



## **PUBLIC CONSTRUCTION LAW OVERHAUL**

Legislation enacted in July incorporates sweeping changes that will impact the ability of towns and cities to undertake important capital projects and to bring them in on budget and on time. After a number of bills died on Beacon Hill, proponents of public construction reform finally succeeded by enacting widespread changes aimed at promoting competition, flexibility, and accountability, while controlling spiraling costs. Moreover, the school building assistance program has been resuscitated. Highlighted below, these new laws contain reforms that will affect virtually all current and future public construction projects in Massachusetts.

### **REFORM IS HAPPENING NOW**

#### **Project Manager**

Towns and cities now are required to employ a project manager with specified credentials and/or experience for any project valued at greater than \$1.5 million. This person plays an important function with respect to other changes in the law, such as the prequalification process described below. The project manager must be hired early in the process. While the project manager's salary is an up-front cost to the awarding authority, the hope is for long-term savings due to the value added by having expertise at the table, representing solely the interests of the town or city, from the very outset.

#### **Construction Manager at Risk on Projects Over \$5 Million**

For projects expected to cost greater than \$5 million, beginning January 1, 2005 towns and cities may opt for a construction manager ("CM") at risk paradigm in lieu of the traditional design/bid/build approach. As with the project manager, the CM at risk is hired early in the process, even before the design is complete. Potential candidates must be prequalified by the awarding authority so that the ultimate pool of prospects is limited to those who satisfy a set of predetermined criteria. Ultimately, the CM at risk negotiates a cost plus contract with a guaranteed maximum price, and acts as the general contractor for the project. In this manner, the municipality is assured that a certain level of cost will not be exceeded on a project.

#### **Design Build on Horizontal Projects Over \$5 Million**

For horizontal/public works projects greater than \$5 million, yet another alternate delivery system now is available: design build. Here, the town or city prequalifies prospects and ultimately engages in a two-phased bidding process, the combined result of which yields a design build candidate with the most competitive price and

qualifications. As the name suggests, the design builder ultimately assumes responsibility for both design and construction of the project, thereby eliminating the finger pointing that is all too common between contractors and architects, and often the precursor to litigation.

#### **Small Projects and Elimination of Filed Sub-Bidder**

Procurement for small projects has changed, depending upon whether the cost is less than \$10,000, \$25,000, or \$100,000. Ease of procurement at lower job costs is intended to streamline the process without sacrificing competition. Now, for example, any jobs under \$100,000 no longer require filed sub-bidders.

#### **Certification of Filed Sub-Bidders**

For too long poor performers have been allowed to obtain substantial contracts throughout the commonwealth without adequate accountability. DCAM now will oversee a certification process for filed sub-bidders, much like the current system for general contractors, which DCAM will continue to operate. By weeding out the poor performers, the quality of construction should improve with less acrimony among subcontractors and generals.

#### **Prequalification Required on Projects Over \$10 Million**

Prequalification of general contractors and subcontractors has become mandatory on jobs costing greater than \$10 million, and optional on jobs less than \$10 million. The prequalification process contemplates evaluation of contractors per a set of established criteria that results in an overall rating. Only those contractors reaching a certain score then are permitted to bid on the project. This should mitigate the historical problem of being saddled with a contractor whose bid is lowest but whose record of responsibility is questionable.

**MBE and WBE**

Coming soon there will be set MBE and WBE goals for any public projects that receive partial funding from the state. Contractors satisfying these goals will receive bonus points in the prequalification process.

**Flexibility Into the Future**

For decades in Massachusetts public construction has been accomplished under the traditional design/bid/build archetype. While laudable in its virtues, flaws in the traditional approach were exposed over time: arranged marriages between filed subcontractors and generals; finger pointing between general contractors and designers; building costs run amok due to excessive contractor change orders. These changes are intended to provide greater flexibility to the municipality in meeting its building needs with qualified builders and designers, at reasonable, competitive cost, with lesser downside risk. Most of these changes became effective upon enactment of the legislation. A copy of the law can be found at [www.mass.gov/legis/laws/seslaw04/sl040193.htm](http://www.mass.gov/legis/laws/seslaw04/sl040193.htm).

**SCHOOL BUILDING ASSISTANCE PROGRAM CHANGES**

In July, the legislature also approved significant reforms to the Massachusetts school building assistance program and developed a new financing scheme for school construction. The revisions include moving the program from the Department of Education, and establishment of a new independent authority to control and oversee the program. The new authority is charged with administering the program, including providing financial assistance and reviewing construction and renovation standards. A report issued in August by the State Auditor highlighted shortcomings in project oversight by the Department of Education. The changes are expected to increase requirements for municipalities to document and scrutinize project costs. The new legislation allows an accelerated reimbursement schedule, and final reimbursement when the new authority completes its audit of the project. Reimbursement payments to municipalities may be adjusted as a result of the final audit.

**Massachusetts School Building Authority**

Control of the School Building Assistance Program has been transferred from the Department of Education (which had administered the program since 1965) to the newly

established Massachusetts School Building Authority (“MSBA”). The MSBA is chaired by the State Treasurer, and consists of seven members, including the Secretary of Administration and Finance, Commissioner of Education, and four State Treasurer appointees. The members were sworn in on September 23, 2004. The reforms also establish the MSBA Advisory Board. This board includes the state auditor or designee, the inspector general or designee, and fifteen members of nongovernmental organizations including the Massachusetts Municipal Association, the Massachusetts Building Trades Council, the Massachusetts chapter of the Associated Builders and Contractors, the Massachusetts Alliance of Small Contractors, the Associated Subcontractors of Massachusetts, Associated General Contractors of Massachusetts and the Massachusetts Taxpayers Foundation. The MSBA’s web site is [www.mass.gov/msba](http://www.mass.gov/msba).

**Capital Financing**

MSBA will administer a trust fund known as the School Modernization and Reconstruction Trust Fund. The Trust Fund is financed through dedication of a portion of certain Commonwealth sales tax revenues, immediate transfer of \$150 million, and \$1 billion of Commonwealth general obligation bonds. For the future, the MSBA is authorized to issue general obligation or revenue bonds for any of its purposes. The aggregate principal amount of all bonds may not exceed \$10 billion outstanding at any time. The State Treasurer is to disburse funds upon request of MSBA Executive Director.

**Existing Projects**

The changes were enacted to speed construction and renovation of an estimated 425 school projects on the existing waiting list of projects approved by the Department of Education. According to the State Treasurer, MSBA expects to pay off \$5.5 billion in existing commitments, fund another \$6 billion in wait listed projects on an accelerated basis, and support future projects on an ongoing basis. The MSBA may approve a disbursement schedule for approved project grants – a pay as you go method.

**New Projects**

On July 1, 2007, the existing moratorium established on July 1, 2003 for grant applications will end. The percentage of total approved project costs that the Commonwealth will pay in grant amounts for future approved school projects will be reduced, ranging from 40% to 80%, rather than the existing 50% to 90%. No incentive points will be provided for employment of a construction/project manager, now

required for projects valued greater than \$1.5 million. There will be a limit on total facilities grants approved in a fiscal year - \$500 million beginning in 2008, increasing 4.5% in each following fiscal year. Projects on the wait list before August 1, 2004 will not count toward this limit.

**State Auditor’s Report – August 23, 2004**

The State Auditor’s report issued on August 23, 2004 focused on the Commonwealth’s need to increase monitoring and oversight of school construction projects. It highlighted the Board of Education’s alleged failure to require municipalities to comply with regulations covering final project costs, bond refinancing, interest costs, and project records. The report emphasized that the school building assistance program was required to provide programmatic and financial oversight over billions of dollars in school construction and manage approximately 1,200 projects, with limited staff and resources. It concluded that the state overpaid more than \$20 million for school construction projects by using estimates instead of actual costs, and by failing to collect required information from municipalities.

**Looking Forward**

The MSBA and its advisory board are to review regulations and laws governing the School Building Assistance program. The review will include appropriate cost and size standards, advisability of further changes to M.G.L. c. 70B in accordance with construction reform, feasibility of allowing public-private partnerships in constructing schools, and best means to assist in meeting the building needs of charter schools. A progress report is due on December 31, 2004, with a final report, including regulatory and legislative proposals necessary to carry its recommendations into effect, due not later than April 1, 2005.

The MSBA is also to complete final audits on all projects on the existing list, and may adjust payments in accordance with these audits. Given the conclusions of the auditor’s report, we expect extra attention of the MSBA to actual costs of construction in their audits, and in their requirements for information from municipalities. A copy of the school building assistance laws can be found at [www.mass.gov/legis/laws/seslaw04/s1040201](http://www.mass.gov/legis/laws/seslaw04/s1040201), s1040208 and s1040210.

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