SECRETS TO A SUCCESSFUL PUBLIC CONSTRUCTION PROJECT

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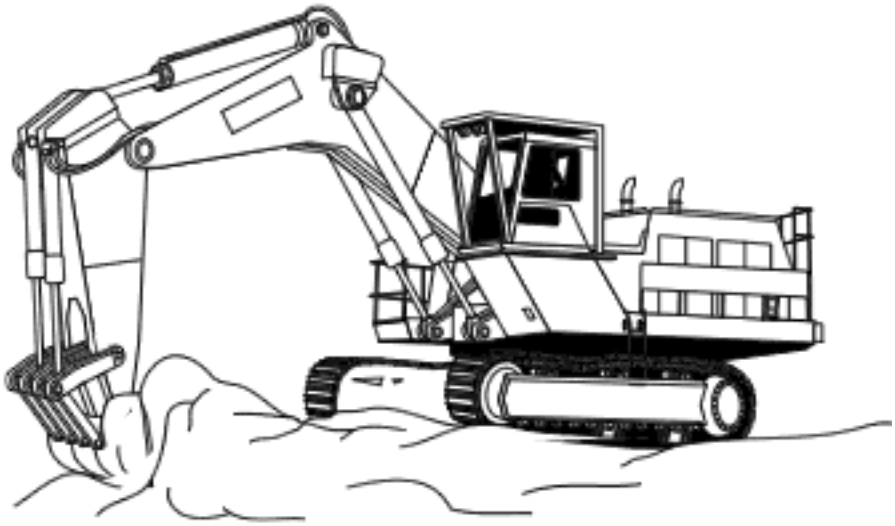

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INTRODUCTION

Public construction often is fraught with complexity and frustration for municipal officials. However, there are many steps that awarding authorities can take to help lessen the likelihood of problems and ensure the ultimate success of public construction projects. This publication offers tips on how to conquer six major steps affecting the ultimate success of these projects: planning, design, contracts, bidding, construction, and payment.

I. PLANNING

Thorough planning is one of the most effective tools that awarding authorities can utilize. Early planning is a crucial step in the battle to avoid costly delays, change orders and conflicts during construction. During the planning stage of a project, owners should identify all issues that may have an effect on the project's scope and timing.

Once the need for a project is recognized, the following is recommended:

Conduct a survey on use by contacting all local groups that are likely to have an interest in the project. These may include the ultimate users of the planned facility, abutters, special committees such as a disability committee, council on aging, youth groups, utilities, and public safety departments.

- Begin to gather community input and identify any issues that will be critical to the general public and local groups.
- If the project is large, consider appointing a Building Committee if one is not already in place. It is a good idea to assign responsibility for oversight of the project, or liaison to the

Building Committee, to one full time staff person. In lieu of this, it may be advisable to hire a project manager to act as the owner's representative from the conceptual through the construction phases of the project.

A. Permitting

Public construction projects often require multiple permits from local, state, and federal agencies. The permitting process can take several months (at times years) to complete, and so can greatly affect the schedule of a project. Many a project has been ready to begin construction, only to find that a needed permit has been overlooked. Although final permit applications often require completed design plans, it is helpful to begin identifying necessary permit information early in the planning process.

The nature of the work involved in the project will dictate what permits are required. Local permitting departments may include the building department, historic boards, planning board, and conservation commission. If the project is on or adjacent to a body of water, it also will be subject to permitting from the state Department of Environmental Protection. This may be in the form of a Chapter 91 license and/or Water Pollution Control Certification. Additionally, projects on navigable waters may require permits from the Army Corps of Engineers.

B. Land acquisition and funding

Siting of the project will be one of the first decisions made. After the site is chosen, acquisition of any needed land or easements should begin at once and be completed prior to the bidding and construction process. Any major obstacles involving easement acquisition should be resolved prior to finalizing the project's design, as these can have great impact on design decisions. If easements are required from state agencies or independent authority such as the Massachusetts Water Resources Authority or Massachusetts Turnpike Authority extra time should be budgeted because it often can take a long time to obtain these easements.

Identify potential funding sources for the projects. The availability of grants may affect the project schedule. Be aware of deadlines for article submittal for town meeting warrants. Leave ample time for developing a project scope suitable for presentation to town meeting. When appropriating funds, always seek a contingency for unexpected problems or changes that may be encountered during the course of the work.

C. Which statutes apply?

An owner must identify which Massachusetts statutes dealing with public construction will govern the project. This determination will affect the remainder of the design and construction process.

Public construction in Massachusetts generally falls into one of two categories. Any work involving repair, remodeling, reconstructions or construction of a public building, referred to as "vertical construction," is governed by M.G.L. c. 149. Construction of public works, referred to as "horizontal construction," is governed by M.G.L. c. 30, §39M. While there is considerable overlap between the two, there are several important differences. In general, projects that involve public buildings are subject to more rigorous requirements, including statutory designer selection procedures, prequalification requirements, additional advertising requirements, and provisions for filed subbids. Failure to follow the correct statutory requirements can result in a bid dispute or unenforceability of the contract. Confusion often arises over whether a hybrid project falls under the laws for public buildings. With the exception of

some pumping stations, even if a planned building is only a small part of the job that otherwise consists of public works, Chapter 149 controls.[1]

In the case of smaller projects, M.G.L. c. 30B provides some alternate and less cumbersome methods of bidding and contract award. For projects with costs between $10,000 and $25,000, a bidding method is outlined. For projects under $10,000, it is possible to proceed by obtaining three or more informal quotes. Proposed legislation filed by the Cellucci/Swift administration would ease the constraints of these laws by raising the above caps. See H.L. 4288. ("An Act Relative to Public Construction Reform").

D. Other Pre-Design Steps

Prior to proceeding with the design phase of the project, it is advisable to compile any background information that is on hand, such as maps, surveys, soil borings, etc. that may be helpful to the designer. At this point, the need for additional information may become apparent. It is cost effective to obtain this information up front, as more complete background information enhances subsequent design and construction. It is the owner's responsibility to share all relevant information with the designer and contractor.[2]

II. DESIGN

A. Designer Selection

After the planning stage, the next step is selection of a designer. Public building projects with costs greater than $100,000 are subject to the requirements of the designer selection laws found at M.G.L. c. 7, §38K. Municipalities have the option of using the same designer for the initial feasibility study/preliminary design as for the final design, provided that they first hire an independent reviewer to determine if the preliminary work is reasonable and adequate. See M.G.L. c. 7, §38H(i). This requirement is intended to ensure that the designer's work is suitable and that he is not acting in furtherance of his own financial objectives. The project budget should contain funds for this purpose.

Public works and smaller building projects are not subject to any statutory requirements for designer selection. However, it is recommended that some form of qualifications-based selection process be utilized. This can include the requirement of price proposals along with qualification statements. Most importantly, it is advisable to develop a consistent procedure. This will avoid the appearance of unfairness and subsequent challenge to the contract award.

B. Designer Contract

The contract between the owner and the designer defines the scope of services that the designer will provide, and assigns responsibility for various tasks and liabilities between the parties. This contract is negotiable and should not adhere to boiler plate forms.[3]

When drafting contract provisions, the owner should be careful not to assume any risks that rightfully belong to the designer. The contract should include statutory requirements, and should require that the Designer carry adequate insurance for errors and omissions, usually at least $1 million per occurrence. The designer also should indemnify the owner against claims arising out of design defects. Architects often claim continued ownership of the design documents. It is desirable for the owner to negotiate a clause providing for the owner's unlimited use of the design documents. The contract also should include terms and timing of payment, and clearly define additional services for which the designer will be paid

beyond his fixed fee.

C. Additional Design Considerations

When the design phase begins, it is important to gather all relevant input from other parties as early as possible. One good way of doing so is to hold an initial meeting, and to schedule regular meetings throughout design development. While difficult to satisfy all desires of all constituents, an advertised public meeting can be particularly helpful in bringing any complaints or problems to the surface at a time when they are more easily addressed.

The designer's primary job will be to prepare plans and specifications that are absolutely clear and concise. Otherwise, expect costly change orders and, in many cases, litigation. Particularly on large projects, designers may focus on aesthetics but develop functional details inadequately. This can lead to leaking roofs, inoperable windows, inadequate heating and cooling, and many other building maladies. A good project manager can be helpful in reviewing design documents for attention to detail. The level of detail expected should be communicated clearly in initial meetings with the designer and during the selection process. Samples of past work can be a good indicator of the quality of design documents a designer typically produces.

III. KEY CONSTRUCTION CONTRACT PROVISIONS

The general construction contract is even more important than the designer's agreement, and in fact dictates key roles of the architect. Attention to key provisions can yield protection to your community against typical construction problems. It is in the owner's best interest to develop a set of contract provisions for use on all construction projects. These can be in the form of general conditions that can be incorporated in the bid documents. The general contract then can be adapted as needed for individual projects. This method is preferable to using standard AIA documents, often provided by the project architect. While the AIA contracts have several useful provisions, they are generally more protective of the architect's interests than those of the owner.

Depending on which statute governs the project, there are certain statutory provisions that should be included in the contract or will be implied into the contract as a matter of law. For example, Chapter 149 requires both performance and payment bonds in the amount of the full contract price for public building contracts, whereas Chapter 30, §39M requires only a payment bond in an amount equal to one half the contract price for public works contracts. (The owner should require a performance bond on all projects, with sureties licensed by the Massachusetts Division of Insurance.)

Amongst others, the owner should include the following protective provisions, which also help to ensure clarity of interpretation and minimize disputes:

- **Indemnity** of owner to fullest extent of law against construction site accidents and construction defects. See M.G.L. c. 149, § 29C.
- **Satisfactory evidence of adequate insurance,** including general and public liability, workmen's compensation, vehicular liability, fire and casualty, and builder's risk that includes fire and extended coverage with the owner named as insured.[4]
- **Guarantees**, including authority for owner to perform any required work and receive reimbursement or offset from contractor in the event the contractor is not responsive.
- **Liquidated damages and/or incentive clauses**. Liquidated damages must not be punitive, but

rather, must represent the owner's actual anticipated losses due to delays.[5] Liquidated damages clauses will be enforced if the damages represent a reasonable approximation of actual damages in cases where damages are difficult to quantify. Liquidated damages will not be awarded if the Owner concurrently has contributed to the delay.[6]

> *Sample Language: If Contractor shall neglect, fail or refuse to complete the work within the time specified or any proper extension thereof granted by the Owner, then the Contractor agrees as part consideration for the awarding of this contract to pay to the Owner the amount specified in the contract not as a penalty but as liquidated damages for such breach of contract as hereinafter set forth, for each and every calendar day that the Contractor shall be in default after the time stipulated in the contract for completing the work. The amount is fixed and agreed upon by and between the Owner and Contractor to be the amount of damages which the owner would sustain, because of the impracticability and extreme difficulty of fixing and ascertaining the actual damages the Owner would in such event sustain.*

- **Labor agreements** protecting against delays and or/work stoppages due to labor problems should be considered. These may be upheld if they have a demonstrable, legitimate purpose, and if they do not run afoul of the underlying purpose of the public bidding laws.[7] For example, labor agreements requiring the use of union labor may be difficult to enforce because they can have the effect of forcing non-union contractors out of the competition.
- **No damages for delay clauses:** These generally will be upheld as long as the owner does not issue a stop work order in accordance with M.G.L. c. 30, §39O.[8] Courts recognize an exception to a "no damages for delay" clause if an awarding authority acts arbitrarily and capriciously in causing delays to the work or refusing legitimate extensions.[9]

> *Sample language: If the Contractor is delayed at any time in performing or furnishing the Work by any act or neglect of the Owner or its Consultants, including without limiting the generality of the foregoing, delay caused by failure of the site being available for work or ready to accept the Contractor's work or the failure of the owner or its Consultants to furnish any work, materials, information, documentation, or decisions; the Contractor shall have no claim to any damages, costs, or expenses of any kind or nature, for any suspension, delay, interruption, hindrance, or acceleration of its work. Furthermore, to the extent Contractor is delayed, it shall not be entitled to an extension of time to its period of contract performance unless so authorized by the Owner and the Contractor will have no claim for damages, cause, or expenses of any kind or nature for any suspension, delay, interruption, or acceleration of its work in the event that the owner fails to grant such an extension of time to the Contractor's performance.*

- **Termination Clauses:** The contract should include a clause that allows the owner to terminate the contract for cause. A clause also should be included that allows the owner (but not the contractor) to terminate the contract for convenience. Regardless of termination clauses or whether one of the parties has breached the contract, the contractor generally will be able to recover the fair value of any pre-termination work, substantially performed in good faith, under a *quantum meruit* theory.[10]

- **Arbitration/mediation clauses:** Currently, the public construction laws do not provide for mediation or arbitration. Legislation has been filed that would require non-binding mediation prior to litigation of claims. A one way mediation clause, which gives the Owner the right to require a mediation process for any disputes during the course of the project, can be very helpful in resolving change order issues. Sample language:

  > *Within 10 days of the date that an Owner has received written notice of a dispute regarding a contract item, the Owner may require that the Contractor enter into a good faith effort to resolve the dispute through mediation. The equitable distribution of the costs of such mediation shall be determined as part of the mediation process.*

- **As-Builts and Maintenance/Operating manuals:**

  While the initial objective is to build a timely project within budget, don't lose sight of the long term goal, which is to have a functional, valuable asset for years to come. It is essential that any contract require delivery of as built drawings, operation/maintenance manuals, warranties, and the like, and that financial incentives (i.e. significant payment on the schedule of values) be tied to delivery of these materials, which typically come late in the project.

- **Incorporation Clauses:** Finally, although the Contractor may sign only one document, it is common to include an incorporation clause that makes all of the bidding documents - - including the invitation to bid, general conditions, supplemental conditions, technical specifications, and plans - part of the contract. The incorporation clause should be included in the actual agreement signed by the contractor. Likewise, provisions required by statute should be included or incorporated by reference in the general contract.

IV. BIDDING

The bidding stage of a project is a time when disputes often arise. Bidding procedures for public works projects are governed by M.G.L. c. 30, § 39M. Building projects are subject to M.G.L. c. 149 and require filed subbids for certain subtrades in which work is estimated to cost more than $25,000.[11]

The purpose of the bidding laws is to provide the lowest cost for a quality product and to establish fair and honest competition among bidders.[12] Bidders who believe that the bidding process has not been carried out in accordance with applicable standards may file a bid protest with the Office of the Attorney General, or they may file a complaint in Superior Court. If the protest is brought before the Attorney General, he will conduct an investigation and may hold a hearing on the matter. See M.G.L. c. 149, §44H. The resolution of bid protests can be highly technical, but generally turns on whether the purposes of the bidding laws have been honored. The Attorney General's decision can be appealed to Superior Court, where the proceeding will be de novo.[13] Once construction has begun, in the absence of bad faith, the damages an aggrieved contractor may recover in a bid dispute generally are limited to its bid preparation costs.[14]

The first step in securing a successful bidding process is strict observance of statutory requirements. Key requirements are as follows:

- Invitations for Bid must be advertised in the Central Register and a local newspaper, and also must be posted in the public offices of the awarding authority. An Invitation for Bid must contain a description of the project, the place and time at which the bid documents can be obtained, the place

and time the bids will be opened, and a reference to prevailing wages. For building projects, the Invitation for Bid must include the contractor certification category, the filed sub-bid categories, and the place and time for submitting and opening filed sub-bids.

- Bid documents should be supplied to all who request them. For building projects subject to M.G.L. c. 149, the list of bidders who have requested bid documents must be published in the Central Register and posted in the awarding authority's offices.
- The Owner must ensure that all bidders are provided with identical information prior to the submission of bids. Bidders often have numerous questions once they have reviewed the bidding documents. It is advisable to keep a record of all such inquiries and to provide answers in writing to all bidders who have requested documents. Any changes requiring revisions to the bid documents should be issued through official addenda. The final bid form must contain the bidder's acknowledgment that he has received all addenda.
- Owners can add requirements in the bidding documents to obtain better information regarding the bidder's qualifications. For example, it is possible to require that a bidder list references from past jobs and that a bidder attend a pre-bid meeting and/or site visit.
- Once bids are opened, the law requires that the contract be awarded to the lowest eligible and responsible bidder. Usually, the lowest price bid will be easily determined. However, it is far more difficult to determine if the low bidder is eligible and qualified. When attempting to determine eligibility and qualification, a good place to begin is to review the bid for conformity with all requirements. If the project is a building project, the bidder must be prequalified by the Division of Capital Asset Management. Along with a prequalification certification, the Bidder must include an update statement listing the nature and value of all work it has undertaken since it last was certified. This update statement should be reviewed to evaluate the bidder's current status, and all of the bidder's references should be checked. (Projects that cost $50,000 or more and use Chapter 90 funding, or involve state roads, are subject to bidder prequalification by the Massachusetts Highway Department.)

Owners often feel pressured into accepting the low bid despite nagging suspicions that the bidder might be unqualified. Problems that occur during construction can result from a bidder who has bid too low and cannot perform adequately without significant cost increases. It is important for owners to realize that they have considerable power in determining the eligibility and responsibility of bidders. Courts will defer to an owner's decision provided that the owner has not acted in an arbitrary and capricious manner.[15]

Bids that fail to comply with statutory requirements must be rejected.[16] An exception exists for obvious clerical errors.[17] However, the awarding authority has the discretion to accept or reject a bid that does not comply with non-statutory requirements.[18] All bids may be rejected when problems arise that require the reworking of the bid documents, or when funding is insufficient for a contract award.[19]

As an aside, at the end of a project all owners should complete and file the contractor's evaluation form with the Division of Capital Asset Management. This helps to curtail the continued qualification of bidders with poor performance records. If passed, H 4288 will limit the liability of individuals who file negative evaluations. Absent gross negligence or maliciousness, the awarding authority would be required to indemnify public officials, architects or engineers from all personal loss and expense up to $1 million dollars arising out of the completion of a contractor evaluation form.

V. CONSTRUCTION

The goal of the construction phase is to achieve the functional physical embodiment of the plans and specifications without incurring substantial cost increases. Naturally, this is easier said than done. Construction, by its nature, requires some adaptation to accommodate unknown or changed conditions, as well as defects or unworkability in the design documents. During construction, an Owner is best protected by keeping close track of the progress of the work.

A. Inspections

Regular inspections are extremely important. In addition to the project manager or staff person assigned to the project, it is advisable to hire a full time owner's representative (or Clerk of the Works) to monitor construction. This person should be responsible for measuring progress and identifying non-conformance with the design documents. His job should be limited to observation and reporting. Written reports should be made daily with copies to the owner, architect, and contractor. (Similarly, the general contract should require the general contractor to circulate its daily reports.) The project representative must take care not to make any decisions that usurp the architect's responsibility. Because construction problems are sometimes caused by design defects, it is preferred that the project representative, or Clerk of the Works, be hired by the owner and not be affiliated with the architect.

B. Project Meetings

It is advisable to hold regular meetings at least weekly throughout the construction phase. The attendees should include the contractor, project manager, owner's project representative, and architect. Here again, good documentation is essential. Meeting minutes can be very useful in resolving future payment disputes.

C. Change Orders

Change orders are one of the most problematic and potentially costly aspects of construction. Of course, some changes are inevitable. Construction may reveal differing underlying site conditions, details may prove unworkable, the owner may need to suspend or interrupt the work, or the owner may find that some changes in products or building elements are desirable.

Costs can be contained somewhat by contractually defining the process that must be followed to make or request changes. Change order requests must be in writing, followed by a certificate from the awarding authority stating the reason for the change, any cost adjustments, and a statement that the change is in the best interests of the project.[20]

The construction contract clearly should define who has responsibility to authorize changes. For example, a contractor who completes a change in work based on instructions from the architect or project representative may have difficulty getting paid if the change requires authorization from the Board of Selectmen. It is important for all parties to agree on provisions for emergency or minor changes, and if possible to give one person (i.e. the project representative) authority to approve changes in those limited situations.

It also is wise to include a provision requiring that requests for payment be made within 20 days of the identification/performance of a change in the work.[21] These will help eliminate surprise requests for extra monies at the end of the project.

Sample notice language: All claims of the Contractor for compensation other than as provided for in the contract on account of any act or omission by the Owner or its agents must be made in writing to the Owner with a copy to the Architect, within (seven) 7 days after the beginning of any work or sustaining of any damage on account of such act or omission. The written statement must contain a description of the work performed or damage sustained with an itemized statement of associated costs. Unless this statement is delivered as required, the Contractor shall not be entitled to payment for the such work or damage.

Courts will uphold such notice provisions provided they are clearly defined in the contract.[22]

VI. PAYMENT

The contractor is entitled to receive progress payments at various stages of construction.[23] Typically, progress to date will be listed on each payment requisition and compared to a schedule of values allocating total project cost among the various portions of the work. The schedule of values should be reviewed carefully at the outset of a project so that payments are not front-end loaded. The architect then will review each requisition for accuracy and certify the amount to be paid. The owner may retain 5% of the money due as a retainage.

The owner's project representative, or the Clerk of the Works, also should review the payment requisition and discuss his observations with the architect prior to certification and payment. It is preferable to resolve any conflicting views on appropriate payment while work is ongoing. Once the architect certifies a payment amount, it is difficult for an owner to withhold allocated funds.

Full payment (less retainage) is due upon substantial completion of the project.[24] Substantial completion is defined as when the value of the remaining work is less than one percent of the original contract price, or the awarding authority takes possession of the building for occupancy, whichever first occurs.[25] Substantial completion is an important milestone. The Owner should be wary of taking action that triggers substantial completion if there are any indications that anything other than routine punch list items remain. It is tempting to move into a new building a soon as possible, but such a move likely will constitute substantial completion and will cause problems later if the roof leaks or the heating system does not work. Retainage must be released at the time of final payment when the project has been successfully completed.[26]

Conflicts often arise over payment to subcontractors. The owner seldom knows when or how much the general contractor has paid the subcontractors. A subcontractor that has not been paid can demand direct payment from the owner.[27] Problems of this nature can be minimized by requiring the general contractor to provide certified records of payments to subcontractors.

CONCLUSION

The pitfalls encountered in public construction often can be avoided. A project can be a success for the owner, architect contractor, and most importantly, the general public, who will enjoy the benefits of its use, provided that the owner takes proactive steps during the planning, design, contract negotiation, bidding, construction, and payment stages of the project.

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1 Modern Continental Constr. Co. Inc. v. City of Lowell. 391 Mass. 829 (1984); Gil-Bern Constr. Corp. v. City of Brockton, 353 Mass. 503 (1968).

2 Federico Co. Inc. v. New Bedford Redevelopment Auth. 723 F. 2d 122 (1st Cir. 1983).

3 Although beyond the scope of this article, in 1997 substantial changes were made to the standardized AIA Owner/Designer contract. Standardized contracts should not be employment blindly, and counsel should be consulted to draft and negotiate this significant agreement.

4 Consult your insurance agent. General contractors pass through these costs, and it may be appreciably less expensive to obtain certain policies (i.e. fire and casualty) for the municipality as a whole.

5 Space Master Intern., Inc. v. City of Worcester. 940 F. 2d 16 (1st Cir. 1991).

6 Peabody N.E., Inc. v. Town of Marshfield, 426 Mass. 436 (1998).

7 Methuen Constr. Co. v. City of Boston, 1998 WL 166427 (Mass. Super. 1998).

8 Reynolds Bros., Inc. v. Commonwealth, 412 Mass. 1 (1992).

9 Farina Brothers Co., Inc. v. Commonwealth, 357 Mass. 131 (1970).

10 Peabody N.E., Inc. v. Town of Marshfield, 426 Mass. 36 (1998).

11 M.G.L. c. 149 § 44F.

12 Modern Continental Constr. Co., Inc. v. City of Lowell, 391 Mass. 829 (1984).

13 Department of Labor and Indus. v. Boston Water and Sewer Comm'n, 18 Mass. App. Ct. 621 (1984).

14 E. Amanti & Sons, Inc. v. Town of Barnstable, 42 Mass. App. Ct. 773 (1997).

15 Catamount Constr. Inc. v. Town of Pepperell, 7 Mass. App. Ct. 911 (1979).

16 J. D'amico, Inc. v. City of Worcester, 19 Mass. App. Ct. 112 (1984).

17 Sciaba Constr. Corp. v. City of Boston, 35 Mass. App. Ct. 181 (1993).

18 Peabody Constr. Co., Inc. v. City of Boston, 28 Mass. App. Ct. 100 (1989).

19 Cf. Petricca Constr. Co. v. Commonwealth, 37 Mass. App. Ct. 392 (1994) (owner cannot rebid in attempt to recapture low bid that was noncompliant).

20 M. G .L. c. 30, § 391: M. G. L. c. 7, § 42G; but see Sutton Corp. v. Metro. Dist. Comm'n., Mass. 200 (1996) (contractor that failed to follow contract procedures for obtaining payment lost all rights to recovery)

21 M. G. L. c. 7, § 42G; but see Dutton Corp., supra.

22 Glynn v. City of Gloucester, 21 Mass. App. Ct. 390 (1986)

23 M. G. L. c. 30, § 39G.

24 M. G. L. c. 30, § 39K; M. G. L. c. 30, § 39M.

25 M. G. L. c. 30, § 39K.

26 M.G. L. c. 30, § 39K; M. G. L. c. 30, § 39M.

27 M. G. L. c. 30, § 39F.