

The Commonwealth of Massachusetts

In the Year Two Thousand and Three

Chapter 193

AN ACT FURTHER REGULATING PUBLIC CONSTRUCTION IN THE COMMONWEALTH.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is forthwith to regulate further public construction in the commonwealth, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives In General Court assembled, and be the authority of the same, as follows:

SECTION 1. Section 38A 1/2 of chapter 7 of the General Laws, as appearing in the 2002 Official Edition, is hereby amended by striking out the definition of "Public agency" and inserting in place thereof the following definition:-

"Public agency", a department, agency, board, commission, authority, or other instrumentality of the commonwealth or political subdivision of the commonwealth or two or more subdivisions thereof other than cities and towns, and any agency, unit, authority, or instrumentality thereof but not including the State College Building Authority or the University of Massachusetts Building Authority.

SECTION 2. Subparagraph (b) of section 38D of said chapter 7, as so appearing, is hereby amended by striking out clause (i) and inserting in place thereof the following clause:-

(i) a description of the project, including the specific designer services sought, the time period within which the project is to be completed, and, if available, the estimated construction cost;

SECTION 3. Section 3 BR of said chapter 7, as so appearing, is hereby amended by striking out subsection (i) and inserting in place thereof the following subsection:-

(i) Awarding authorities in cities and towns may allow a designer who conducted a feasibility study to continue with the design of a project; but, nothing herein shall prohibit the awarding authorities from commissioning, at the discretion of the awarding authorities, 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.

SECTION 4. Subsection (a) of section 38K of said chapter 7, as so appearing, is hereby amended by striking out clause (ii) and inserting in place thereof the following clause:-

(ii) the establishment of uniform requirements of information to be submitted by all applicants, a uniform procedure for the evaluation of all applications to a group of not fewer than 3 finalists, the opportunity to be afforded equally to all finalists to provide additional information to or appear before the selection body, and a procedure for the submission of a fee

proposal and the negotiation of fees between the awarding authority and the selected applicant with whom the fee is being negotiated consistent with the provisions of subsection (b) of section 38G;

SECTION 5. Subsection (b) of said section 38K of said chapter 7, as so appearing, is hereby amended by adding the following 3 sentences:- The board shall publish a standard designer selection form which shall be used by all cities, towns and public agencies not within the board's jurisdiction; but, before publishing the standard form, the board shall seek input from the cities, towns and other public agencies not within the board's jurisdiction. Any fee guidelines promulgated by the board shall be accompanied by a recommended basic scope of designer's services that shall reflect the work associated with the fee guidelines. From time to time, and no less frequently than every 3 years, the board shall review and revise the fee schedule based upon prevailing costs at the time of such review and revision.

SECTION 6. Said chapter 7 is hereby amended by striking out section 40N, as so appearing, and inserting in place thereof the following section:-

Section 40N. (a) The general court finds that (1) the Massachusetts commission against discrimination conducted hearings and investigations which documented a history of discrimination against minorities and women in the commonwealth; (2) and in 1994, the executive office of transportation and construction produced a disparity study which documented a history of discrimination against minority and women owned businesses, in which the commonwealth's agencies were participants; (3) this discrimination against minorities and women currently affects the use of minority and women owned businesses in state contracting; (4) the commonwealth has a compelling interest in promoting the use of minority owned business and women owned businesses through the use of the available and qualified pool of minority and women owned businesses; (5) it is the policy of the commonwealth to promote equality in the market and, to that end, to encourage full participation of minority and women owned businesses in all areas of state contracting, including contracts for construction and design services.

(b) As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:-

"Affirmative marketing program", a program of race and gender conscious goals to promote equality in, and to encourage the participation of, minority-owned businesses and women-owned businesses in contracts for capital facility projects and state assisted building projects;

"Capital facility project", shall have the same meaning as found in section 39A of chapter 7 when the project is under the control of the division of capital asset management and maintenance;

"Design services", any of the following services provided by any designer, programmer, or construction manager in connection with any public building project:

(i) preparation of master plans, studies, surveys, soil tests, cost estimates or programs;

(ii) preparation of drawings, plans, or specifications, including, but not limited to, schematic drawings, preliminary plans and specifications, working plans and specifications or other administration of construction contracts documents;

(iii) supervision or administration of a construction contract;

(iv) construction management or scheduling.

"Minority", a person with a permanent residence in the United States who is American Indian, Black, Cape Verdean, Western Hemisphere Hispanic, Aleut, Eskimo, or Asian.

"Minority-owned business", any contracting or subcontracting business, or

businesses that supply the contractors and subcontractors which is beneficially owned by one or more minority persons as follows:

(i) the business must be at least 51 per cent owned by minority persons; in the case of a corporation having more than one class of stockholders, the ownership requirement must be met as to each class of stock;

(ii) the minority owners shall demonstrate that they have dominant control over management;

(iii) the business has not been established solely for the purpose of taking advantage of a special program which has been developed to assist minority businesses;

(iv) in the case of a joint venture between a minority business meeting the requirements of clauses (i) to (iii), inclusive, and a non-minority business, the joint venture shall be found to be a minority business if the minority business meeting the requirements of said clauses (i) to (iii), inclusive, shall have more than one-half control over management of the project bid upon and shall have the right to receive more than one-half of the profits deriving from that project.

"State assisted building project"~ a construction project undertaken by a political subdivision of the commonwealth or 2 or more subdivisions thereof for the planning, acquisition, design, construction, demolition, installation, repair or maintenance of a capital facility and whose costs are paid for, reimbursed, grant funded, or otherwise supported, in whole or in part, by the commonwealth;

"State office of minority and women business assistance" or "SOMWBA", shall have the same meaning as found in section 40 of chapter 23A.

"Women-owned business", any contracting or subcontracting business which is beneficially owned by one or more women meeting the requirements set forth in clauses (1) to (4), inclusive, of the definition of minority business, except that the terms "women", "women owners", and "women-owned business", shall be substituted for the terms "minority" and "minority persons", "minority owners", and "minority business" appearing in the definition.

(c) The commissioner, in consultation with the director of the state office of minority and women business assistance, may establish an affirmative marketing program to ensure the fair participation of minority-owned and women-owned businesses on capital facility projects and state assisted building projects. The affirmative marketing program shall establish participation goals for minority-owned and women-owned business in the capital facility projects and state assisted building projects. The participation goals for minority-owned business and women-owned business shall be based upon the broadest and most inclusive pool of available minority-owned businesses and women-owned businesses interested in and capable of performing construction work and design services on the capital facility projects, state funded building projects, and state assisted building projects; but, the commissioner may establish both statewide and regional participation goals based upon the availability of minority-owned businesses and women-owned businesses. The state office of minority and women business assistance, or its successor agency, shall create and maintain a current directory of certified minority-owned businesses and women-owned businesses which will serve as one source of information in determining the pool of available minority-owned businesses and women-owned businesses. The commissioner and the director of SOMWBA shall meet on a quarterly basis to determine the status of the implementation of the affirmative marketing program and what further steps both agencies consider necessary to achieve the purpose of this section.

(d) Not later than January 15 of each year, the commissioner, in consultation with the director of state office of minority and women business assistance, shall establish participation goals for minority-owned businesses and women-owned businesses. The participation goals established pursuant to

this section shall apply to capital facility projects and state assisted building projects. The participation goals shall be expressed as overall annual program goals which shall be applicable to the total dollar amount of contracts awarded for construction work and design services on capital facility projects and state assisted building projects for the calendar year. The commissioner shall publish in the central register, established under section 20A of chapter 9, the participation goals for minority-owned businesses and for women-owned businesses on capital facility projects and state assisted building projects. The participation goals for minority owned businesses and women owned businesses shall remain in effect until revised participation goals are established and published pursuant to this paragraph. The participation goals for minority owned businesses and women owned businesses, developed before the effective date of this section, under any existing executive order and in effect as of the January preceding the effective date of this section shall remain in effect until January 15 of the following year. The participation goals for minority-owned businesses and women-owned businesses shall be revised as necessary every 2 years thereafter.

(e) The commissioner, in consultation with the director of the state office of minority and women business assistance, shall develop a written procedure by which a public agency may, for an individual capital facility project, adjust the participation goals for minority-owned business and women-owned business based upon the actual availability of minority-owned businesses and women-owned businesses, the geographic location of the project, the scope of work of the capital facility project, or other relevant factors.

(f) The commissioner shall develop a written, good faith efforts waiver procedure by which public agencies may determine, at any time before the award of a contract, that compliance with the goals is not feasible and by which public agencies may reduce or waive the goals for an individual contract.

(g) In connection with the affirmative marketing program, the state office of minority and women business assistance shall regularly review and, where necessary, modify its certification process to ensure that it operates effectively, and shall report annually to the secretary of the executive office of administration and finance regarding these matters.

(h) The commissioner shall be responsible for the overall management, monitoring, and enforcement of the affirmative marketing program, as the program relates to capital facility projects under the control of the division, established pursuant to this section. The commissioner may appoint a program director within the office of the commissioner to assist in program development, coordination and compliance. The program director shall also have responsibility for monitoring contract compliance within the division, addressing potential program violations and coordinating division enforcement activities with the state office of minority and women business assistance and the attorney general.

(i) The commissioner shall by March 15 of each year submit to the joint committee on state administration, the senate committee on ways and means, the house committee on ways and means, the clerk of the house, and the clerk of the senate a report on the performance of the division's affirmative marketing program for the preceding year. The report shall, at a minimum, show the name and address of each such minority owned business and women owned business, its designation as a minority-owned or women-owned business, the contract or subcontract price, a description of the work performed on the contract by class of work, and project type, and shall show separately the total number of contracts awarded to minority-owned and women-owned businesses as a percentage of the total number of contracts awarded and as a percentage of the total contract price.

(j) The commissioner shall promulgate regulations necessary to implement this section.

SECTION 7. Section 44 of chapter 23A of the General Laws, as so appearing, is hereby amended by adding the following subsection:-

(11) The director shall consult with the commissioner of the division of capital asset management and maintenance on the establishment of an affirmative marketing program pursuant to section 40N of chapter 7. The affirmative marketing program shall be established for the purpose of ensuring the fair participation of minority-owned and women-owned businesses on capital facility projects and state assisted building projects; provided that the affirmative marketing program shall establish participation goals for minority-owned and women-owned business on capital facility projects and state assisted building projects; provided further, that participation goals for minority-owned business and women-owned business shall be based upon the broadest and most inclusive pool of available minority-owned businesses and women-owned businesses interested in and capable of performing construction work and design services on such capital facility projects and state assisted building projects; and provided further, that the director and the commissioner of the division of capital asset management and maintenance shall meet on a quarterly basis to determine the status of implementation of the affirmative marketing program and what further steps both agencies deem necessary to achieve the purposes of section 40N of chapter 7 and this subsection. For purposes of this subsection, the terms "capital facility project" and "state assisted building project" shall have the same meanings as found in section 40N of chapter 7.

In connection with the affirmative market program established pursuant to section 40N of chapter 7, the state office of minority and women business assistance shall regularly review and, where necessary, modify its certification process to ensure that it operates effectively, and shall report annually to the secretary of the executive office of administration and finance regarding these matters.

SOMWBA shall be responsible for the overall management, monitoring, and enforcement of the affirmative marketing program as it relates to minority owned businesses and women owned businesses participation on state assisted building projects. The director may appoint a program director to assist in program development, coordination of program operations and compliance with program goals and objectives. The program director shall also have responsibility for monitoring compliance regarding minority owned businesses and women owned businesses participation on state assisted building projects, addressing program violations and coordinating enforcement activities.

The director shall develop a written procedure by which participation goals, for an individual state assisted building project, may be adjusted for minority-owned businesses, women-owned businesses or both; but, the adjustment shall be based upon the actual availability of minority-owned businesses and women-owned businesses, the geographic location of the project, the scope of work of the capital facility project or other relevant factors.

The director shall develop a written waiver procedure by which, at any time before the award of a contract, it may be determined that compliance with the participation goals is not feasible and by which the participation goals on a state assisted building project may be reduced or waived. Waiver shall be granted only upon a showing that good faith efforts have been made to comply with the participation goals.

The director shall by March 15 of each year submit to the joint committee on state administration, the senate committee on ways and means, the house committee on ways and means, the clerk of the house, and the clerk of the senate a report on the performance of the affirmative marketing program for the preceding year. The report shall, at a minimum, show the name and address of each such minority owned business and women owned business, its designation as a minority-owned or women-owned business, the contract or subcontract price, a

description of the work performed on the contract by class of work, and project type, and shall show separately the total number of contracts awarded to minority-owned and women-owned businesses as a percentage of the total number of contracts awarded and as a percentage of the total contract price.

The director shall promulgate regulations necessary to implement this subsection.

SECTION 8. Section 29F of chapter 29 of the General Laws is hereby amended by inserting after the word "causes", in line 52, as so appearing, the following words:- ; but, debarment shall be imposed in all causes where debarment is required by law.

SECTION 9. Section 39M of chapter 30 of the General Laws, as so appearing, is hereby amended by striking out, in lines 9 and 10, the words "ten thousand dollars but not more than twenty-five thousand dollars" and inserting in place thereof the following words:- \$25,000 but not more than \$100,000.

SECTION 10. Said section 39M of said chapter 30, as so appearing, is hereby amended by inserting after the word "from", in line 34, the following words:- an imminent security threat.

SECTION 11. Section 44A of chapter 149 of the General Laws, as so appearing, is hereby amended by striking out subsection (2) and inserting in place thereof the following subsection:

(2)(A) Every contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency estimated to cost less than \$10,000 shall be awarded to the responsible person offering to perform the contract at the lowest price quotation; provided, however, that the public agency shall seek written price quotations from no fewer than 3 persons customarily providing the work for which the contract is being made available. When seeking written quotations the public agency shall make and keep a record of the names and addresses of all persons from whom price quotations were sought, the names of the persons submitting price quotations and the date and amount of each price quotation.

(B) Every contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building estimated to cost not less than \$10,000 but not more than \$25,000 shall be awarded to the responsible person offering to perform the contract at the lowest price. The public agency shall make public notification of the contract and shall seek written responses from persons who customarily perform such work. The public notification shall include a scope of work statement that defines the work to be performed and provides potential responders with sufficient information regarding the objectives and requirements of the public agency and the time period within which the work is to be completed. For purposes of this subsection "public notification" shall include, but not necessarily be limited to, posting, no less than 2 weeks before the time specified in the notification for the receipt of responses, the contract and scope of work statement on the website of the public agency, on the COMPASS system, so-called, or in the central register established under section 20A of chapter 9, and in a conspicuous place in or near the primary office of the public agency.

(C) Every contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency estimated to cost not less than \$25,000 but not more than \$100,000, except for a pumping station to be constructed as an integral part of a sewer construction or water construction project bid under the provisions of section 39M of chapter 30, shall be awarded to the lowest responsible and eligible bidder on the basis of competitive bids publicly opened and read in accordance with the procedure set

forth in said section 39M of said chapter 30. The term "pumping station" as used in this section shall mean a building or other structure which houses solely pumps and appurtenant electrical and plumbing fixtures.

(D) Every contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by a public agency estimated to cost more than \$100,000, except for a pumping station to be constructed as an integral part of a sewer construction or water construction project bid under the provisions of section 39M of chapter 30, shall be awarded to the lowest responsible and eligible general bidder on the basis of competitive bids in accordance with the procedure set forth in section 44A to 44H, inclusive.

(E) When the general court has approved the use of an alternative mode of procurement of construction for a project pursuant to section 7E of chapter 29, the awarding authority responsible for procuring construction services for the project shall follow the policies and procedures of this section and of section 44B to 44H, inclusive, to the extent compatible with the mode of construction procurement selected.

(F) Notwithstanding paragraph (E), a public agency may undertake the procurement of modular buildings, in accordance with section 44E. A public agency may procure site work for modular buildings, including but not limited to, construction of foundations, installations, and attachment to external utilities, or any portion of site work, either in combination with the procurement of modular buildings pursuant to section 44E or on the basis of competitive bids pursuant to the paragraph (E). Notwithstanding the paragraph (E), a public agency may procure energy management services in accordance with section 11C of chapter 25A and regulations promulgated thereunder.

SECTION 12. Said section 44A of said chapter 149, as so appearing, is hereby amended by inserting after the word "property", in line 97, the following words:- or to alleviate an imminent security threat.

SECTION 13. Said chapter 149 is hereby further amended by inserting after section 44A the following section:-

Section 44A 1/2. (a) A public agency, before entering into a contract for design services pursuant to section 38D or section 38K of chapter 7, shall contract for the services of an owner's project manager to serve as the public agency's agent and consultant during the planning, design and implementation of a contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by the public agency estimated to cost not less than \$1,500,000. The duties of the owner's project manager shall include, but need not be limited to, providing advice and consultation with respect to design, value engineering, scope of the work, cost estimating, general contractor and subcontractor prequalification, pursuant to section 44D 1/2 or 44D 3/4 when applicable, scheduling, construction and the selection, negotiation with and oversight of a designer and a general contractor for the project, ensuring the preparation of time schedules which shall serve as control standards for monitoring performance of the building project, and assisting in project evaluation including, but not limited to, written evaluations of the performance of the design professional, contractors, and subcontractors. For the purposes of this subsection, the term "owner's project manager" shall mean 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 owner's project manager shall be a person who is registered by the commonwealth as an architect or professional engineer and who has at least 5 years experience in the construction and supervision of construction of buildings or a person, if not registered as an architect or professional engineer, who has at least 7 years experience in the

construction and supervision of construction of buildings. The owner's project manager shall be independent of the designer, general contractor or any sub-contractor involved in the building project.

(b) Notwithstanding subsection (a), a public agency may assign an existing employee to serve as the owner's project manager, if that employee meets or exceeds the minimum qualifications as outlined in subsection (a) and has experience in the construction and supervision of construction of buildings of similar size and scope of complexity as the project to which he is assigned.

(c) The public agency shall use a qualifications based selection process to procure the services of an owner's project manager.

SECTION 14. Subsection (4) of section 44B of said chapter 149, as so appearing, is hereby amended by striking out the second sentence and inserting in place thereof the following sentence:- The bid deposits of sub-bidders not returned pursuant to the preceding sentence shall be returned within 5 days, Saturdays, Sundays, and legal holidays excluded, after the execution of the general contract; except that, if a selected sub-bidder fails to perform his agreement to execute a sub-contract with the general bidder selected as the general contractor, contingent upon the execution of the general contract, and, if required to do so pursuant to the prequalification process under section 44D 3/4 or if requested to do so in the general bid by such general bidder, to furnish a performance and payment bond as stated in his sub-bid in accordance with subsection (2) of section 44F, the bid deposit of that sub-bidder shall become and be the property of the commonwealth or the governmental unit thereof to which it is payable, as liquidated damages; provided, that the amount of the bid deposit which becomes the property of the commonwealth or the governmental unit thereof shall not, in any event, exceed the difference between his sub-bid price and the sub-bid price of the next lowest responsible and eligible sub-bidder; and provided further that, in case of death, disability, bona fide clerical or mechanical error of a substantial nature, or other unforeseen circumstances affecting any such sub-bidder, his bid deposit shall be returned to him.

SECTION 15. Subsection (2) of section 44D of said chapter 149, as so appearing, is hereby amended by striking out the last sentence and inserting in place thereof the following sentence:- An application for a certificate of eligibility shall not be a public record as defined in section 7 of chapter 4.

SECTION 16. The first paragraph of subsection (7) of said section 44D of said chapter 149, as so appearing, is hereby amended by adding the following sentence:- Evaluations, including any responses submitted by the contractor, submitted to the division pursuant to this subsection shall be a public record as defined in section 7 of chapter 4.

SECTION 17. Said section 44D of said chapter 149, as so appearing is hereby amended by striking out subsection (8) and inserting in place thereof the following subsection:-

(8) With the exception of subsection (7), this section shall not apply to sub-bidders.

SECTION 18. Said section 44D of said chapter 149, as so appearing, is hereby amended by adding the following 7 subsections:-

(11)(i) Every sub-bid submitted for a contract subject to section 44A shall be accompanied by a copy of a certificate of eligibility issued by the commissioner showing that the sub-bidder has been certified to participate on public construction projects and to perform the work required. The sub-bid shall also be accompanied by an update statement in a form as the commissioner

shall prescribe. A blank copy of the form shall be furnished by the awarding authority to every person or business entity requesting a copy. The update form shall provide space for information regarding all projects in which the sub-bidder participated on since the date of certification of eligibility, all projects which the sub-bidder currently has under contract including the percentage of work on such projects not completed, the names and qualifications of the personnel who will have supervisory responsibility for the performance of the contract, any significant changes in the sub-bidder's financial position or business organization since the date of certification of eligibility, and such other relevant information as the commissioner shall prescribe. The sub-bidder shall also include in its bid and update statement the list of completed construction projects submitted to the division in its most recent application for subcontractor certification. Any sub-bid submitted without the appropriate certificate and update statement shall be invalid.

(ii) The applicant shall certify under penalties of perjury at the conclusion of the application to bid that there have been no substantial changes in his financial position or business organization other than those changes noted within the application since the applicant's most recent update statement and that the sub-bid to be made will be in all respects bonafide, fair and made without collusion or fraud with any other person. As used in this subsection, "Person" shall mean any natural person, joint venture, partnership, corporation or other business or legal entity which sells materials, equipment or supplies used in or for, or engages in the performance of, the same or similar construction, reconstruction, installation, demolition, maintenance or repair work or any part thereof.

(12) The division of capital asset management and maintenance shall accept applications for subcontractor certification in a form as the commissioner shall prescribe, signed by the applicant under penalties of perjury, supplying information concerning the applicant's form of organization, its principals and key personnel; the applicant's experience on public and private construction projects over the past 3 years or on the 10 projects on which the applicant most recently performed work; all legal or administrative proceedings currently pending against the applicant or concluded adversely to the applicant within the past 3 years which relate to the procurement or performance of any public or private construction contract, the nature of any financial, personal or familial relationship to any public or private construction project owners listed on the application as constituting prior construction experience; and such other information as the commissioner considers relevant to the determination of the applicants qualifications and responsibility. The application shall include a statement of financial condition prepared by a certified public accountant which shall include, but not necessarily be limited to, information concerning the applicant's current assets and liabilities, bank and credit references, bonding company and maximum bonding capacity; and such other information as the commissioner shall consider relevant to an evaluation of the applicant's financial capacity and responsibility. The information contained in the application shall be current at the time of filing; but, the statement of financial condition shall pertain to the applicant's most recent, completed fiscal year. Any materially false statement in the application or update statement may, in the discretion of the awarding authority, result in termination of any contract awarded the applicant by the awarding authority, and shall constitute cause for debarring the applicant from future public work as provided in section 44C and shall subject the applicant to the punishments for perjury as set forth in section 1 of chapter 268. Applications for a certificate of eligibility shall not be a public record as defined in section 7 of chapter 4.

Every applicant shall pay to the division, upon filing his application for subcontractor certification, a nonrefundable fee to be determined annually

by the commissioner of administration and finance under section 3B of chapter 7. The application fee shall not be less than \$100.

(13) The division of capital asset management and maintenance shall evaluate every applicant on the basis of the application and on relevant past performance according to procedures and criteria which the commissioner shall prescribe by regulations or guidelines. Such criteria shall include the record of the applicant's performance including, where available, written evaluations of the applicant's performance on public and private jobs over the past 3 years; the experience and qualifications of supervisory personnel; and any other relevant criteria that the commissioner may prescribe. The regulations and guidelines shall provide that, to the extent possible, the criteria considered shall be assigned separate designated numerical values and weights, and the applicant shall be assigned an overall numerical rating on the basis of all criteria. The applicant shall indicate among categories established by the commissioner the class of work for which certification is sought. The division of capital asset management and maintenance shall issue a certificate as warranted by the evaluation which shall be effective for 1 year from the date issued, showing the class of work on which the applicant is eligible to bid. The certificate shall include the number of prior construction projects evaluated by the division of capital asset management and maintenance, the contractor's average numerical value on those projects evaluated, and the number of projects given numerical values below a passing score, as defined by the division's regulations or guidelines, during each of the previous 3 years.

(14) The division of capital asset management and maintenance shall promptly notify an applicant of its preliminary determination regarding the conditions of the certification, or a denial of certification, or of decertification pursuant to this section, and the reasons therefor. An applicant aggrieved by the division's preliminary determination may, within 5 business days of receipt of notice, request copies of the information upon which the division relied in making its preliminary determination. Within 10 business days of receipt of notice, the applicant may submit further information to the division with a request for reconsideration. The division shall issue a final determination regarding an application for certification within 30 business days from the date of its preliminary determination, unless the applicant and the division agree to extend the 30-day period.

Any applicant aggrieved by the final determination of the division may appeal in writing to the attorney general within 5 business days of receipt of final notice thereof. Within 30 calendar days of the appeal, the attorney general shall investigate the matter and issue a written decision. The attorney general may institute and prosecute proceedings in the superior court to enforce this section on the same terms as set forth in section 44H. Following the decision by the attorney general, or failure to render a decision within the 30-day period, either the division or the applicant may seek remedies at law.

(15) The commissioner may, upon receipt of additional information regarding a subcontractor's qualifications, decertify a subcontractor. Upon that decision, the commissioner shall follow the procedures established by this section.

(16) The division of capital asset management and maintenance shall develop a standard subcontractor evaluation form that shall be completed by every public agency as defined in section 44A, upon completion of a building project under its control, and submitted to the division for the subcontractor's qualification file. The official from the public agency, or the owner's representative, shall certify that the information contained on the contractor evaluation form represents, to the best of his knowledge, a true and accurate analysis of the contractor's performance record on that contract. The public agency shall mail a copy of the subcontractor evaluation form to the

subcontractor and the subcontractor shall, within 30 days, submit a written response to the division disputing any information contained in the evaluation form and setting forth any additional information concerning the building project or the oversight of the contract that may be relevant to the evaluation of the subcontractor's performance on the contract. The division shall attach any such response to the evaluation form for inclusion in the subcontractor's qualification file. No person shall be liable for any injury or loss to a subcontractor as a result of the completion of a subcontractor evaluation form as required by this section unless the individual completing the form has been found by a court of competent jurisdiction to have acted in a willful, wanton or reckless manner. If a suit is commenced by a subcontractor against a public employee, an owner's representative, an architect or an engineer who has completed a subcontractor evaluation form as required by this section seeking to recover damages resulting from injury caused by such evaluation, the public agency for whom the evaluation form was completed, or the commonwealth if the evaluation was completed for a state agency, shall provide for the legal representation of the employee, owners representative, architect or engineer. The public agency, or the commonwealth, shall also indemnify the person from all financial loss and expenses, including but not limited to legal fees and filing costs, in an amount not to exceed \$1,000,000. No person shall be indemnified for losses other than legal fees and filing costs under this section if the person is found by a court or a jury to have acted in a willful, wanton or reckless manner.

Evaluations, including any responses submitted by the contractor, submitted to the division pursuant to this subsection shall be a public record as defined in section 7 of chapter 4.

Any public agency that fails to complete and submit the subcontractor evaluation form, together with any written response by any subcontractor, to the division within 90 days of the completion of a project shall be ineligible to receive any public funds disbursed by the commonwealth for the purposes of any public buildings or public works projects.

(17) The commissioner may issue rules, regulations, orders, guidelines and policies considered necessary or expedient to effectuate the purposes of this section.

SECTION 19. Said chapter 149 is hereby further amended by inserting after section 44D the following 2 sections:-

Section 44D 1/2. (a) Notwithstanding section 44E, an awarding authority on contracts subject to section 44A and which are estimated to cost not less than \$10,000,000 shall prequalify general contractors to submit general bids in accordance with the provisions of subsections (a) to (j), inclusive; provided, that on such contracts subject to section 44A and which are estimated to cost not less than \$100,000 but not more than \$10,000,000, an awarding authority may elect to prequalify general contractors to submit general bids in accordance with subsections (a) to (j), inclusive. When prequalifying general contractors, the awarding authority shall initiate said prequalification through the solicitation of responses to a request for qualifications pursuant to subsection (d) of this section.

(b)(1) Notwithstanding subsection (a), the division of capital asset management and maintenance, the Massachusetts Port Authority, the Massachusetts Water Resources Authority, the Massachusetts State Colleges Building Authority, and the University of Massachusetts Building Authority, hereinafter referred to as "exempt agencies", shall not be subject to said subsection (a), but may elect to prequalify general contractors to submit general bids in accordance with the subsections (c) to (j), inclusive.

(2) For cases involving security sensitive information as defined by subclause (n) of clause Twenty-sixth of section 7 of chapter 4 and in order to

maintain the confidentiality of security sensitive information, the awarding authority may, with prior approval of the commissioner, implement a prequalification process whereby the awarding authority selects a final list of a minimum of 3 general contractors who are eligible to submit bids and the awarding authority may award a contract to the lowest bidder amongst the final list of bidders. The commissioner of the division of capital asset management and maintenance shall promulgate regulations to implement this paragraph.

(c) Before issuing a request for qualifications, hereinafter referred to as RFQ, the awarding authority shall establish a prequalification committee for the purpose of reviewing and evaluating responses submitted in response to the RFQ issued pursuant to subsection (d). The prequalification committee shall be comprised of 1 representative of the designer and 3 representatives of the awarding authority. One of the representatives of the awarding authority shall be the owner's project manager if an owner's project manager is required on the building project pursuant to this section.

(d) When prequalifying general contractors, the awarding authority shall initiate the prequalification process through public notice of the building project and the solicitation of responses to the RFQ from general contractors. The 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;

(3) the evaluation procedure and the criteria for the prequalification of general contractors, including the point rating system, and the schedule for the evaluation process;

(4) the anticipated schedule and estimated construction cost for the building project;

(5) a listing of the project team including the awarding authority, the designer, and awarding authority's owner's project manager, if applicable;

(6) a statement indicating that the RFQ will be used to prequalify general contractors who will be invited to submit a bid pursuant to section 44E;

(7) a prohibition against any unauthorized communication or contact with the public agency outside of official pre-bid meetings; and if desired,

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

(e) The awarding authority shall require interested general contractors to submit a statement of qualifications in response to the RFQ issued pursuant to subsection (d). The RFQ shall require only the information contained in paragraphs (1) to (4), inclusive, of this subsection, 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, The name, title, years with firm of the owner(s) of the business.

(ii) Management personnel, The names, title, education and construction experience, years with firm, and list of projects completed by all management personnel.

(iii) Similar project experience, The project name(s), description, original contract sum, final contract sum with explanation, and date completed of similar projects.

(iv) Terminations, A list of any projects on which the firm was terminated or failed to complete the work.

(v) Legal proceedings, A list of all legal or administrative proceedings currently pending against the general contractor or concluded adversely to the general contractor within the past 5 years which relate to the procurement or performance of any public or private construction contract.

(vi) Safety record, The 3-year history of the firm's workers' compensation experience modifier.

(vii) Compliance Record, Information on and evidence of 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.

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

(i) project references, References from owners and architects for all projects listed in clause (iii) of paragraph (1), including project names and the names of the owners and architects, with address, telephone and fax number, and contact person for each.

(ii) Credit references, A minimum of 5 credit references, including the telephone and fax number of contact person from key suppliers, vendors and banks.

(iii) Public project record, A list of all completed public building construction project or projects as defined in section 44A during the past 3 years with owner's name, address, telephone and fax number and contact person.

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

(i) Audited financial statement for the most recent fiscal year, provided that financial information submitted shall remain confidential and shall not be a public record under section 7 of chapter 4.

(ii) Revenue under contract for the next 3 fiscal years.

(4) Mandatory requirements, for which no points are assigned:

(i) A commitment letter for payment and performance bonds at 100 per cent of the estimated contract value from a surety company licensed to do business in the commonwealth and whose name appears on United States Treasury Department Circular 570.

(ii) A certificate of eligibility issued by the division of capital asset management and maintenance pursuant to section 44D, showing a capacity rating sufficient for the project, and an update statement.

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

(f) The public notice and solicitation required in subsection (d) 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. The public notice and solicitation shall be given not less than 2 weeks before the deadline for submitting responses to the RFQ.

(g) The awarding authority shall not open the statement of qualifications publicly, but shall open them in the presence of 1 or more witnesses at the time specified in the RFQ. At the opening of responses, the awarding authority shall prepare a register of responders which shall include the name of each responder who submitted a statement of qualifications to said request for qualifications. The register of responders shall be open for public inspection. Upon completion of the evaluations, the contents of the statements of qualifications shall be open to the public. The financial information contained in the statements of qualifications shall not be a public record as defined in section 7 of chapter 4.

(h) The prequalification committee established pursuant to subsection (c) shall evaluate each statement of qualifications using solely the criteria provided in the RFQ. Only general contractors achieving a minimum score of 70

shall be prequalified and invited to submit bids consistent with the section 44E. The prequalification committee shall select a minimum of 3 qualified general contractors to submit bids pursuant to said section 44E. Any general contractor invited to submit a bid pursuant to this subsection shall be subject to sections 44B and 44D.

A general contractor's score shall be made available to the general contractor upon request. The decision of the prequalification committee shall be final and shall not be subject to appeal except on grounds of fraud or collusion.

(i) Notwithstanding the foregoing subsections (a) to (h), inclusive, if the awarding authority qualifies fewer than 3 general contractors to submit bids pursuant to subsection (h) and the prequalification process was required pursuant to subsection (a), the awarding authority shall reject all responses and shall issue a new request for qualifications. If the awarding authority qualifies fewer than 3 general contractors to submit bids pursuant to subsection (h) and the prequalification process was initiated at the option of the awarding authority pursuant to subsection (a), the awarding authority may reject all responses and issue a new request for qualifications or may invite general bids pursuant to sections 44B to 44E, inclusive.

(j) Regulations and procedures shall be promulgated by the commissioner of the division of capital asset management and maintenance to implement this section and to ensure that the prequalification process set forth in subsections (a) to (i), inclusive, is sufficient, fair and consistent.

Section 44D 3/4. (a) Notwithstanding section 44E, an awarding authority on contracts subject to section 44A which are estimated to cost not less than \$10,000,000 shall prequalify subcontractors to submit sub-bids in accordance with the provisions of subsections (a) to (j), inclusive; provided that, on contracts subject to section 44A which are estimated to cost not less than \$100,000 and not more than \$10,000,000, an awarding authority may elect to prequalify subcontractors to submit sub-bids in accordance with subsections (a) to (i), inclusive. The prequalification process shall be for all sub-bid classes of work listed in subsection (1) of section 44F that meet or exceed the threshold value for sub-bid work of said subsection (1) of said section 44F. When prequalifying the subcontractors, the awarding authority shall initiate the prequalification process through the solicitation of responses to a request for qualifications pursuant to subsection (d) of this section.

(b) Notwithstanding subsection (a), the division of capital asset management and maintenance, the Massachusetts Port Authority, the Massachusetts Water Resources Authority, the Massachusetts State Colleges Building Authority, and the University of Massachusetts Building Authority, hereinafter called exempt agencies, shall not be subject to said subsection (a), but may elect to prequalify subcontractors to submit sub-bids in accordance with subsections (c) to (j), inclusive.

(c) Before issuing a request for qualifications, hereinafter called RFQ, the awarding authority shall establish a prequalification committee for the purpose of reviewing and evaluating responses submitted in response to the RFQ issued pursuant to subsection (d). The prequalification committee shall be comprised of 1 representative of the designer and 3 representatives of the awarding authority. One of the representatives of the awarding authority shall be the owner's project manager if an owner's project manager is required on the building project pursuant to section 44A 1/2.

(d) When prequalifying subcontractors, the awarding authority shall initiate the prequalification process through public notice of the building project and the solicitation of responses to the RFQ from subcontractors; but, the 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) 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;

(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 that 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 included in the response to the RFQ.

(e) The awarding authority shall require interested subcontractors to submit a statement of qualifications in response to the RFQ issued pursuant to subsection (d); provided that the RFQ shall require only the information contained in paragraphs (1) to (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, the awarding authorities 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, The name, title, years with firm of the owner(s) of the business.

(ii) Management personnel, The names, title, education and construction experience, years with firm, and list of projects completed by all management personnel.

(iii) Similar project experience, The project name(s), description, description of scope, original trade contract sum, final trade contract sum with explanation and date completed of similar projects.

(iv) Terminations, A list of any projects on which the subcontractor was terminated or failed to complete the work.

(v) Legal proceedings, A list of all legal or administrative proceedings currently pending against the subcontractor or concluded adversely to the subcontractor within the past 3 years which relate 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 section 39F of chapter 30.

(vi) Safety Record - The 3 year history of the subcontractor's workers' compensation experience modifier.

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

(i) Project references, References from owners and architects for all projects listed in clause (iii) of paragraph (1) including project name, client's name, address, telephone and fax number, and contact person.

(ii) Credit references, A minimum of 5 credit references, including telephone and fax number of contact person from key suppliers, vendors and banks.

(iii) Public project record, A list of all completed public building construction project as defined in section 44A during past 3 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 3 fiscal years, provided that financial information submitted shall remain confidential and shall not be a public record under section 7 of chapter 4. There shall be no requirement for submission of financial statements.

(ii) Revenue under contract for the next 3 fiscal years.

(4) Mandatory requirement, for which no points are assigned:

A commitment letter for payment and performance bonds at 100 per cent of the estimated contract value from a surety company licensed to do business in the commonwealth and whose name appears on United States Treasury Department Circular 570.

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

(f) The public notice and solicitation required in subsection (d) 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. The public notice and solicitation shall be given not less than 2 weeks before the deadline for submitting responses to the RFQ.

(g) The awarding authority shall not open the responses to the RFQ publicly, but shall open them in the presence of 1 or more witnesses at the time specified in the RFQ. At the opening of responses, the awarding authority shall prepare a register of responders which shall include the name of each responder who submitted a statement of qualifications to said request for qualifications. The register of responders shall be open for public inspection. Upon completion of the evaluation of the responses, the contents of the statements of qualifications shall be open to the public; but, the financial information contained in the statements of qualifications shall not be a public record as defined in section 7 of chapter 4.

(h) Upon receipt of the statement of qualifications submitted by subcontractors, the prequalification committee established pursuant to subsection (c) shall evaluate each statement of qualifications using solely the criteria provided in the RFQ pursuant to paragraph (e). Only subcontractors achieving a minimum score of 70 shall be prequalified and invited to submit bids consistent with the provisions of section 44E. The prequalification committee shall select a minimum of 3 qualified subcontractors to submit bids pursuant to said section 44E. The subcontractor invited to submit a bid pursuant to this subsection shall be subject to section 44B.

A subcontractor's score shall be made available to the subcontractor upon request. The decision of the prequalification committee shall be final and shall not be subject to appeal except on grounds of fraud or collusion.

(i) Notwithstanding the subsections (a) to (h), inclusive, if the awarding authority qualifies fewer than 3 subcontractors to submit bids pursuant to subsection (h) and the prequalification process was required pursuant to subsection (a), the awarding authority shall reject all responses and shall reissue a request for qualifications pursuant to subsection (d). If the awarding authority qualifies fewer than three sub-contractors to submit bids pursuant to subsection (h) and the prequalification process was initiated at the option of the awarding authority pursuant to subsection (a), the awarding authority may reject all responses and issue a new request for qualifications or may invite sub-bids pursuant to sections 44B to 44E, inclusive.

(j) The commissioner of the division of capital asset management and maintenance, in conjunction with the inspector general, shall promulgate regulations and procedures to implement this section and to ensure that the

prequalification process set forth in subsections (a) to (i), inclusive, is sufficient, fair and consistent.

SECTION 20. Section 44E of said chapter 149, as appearing in the 2002 Official Edition, is hereby amended by striking out subsection (1) and inserting in place thereof the following subsection:-

(1) Whenever general bids are invited for a contract subject to section 44A and whenever sub-bids are invited in connection with such a contract subject to subsection (1) of section 44F, the awarding authority shall prescribe 1 place for filing the general bids and 1 place for filing the sub-bids, which need not be the same place. Notwithstanding any general or special law, ordinance or by-law to the contrary, a bidder shall not be required to file a duplicate of his bid or sub-bid in any other place. For all projects where prequalification of general contractors is required, or where an awarding authority has elected to prequalify general contractors pursuant to subsection (a) of section 44D 1/2, an awarding authority shall request bids only from general contractors who have been so prequalified pursuant to subsections (a) to (j), inclusive, of section 44D 1/2. For all projects where prequalification of subcontractors is required, or where an awarding authority has elected to prequalify subcontractors pursuant to subsection (a) of section 44D 3/4, an awarding authority shall request bids only from subcontractors who have been so prequalified pursuant to subsections (a) to (j), inclusive, of section 44D 3/4.

SECTION 21. Section 44F of said chapter 149 as so appearing, is hereby amended by striking out, in line 6, the words "ten thousand dollars" and inserting in place thereof the following figure:- \$20,000.

SECTION 22. Subsection (2) of said section 44F of said chapter 149, as so appearing, is hereby amended by striking out paragraph D and inserting in place thereof the following paragraph:-

(D) The undersigned agrees that, if he is selected as a sub-bidder, he will, within 5 days, Saturdays, Sundays and legal holidays excluded, after presentation of a subcontract by the general bidder selected as the general contractor, execute with such general bidder a subcontract in accordance with the terms of this sub-bid, and contingent upon the execution of the general contract, and, if requested so to do in the general bid by the general bidder, who shall pay the premiums therefor, or if prequalification is required pursuant to section 44D 3/4, furnish a performance and payment bond of a surety company qualified to do business under the laws of the commonwealth and satisfactory to the awarding authority, in the full sum of the subcontract price.

SECTION 23. Subsection (3) of said section 44F of said chapter 149, as so appearing, is hereby amended by striking out the third paragraph and inserting in place thereof the following paragraph:-

A performance and payment bond furnished by the subcontractor, either pursuant to the requirements of the prequalification process as established in section 44D 3/4 or at the request of a general contractor set forth in the general bid form, shall be for the benefit of the general contractor; shall secure the performance of the subcontract by the subcontractor; and shall indemnify and hold harmless the general contractor and the surety or sureties under the labor and materials or payment bond furnished by the general contractor to the awarding authority against (i) any and all loss and expense arising out of any and all claims in connection with the performance of the subcontract which would be required to be paid under the labor and materials or payment bond furnished by the general contractor to the awarding authority and (ii) attorneys' fees in the event that the subcontractor, after notice, fails

to assume the defense of and defend such claims.

SECTION 24. Subsection (4) of said section 44F of said chapter 149, as so appearing, is hereby amended by striking out paragraph (c) and inserting in place thereof the following paragraph:-

(c) If a selected sub-bidder fails, within 5 days, Saturdays, Sundays and legal holidays excluded, after presentation of a subcontract by the general bidder selected as the general contractor, to perform his agreement to execute a subcontract in the form hereinafter set forth with such general bidder, contingent upon the execution of the general contract, and, if required to do so pursuant to the prequalification process under section 44D 3/4 or if requested to do so by such general bidder in the general bid, to furnish a performance and payment bond as stated in his sub-bid such general bidder and the awarding authority shall select, from the other sub-bids duly filed with the awarding authority for such sub-trade and not rejected under section 44H the lowest responsible and eligible sub-bidder at the amount named in his sub-bid as so filed against whose standing and ability the general contractor makes no objection, and the contract price shall be adjusted by the difference between the amount of the sub-bid and the amount of the sub-bid of the delinquent sub-bidder.

SECTION 25. Said chapter 149 is hereby further amended by striking out section 44H, as so appearing, and inserting in place thereof the following section:-

Section 44H. Except as otherwise provided by sections 44A to 44H, inclusive, and except for the consideration and determination after contract award as to whether an item is equal to an item named or described in the specifications for a contract, the attorney general or his designee shall enforce sections 44A to 44H, inclusive, of this chapter and section 39M of chapter 30, sections 38C to 38N, inclusive, of chapter 7, and chapter 149A. The attorney general shall have all the necessary powers to require compliance therewith including the power to institute and prosecute proceedings in the superior court to restrain the award of contracts and the performance of contracts in all cases where, after investigation of the facts, he has made a finding that the award or performance has resulted in violation, directly or indirectly, of said sections 44A to 44H, inclusive, or of said section 39M or of said sections 38C to 38N, inclusive, or of said chapter 149A, and he shall not be required to pay the clerk of the court any entry fee in connection with the institution of the proceeding.

SECTION 26. Said chapter 149 is hereby further amended by striking out section 148B, as so appearing, and inserting in place thereof the following section:-

Section 148B. (a) For the purpose of this chapter and chapter 151, an individual performing any service, except as authorized under this chapter, shall be considered to be an employee under those chapters unless:

(1) the individual is free from control and direction in connection with the performance of the service, both under his contract for the performance of service and in fact; and

(2) the service is performed outside the usual course of the business of the employer; and,

(3) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

(b) The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers compensation premiums with respect to an individual's wages shall not be considered in making a

determination under this section.

(c) An individual's exercise of the option to secure workers' compensation insurance with a carrier as a sole proprietor or partnership pursuant to subsection (4) of section 1 of chapter 152 shall not be considered in making a determination under this section.

(d) Whoever fails to properly classify an individual as an employee according to this section and in so doing fails to comply, in any respect, with chapter 149, or section 1, 1A, 1B, 2B, 15 or 19 of chapter 151, or chapter 62B, shall be punished and shall be subject to all of the criminal and civil remedies, including debarment, as provided in section 27C of this chapter. Whoever fails to properly classify an individual as an employee according to this section and in so doing violates chapter 152 shall be punished as provided in section 14 of said chapter 152 and shall be subject to all of the civil remedies, including debarment, provided in section 27C of this chapter. Any entity and the president and treasurer of a corporation and any officer or agent having the management of the corporation or entity shall be liable for violations of this section.

(e) Nothing in this section shall limit the availability of other remedies at law or in equity.

SECTION 27. The General Laws are hereby amended by inserting after chapter 149 the following chapter:-

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 \$5,000,000, 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. Prior to using the construction management at risk delivery method, the public agency shall obtain a notice to proceed from inspector general pursuant to section 4 of this chapter.

Section 2. As used in sections 1 to 9, inclusive, the following words shall have the following meanings unless indicated otherwise or unless the context in which they are used clearly requires a different meaning:-

"Building project", the construction, reconstruction, installation, demolition, maintenance or repair of any public building;

"Construction management at risk" or "Construction management at risk services" or "Construction management at risk delivery method", 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", 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", 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", 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", 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 for the construction and supervision of construction of a building project. 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 5 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 7 years experience in the construction and supervision of construction of buildings of similar size and complexity. A public agency may utilize a member or members of its staff as owner's project manager provided such staff meets the required qualifications. The owner's project manager shall be independent of the designer and the construction management at risk firm.

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

"Two-phase selection process", 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) Before procuring the services of a designer pursuant to subsection (b) and prior to submitting an application to use the construction management at risk delivery method pursuant to section 4, the public agency shall procure or otherwise employ the services of an owner's project manager pursuant to section 44A 1/2 of chapter 149. The owner's project manager may assist the public agency in the procurement of the designer.

(b) Before 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. In procuring the services of a designer, the public agency shall do so in a manner consistent with sections 38A 1/2 to 390, inclusive, of chapter 7. 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) Before 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. The detailed application shall conform to regulations and procedures promulgated by the inspector general. 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. The 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 \$5,000,000 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 the 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 the 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. All decisions shall be rendered by the inspector general to a public agency in not less than 60 days from the date the application is submitted to the inspector general.

(d) Notwithstanding subsection (a), 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 referred to as exempt agencies, shall not be subject to said subsection (a). 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 the procedures of an exempt agency comply with 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. Each exempt agency shall annually submit its procedures to the inspector general for review and approval by the inspector general. If an exempt agency modify or amend the procedures so approved, the exempt agency shall immediately submit the amended procedures to the inspector general for approval. The inspector general shall have 60 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. 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. The public agency or exempt agency shall procure a construction management at risk firm in accordance with a 2-phase process in a manner consistent with section 5.

Section 5. (a) The public agency shall utilize a 2-phase selection process as provided in subsection (c) of this section and sections 6 to 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. 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) Before issuing a request for qualifications, hereinafter called RFQ, the public agency shall establish a prequalification committee for the purpose of reviewing and evaluating responses submitted to the RFQ issued pursuant to subsection (c). The prequalification committee shall be comprised of 1 representative of the designer, the owner's project manager, and at least 2 representatives of the public agency.

(c) Phase 1 of the 2-phase selection process shall begin once the public agency gives public notice of the building project and solicits responses to an RFQ from construction management at risk firms; but, that the 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 subsection (f), 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.

(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 subsection (c). The 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 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 3 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 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; but, the 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 3 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 the 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 or other illustrations of the company's operating philosophy;

(12) a certificate of eligibility 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 subsection (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. The public notice and solicitation shall be given not less than 2 weeks before 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 subsection (b), 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 clause (3) of subsection (c) will be selected to proceed to phase 2 of the 2-phase selection process and receive a request for proposals issued pursuant to section 6. The prequalification committee shall select a minimum of 3 qualified construction management at risk firms to receive the request for proposals. If the prequalification committee is not able to identify a minimum of 3 qualified construction management at risk firms, the public agency shall readvertise 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) Before 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 subsection (b). The selection committee shall be comprised of 1 representative of the designer, the owner's project manager, and at least 2 representatives of the public agency. Nothing herein shall prohibit the public agency from appointing the same individuals 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 subsection (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 guaranteed maximum price 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 the RFP.

(1) The price component shall include (i) the fee for preconstruction services with appropriate detail, (ii) the fee for construction services with explanation of the basis, and (iii) the estimated cost of general conditions with appropriate detail.

(2) The technical component shall include: (i) a detailed project approach, including preconstruction services, (ii) supplemental relevant project references, (iii) the project team members with position descriptions and relevant time commitments of said team members during the project, (iv) the construction management plan indicating approach to control of cost, schedule, quality, documents and claims; (v) preliminary definition of trade contractor and subcontractor bid packages and scopes of work, (vi) affidavit of prevailing wage compliance pursuant to sections 26 and 27 of chapter 149; (vii) 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 per cent of the budget for the building project, (viii) a technical challenges and solutions plan, and (ix) 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 subsection (b), the selection committee shall evaluate all proposals in accordance with the criteria included in the RFP; but, 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. The 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 9, inclusive, 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 the contract for various performance objectives; but, the incentive clause shall not include an incentive that exceeds 1 per cent 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:

(1) The guaranteed maximum price shall be based on design documents which are no less developed than 60 per cent 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 before the commencement of any construction work; except that the public agency, before 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 before execution of the guaranteed price amendment. The 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; but, any class of work included in the scope of work selected to commence before 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 before 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 before 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 before 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 5 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 1 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 the 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 3. to 9, inclusive, 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 subsection (1) of section 44F of chapter 149. The selection process for the trade contractors shall conform to the requirements set out in subsections (b) to (k), inclusive, of this section. The public agency shall also establish a selection process for subcontractors who are not trade contractors as defined above. The selection process shall conform to the requirements of subsection (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 this section. The public agency may, consistent with established minority business enterprise and women business enterprise inclusion goals, provide an additional 5 points to the total score of each minority business enterprise and women business enterprise in the prequalification process as provided in subsection (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 this section; provided that the construction management at risk firm customarily performs the work for which it submits qualifications; provided further, that the 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 and whose name appears on United States Treasury Department Circular 570; provided that the bonds are subject to subsection (3) of section 44F 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 2 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 subsection (a) an RFQ which shall be used to solicit responses from eligible trade contractors and which shall be used to prequalify the trade contractors to participate on the building project; but, the 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 subsection (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. The public notice and solicitation shall be given not less than 2 weeks before the deadline for submitting responses to the RFQ.

(e) The RFQ shall require only the information contained in subparagraphs 1 to 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, The name, title, years with firm of the owner(s) of the business.
- (ii) Management personnel, The names, title, education and construction experience, years with firm, and list of projects completed by all management personnel.
- (iii) Similar project experience, The project name(s), description, description of scope, original trade contract sum, final trade contract sum with explanation, and date completed of similar projects.
- (iv) Terminations, A list of any projects on which the trade contractor was terminated or failed to complete the work.
- (v) Lawsuits, A list of commercial lawsuits in which the trade contractor is a defendant or defendant-in-counterclaim with regard to construction contracts within the last 3 years. The 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 section 39F of chapter 30.

(vi) Safety record, The 3 year history of the trade contractor's workers' compensation experience modifier.

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

(i) Client references for all projects listed in clause (iii) of subparagraph (1), including the project name, client's name, address, telephone and fax number, and contact person.

(ii) Credit references, A minimum of 5 credit references, including telephone and fax number of contact person from key suppliers, vendors and banks.

(iii) Public project record, A list of all completed public building construction projects as defined in section 44A of chapter 149 during past 3 years with client's name, address, telephone and fax number and contact person.

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

(i) Annual revenue for prior 3 fiscal years. There shall be no requirement for submission of financial statements.

(ii) Revenue under contract for next 3 fiscal years.

(4) Mandatory commitment letter, for which no points are assigned, for payment and performance bonds at 110 per cent 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 subsection (e) shall be reviewed and scored by the trade contractor prequalification committee established pursuant to subsection (b). 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 subsection (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 (a) of subsection (1) 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 subsection (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, without limitation, a listing of price, addenda, alternates and allowances, if any, for the trade work; certification that the trade contractor 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 the names of all sub-trade subcontractors to be used if awarded the trade contract

and 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 per cent bid bond from a surety company licensed to do business in the commonwealth and whose name appears on U.S. Treasury Department Circular 570; but, 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 subsection 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; but, if the public agency receives fewer than 3 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 the 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 construction manager 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 subsection (j).

(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 10 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 subsection (k).

(j) For subcontractors who are not trade contractors as defined in subsection (a) and whose work has an estimated cost at or exceeding the threshold sum identified in subsection (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 3 subcontracting firms which the construction management at risk firm believes meets the qualifications. The public agency may eliminate firms from the list and may add firms to the list; if, 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. 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. 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 subsection (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 subsections (h) and (i), 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. Sections 26, 27, 27A, 27B, 27C, 27D, 29, 29C, and 34A of chapter 149, and sections 39F, 39J, 39K, 39N, 39O, 39P and 39R 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 in other statutory provisions referred to in this chapter shall have the following meanings:

"Awarding authority", "contracting authority", "contracting body", or "public body", a public agency.

"General contractor", "contractor", or "contractor principal", a construction management at risk firm.

"Subcontractor", a subcontractor and trade contractor except that the term

"subcontractor" in subsection (3) of section 39F of chapter 30 shall mean a trade contractor pursuant to subsection (a) and a subcontractor pursuant to subsection (j) of section 8.

Section 12. The inspector general shall promulgate regulations and procedures to implement sections 1 to 11, inclusive. In preparing the 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 subsection (d) of section 4, and other parties considered necessary to promulgate the regulations and procedures.

Section 13. Not later than 5 years after the effective date of this chapter, 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. The review shall serve as the basis for a report to be submitted by the inspector general to the joint committee on state administration, the clerk of the house of representatives, and to the clerk of the senate not later than October 1, 2009. The report shall also include legislative recommendations, if any.

Section 14. Notwithstanding section 39M of chapter 30, for each contract for the construction, reconstruction, alteration, remodeling or repair of a public works project by an awarding authority and estimated by the awarding authority to cost not less than \$5,000,000, the awarding authority may utilize design build for the construction, reconstruction, alteration, remodeling or repair of any public works project pursuant to this section and sections 15 to 21, inclusive; but, before using the design build, the awarding authority shall seek the approval of the inspector general pursuant to section 16.

Section 15. As used in sections 1 to 8, inclusive, the following words shall, unless the context indicates otherwise, have the following meanings:

"Best value", the highest overall value to the awarding authority, considering quality and cost.

"Awarding authority", the commonwealth, or any political subdivision, department, agency, board, commission, authority, or other instrumentality thereof, or any county, city, town, or district.

"Building project", the construction, reconstruction, installation, demolition, maintenance or repair of any building.

"Design build", a construction delivery system that provides responsibility for the delivery of design services and construction services within a single contract.

"Design build contract", a contract for a public works project between an awarding authority and a design build entity to furnish design build services.

"Design build entity", an individual, sole proprietorship, firm, partnership, joint venture, corporation, or other entity that provides design build services.

"Design professional", shall have the same meaning as "designer" as defined in section 38A 1/2 of chapter 7.

"Governing body", the person or group of persons who have the power to enter into and approve of a contract between an awarding authority and a design build entity.

"Major participant", a private entity that would have a major role in the design or construction of the project as a member of the design build entity.

"Proposal", an offer by the proposer in accordance with all RFP provisions for the price contained in the proposal.

"Public works project", a project subject to section 39M of chapter 30 or section 34 of chapter 90; but, the term "public works project" shall not include a building project.

"Quality", the basis on which the awarding authority shall evaluate the elements of the project that the awarding authority determines are most important to the project. The elements may include quality of design, innovative approach, constructability, life-cycle cost and other long-term maintenance costs, maintenance of traffic, aesthetics, environmental impacts, local impacts, traveler and other user costs, service life, time to construct and other factors that the awarding authority considers to be in the best interest of the awarding authority.

"Request for proposal", or "RFP", the document issued by an awarding authority to solicit proposals from pre-qualified design build entities for the purpose of entering into a design build contract.

"Request for qualifications", or "RFQ", the document issued by an awarding authority for the purpose of creating a short list of qualified design build entities to respond to an RFP issued by said awarding authority.

"Responsible proposer", a person, corporation, or other organization or entity which has the capability to perform the requirements of the design build contract, has the integrity and reliability to assure good faith performance, and meets the qualifications component of the RFP.

"Selection committee", the committee established by the awarding authority that shall review proposals and recommend selection of best-value or low-bid proposals.

"Two-phase selection process", a procurement process in which the first phase consists of creating a short list of qualified design build entities as determined by responses to an RFQ and in which the second phase consists of the submission of technical and price proposals in response to an RFP.

Section 16. (a) Before undertaking a public works project using design build, an awarding authority shall notify and submit a detailed application to proceed to the office of the inspector general. The detailed application shall conform to regulations and procedures promulgated by the inspector general and as may be amended from time to time. In order to receive a notice to proceed from the office of the inspector general, the awarding authority shall demonstrate the following:

(1) The awarding authority has authorization from its governing body to enter into a contract for design build. The authorization shall include the results of any public vote if applicable.

(2) The awarding authority has the capacity, a plan and procedures in place and approval by the governing body, where appropriate, to effectively procure and manage a design build entity for the specific project.

(3) The awarding authority has in place procedures to ensure fairness in competition, evaluation and reporting of results in the procurement process.

(4) The public works project has an estimated construction value of \$5,000,000 or more.

(5) The awarding authority has determined that the use of design build is appropriate for the public works project and states in writing the reasons for the determination.

(b) An awarding authority that meets all requirements established by the inspector general shall be issued a notice to proceed to use design build for a public works project. If the inspector general declines to issue a notice to proceed to an awarding authority, the inspector general shall provide in writing to the awarding authority the reason or reasons for the decision. An awarding authority that does not receive a notice to proceed from the inspector general may re-submit the application upon correcting or responding to the reason or reasons provided to the awarding authority by, the inspector general. The inspector general shall review the resubmitted application and, if the application meets the requirements established by the inspector general, shall issue a notice to proceed.

(c) The inspector general shall consider applications for approval to use design build in a timely manner and shall make decisions on such applications on an awarding authority's application within 60 days of the date the application is submitted to the inspector general.

(d) Notwithstanding subsection (a), the Massachusetts highway department, the Massachusetts port authority, and the Massachusetts water resources authority, hereinafter, "exempt agencies", shall not be subject to said subsection (a). Each exempt agency shall submit its procedures for the procurement and use of design build to the inspector general, and so long as the inspector general determines that the procedures of an exempt agency comply with sections 1 to 10, inclusive, the inspector general shall approve the procedures and each exempt agency, so approved, may use the design build delivery method consistent with the procedures so approved on building projects. Each exempt agency shall annually submit its procedures to the inspector general for review and approval by the inspector general. If an exempt agency modifies or amends the procedures so approved, the exempt agency shall immediately submit the amended procedures to the inspector general for approval. The inspector general shall have 60 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. The inspector general shall conduct an expedited review of corrected procedures.

(e) A awarding authority after receiving a notice to proceed, or an exempt agency after having its procedures approved, may use design build as approved. The awarding authority or exempt agency shall procure a design build entity in accordance with the 2 phase selection process as provided in sections 17 to 19, inclusive.

Section 17. The awarding authority shall utilize a 2 phase selection process as provided in this section, and sections 18 and 19, for the selection of a design build entity with whom to enter into a design build contract for the delivery of a public works project.

(a) Phase 1 of the 2 phase selection process shall begin once the awarding authority gives public notice of the public works project and solicits letters of interest from design build entities; but, the public notice and solicitation shall include:

(1) the time and date for receipt of letters of interest, the address of the office to which the responses are to be delivered, and the timeframe in which the awarding authority will respond to the letters of interest;

(2) a general description of the project, including the estimated construction cost of the work, the time period within which the projected construction work is to be completed, and the evaluation criteria that will be utilized pursuant to subsection (e); and

(3) a statement indicating that a request for qualifications, or RFQ, will be utilized to identify qualified design build entities to submit a proposal pursuant to section 19.

(b) The public notice and solicitation required in subsection (a) shall be advertised in a newspaper of general circulation in the area in which the project is located or to be located and in the central register established under section 20A of chapter 9. Said public notice and solicitation shall be given not less than 2 weeks before the deadline for submitting said letters of interest.

(c) Upon receipt of letters of interest from design build entities, the awarding authority shall provide to each such design build entity an RFQ. The RFQ shall serve as the basis by which an awarding authority creates a shortlist of design build entities to receive an RFP in phase 2 of the 2 phase selection process. The RFQ shall also contain the date certain by which responses to said RFQ are due. Said RFQ shall require the following information from each major participant upon which the responses shall be reviewed and evaluated:

(1) work experience on projects similar in size and scope, any terminations from work or failure to complete work, any lawsuits filed against any of the major participants, any prior business record of the officers or principals of the major participants, and the safety record of major participants; said information shall be provided for the past 3 years;

(2) references, including references from previous clients, bank references, surety references, and a complete record of public project record for the 3 years before submission of the request for qualifications;

(3) bonding capacity, which shall be evidenced by a commitment letter from an approved surety;

(4) interested design build entities shall respond to the awarding authority by submitting all information required by, and not later than the date indicated in, the RFQ to the awarding authority.

(d) The awarding authority shall designate the individuals responsible for the evaluation of the responses on the basis of the evaluation criteria set forth in the request for qualifications. The designated individuals shall have experience in design build. The individuals shall prepare their evaluations based solely on the information requested pursuant to the RFQ. Such information shall serve as the criteria by which the qualifications are evaluated. The information shall include all other performance measures that will be utilized, provided that said other performance measurers were made known to perspective responders at the time the request for qualifications was made available to said responders. The evaluations shall specify in writing:

(1) for each evaluation criterion, a rating of each response as advantageous, not advantageous, or unacceptable, and the reasons for the rating; and

(2) a composite rating for each proposal using said ratings as advantageous, not advantageous, or unacceptable, and the reasons for said composite rating.

(e) The awarding authority shall investigate and verify all information received. All financial information, trade secrets or other information customarily regarded as confidential business information shall not be deemed to be public information and shall remain confidential to the extent permissible under current law.

(f) Design build entities achieving a composite rating of highly advantageous or advantageous shall be eligible to receive an RFP in phase 2 of the 2 phase selection process. The awarding authority may select any number of design build entities to receive an RFP, except that, if the awarding authority fails to identify at least 2 design build entities to receive an RFP, the awarding authority shall re-advertise the public works project and renew the RFQ process.

Section 18. Before issuing an RFQ pursuant to section 17, the awarding authority shall contract for the duration of the 2 phase selection process with a design professional to provide technical advice and professional expertise to

the awarding authority; but, in retaining the services of a design professional the awarding authority may utilize the services of a design professional already in the employ of the awarding authority, or if the awarding authority does not already have in its employ the design professional, the awarding authority shall procure the services of a design professional pursuant to sections 38A 1/2 to 380, inclusive, of chapter 7.

After the awarding authority has retained a design professional, the awarding authority shall develop with the assistance of the design professional a scope of work statement that defines the public works project and provides prospective design build entities with sufficient information regarding the awarding authority's objectives and requirements. The scope of work statement shall include criteria and preliminary design, general budget parameters, and general schedule requirements to enable prospective design build entities to submit proposals in response to the RFP issued pursuant to section 19.

Once the awarding authority has developed a scope of work statement that adequately defines the awarding authority's objectives and requirements for the public works project, the awarding authority may develop and issue a draft RFP at the same time and in the same manner as issuing an RFQ pursuant to section 17. Design build entities receiving a draft RFP may submit written comments on the draft RFP to the awarding authority at the same time as submitting a response to the RFQ issued pursuant to section 4. The awarding authority may, at its sole discretion, incorporate written comments received from design build entities within the final RFP and may provide to design build entities prequalified to submit a proposal the final RFP pursuant to section 6.

The design professional retained to provide technical assistance and consulting services to the awarding authority shall not be eligible to participate in any way as a member of the design build entities competing for the award of the design build contract.

Section 19. The awarding authority shall issue an RFP to each design build entity that has been prequalified to receive an RFP pursuant to section 17. In addition to identifying the date by which the RFP is to be submitted to the awarding authority, the following requirements shall apply to an RFP issued pursuant to this section, unless noted otherwise:

(1) The RFP shall set forth a detailed scope of work including design concepts, technical requirements, performance criteria, construction requirements, time constraints and all other requirements that have a substantial impact on the cost, schedule and quality of the public works project and the project development process, as determined by the awarding authority.

(2) The RFP shall include the criteria for evaluating and ranking proposals.

(3) The RFP shall identify the cost basis, low-bid or best value, by which the awarding authority will evaluate proposals submitted in response to said RFP. For projects to be awarded on a best-value basis, the scoring process, quality criteria and relative weight thereof must be contained in the RFP.

(4) At the awarding authority's discretion, the RFP may provide for a process, including the establishment of a team, to review conceptual technical submittals before full proposal submittal for the purposes of identifying defects that would cause rejection of the proposal as non-responsive.

(5) All such technical conceptual submittals and responses shall remain confidential until after the award of the contract.

(6) The RFP shall require that every response shall be accompanied by a bid deposit in the form of a bid bond, or cash, or a certified check on, or a treasurer's or cashier's check issued by, a responsible bank or trust company, payable to the awarding authority. The amount of such bid deposit shall be 5 per cent of the value of the bid. Any person submitting a bid under this

section shall, on such bid, certify as follows:

The undersigned certifies under penalties of perjury that this bid is in all respects bona fide, fair and made without collusion or fraud with any other person. As used in this paragraph the word "person" shall mean any natural person, joint venture, partnership, corporation or other business or legal entity.

(Name of person signing bid)

(Company)

The RFP may provide for a stipend upon terms specified in the RFP to unsuccessful proposers that submit proposals that conform to the requirements of the RFP; but, the awarding authority may only use ideas and designs contained in non-successful proposals if a stipend, as defined in the RFP, is paid to the proposer.

Section 20. Pursuant to this section the awarding authority may evaluate and select proposals on either a best-value or low-bid basis. If the scope of work requires substantial engineering judgment, the quality of which may vary significantly as determined by the awarding authority, then the basis of award shall be best value. If the awarding authority evaluates proposals using low-bid as the basis for making such evaluation, it shall do so using the process outlined in subsection (a). If the awarding authority evaluates proposals using best value as the basis for making such evaluation, it shall do so using the process outlined in subsection (b).

(a) If the basis of the award is low bid, then each proposal, including the price or prices, must be sealed by the proposer and submitted to the awarding authority as one complete package. The awarding authority shall publicly open and read the proposals forthwith upon the expiration of the time for filing said proposals. The awarding authority shall enter into good faith, non-fee negotiations of the design-build contract with the responsible proposer that submits a responsive proposal with the lowest bid.

(b) If the basis of the award is best value, then each proposal shall be submitted by the proposer to the awarding authority in two separate proposals, which shall include a sealed technical proposal and a sealed price proposal. The sealed technical proposal and sealed price proposal shall be submitted simultaneously.

(1) The awarding authority shall establish a selection committee that shall first open, evaluate, and score each technical proposal from responsible proposers based on the quality criteria contained in the RFP. The evaluation and ranking of proposals shall be in accordance with the quality criteria and relative weights assigned or identified in the RFP. During this evaluation process, the price proposals shall remain sealed. Each technical proposal shall remain confidential.

(2) After completion of the evaluation of the technical proposals, the awarding authority shall publicly open and read, at the place and time designated in the RFP, the sealed price proposals and shall publicly calculate the overall value rating for each proposal. The overall value rating shall be the total price divided by the quality score or another objective formula clearly detailed in the RFP. The awarding authority shall enter into good faith negotiations with the responsible proposer with the lowest price per quality score point. In the event that two or more proposers have the same lowest price per quality score, the awarding authority shall enter into good faith negotiations with the responsible proposer who submitted the lowest price.

(c) Upon the completion of successful negotiations with the, selected design build entity, the awarding authority shall enter into a design build

contract with said entity. After signing a design build contract, the awarding authority shall notify in writing all other design build entities that their proposals were not accepted.

Section 21. The inspector general shall promulgate regulations and guidelines to implement sections 14 to 20, inclusive. In preparing said regulations and guidelines, the inspector general shall, at a minimum, consult with the Construction Industries of Massachusetts, the American Council of Engineering Companies, the Massachusetts Municipal Association, the National Association of Minority Contractors, New England Chapter, the Massachusetts Building Trades Council, the exempt agencies as identified in subsection (d) of section 4, and other parties whose input is would be helpful in promulgating said regulations and guidelines.

SECTION 28. Section 2 of chapter 152A of the General Laws, as appearing in the 2002 Official Edition, is hereby amended by adding the following 2 paragraphs:-

The failure to withhold federal or state income taxes or to pay workers compensation premiums with respect to an individual's wages shall not be used for the purposes of making a determination under this section. An individual's exercise of the option to purchase insurance as permitted by subsection (4) of section 1 of chapter 152 shall not be used for purposes of making a determination under this section.

Whoever fails to treat an individual as an employee according to this chapter shall be punished as provided in section 47. Nothing in this section shall limit the availability of other remedies at law or in equity.

SECTION 29. The second paragraph of section 18 of chapter 773 of the acts of 1960 is hereby amended by inserting at the end thereof the following sentence:- As used in this section, the term "nongovernmental sources" shall be limited to private donations, gifts, contracts, or grants, including commercial ventures and intellectual property contracts, or grants or contracts from the federal government or the administrative overhead associated with such grants and contracts; but the term shall not mean revenue derived from fees, tuition or charges of any kind paid by students, faculty, or staff.

SECTION 29A. Section 29 shall expire on August 1, 2006.

SECTION 30. Chapter 703 of the acts of 1963 is hereby amended by inserting after section 21 the following 9 sections:-

Section 21A. For each contract for a building project, as defined in section 21B, which is estimated to cost not less than \$1,000,000, the authority may elect to use the single selection method, as defined in section 21B, pursuant to sections 21A to 21I, inclusive. Before using the single selection method, the authority shall submit to the inspector general for approval its procedures for the use of the delivery method pursuant to section 21C.

Section 21B. As used in sections 21A to 21I, inclusive, the following words shall unless the context clearly indicates a different meaning or intent have the following meanings:-

"Authority", the Massachusetts State College Building Authority, established by section 2 of chapter 703 of the acts of 1963.

"Building project", shall have the same meaning as the word "project" as found in section 1 of chapter 703 of the acts of 1963.

"Construction management at risk" or "Construction management at risk services" or "Construction management at risk delivery method", 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 Authority 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 management at risk firm", 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 1/2 of chapter 7 of the General Laws, and shall be independent of the construction management at risk firm and the owner's project manager.

"Guaranteed Maximum Price", or "GMP", 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 have the same meaning as found in section 44A 1/2 of chapter 149 of the General Laws.

"Request for qualifications and proposals" or "RFQP", the documents utilized for soliciting statements of qualifications and proposals, including documents attached or incorporated by reference.

"Responsible bidder or offeror", a person who has the capability to perform fully the contract requirements, and the integrity and reliability which assures good faith performance.

"Single selection method" or "single selection procurement process", the method or process by which a designer and a construction management at risk firm submit jointly as a team in response to a request for qualifications and proposals and are evaluated and scored as such by the authority.

"Two-phase selection process", 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 21C. (a) The authority may establish written procedures, consistent with sections 21A to 21I, inclusive, to implement the single selection method subject to approval by members of the authority. Before implementing the written procedures and before entering into a contract for a building project in which the authority seeks to use the single selection method, the Authority shall submit the written procedures to the inspector general for approval. If the inspector general determines that the written procedures of the authority are consistent with sections 21A to 21I, inclusive, the inspector general shall approve the written procedures for use for 1 year commencing on the date the approval was granted. The authority annually thereafter shall submit its written procedures to the inspector general for review and approval in the manner prescribed herein. The inspector general shall have not more than 60 days from the time the authority submits its written procedures to approve or disapprove them. If the inspector general disapproves of the written procedures, notice in writing of the disapproval shall be provided to the authority. The notice shall indicate the reasons for the disapproval. The authority, upon correction of the deficiencies indicated in the notice from the inspector general, may re-submit the written procedures to the inspector general for review and approval. Upon re-submission of the procedures the inspector general shall have not more than 30 days to conclude the subsequent review. The authority, upon amending or otherwise modifying its

written procedures, shall submit immediately the amended or otherwise modified written procedures to the inspector general for approval. The authority shall implement the amended or otherwise modified written procedures only after having received the approval of the procedures from the inspector general. The process for approving amended or otherwise modified procedures shall be the same as the process for approving procedures as contained herein.

(b) The authority after receiving approval by the inspector general may implement its written procedures for the single selection method as described in the written procedures and consistent with sections 21A to 21I, inclusive.

Section 21D. (a) For each building project undertaken pursuant to sections 21A to 21I, inclusive, the authority shall utilize the single selection method, pursuant to this section, for the procurement of a designer and a construction management at risk firm.

Before procuring the services of a designer and construction management at risk firm, the authority, if required, shall procure or otherwise employ the services of an owner's project manager pursuant to section 44A 1/2 of chapter 149 of the General Laws. The owner's project manager shall be independent of the designer and the construction management at risk firm.

(b) Before issuing an RFQP, the authority shall establish a selection committee for the purpose of reviewing and evaluating statements of qualifications and proposals, as necessary, submitted in response to the RFQP issued pursuant to subsection (c). The selection committee shall be comprised of not less than 5 representatives of the authority, including staff members; but, 1 member of the prequalification committee shall be the owner's project manager, if applicable for the building project.

(c) The single selection procurement process shall begin once the authority provides public notice of the building project and solicits responses from designers and construction management at risk firms to an RFQP issued by the authority. Responses shall take the form of submission of statements of qualifications and proposals. The public notice shall include the following information:

(1) the date and time that the RFQP will be available to interested parties, including how interested parties shall obtain an RFQP;

(2) the date and time for receipt of statements of qualifications and proposals to the RFQP, including the address of the office to which the statements of qualifications and proposals are to be delivered;

(3) notice that the authority will accept only joint statements of qualifications and joint proposals from designers and construction management at risk firms who will be selected as a team;

(4) notice that the authority, although inviting responses from, and making final selection of, teams of designers and construction management at risk firms, will enter into a separate contract with the designer and the construction management at risk firm;

(5) a clear description of requirements regarding the submission of the statements of qualifications and proposals, including that proposals submitted shall be in the form of separate technical and price components;

(6) a description of the building project including available preliminary concept designs and/or design information, geotechnical reports, existing condition surveys and specifications;

(7) a description of the specific designer services sought and the scope of services expected of the construction management at risk firm during the preconstruction and construction phases of the building project;

(8) a general description of the anticipated schedule and estimated construction cost for the building project, including site availability, the estimated time period within which the building project is to be completed, and any occupancy expectations;

(9) the evaluation procedure, the criteria for the selection of the

designer and construction management at risk firm, who shall be selected as a team, and the rating system employed;

(10) 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;

(11) the form of contract and general and supplemental conditions including any incentive provisions allowable and any damages for delay provisions;

(12) information on whether the designer fee has been set or will be negotiated, and if the fee has been set, the amount of the fee;

(13) a fully developed schedule of cost items listing the authority's determination of what will be considered fee, cost of the work, and general condition items;

(14) specific information on the evaluation criteria including the methodology for determining the selected construction management at risk firm;

(15) the timetable and process for establishing a GMP including status of design and limitations on the amount and use of contingency;

(16) a list of the trade contractor classes of work to be required in the trade contractor prequalification plan;

(17) any additional information, as determined by the authority, that identifies the expectations of the authority of the selected team; and

(18) a statement indicating that the RFQP will be used to prequalify teams who will be invited to submit a proposal in response to a request for proposal issued pursuant to this section.

Public notice of the solicitation required pursuant to this section 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 of the General Laws, on the COMPASS system, so-called. The public notice and solicitation shall be given not less than 4 weeks before the deadline for submitting responses to the RFQP.

Section 21E. (a) In order to respond to the solicitation issued by the authority, interested designers and construction management at risk firms shall submit joint statements of qualifications and proposals in response to a publicly advertised RFQP. The statement of qualifications, submitted as part of the responses to the RFQP, shall include, at a minimum, the following:

(1) a cover letter or executive summary detailing the key elements and factors that differentiate the designer and construction management at risk firm, hereinafter referred to as the "team", from other responders;

(2) completion of a qualifications application similar in form to AIA Document A305, 1986 edition, listing general business information and financial capacity;

(3) a list of lawsuits and arbitrations to which the either member of the team is a party in regard to design or construction contracts within the last 3 years, including a list of all convictions or fines for violations of state or federal law;

(4) submission of an audited financial statement for both members of the team for the most recent fiscal year and a letter from the surety company of the construction management at risk firm confirming the ability to provide performance and payment bonds for the building project under consideration;

(5) submission of information on the construction management at risk firm's safety record including its workers' compensation experience modifier for the prior 3 years;

(6) submission of information on and evidence of each team member's compliance record with respect to minority business enterprise and women business enterprise inclusion goals and workforce inclusion goals, if applicable;

(7) submission of information regarding the team's experience on

building projects of similar size, scope and complexity, including references from the owners and architects of such building projects; but, each member of the team may also submit its own experience on building projects of similar size, scope and complexity;

(8) submission of information on any projects where either member of the team was terminated, failed to complete the work, or paid liquidated damages;

(9) submission of specific examples of the construction management at risk firm's project management reports or other illustrations of the construction management at risk firm's operating philosophy; and,

(10) any other relevant information that the authority determines is necessary to make an informed regarding team selection.

The statement of qualifications shall be signed by the duly authorized representative of the designer and the construction management at risk firm under pains and penalties of perjury.

(b) The RFQP, in addition to the statement of qualifications, shall require the submission of separate technical and price components as part of the overall proposal submitted in response to said RFQP. The technical component shall include:

(1) a detailed project approach, including preconstruction services;

(2) the project team members with position descriptions and relevant time commitments of said team members during the project, if applicable;

(3) submission of a project organization chart with specific information on key project personnel and/or consultants of the team;

(4) the construction management plan indicating approach to control of cost, schedule, quality, documents and claims;

(5) preliminary definition of trade contractor and subcontractor bid packages and scopes of work;

(6) affidavit of prevailing wage compliance pursuant to sections 26 and 27 of chapter 149 of the General Laws;

(7) 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 100 per cent of the budget for the building project;

(8) a technical challenges and solutions plan, and any qualifications or exceptions to the terms of the form of contract or supplemental conditions as included in the RFQP.

The price component shall include:

(1) the fee for design services, if the authority does not set the fee per the RFQP,

(2) the fee for preconstruction services with appropriate detail,

(3) the fee for construction services with explanation of the basis, and

(4) the estimated cost of general conditions with appropriate detail.

(c) Upon receipt of the statements of qualifications and proposals submitted by interested teams, the selection committee established pursuant to this section shall evaluate each statement of qualifications using the criteria as provided in the RFQP. Only teams who achieve an acceptable rating as defined in the RFQP will have the technical and price components of their proposals opened and reviewed. The decision of the prequalification committee shall be final and shall not be subject to appeal except on grounds of fraud or collusion.

(d) After making a determination as to which teams shall be prequalified to have their proposals reviewed, pursuant to subsection (c), the selection committee shall evaluate all proposals in accordance with the criteria included in the RFQP; but, if the selection committee elects to conduct an interview

with any team that submitted a proposal in response to the RFQP, then the selection committee shall conduct interviews with each team that submitted a proposal to said RFQP. Based upon the evaluations of each proposal submitted by each team, the selection committee shall rank the proposals submitted by the teams and shall make a recommendation to the board as to the team selected to perform the work. The decision of the selection committee shall be final and not subject to appeal except on the grounds of fraud or collusion.

(e) The authority shall commence negotiations each member of the highest ranked team. Said negotiations shall commence with the designer, unless the board had been previously set and included the fee in the RFQP. Non-fee negotiations shall commence with the construction management at risk firm. If the authority determines that negotiations with the designer or the construction management at risk firm will not result in a contract acceptable to the authority, the authority shall terminate negotiations with the highest ranked team and shall commence negotiations with the next highest ranked team. The process shall continue until the authority has reached an acceptable contract with 1 of the prequalified teams. The list and ranking of proposed teams shall be certified by the public agency and made available as a public record after the contracts have been awarded.

Section 21F. (a) Each contract for a building project procured pursuant to this section shall utilize a cost plus not to exceed guaranteed maximum price form of contract in which the authority shall be entitled to monitor and audit all project costs. The team 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 authority may include an incentive clause within the contract for various performance objectives; but, the incentive clause shall not include an incentive that exceeds 1 per cent of the estimated construction cost.

In establishing the schedule and process for determining a guaranteed maximum price, the contract between the authority and the construction management at risk firm shall comply with the following:

(1) the guaranteed maximum price shall be based on design documents which are no less developed than 60 per cent construction documents;

(2) the guaranteed maximum price shall be agreed to as an amendment to the contract between the authority and the construction management at risk firm;

(3) the guaranteed maximum price amendment shall be executed before the commencement of any construction work; except that that the authority, before the execution of the guaranteed maximum price amendment, may commence construction, so long as the authority executes a separate amendment to the contract with the construction management at risk firm detailing the scope of work selected to commence before execution of the guaranteed price amendment. The 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 management at risk firm; but, any class of work included in the scope of work which is selected to commence before the execution of the guaranteed maximum price amendment shall be subject to the trade contractor selection process set forth in subsection (g), for the stated scope of work only. In the event that a guaranteed maximum price cannot be successfully negotiated between the authority and the construction management at risk firm, any trade contractor agreement between the construction management at risk firm and a trade contractor for work selected to commence before execution of the guaranteed maximum price amendment may be assigned to the authority or to another construction management at risk firm designated by the authority, without the assent of the trade contractor, and the authority or the designated construction management at risk firm 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 authority 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 before 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 5 business days after the execution of the guaranteed maximum price amendment.

In the event that a guaranteed maximum price cannot be successfully negotiated between the authority and the construction management at risk firm, the board or its designee may commence negotiations with the next highest ranked team. The process shall continue until the authority has reached an acceptable contract with one of the prequalified teams. In the event that a contract and guaranteed maximum price amendment cannot be successfully negotiated between the authority and a prequalified team, the authority shall terminate the procurement process and shall instead procure the project in accordance with sections 44A to 44M, inclusive, of chapter 149 of the General Laws.

Section 21G. (a) For building projects implemented pursuant to this section, the authority shall establish a trade contractor selection process for all sub-bid classes of work listed in section 44F of chapter 149 of the General Laws and all other sub-bid classes of work selected by the authority for the project; provided, however, that the sub-bid work meets or exceeds the threshold sum identified in paragraph (1) of section 44F of said chapter 149; and provided, further, that the selection process for such trade contractors shall conform to the requirements set out in this subsection. The authority shall also establish a selection process for subcontractors who are not trade contractors as defined above. The selection process shall conform to the requirements of this subsection. All trade contractors seeking to provide services in connection with building projects of the authority shall be prequalified in accordance with this subsection. All subcontractors seeking to provide services in connection with building projects of the authority shall be prequalified in accordance with subsection (h). The authority may, consistent with established minority business enterprise and women business enterprise inclusion goals, provide an additional 5 points to the total score of each minority business enterprise and women business enterprise in the prequalification process as provided in this subsection. The construction management at risk firm may submit its qualifications to bid on trade contract or subcontract work in accordance with this subsection; provided, however, that the construction management at risk firm customarily performs the work for which it submits its qualifications; provided further, that the construction management at risk firm shall 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.

(b) All trade contracts entered into in accordance with this subsection 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 and whose name appears on United States Treasury Department

Circular 570; but, the bonds shall be subject to paragraph (3) of section 44F of chapter 149 of the General Laws.

(c) The authority shall establish a trade contractor prequalification committee for the building project. The prequalification committee shall be comprised of a minimum of 5 members appointed by the authority, including a representative of the designer and a representative of the construction management at risk firm.

(d) The construction management at risk firm shall provide to the authority 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 authority. The authority shall give public notice of trade contractor work on the building project and shall issue for each trade contract established under this subsection an RFQ which shall be used to solicit responses from eligible trade contractors and which shall be used to prequalify the trade contractors to participate on said building project; but, the 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.

(e) 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 of the General Laws and shall not be open to public inspection.

(f) The public notice and solicitation required pursuant to this section 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 of the General Laws, and within the COMPASS system, so-called. The public notice and solicitation shall be given not less than 2 weeks before the deadline for submitting responses to the RFQ.

(g) The RFQ shall require only the information contained in paragraphs (1) to (4), inclusive of this subsection, 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 off 25 required for approval):

(i) Business owners, The name, title, and years with firm of the owner of the business.

(ii) Management personnel, The names, title, education and construction experience, years with firm, and list of projects completed by all management personnel.

(iii) Similar project experience, The project name, description, description of scope, original trade contract sum, final trade contract sum with explanation, and date completed of similar projects.

(iv) Terminations, A list of any projects on which the trade contractor was terminated or failed to complete the work.

(v) Lawsuits, A list of commercial lawsuits in which the trade contractor is a defendant or defendant-in-counterclaim with regard to

construction contracts within the last 3 years. The 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 section 39F of chapter 30 of the General Laws.

(vi) Safety record, The 3-year history of the trade contractor's workers' compensation experience modifier.

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

(i) Project references, Client references for all projects listed in clause (iii) of paragraph (1), including the project name, client's name, address, telephone and fax number, and contact person.

(ii) Credit references, A minimum of 5 credit references, including telephone and fax number of contact person from key suppliers, vendors and banks.

(iii) Public project record, A list of all completed public building construction projects as defined in section 44A of chapter 149 of the General Laws during past 3 years with client's name, address, telephone and fax number and contact person.

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

(i) Annual revenue for prior 3 fiscal years. There shall be no requirement for submission of financial statements.

(ii) Revenue under contract for next 3 fiscal years.

(4) Mandatory commitment letter, for which no points are assigned, for payment and performance bonds at 100 per cent 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.

(h) Statements of qualifications submitted in response to the RFQ issued pursuant to this section shall be reviewed and scored by the trade contractor prequalification committee established pursuant to this section. All trade contractors who achieve a score of 70 points or greater shall be prequalified to participate in a request for bids processes initiated for a specific building project. The decision of the prequalification committee shall be final and not subject to appeal except on the grounds of fraud or collusion.

(i) When initiating a request for bids process, the authority shall issue a request for bids document which 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 subsection (1) of paragraph (a) of section 44F of chapter 149 of the General Laws which shall provide for full competition for each item of material to be furnished under the contract as set forth under subsection (b) of section 39M of chapter 30 of the General Laws;

(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 of the General Laws;

(10) a non-collusion affidavit;

(11) a requirement for the bidder to post a 5 per cent bid bond from a surety company licensed to do business in the commonwealth and whose name appears on U.S. Treasury Department Circular 570; but, 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 proposals in response to a request for bids shall do so in accordance with the requirements contained in the request for bids package. Any proposal 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.

(j) Proposals shall be opened publicly by the authority and shall be awarded to the lowest responsible prequalified bidder. If the authority receives fewer than 3 responsive bids on any proposed trade contract and the lowest bid exceeds the estimated cost for the work for which proposals are requested, the construction management at risk firm shall attempt* to negotiate an acceptable price with the lowest prequalified bidder. If the negotiations are unsuccessful, the construction management 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 construction management at risk firm is unsuccessful in negotiating an acceptable price with the lowest prequalified bidder and second lowest prequalified bidder, the construction management at risk firm, on behalf of and with the consent of the authority, shall solicit additional bids, utilizing the procedures for selection of subcontractors who are not trade contractors, set out in subsection (i).

(k) Each trade contractor selected by 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 management at risk firm within ten business days of receipt of the trade contract from the construction management at risk firm. The trade contract shall be the trade contractor agreement as follows:

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:

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. ____ , ____ , ____ , ____ .

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 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 _____ (Authority) hereinafter called the "Authority", except to the extent that provisions contained therein are by their terms or by law applicable only to the Construction Management At Risk Firm.

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 Authority 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 Authority.

The Construction Management At Risk Firm agrees to begin, prosecute and complete the entire work specified by the authority 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.

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 authority by the Construction Management At Risk Firm.

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.

This Trade Contractor Agreement is contingent upon the execution of an amendment to the contract between the Construction Management At Risk Firm and the authority for the work of the Trade Contractor.

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.

The following exhibits are incorporated into their subcontract:

- Exhibit A: List of Contract Documents
- Exhibit B: Detailed Scope of Work
- Exhibit C: Project Schedule

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 2111. (a) For building projects implemented pursuant to section 21A to 21I, inclusive, subcontractors who are not trade contractors as defined in subsection (a) of section 21G and whose work has an estimated cost at or exceeding the threshold sum identified in subsection (1) of section 44F of chapter 149 of the General Laws, the construction management at risk firm shall submit to the authority for approval the qualifications that a subcontractor must have in order to perform the work of the subcontract and a list of 3 subcontracting firms which the construction management at risk firm believes meets the qualifications. The authority may eliminate firms from the list and may add firms to the list; if, 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 authority to submit a bid for the work; but, 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 authority. The construction management at risk firm shall indicate the bidders who are selected to be awarded a subcontract. 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 subsection (1) of section 44F of said chapter 149, may be awarded by the construction management at risk firm using a selection method selected by the construction management at risk firm with the approval of the authority.

Section 21I. Sections 26, 27, 27A, 27B, 27C, 27D, 29, 29C, and 34A of chapter 149 of the General Laws, and sections 39F, 39J, 39K, 39N, 39O, 39P, and 39R of chapter 30 of the General Laws shall apply to all building projects constructed by the Authority as provided in sections 22A to 21I, inclusive of this chapter.

SECTION 31. Chapter 127 of the acts of 1999 is hereby amended by striking out section 260 and inserting in place thereof the following section:-

SECTION 260. Notwithstanding the provisions of any general or special law to the contrary, the commissioner of the division of capital asset management and maintenance may, upon the request of a public institution of higher education, delegate project control and supervision to that institution over projects whose estimated cost is less than \$500,000 if said commissioner determines that the institution has the ability to control and supervise such project.

SECTION 32. Notwithstanding any general or special law, or any policy, rule or regulation to the contrary, every contract for the construction, reconstruction, installation, demolition, maintenance or repair of any building by an auxiliary organization established and organized by the university of Massachusetts shall be subject to sections 44A to 44I, inclusive, of chapter 149 of the General Laws. Every contract for the construction, reconstruction, alteration, remodeling or repair of any public works project by an auxiliary organization shall be subject to section 39M of chapter 30 of the General Laws. Design services procured by an auxiliary organization shall be procured in the same manner as the university of Massachusetts procures the services.

SECTION 32A. The corporations established pursuant to chapter 138 of the acts of 1992 and chapter 163 of the acts of 1997 shall not be considered auxiliary organizations of the university.

SECTION 32B. Section 32A shall expire on August 1, 2006.

SECTION 33. Notwithstanding any general or special law to the contrary, the Massachusetts Development Finance Agency shall make not less than \$500,000 available in fiscal year 2005 for a contract with the Massachusetts Alliance for Small Contractors for the purpose of providing technical assistance, education, capacity building, and support services to small businesses, minority owned businesses and women owned businesses, with a particular focus on the businesses that are seeking to participate in public building projects and public works projects.

SECTION 34. Sections 18 and 27 shall take effect on January 1, 2005.

House of Representatives, July 9, 2004.
Preamble adopted, (A. Stephen Tobin), Speaker.

In Senate, July 9, 2004.
Preamble adopted, (Steven A. Tolman), President.

House of Representatives, July 13, 2004.
Bill passed to be enacted, (Paul J. Donato), Speaker.

In Senate, July 14, 2004.

Bill Passed to be enacted, (Robert A. Havern), President.

July 19, 2004.

Approved,
at 1 o'clock and 37 minutes, P.M.
(Kerry Healey)
Acting Governor.