures to assure that the selection process will be open and fair;
- (8) the form of contract and general and supplemental conditions including any incentive provisions allowable under this statute and any damages for delay provisions;
- (9) the budget for the project;

- (10) a fully developed schedule of cost items listing the public agency's determination of what will be considered fee, cost of the work, and general condition items;
- (11) specific information on the evaluation criteria including any point scale or measurement system;
- (12) the timetable and process for establishing a GMP including status of design and limitations on the amount and use of contingency; and
- (13) a list of the trade contractor classes of work to be required in the trade contractor prequalification plan

(c) The RFP shall require the submission of separate price and technical components as part of the proposal submitted in response to said RFP. (1) The price component shall include (a) the fee for preconstruction services with appropriate detail, (b) the fee for construction services with explanation of the basis, and (c) the estimated cost of general conditions with appropriate detail. (2) The technical component shall include: (a) a detailed project approach, including preconstruction services, (b) supplemental relevant project references, (c) the project team members with position descriptions and relevant time commitments of said team members during the project, (d) the construction management plan indicating approach to control of cost, schedule, quality, documents and claims; (e) preliminary definition of trade contractor and subcontractor bid packages and scopes of work, (f) affidavit of prevailing wage compliance pursuant to sections 26 and 27 of chapter 149; (g) a commitment letter from a surety company licensed to do business in the Commonwealth and whose name appears on United States Treasury Department Circular 570 stating the surety's willingness to bond the building project in the full sum of the contract at 110% of the budget for the building project, (h) a technical challenges and solutions plan, and (i) any qualifications or exceptions to the terms of the form of contract or supplemental conditions as included in the RFP.

(d) Upon receipt of the proposals to the RFP issued pursuant to paragraph (b) of this section, the selection committee shall evaluate all proposals in accordance with the criteria included in the RFP; provided that if the selection committee elects to conduct an interview with a construction management at risk firm who submits a proposal in response to the RFP, then the selection committee shall conduct interviews with each construction management at risk firm that submits a proposal to said RFP. Based upon the evaluations of each proposal submitted by each construction management at risk firm, the selection committee shall rank the proposals submitted by the construction management at risk firms. The decision of the selection committee shall be final and not subject to appeal except on the grounds of fraud or collusion.

(e) The selection committee shall commence non-fee negotiations with the highest ranked construction management at risk firm. If the selection committee determines that negotiations with the highest ranked construction management at risk firm will not result in a contract acceptable to the public agency, the selection committee shall terminate negotiations with the highest ranked construction management at risk firm and shall commence negotiations with the next highest ranked construction management at risk firm. Such process shall continue until the selection committee has reached an acceptable

contract with one of the prequalified construction management at risk firms. The list and ranking of proposed construction management at risk firms shall be certified by the public agency and made available as a public record after the contract award.

Section 7. (a) Each contract for a building project procured pursuant to sections 1 to section 9, inclusive, of this chapter shall utilize a cost plus not to exceed guaranteed maximum price form of contract in which the public agency shall be entitled to monitor and audit all project costs. The construction management at risk firm shall not be entitled to share in any savings between the final guaranteed maximum price figure and the final cost of the work including the fee of the construction management at risk firm except that the public agency may include an incentive clause with said contract for various performance objectives; provided that such an incentive clause shall not include an incentive that exceeds 1% of the estimated construction cost.

(b) In establishing the schedule and process for determining a guaranteed maximum price, the contract between the public agency and the construction management at risk firm shall comply with the following provisions:

- (1) the guaranteed maximum price shall be based on design documents which are no less developed than 60% Construction Documents;
- (2) the guaranteed maximum price shall be agreed to as an amendment to the contract between the public agency and the construction management at risk firm;
- (3) The guaranteed maximum price amendment shall be executed prior to the commencement of any construction work; except that that the public agency, prior to the execution of the guaranteed maximum price amendment, may commence construction, so long as the public agency executes a separate amendment to the contract with the construction manager at risk detailing the scope of work selected to commence prior to execution of the guaranteed price amendment. Said separate amendment shall state the sum for the scope of work, which shall include the cost of the work, the general conditions and additional fee, if any, for the construction manager at risk; and provided further that any class of work included in the scope of work selected to commence prior to the execution of the guaranteed maximum price amendment shall be subject to the trade contractor selection process set forth in section 8, for the stated scope of work only. In the event that a guaranteed maximum price cannot be successfully negotiated between the public agency and the construction manager at risk, any trade contractor agreement between the construction manager at risk and a trade contractor for work selected to commence prior to execution of the guaranteed maximum price amendment may be assigned to the public agency or to another construction manager at risk designated by the public agency, without the assent of the trade contractor, and the public agency or the designated construction manager at risk and the trade contractor shall be bound by the terms of the trade contractor agreement; and

- (4) the guaranteed maximum price amendment to the contract between the public agency and the construction management at risk firm shall include a detailed line item cost breakdown by trade, including any cost for work selected to commence prior to the execution of the guaranteed maximum price amendment; dollar amounts for the construction management at risk firm's contingency; dollar amounts for the general conditions and fees, including any amounts related to work selected to commence prior to the execution of the guaranteed maximum price amendment; a list of all the drawings, specifications and other information on which the guaranteed maximum price is based; a list of allowances and statement of their basis; a list of any assumptions or clarifications on which the guaranteed maximum price is based; the dates for substantial and final completion on which the guaranteed maximum price is based; and a schedule of applicable alternates and unit prices.

Upon establishment of the guaranteed maximum price, the construction management at risk firm shall provide all required performance and payment bonds in the amount of the guaranteed maximum price within five business days after the execution of the guaranteed maximum price amendment.

(c) In the event that a guaranteed maximum price cannot be successfully negotiated between the public agency and the construction management at risk firm, the selection committee may commence negotiations with one additional proposer starting with the next highest ranked proposer. In the event that a contract and guaranteed maximum price amendment cannot be successfully negotiated between the selection committee and the next highest ranked proposer, the public agency shall terminate the procurement process and shall instead procure the project in accordance with sections 44A to 44J, inclusive, of chapter 149. Upon such termination, the public agency may not re-apply for approval to use the construction management at risk delivery method for the same building project unless the building project has been materially changed in form or function.

Section 8. (a) For each building project procured pursuant to sections 1 to 9, inclusive, of this chapter, the public agency shall establish a trade contractor selection process for all sub-bid classes of work listed in section 44F of chapter 149 and all other sub-bid classes of work selected by the public agency for the project, provided the sub-bid work meets or exceeds the threshold sum identified in paragraph (1) of section 44F of chapter 149; and provided further, that the selection process for such trade contractors shall conform to the requirements set out in paragraphs (b) through (k), inclusive, of this section. The public agency shall also establish a selection process for subcontractors who are not trade contractors as defined above. Said selection process shall conform to the requirements of paragraph (j) of this section. All trade contractors and subcontractors seeking to provide services in connection with the building project shall be prequalified in accordance with the provisions of this section. The public agency may, consistent with established minority business enterprise and women business enterprise inclusion goals, provide an additional five points to the total score of each minority business enterprise and women business enterprise in the prequalification process as provided in paragraph

(e) of this section. The construction management at risk firm may submit its qualifications to bid on trade contract or subcontract work in accordance with the provisions of this section; provided that the construction management at risk firm customarily performs the work for which it submits qualifications; provided further, that said construction management at risk firm must perform the work with employees on its own payroll; and provided further, that the construction management at risk firm meets all the requirements of the selection process.

All trade contracts entered into in accordance with this chapter shall be secured by performance and payment bonds in the full amount of the trade contract amount from a surety company licensed to do business in the commonwealth of Massachusetts and whose name appears on United States Treasury Department Circular 570; provided that said bonds are subject to the provisions of paragraph (3) of section 44F(3) of chapter 149.

(b) The public agency shall establish a trade contractor prequalification committee for the building project. The prequalification committee shall be comprised of a representative from the designer, a representative from the construction management at risk firm, and two representatives appointed by the public agency.

(c) The construction management at risk firm shall provide to the public agency detailed information describing the work required for each trade contractor. This detailed information shall serve as the basis for an RFQ to be issued by the public agency. The public agency shall give public notice of trade contractor work on the building project and shall issue for each trade contract established under paragraph (a) of this section an RFQ which shall be used to solicit responses from eligible trade contractors and which shall be used to prequalify said trade contractors to participate on said building project; provided that said public notice and solicitation shall include at a minimum:

- (1) the date, time and place for submission;
- (2) relevant information about the project and the bidding process;
- (3) the specific criteria for trade contractor prequalification and selection;
- (4) a statement indicating that the RFQ will be used to prequalify trade contractors that will be invited to submit a bid; and
- (5) that the responders' names are to be posted, but that there shall be no public opening of responses.

All interested trade contractors shall be eligible to respond to the RFQ and participate in the prequalification process.

Each response submitted by a trade contractor in response to the RFQ shall be signed under pains and penalties of perjury. Financial information provided in response to the RFQ shall remain confidential and not be a public record, as defined in section 7 of chapter 4 and shall not be open to public inspection, to the fullest extent possible under the law.

(d) The public notice and solicitation required in paragraph (c) shall be advertised in a newspaper of general circulation in the area in which the building project is located, in the central register pursuant to section 20A of chapter 9, and within the COMPASS system, so-called. Said public notice and solicitation shall be given not less than two weeks prior to the deadline for submitting responses to the RFQ.

(e) The RFQ shall require only the information contained in sub-paragraphs 1 through 4, inclusive of this paragraph, and shall identify the specific point allocation for each category and sub-category of information. Within each category of information, public agencies may 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, 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 trade contractor was terminated or failed to complete the work.
- (v) Lawsuits – commercial lawsuits in which the trade contractor is a defendant or defendant-in-counterclaim with regard to construction contracts within the last three years. Such lawsuits shall not include any actions that primarily involve personal injury or workers' compensation claims, or where the sole cause of action involves the trade contractor's exercise of its rights for direct payment under Chapter 30, section 39F.
- (vi) Safety Record – three year history of the trade contractor's workers' compensation experience modifier

(2) References (30 points; minimum of 15 required for approval):

- (i) Client references for all projects listed in (1)(iii), including the project name, client's name, address, telephone and fax number, and contact person.
- (ii) Credit References – telephone and fax number of contact person from key suppliers, vendors and banks. Trade contractors shall submit a minimum of five such references.
- (iii) Public Project Record – list of all completed public building construction project (s) as defined in section 44A of chapter 149 during past three years with client's name, address, telephone and fax number and contact person.

(3) Capacity to Complete Projects (20 points; minimum of 10 required for approval):

- (i) Annual revenue for prior three fiscal years. There shall be no requirement for submission of financial statements.
- (ii) Revenue under contract for next three fiscal years.

(4) Mandatory commitment letter, for which no points are assigned, for payment and performance bonds at 110% of the estimated trade contract value from a surety company licensed to do business in the commonwealth and whose name appears on United States Treasury Department Circular 570.

(f) Responses submitted in response to the RFQ issued pursuant to paragraph (e) of this section shall be reviewed and scored by the trade contractor prequalification committee established pursuant to paragraph (b) of this section. All trade contractors who achieve a score of 70 points or greater shall be prequalified to submit a bid. The public agency shall notify the prequalified trade contractors of their approval to submit a bid on the project as well as the schedule and timing for the submission of the Request for Bid as outlined below. The decision of the prequalification committee shall be final and not subject to appeal except on the grounds of fraud or collusion. A trade contractor's score shall be made available to the trade contractor upon request, but shall not be a public record as defined in section 7 of chapter 4 and shall not be open to public inspection, to the fullest extent possible under the law.

(g) Trade contractors prequalified pursuant to paragraph (f) shall be invited to submit a bid on the proposed building project pursuant to a Request for Bids for trade subcontracting services. The request for bids document shall include, without limitation, the following information:

- (1) the date, time and place for submission of responses to the request for bids,
- (2) fully detailed drawings and specifications by class of work in accordance with paragraph (1)(a) of section 44F of chapter 149 which shall provide for full competition for each item of material to be furnished under the contract as set forth under paragraph (b) of section 39M of chapter 30;
- (3) a detailed definition of the trade contractor's scope of work, including alternates and allowances, if any, within that scope of work;
- (4) a project schedule indicating the planned sequence and duration of each trade contractor's work;
- (5) a list of prequalified trade contractors;
- (6) a trade contractor bid form that shall require a listing of price, addenda, alternates and allowances, if any, for the trade work; and shall further require the trade contractor to certify that he will perform the complete trade work with employees on his own payroll, except for work customarily performed by sub-trade subcontractors within the trade; and shall further

- require, without limitation, the names of all sub-trade subcontractors to be used if awarded the trade contract and ~~the~~ each sub-trade contract sum;
- (7) an affidavit that all sub-trade subcontractors named on the bid form have been prequalified by the trade contractor using criteria similar to the criteria for the prequalification of trade contractors;
 - (8) an affidavit of tax compliance;
 - (9) an affidavit of prevailing wage compliance pursuant to sections 26 and 27 of chapter 149;
 - (10) a non-collusion affidavit;
 - (11) a requirement for the bidder to post a 5% bid bond from a surety company licensed to do business in the commonwealth of Massachusetts and whose name appears on U.S. Treasury Department Circular 570; provided that the bid bond shall be returned to the bidder if the bidder is not selected as the trade contractor;
 - (12) the budget for the project, and the budget amount for the trade contract scope of work as provided in the project guaranteed maximum price if available, or as provided in the most recent budget for the project; and
 - (13) a trade contractor agreement form as set forth in this section including all exhibits.

Trade contractors submitting bids in response to the request for bids shall do so in accordance with the requirements contained in the request for bids package. Any bid which does not include the bid bond or affidavits required pursuant to this paragraph or any response in which the information requested is incomplete, conditional, or obscure or which contains any additions not required in the request for bids package shall be rejected.

(h) Bids shall be opened publicly by the public agency and shall be awarded to the lowest prequalified bidder; provided that if the public agency receives fewer than three responsive bids on any trade contract and the lowest bid exceeds the estimated cost for the work for which the bids are requested, the construction manager at risk firm shall attempt to negotiate an acceptable price with the lowest prequalified bidder. If such negotiations are unsuccessful, the construction manager at risk firm shall terminate negotiations with the lowest prequalified bidder and shall initiate negotiations with the trade contractor who was the second lowest prequalified bidder. If the CM is unsuccessful in negotiating an acceptable price with the lowest prequalified bidder and second lowest prequalified bidder, the construction manager at risk firm, on behalf of and with the consent of the public agency, shall solicit additional bids, utilizing the procedures for selection of subcontractors who are not trade contractors, set out in paragraph (j) of this section.

(i) Each trade contractor selected by the construction management at risk firm to perform work on the building project shall return an executed trade contract including the required performance and payment bonds and insurance certificate to the construction manager at risk firm within ten business days of receipt of the trade contract from the

construction manager at risk firm. The trade contract shall be the trade contract agreement in paragraph (k) of this section.

(j) For subcontractors who are not trade contractors as defined in paragraph (a) of this section and whose work has an estimated cost at or exceeding the threshold sum identified in paragraph (1) of section 44F of chapter 149, the construction management at risk firm shall submit to the public agency for approval the qualifications that a subcontractor must have in order to perform the work of the subcontract and a list of three subcontracting firms which the construction management at risk firm believes meets said qualifications. The public agency may eliminate firms from the list and may add firms to the list; provided that any firm added is acceptable to the construction management at risk firm. The construction management at risk firm shall invite each subcontractor approved by the public agency to submit a bid for the work; provided that the bid shall be based on detailed bidding information developed by the construction management at risk firm. The construction management at risk firm shall present a list of the bids submitted to the public agency. The construction management at risk firm shall indicate the bidders who are selected to be awarded a subcontract; provided that the construction management at risk firm shall provide a written explanation as to the reason for the award of a subcontract. Notwithstanding the foregoing, subcontracts with an award value that does not exceed the threshold sum as identified in paragraph (1) of section 44F of chapter 149, may be awarded by the construction management at risk firm using any selection method selected by the construction management at risk firm with the approval of the public agency.

(k) When entering into a contract with a trade contractor selected to perform work pursuant to paragraphs (h) and (i) of this section, the trade contractor agreement shall be in the following form:

TRADE CONTRACTOR AGREEMENT

THIS AGREEMENT MADE THIS ____ DAY OF _____, 20____, by and between _____ a corporation organized and existing under the laws of _____ a partnership consisting of _____ an individual doing business as _____ hereinafter called the "Construction Management At Risk Firm" and _____ a corporation organized and existing under the laws of _____ an individual doing business as _____ hereinafter called the "Trade Contractor".

WITNESSETH that the Construction Management At Risk Firm and the Trade Contractor for the considerations hereafter named, agree as follows:

1. The Trade Contractor agrees to furnish all labor and materials required for the completion of all work specified in Section No(s). ____ of the specifications for _____ (name of Sub-trade(s)) and the plans referred to therein and addenda No. ____ for the _____ (project) all as prepared by

_____ designer. All work shall be in accordance with the contract documents listed on Exhibit A; and the detailed Scope of Work listed on Exhibit B. The Construction Management At Risk Firm agrees to pay the Trade Contractor as full payment for all the work in Exhibit B the sum of \$ _____. This price includes the following alternates: Nos. _____, _____, _____, _____.

- A. The Trade Contractor agrees to be bound to the Construction Management At Risk Firm by the terms of the hereinbefore described plans; specifications (including all general conditions stated therein) and addenda No. _____, and _____, and _____, and to assume to the Construction Management At Risk Firm all the obligations and responsibilities that the Construction Management At Risk Firm by those documents assumes to the _____ (Public Agency) hereinafter called the "Public Agency," except to the extent that provisions contained therein are by their terms or by law applicable only to the Construction Management At Risk Firm.
 - B. The Construction Management At Risk Firm agrees to be bound to the Trade Contractor by the terms of the hereinbefore described documents and to assume to the Trade Contractor all the obligations and responsibilities that the Public Agency by the terms of the hereinbefore described documents assumes to the Construction Management At Risk Firm, except to the extent that provisions contained therein are by their terms or by law applicable only to the Public Agency.
2. The Construction Management At Risk Firm agrees to begin, prosecute and complete the entire work specified by the Public Agency in an orderly manner so that the Trade Contractor will be able to begin, prosecute, and complete the work described in this Trade Contract; and, in consideration thereof, upon notice from the Construction Management At Risk Firm, either oral or in writing, the Trade Contractor agrees to begin, prosecute and complete the work described in this Trade Contract in an orderly manner and in accordance with the Project Schedule attached as Exhibit C as it may be reasonably modified from time to time by agreement of the Construction Management At Risk Firm and the Trade Contractor.
 3. The Trade Contractor agrees to furnish to the Construction Management At Risk Firm, on execution of this Trade Contractor Agreement and prior to commencing the work, evidence of workers' compensation insurance as required by law and evidence of public liability and property damage insurance of the type and in limits required to be furnished to the Public Agency by the Construction Management At Risk Firm.
 4. The Construction Management At Risk Firm agrees that no claim for services rendered or materials furnished by the Construction Management At Risk Firm to the Trade Contractor shall be valid unless written notice thereof is given by the

Construction Management At Risk Firm to the Trade Contractor during the first ten (10) days of the calendar month following that in which the claim originated.

- 5. This Trade Contractor Agreement is contingent upon the execution of an amendment to the contract between the Construction Management At Risk Firm and the Public Agency for the work of the Trade Contractor.
- 6. If the Trade Contractor should be adjudged a bankrupt, or if he should make a general assignment for the benefit of his creditors, or if a receiver should be appointed on account of his insolvency, or if he should persistently or repeatedly refuse or should fail, except in cases for which extension of time is provided, to supply enough properly skilled workmen or proper materials, or if he should fail to make prompt payment to sub-trade subcontractors or for material or labor, or persistently disregard laws, ordinances or the instructions of the Construction Management At Risk Firm, or otherwise be guilty of a substantial violation of any provision of the contract, then the Construction Management At Risk Firm may, without prejudice to any other right or remedy and after giving the Trade Contractor and his surety seven days' written notice, terminate the employment of the Trade Contractor and take possession of the premises and of all materials, tools, and appliances thereon and finish the work by whatever method he may deem expedient. In such case the Trade Contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the trade contract price shall exceed the expense of finishing the work including compensation for additional architectural, managerial and administrative services, such excess shall be paid to the Trade Contractor. If such expense shall exceed such unpaid balance, the Trade Contractor shall pay the difference to the Construction Management At Risk Firm. The Construction Management At Risk Firm and Trade Contractor shall have the right to seek damages for breach of this Trade Contract without terminating this Trade Contract or ceasing performance hereunder.
- 7. The following exhibits are incorporated into their subcontract:
 - Exhibit A: Contract Documents
 - Exhibit B: Detailed Scope of Work
 - Exhibit C: Project Schedule
- 8. IN WITNESS WHEREOF, the parties hereto have executed this agreement the date and year first above-written.

SEAL

ATTEST _____

Trade Contractor

SEAL

ATTEST _____

Construction Management At Risk

Firm

Section 10. The provisions of sections 26, 27, 27(A), 27(B), 27(C), 27(D), 29, 29(C), and 34(A) of chapter 149, and sections 39(F), 39(J), 39(K), 39(N), 39(O), 39(P), and 39(R) of chapter 30 shall apply to all building projects using the construction management at risk delivery method as provided in this chapter.

Section 11. For purposes of sections 1 to 10, inclusive of this chapter, the following terms as they may appear other statutory provisions referred to in this chapter shall have the following meaning:

“Awarding authority”, “contracting authority”, “contracting body”, or “public body” shall mean “public agency”;

“General contractor”, “contractor”, or “contractor principal”, shall mean “construction management at risk firm”;

“Subcontractor”, shall mean “subcontractor” and “trade contractor” except that the term “subcontractor” in paragraph (3) of section 39(F) of chapter 30 shall mean a trade contractor pursuant to paragraph (a) and a subcontractor pursuant to paragraph (j) of section 8 of this chapter.

Section 12. The Inspector General shall promulgate regulations and procedures to implement sections 1 to 11, inclusive; provided that, in preparing said regulations and procedures, the Inspector General shall, at a minimum, consult with the Associated General Contractors, the Associated Subcontractors of Massachusetts, the Boston Society of Architects, the Massachusetts Building Trades Council, the exempt agencies as identified in paragraph (d) of section 4, and other parties deemed necessary to promulgate said regulations and procedures.

Section 13. Not later than five years after the passage of this statute, the inspector general shall undertake and complete a review for the purpose of describing the experience of public agencies that utilized construction manager at risk services; provided that said review shall serve as the basis for a report to be prepared by the inspector general not later than October 1, 2009; provided further that said report to be prepared not later than October 1, 2009 shall include legislative recommendations, if any; provided further, that said report shall be submitted to the joint committee on state administration, the clerk of the house of representatives, and to the clerk of the senate.