

THE COMMONWEALTH OF MASSACHUSETTS
SPECIAL COMMISSION ON PUBLIC CONSTRUCTION REFORM
STATE HOUSE • BOSTON, MA 02133

PUBLIC CONSTRUCTION EFFORT

Chronology of Effort

The Special Commission on Public Construction Reform was authorized pursuant to Section 138 of Chapter 46 of the Acts of 2003. The composition was slightly amended per Section 12 of Chapter 55 of the Acts of 2003. For composition of Special Commission, see attached sheet.

The charge to the Special Commission was as follows: “to investigate, study and make legislative recommendations on the adequacy and efficiency of laws and regulations governing public construction projects.” The Special Commission is pleased to release its recommendations today.

The Special Commission commenced its work in December of 2003. In addition to the January 7, 2004 public hearing hosted by the Special Commission, the Special Commission met at least twice a month from January through the first week in May.

Issues Identification

The Special Commission commenced its work in December of 2003. The first meeting, which was organizational in nature, was used to identify the most important issues that everyone thought the commission should tackle. The list of issues included:

Alternative Delivery Methods

Bid Requirements

- File Sub-bid
- Non File Sub-bid

Low-bid Policy

Minority / Women Business Participation

- Pass-through contracts
- Quality sub-contractor plans

Owner Issues

- Owner Representative
 - Monitoring / Enforcement
- Blanket state PM / CM Program
- Designer Selection process

Qualifications / Pre-qualification / Disqualification

- Bond requirements
- Monitoring / Enforcement
- DCAMM role (Certification)

Thresholds

Payment
State Oversight Role of Municipal Projects
Security Projects

Attached matrix reveals how the Special Commission handled each issue.

Lessons Learned

Through the public hearing, feedback presented to the Commission and the many meeting helds, the Special Commission came to understand the following:

The Filed Sub-Bid system, which is often cited as the reason for difficulty in public construction, had become a convenient straw man upon which to blame almost anything under the sun. The Special Commission took in sufficient information to understand that the additional processes that derive from filed sub-bid added a measure of complexity to projects but, when pressed to articulate why the system should be discarded, the Special Commission did not hear enough to warrant such a recommendation. The Special Commission did accept that inflation, since the inception of the thresholds was in need of adjustment. The Special Commission recommended an increase of 100% to the filed sub-bid threshold (from \$10,000 to \$20,000). The Special Commission also recommended an increase of 400% to the threshold under Section 44A of Chapter 149 (from \$25,000 to \$100,000).

The Special Commission identified that public construction projects, once of a particular size and / or level of complexity could greatly benefit from additional, hands-on oversight at the owner's level. In response, the Special Commission has recommended that an Owner's Project Manager be required on every project that is estimated to cost \$1.5 million or more.

The Special Commission learned that the designer selection process at the local level represented a hodge-podge of practices that make it difficult for the industry to know what to expect. Variance in process leads to diminished competition and to possible violations of the spirit of the law. The Special Commission recommends the adoption of uniform procedures at the municipal level. Also, in response to concerns raised by municipal officials that the requirement of "peer review" of preliminary design work added unnecessary delays and cost to the design work, the Special Commission has recommended that the requirement for "peer review" be amended to allow for its use at the discretion of the municipality.

The Special Commission learned that the inclusion of minority-owned businesses and women-owned businesses on construction projects at the local level is virtually non-existent. The lack of participation has little to do with the number of such firms in the marketplace. Instead, the lack of participation is driven by two factors: (1) there is no state requirement for MBE and WME participation at the municipal level and (2) project owner's at the municipal level have taken little responsibility for ensuring MBE and WBE inclusion (unless the municipality has an inclusion policy on its books). Additionally, the Special Commission learned that state projects, which are prosecuted through the Division of Capital Asset Maintenance and Management, bring about MBE and WBE inclusion not based on statutory requirements but through the mandates of Executive Order 390. In response to both of these issues, the Special Commission has recommended the following

1. Codification of the Affirmative Marketing Program established under EO 390 with respect to DCAMM
2. Application of the Affirmative Marketing Program on municipal building projects that are state assisted.

Finally, the Special Commission, aware of the multiple efforts on the part of state agencies, municipalities, and other public agencies to prosecute projects under an alternative delivery method, has recommended that the delivery method of Construction Management At Risk be available for building projects that are estimated to cost \$5 million or more. The Special Commission has also recommended that the alternative delivery method of Design Build be available for public works projects that are estimated to cost \$5 million or more. For each methodology, there is a built in mechanism – approval (notice to proceed) by the Inspector General’s office, to ensure that the use of the alternative delivery method has been well thought out and that the public agency has determined that its use would be best to use on the project.

Public Construction Reform: Themes of Reform

1. Increased Accountability

- Requirement of Owner’s Project Manager
- Mandatory Prequalification of General Contractors and Subcontractors
- Required Certification of Subcontractors
- Uniform Designer Selection at Municipal Level
- Enhanced Access to Contractor Evaluations (and Subcontractors)
- Enhanced Enforcement of Contractors (debarment & classification of employees)

2. Increased Flexibility

- Statutorily permitted use of Construction Management At Risk Delivery Method on building projects
- Statutorily permitted use of Design Build Delivery Method on public works projects
- Elimination of Mandatory Designer Peer Review at Municipal Level

3. Increased Inclusion and Competition

- Codification of Affirmative Marketing Program under DCAMM
- Establishment of Affirmative Marketing Program for municipalities on “state assisted building projects”
- Overall improvement to process to encourage greater participation on the part of general contractors and subcontractors

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COMPETITIVE BIDDING REFORMS

	Construction Project Value \$0 - \$5,000	Construction Project Value \$5,000 - \$10,000	Construction Project Value \$10,000-\$25,000	Construction Project Value \$25,000-\$100,000	Construction Project Value > \$100,000
MGL c. 149, §44a – 44M Competitive Bidding Statute	<u>Current</u> Law does not apply <u>Proposed</u> Three written price quotations	<u>Current</u> Law does not apply Proposed Three written price quotations	Current Sealed bid process Proposed Written responses via public notification process	Current Sealed bid process with filed sub-bids. Filed sub-bids required when trade work is valued at \$10,000 or more. Proposed Sealed bid process	Current Sealed bid process with filed sub-bids Proposed Sealed bid process with filed sub-bids. Filed sub-bids required when trade work is valued at \$20,000 or more.

CONSTRUCTION REFORMS

Construction Projects valued at \$1.5 million or more	Vertical Construction Projects valued at \$5 million or more	Horizontal Construction Projects valued at \$5 million or more	Vertical Construction Projects valued at \$10 million or more
Owner’s Project Manager required	Construction Management-at-Risk available	Design/Build available	Pre-qualification of General Contractors and Subcontractors required

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RECOMMENDATIONS

ISSUE ADDRESSED	RECOMMENDATION
Alternative Delivery Methods	<ul style="list-style-type: none">○ Construction Management-at-Risk available on building projects costing \$5 million or more○ Design/Build available on road/public works projects costing \$5 million or more
Bid Requirements	<ul style="list-style-type: none">○ No elimination or expansion of filed sub-bid system○ 100% increase in the threshold trigger for filed sub-bid
Low Bid Requirement	<ul style="list-style-type: none">○ Establish a qualifications based system to identify well-qualified firms to compete for low bid○ Pre-qualification of General Contractors and Subcontractors
Minority-Owned and Women-Owned Business Participation	<ul style="list-style-type: none">○ Codify affirmative marketing program used under Executive Order 390 on projects within DCAMM jurisdiction○ Apply affirmative marketing program on building projects on other state-assisted○ Adds additional monitoring and enforcement responsibilities to SOMWBA

Public Agency Responsibility	<ul style="list-style-type: none"> ○ Require mandatory Owner's Project Manager on projects costing \$1.5 million or more ○ Apply uniform designer selection processes at municipal level ○ Eliminate "peer review" requirement
Contractor/Subcontractor Qualifications	<ul style="list-style-type: none"> ○ Performance and payment bonds required by subcontractor when pre-qualification is completed ○ Pre-qualification of general contractors and subcontractors required on projects costing \$10million or more ○ Begin DCAMM certification of subcontractors by January 1, 2005
Thresholds Under Public Bidding Laws	<ul style="list-style-type: none"> ○ Projects costing \$1-\$10,000: 3 written quotations required ○ Projects costing \$10,000-\$25,000: public notification required, written responses solicited ○ Projects costing \$25,000-\$100,000: competitive sealed bid process required ○ Projects costing \$100,000 or more: competitive sealed bid process with filed sub-bids required ○ Filed sub-bid threshold increased from \$10,000 to \$20,000
Security Projects	<ul style="list-style-type: none"> ○ Apply emergency waiver provisions when there is a need to act immediately ○ Apply pre-qualification process when there is no need to act immediately but there is a need to protect access to documents