Background on Massachusetts Approach to Construction Reform

New York City Bar Association

November 12, 2014
Construction Reform Overview

- Alternative Delivery Methods (CM at Risk and Design-Build)
- General Bid & Filed Sub-Bid Threshold Changes
- Filed Sub-Bidder & General Bidder Certification
- General & Filed Sub-Bidder Pre-Qualification
- Owner’s Project Manager Requirements

- MBE/WBE Affirmative Marketing Program
- Designer Selection Changes
- Owner’s Project Manager Requirements
OVERVIEW OF KEY PROVISIONS
Construction Reform – What was it?

- The most comprehensive reform of state public construction laws since the Ward Commission (1981)
- Modified several fundamental areas in these laws:
  - Changed **thresholds** governing general and filed sub-bids.
  - Required **certification of filed sub-bid subcontractors**.
  - Made owner **prequalification** of contractors widely available/mandatory in certain instances (GCs, subs).
  - Required **Owner’s Project Manager** on certain projects.
  - Provided for use of **Alternative Delivery Methods** for vertical and horizontal construction projects.
  - Extended **MBE/WBE program** requirements to state funded municipal projects.
Background on Massachusetts Process For Construction Reform
Construction Reform - How Did We Finally Get Here?

- Legislative mandate – Section 138 of Chapter 46 of the Acts of 2003 established the “Special Commission on Construction Reform”.

- “Special Commission” given statutory mandate to “investigate, study and make legislative recommendations on the adequacy and efficiency of the laws and regulations governing public construction projects” in the Commonwealth.
Construction Reform - How Did We Finally Get Here?

- Special Commission comprised of 20 members representing local and state government awarding authorities, industry associations, and the Legislature.
- Key to success was having all stakeholders at the table.
- Every major interest group came together to hammer out needed legislative change:
  - Public Owners
  - Office of the Inspector General
  - General/Subcontractor groups (AGC, ABC, ASM)
  - Architect and Engineer groups
  - Organized Labor
  - MBE/WBE groups
  - The Legislature and the Administration
Implementation and Outreach

DCAM’s Responsibilities:

- Filed Sub Contractor Certification Regulations.
- GC and Subcontractor Prequalification Regulations.
- Affirmative Marketing Program Goals and Waiver Guidelines.
Implementation and Outreach

Collaborative Implementation Efforts (Public Sector & Industry):

• Team effort IG, AG, SOMWBA and DCAM on overall implementation of construction reforms.

• Frequently Asked Questions (FAQs) and Construction Reform information and updates on DCAM and IG websites. www.mass.gov/cam & www.mass.gov/ig

• Implementation Working Group with representatives of IG, AG, DCAM, Mass Municipal, AGC, ASM, AIA, labor and other interested parties.

• Participating in presentations to municipalities, state agencies, construction and design community and others across the state.
WHAT DID THE NEW LAW CHANGE?
GENERAL BID & FILED SUB-BID THRESHOLDS
Bidding Threshold Changes to Ch. 149
Public Buildings

Effective July 19, 2004

- General Bids – Four categories based upon estimated construction cost (ECC):
  - Less than $10,000
  - $10,000 - $25,000
  - $25,000 - $100,000
  - Over $100,000

- Sub-Bids - $20,000 or More
Bidding Threshold Changes

**ECC Less than $10,000 – Public Building Project**

- Seek three or more written quotes.
- Quotes from firms customarily performing type of work sought.
- Award to responsible firm providing lowest quote.
- Agency must keep records of:
  - Firms that were solicited for quotes;
  - Quotes submitted; and
  - Date and amount of each quote.
- Awarding Authorities can use Operational Services Division (OSD) Trade Contractor List to identify firms from which to seek quotes.
- Not Applicable: DCAM Certification, Filed Sub-Bids or bid deposit.
Bidding Threshold Changes

**ECC $10,000 to $25,000 – Public Building Project**

- Public notification of scope, defining work and requirements and time period for completion of work.
- Posting two weeks on agency website and Comm-Pass or Central Register and conspicuous place in primary office of awarding authority.
- Written prices from firms customarily performing type of work sought.
- Award to responsible firm providing lowest price.
- Awarding authorities can supplement public notification by notifying firms on OSD Trade Contractor List or other list of firms customarily providing work sought.
- Not Applicable – DCAM Certification, Filed Sub-Bids or bid deposit.
Bidding Threshold Changes

**ECC $25,000 to $100,000** – Public Building Project (formerly projects $10,000 - $25,000) M.G.L. c. 30, §39M Process Applies

- Advertise two weeks in Central Register & newspaper of general circulation, Comm-Pass (recommended)

- Bid Deposit Required.

- Public Bid Opening.

- Award to lowest eligible and responsible bidder (eligible as defined in c. 30, §39M).

- Not Applicable: DCAM Certification or Filed Sub-Bids.
Bidding Threshold Changes

**ECC over $100,000** – Public Building Project (formerly over $25,000) M.G.L. c. 149, §44A-44H Process Applies

- Advertise two weeks in Central Register & newspaper of general circulation, Comm-Pass (recommended).

- DCAM Certification Required of General Bidders with Update Statement.

- DCAM Certification of Filed Sub-bidders required with Update Statement (effective 1/31/05 - C. 507).

- Filed Sub-bid applies for trades in §44F with ECC of $20,000 or more.
**Bidding Threshold Changes**

**ECC over $100,000** (continued)

- Bid Deposit Required.
- Public Bid Opening.
- Award to lowest eligible and responsible general bidder.
- Pre-qualification of prime and sub-bidders:
  - Optional for projects with ECC of $100,000 - $10 million,
  - Mandatory for non-exempt awarding authorities on projects with ECC of $10 million or more. Certain state agencies exempt.
Bidding Threshold Changes

**Filed Sub-Bids** (effective July 19, 2004)

- (a) roofing and flashing;
- (b) metal windows;
- (c) waterproofing, damp-proofing and caulking;
- (d) miscellaneous and ornamental iron;
- (e) lathing and plastering;
- (f) acoustical tile;
- (g) marble;
- (h) tile;
- (i) terrazzo
- (j) resilient floors;
- (k) glass and glazing;
- (l) painting;
- (m) plumbing;
- (n) heating, ventilating and air-conditioning;
- (o) electrical work, including direct electrical radiation for heating; (p) elevators;
- (q) masonry work;
- (r) fire protection sprinkler system
Bidding Threshold Changes

• New filed sub-bid threshold: ECC $20,000 (formerly $10,000).

• Effective December 31, 2005 – Filed Sub-bidders must be DCAM certified in trade. (Throughout 2005 sub-bidders are applying and being certified so that Sub-bidder pool of trades will be certified by effective date of December 31, 2005.)
SUBCONTRACTOR & GENERAL CONTRACTOR CERTIFICATION
Subcontractor Certification - Effective December 31, 2005

- Filed Sub-bidders must be certified by DCAM in order to bid on Chapter 149 building contract work (Project ECC > $100,000, sub-bid ECC $20,000+).

- As of December 31, 2005 a DCAM Certificate of Eligibility & Update Statement will be required with every sub-bid submitted on a Chapter 149 building contract. (Chapter 507).

- DCAM has published an implementation schedule for application & certification of the sub-trades during 2005.

- See DCAM Website for up to date implementation and certification information and forms - www.mass.gov/cam
Subcontractor Certification


- DCAM reviews sub-bidder applications for certification in much the same way as prime contractors are certified, including review of applicants’ construction experience and financial condition.

- As of December 31, 2005 every sub-bid for a building contract subject to the filed sub-bid law (estimated cost of construction >$100,000) must include a copy of a Certificate of Eligibility issued by DCAM & an Update Statement, containing updated information since sub-bidders last application for certification including new projects and projects currently under contract.

- Sub-bidders must certify under penalties of perjury the truthfulness and completeness of the information in their sub-bid.
Subcontractor Certification


Sub-contractor certification is essentially the same as prime contractor certification except:

- Projects evaluated over past 3 years compared to 5 years for prime contractors.

- Certificate of eligibility will **not** show single project and aggregate limits like the certificate for prime contractors.

- Certificate of eligibility will show the number of prior construction projects evaluated by DCAM, the average numerical value on those projects, and the number of projects given scores below the passing score established by DCAM (80%) over last 3 years.
Subcontractor Certification


- Subcontractor evaluations and responses to subcontractor evaluations are public records (this will apply to prime contractor evaluations as well).

- Public agencies that fail to submit to DCAM the sub-contractor evaluations forms together with any sub-contractor responses, within 90 days of project completion (certificate of occupancy) risk not being eligible for state funding.

- Indemnification of $1 million for representatives of public agencies providing sub-contractor evaluations with limited indemnification of legal fees only, if the person is found to have acted in a willful, wanton or reckless manner in the evaluation (this is same as for prime contractors).
Changes to General Contractor Certification

- Not specifically mandated in Construction Reform legislation.

- Making GC Certification regulations more user-friendly by separating those directed at the contractor from those directed at the awarding authority.

- DCAM has incorporated new factors into numerical rating system including criteria such as: termination, amount of litigation, direct payment claims history, OSHA penalties.

- A contractor’s single project limit will be based on the average of the largest two projects, rather than on just the single largest project.

- Single project and aggregate limits reduced to 130% of the average of the two largest projects - 180% if the contractor has demonstrated the capacity in the opinion of the Commissioner.
AFFIRMATIVE MARKETING PROGRAM MBE/WBE and DESIGNER SELECTION
MBE/WBE Participation-Affirmative Marketing Program
(revision to M.G.L. c. 7, §40N and c. 23A, §44)

• MBE/WBE goals set by DCAM

• Published in Central Register, currently
  Design - 8% MBE, 4% WBE
  Construction 7.4% MBE, 4% WBE

• Apply to all “state assisted building projects” includes projects by
  municipalities and political subdivisions when costs paid in whole
  or in part by Commonwealth.

• DCAM and SOMWBA/SDO to develop procedures for adjustment of
  goals by awarding authority on individual projects.
Affirmative Marketing Program (continued)

- DCAM and SOMWBA/SDO develop good faith efforts waiver procedure before award for use by awarding authorities.

- SOMWBA/SDO monitors and reports for political subdivisions Affirmative Marketing Program.

- DCAM monitors and reports for DCAM’s Affirmative Marketing Program.

- DCAM & MassHousing currently undertaking new disparity study.
Municipal Designer Selection

- Municipalities may now utilize designer that conducted the feasibility study for the project design without mandatory peer review.

- Municipalities must use standard designer selection form issued by Designer Selection Board (DSB).
OWNER’S PROJECT MANAGER
Owner’s Project Manager

- Owner’s Project Manager (OPM) required on all projects with ECC of $1.5 million or more.

- OPM Must be a registered Architect or Engineer with five years relevant experience, or if not registered seven years relevant experience.

- Hired before designer, serves as public agencies agent and consultant throughout planning, design, procurement and construction including advice on selection of designer, design, value engineering, scope, estimating, general and subcontractor pre-qualification and selection, scheduling and construction.
• Agency may assign an employee to serve as owner’s project manager if they meet qualification requirements.

• Owner’s Project Manager must be independent of designer, general contractor and sub-contractor.

• Qualifications based selection process required to procure OPM.

• Owner’s Project Manager Guidelines posted on DCAM website. www.mass.gov/cam
PREQUALIFICATION OVERVIEW
Prequalification Overview

What is Prequalification?

**Prequalification** is part of a new **two-phased** procurement process utilized by public awarding authorities which enables public awarding authorities to limit the “bidding pool” to general bidders and sub-bidders who are **qualified** to do the work.

The Two-Phase Process:

- **RFQ Phase** – the awarding authority issues a RFQ and reviews information submitted to determine qualified bidders.
- **RFP Phase** – only “prequalified” bidders are invited to bid.
Prequalification Overview

Advantages of Prequalification

• Only prequalified contractors are in bidding pool.
• “Raises the bar” for quality of work.
• Price not the sole deciding factor.
Prequalification Overview

When is “prequalification” required by awarding authority?

- **Mandatory** for all “non-exempt” public awarding authorities to “prequalify” all general contractors and filed sub-bidders for public construction projects with estimated construction costs of $10 million or more.

- **Discretionary** for all “non-exempt” public awarding authorities to “prequalify” all general contractors and filed sub-bidders where estimated construction costs are between $100,000 and $10,000,000.

Prequalification Overview

Prequalification Steps:

- Prequalification Committee established.
- Public notice of RFQ.
- Statements of Qualifications submitted by GC and filed subs.
- Evaluation of Statements of Qualifications.
- Selection of “prequalified” bidders.
- RFP issued to “prequalified” bidders.
Prequalification Overview

Composition of Prequalification Committee:

• 1 representative from design group.
• 3 representatives from public owner (OPM is 1 of the 3 if OPM required).

RFQ Requirements

• **Public Notice** – awarding authority must advertise RFQ in the newspaper, central register and COMPASS system.

• **Qualification Requirements/Points** – awarding authority must set forth the qualifications and evaluations points in the public notice.
Prequalification Overview

Public Notice of RFQ contains:

- Time and date for receipt of response; address to which responses should be sent; and timeframe that awarding authority will respond;
- General description of building project;
- Evaluation procedure and criteria for prequalification (including the point rating system and schedule for evaluation);
- Anticipated schedule and estimated cost for the building project;
Public Notice (continued)

- Listing of the project team, including awarding authority name, designer and owner’s project manager, if applicable;
- Statement that RFQ will be used to prequalify general contractors & subcontractors who will be invited to bid pursuant M.G.L. c. 149, §44E/§44F;
- Prohibition against any unauthorized communication or contact with the public agency beyond official pre-bid meetings;
- A limitation on the size and number of pages to be included in the response to the RFQ, if desired by the public agency.
Prequalification Overview

Evaluation Criteria:

• Mandatory Requirements
• Management Experience (25/50 points required)
• References (15/30 points required)
• Capacity to Complete Projects (10/20 points required)
Mandatory Requirements

• Commitment letter from bonding company for payment and performance bonds at 100% of estimated project value. (On projects with prequalification both general bidders and filed sub-bidders will be required to provide their own payment and performance bonds and must carry the cost of the bonds in their own bid prices); and

• DCAM Certificate of Eligibility showing capacity rating sufficient for project and an Update Statement.
Prequalification Overview

Management Experience - 25/50 points required

- Business owner’s experience
- Experience of management personnel
- Similar projects
- Terminations
- Legal proceedings
- Safety record
- MBE/WBE and Workforce compliance records
Prequalification Overview

References - (15/30 points required)

• Project references
• Credit references
• Public project record over last 3 years

Capacity to Complete - (10/20 points required)

• Audited financial statements from general contractor for current fiscal year (filed sub-bidders do not have to submit)
• Revenue under contract for next 3 years
Prequalification Overview

Evaluation Process

• Statements of Qualifications not opened publicly but opened in presence of 1 or more witnesses.

• “Register of Responders” prepared for public records.

• PQC evaluation based ONLY on criteria set forth in RFQ.

• minimum score of 70 required to be prequalified.

• minimum of 3 prequalified general contractors and filed sub-bidders in each trade required.
Prequalification Overview

What if there are less than 3 prequalified general contractors or filed sub-bidders?

• If < 3 prequalified & prequalification is mandatory, then awarding authority must solicit additional responses to RFQ by readvertising. After second solicitation if still <3 awarding authority can either:
  • issue RFQ again,
  • invite bids under c. 149 without prequalification, or
  • if at least 2 firms prequalified can solicit bids from those firms. (under Chapter 507, Acts of 2004).

• If < 3 prequalified & prequalification is discretionary, then awarding authority can either:
  • issue RFQ again,
  • invite bids under c. 149 without prequalification, or
  • if at least 2 firms prequalified can solicit bids from those firms. (under Chapter 507, Acts of 2004).
Prequalification Overview

Public Records Issues

- Statements of Qualifications are public records once evaluation completed.
- Register of Responders prepared by awarding authority is a public record.
- Financial statements and financial/revenue information submitted with Statements of Qualifications are not public records.
Prequalification Overview

Review of Decision

• Upon inquiry, general contractors and filed sub-bidders are entitled to know their score.

• Decision of Prequalification Committee final and not subject to appeal (except where evidence of fraud and collusion).
Prequalification Overview

Status of Regulations and Forms:

• DCAM drafting prequalification regulations, expected public comment period within next month.

• DCAM developing suggested standardized forms for prequalification process.

• Sample form - RFQ for Millbury State Police Project.
CONSTRUCTION MANAGER AT RISK & DESIGN-BUILD
Design Build for Public Works Projects

Effective January 1, 2005

• Awarding authority contracts with one firm that provides both design and construction

• Available to construct public works projects otherwise subject to G.L. c. 30, sec. 39M, estimated to cost $5 million or more (e.g., roadwork, site work, site remediation) with prior approval of the Inspector General.

  • A 2 phase selection process is required:
    • Prequalification via RFQ;
    • Formal proposals, including separate technical and price components.

• Exempt Agencies procedures are subject to IG review and approval on an annual basis. Exempt agencies are MHD, MassPort and MWRA.
CM at Risk Services

Effective January 1, 2005

A construction management firm provides a range of pre-construction services and construction management services

- Cost estimation
- Consultation regarding the design of the building project
- Preparation and coordination of bid packages
- Scheduling
CM at Risk Services

Effective January 1, 2005

CM Services (continued)

• Cost control - value engineering

• Assist with pre-qualification and evaluation of trade contractors and other subcontractors.

• Act as the general contractor during the construction which includes holding trade contracts and other subcontracts.

• Provide management and construction services.
CM at Risk Services

- Delivery method is optional for DCAM and other public agencies for building projects $5 million or more.

- Inspector General approval required on a case by case basis---exceptions are DCAM, Mass Port, MWRA, and MSCBA, which must annually submit procedures for projects they choose to procure CM at Risk.

- CM at Risk firm must be Certified by DCAM in the Category of General Building Construction.

- Laws governing prevailing wages, direct payment, prompt payment, unforeseen conditions, delays and contractor record keeping are all applicable.
CM at Risk Services

- Two-phase sealed competitive proposal selection process

- First a Qualifications Selection Committee (QSC) “prequalifies” entities through a Request for Qualifications (RFQ) and creates a short list of firms for participation in the second phase of the process.

- Second, after distributing the RFP to prequalified firms and receiving proposals, a Selection Committee (SC) awards a contract, to the highest ranked proposer with whom it is able to successfully negotiate.

- Committees comprised of one representative of the designer, the project manager, and at least two other representatives of awarding authority (committees can be the same).

- Public advertising in newspaper of general circulation, Central Register and Comm-Pass at least two week before RFQ is due.
CM at Risk Services

- QSC must prepare evaluations based solely on the criteria set forth in the RFQ and must rank the qualifications statements based on the composite ratings.

- In Phase 2 procurement the SC prepares non-price evaluations based solely on the criteria set forth in the RFP.

- Fee/cost proposals and technical proposals submitted in separately sealed envelopes and at the same time.

- The most advantageous proposal selected considering both technical and price proposals.
Guaranteed Maximum Price (GMP)

- GMP is the guaranteed maximum price the awarding authority will pay for the project.

- GMP is comprised of the:
  - Hard cost of the work;
  - General conditions costs;
  - Fee payable to the construction management at risk firm.

- CM may not share in any savings between the GMP and the final cost of the work but an incentive clause for various performance objectives of up to 1% of the estimated construction cost is permitted.
CM at Risk Services

Guaranteed Maximum Price (GMP) Shall:

• Be based on design documents, which are no less developed than 60 percent construction documents.

• Be agreed to as a written amendment to the contract between the awarding authority and the CM at risk firm.

• Be executed before the commencement of any construction work; except where some work must take place and it is the subject of a separate agreement with the CM at risk firm.
Guaranteed Maximum Price (GMP) Shall Include:

- Detailed line item cost breakdown by trade.
- Dollar amounts for the CM firm’s contingency, general conditions, and fees.
- List of all the drawings, specifications and other information on which the GMP is based.
- List of any assumptions or clarifications on which the GMP is based.
- Detail project schedule on which the GMP is based.
- Require submission of payment and performance bonds.
Prequalification of “Trade” Subcontractors:

- Trade Contractor selection process will be utilized to procure the services for all sub-bid classes of work that are subject to the filed sub-bid law in c. 149, 44F.

- The CM prepares Trade Contractor packages for bidding based on design documents provided by the designer.

- RFQ shall be issued for each such trade exceeding $20,000.

- CM Firm may submit qualifications if it customarily performs such work with its own forces.

- Trade contracts awarded to the lowest prequalified bidder and must be secured by performance and payment bonds paid for by Trade Contractor.
CM at Risk Services

Prequalification of other Subcontractors:

- Separate subcontractor selection process utilized to procure the services for all classes of work exceeding $20,000 which are not subject to the filed subbid law.
- CM, subject to the final approval of awarding authority, selects subcontractors to perform such work by submitting a set of criteria and a list of firms able to meet those criteria.
- CM’s selection of subcontractors based on relevant factors including, but not limited to, price, quality of work, and MBE and/or WBE participation.
- Subcontracts with an estimated cost equal to or less $20,000 and subcontracts for the supply of materials or equipment not including performance of labor in construction at the Project site, regardless of the estimated cost, may be awarded by the CM using any method selected by the CM with the approval of awarding authority.