

Scribbles Squibs #54¹ (February 14, 2017):

FIVE MASSACHUSETTS PUBLIC CONTRACT DELIVERY SYSTEMS

By Massachusetts Construction Law Attorney Jonathan Sauer

I. INTRODUCTION

In this *Squib*, I will discuss five specific delivery systems available with regard to Massachusetts public work: (1) projects advertised per plans and specifications (design specifications); (2) projects advertised containing proprietary specifications; (3) projects advertised containing performance specifications; (4) projects based on a design build model, and; (5) projects advertised under the contractor at risk model. It can be noted that some of these remarks – but not all of them – could have some private construction application, as well.

II. PER PLANS AND SPECIFICATIONS

This would be the typical, traditional procurement model such as is described by Massachusetts General Laws (MGL) Chapter (C) 149, s. 44B, referred to by some as ‘design specifications’:

“44B. Plans and specifications; bid deposits

(1) The awarding authority shall prepare for bidding purposes a sufficient number of sets of plans and specifications so that there will be available without cost or charge, except for a fully refundable deposit for return of the same in good condition, one complete set of specifications and plans drawn on a scale of not less than one-eighth inch to one foot except for site plans and which have not been mechanically reduced, for each person requesting the same.”

With a pure ‘per plans and specifications’ job, unless the design clearly violates a substantive requirement of the trade - such as NECA for electrical contractors - or the clear provisions of the State Building Code or of what is custom and usage of that particular trade, then the contractor is not responsible for buildings that are not successful for reasons not having to do with the actual construction. To put it bluntly, if it falls down, it’s the owner’s problem. This is the ‘Spearin Doctrine’.

The *Spearin* doctrine's roots and name come from a 1918 United States Supreme Court decision, *United States v. Spearin*, 248 U.S. 132 (1918), which held that a contractor will not be liable to an owner for loss or damage that results solely from defects in the plan, design, or specifications provided to the contractor. Effectively, *Spearin* created a doctrine whereby the owner impliedly warrants that the plans and specifications, if followed, will result in a functioning system. *Spearin* holds that if a contractor is required to build according to plans and specifications prepared by the owner (or the owner's representative), then the contractor will not be responsible for the consequences of defects in the plan. As Justice Brandeis held in *Spearin*, "the insertion of the articles [in the contract] prescribing the character, dimensions and location of the [work to be performed] imported a warranty that if the specifications were complied with, [the work] would be adequate." *Id.* at 137.

Under Massachusetts law, there are cases which have held that there is implied in every set of construction plans and specifications a warranty that they are accurate as to descriptions of the kind and quantity of work required. In *Alpert v. Com.*, the Supreme Judicial Court stated that "it is well established that where one party furnishes plans and specifications for a contractor to follow in a construction job, and the contractor in good faith relies thereon, the party furnishing such plans impliedly warrants their sufficiency for the purpose intended." It is important to note, however, that this applies only to design specifications and not to performance specifications.

At the same time, Massachusetts has a line of cases that say that if a bidder is aware of a *patent* defect or *should* have been aware of a patent defect when it bids a job, a failure to seek an RFI or addendum correcting the defect before it bids can mean that it may not be entitled to a change order for the subject of the patent defect post-bid and post-award if additional work is required. This does not apply to *latent* defects and, as you might imagine, there are arguments frequently as to whether or not a given defect is latent or patent. It might be helpful if this information is shared with your estimators inasmuch as it will be their responsibility to seek necessary pre-bid clarifications when they are required to properly and completely bid a job..

Contractors might say that 'I knew there was a problem but I simply didn't have enough time to seek clarification'. This is understandable, practically speaking. From a judicial standpoint, however, if the scope of a project is not clear enough to bid it, then the contractor should not bid it. By analogy, just as a painter accepts the drywall when he starts painting it, for better or worse, the contractor accepts the plans and specifications when it submits a bid in the face of a patent defect.

For a pure 'pure plans and specifications' procurement, typically three different material suppliers must be able to meet the requirements of the procurement. This is provided for by provisions of MGL. C. 30, s. 39M:

“(b) Specifications for such contracts, and specifications for contracts awarded pursuant to the provisions of said sections forty-four A to forty-four L of said chapter one hundred and forty-nine, shall be written to provide for full competition for each item of material to be furnished under the contract; except, however, that said specifications may be otherwise written for sound reasons in the public interest stated in writing in the public records of the awarding authority or promptly given in writing by the awarding authority to anyone making a written request therefor, in either instance such writing to be prepared after reasonable investigation. Every such contract shall provide that an item equal to that named or described in the said specifications may be furnished; and an item shall be considered equal to the item so named or described if, in the opinion of the awarding authority: (1) it is at least equal in quality, durability, appearance, strength and design, (2) it will perform at least equally the function imposed by the general design for the public work being contracted for or the material being purchased, and (3) it conforms substantially, even with deviations, to the detailed requirements for the item in the said specifications. For each item of material the specifications shall provide for either a minimum of three named brands of material or a description of material which can be met by a minimum of three manufacturers or producers, and for the equal of any one of said name or described materials.”

The AG has taken the position that even when one bids on a project requiring a proprietary product/system, nonetheless, a bidder can still bid on a planned alternative product. And, that the determination of the sufficiency of the alternative product is a matter of submittal post award and not a determinative factor in making the award. More on this later.

For a pure ‘plans and specifications’ job, absolute, strict compliance with the plans and specifications is required. This is seen, for example, in the provisions of MGL. C. 30, s. 39I:

“Every contractor having a contract for the construction, alteration, maintenance, repair or demolition of, or addition to, any public building or public works for the commonwealth, or of any political subdivision thereof, shall perform all the work required by such contract in conformity with the plans and specifications contained therein. No wilful and substantial deviation from said plans and specifications shall be made unless authorized in writing by the awarding authority or by the engineer or architect in charge of the work who is duly authorized by the awarding authority to approve such deviations. . . .

Whoever violates any provision of this section wilfully and with intent to defraud shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than six months, or both.”

III. PROPRIETARY SPECIFICATIONS

As set forth above, under MGL C. 30, s. 39M, proprietary specifications can be used in lieu of the requirement that three materials/material systems have to be able to meet the requirements of the bid documents. Irrespective of whatever record keeping the owner is required to have to justify this, my own experience has been that this is, at best, a fairly light requirement.

It would seem that a specified proprietary system would carry with it the implied warranty of its suitability inasmuch as a proprietary system is simply a variant of a per plans and specifications job.

The AG has provided definitions of what are proprietary specifications in a variety of decisions.

One of the most recent is the Bid Protest of Pavillion Floors, Inc., Town of Belmont, April 14, 2016:

“This case involves the so-called “proprietary specifications” law, M.G.L. c. 30, s. 39M (b). That law mandates that open competition regarding products to be used in a project is the norm; however, a specific named product may be included in the specifications for “sound reasons in the public interest.” If a proprietary product is named, the specifications must provide bidders with the opportunity to submit products that are equal to the named product. Whether or not a product is equal to a proprietary product is a matter solely within the discretion of the awarding authority. M. G. L. c. 30, s 44H (*sic*) specifically removes the consideration of equal products from the authority of the Attorney General’s Office.”

The conflict between an owner’s right to require compliance with a proprietary specification and a bidder’s right to submit a bid clearly on a different system was discussed in the October 24, 2016 decision in the recent case of the Bid Protest of Mass Bay Electrical Corp. (Mass Port; MPA Contract L1271-C1; Old Tower Generator Replacement; Logan International Airport, East Boston, MA.) This decision was briefly referenced in a previous *Squib* concerning declaratory judgments. Briefly, here are the facts:

Filed subbidders were to submit bids for the electrical work for this project. Mass Port, the owner, issued an addendum only a few days before bids were due stating that as to the communications system, which would be Paragraph E work, there would be a proprietary specification and that there would be only one system acceptable to the owner. This addendum stated that: “Proprietary Manufacturer Sumitomo and no other manufacturer will be considered or substitutions allowed.” In addition, one bidder posed a question to the owner concerning the

proprietary system prior to bid and the owner answered it by affirming the language above-cited. Namely, that only one proprietary-specified product and system - the Sumitomo system - would be acceptable for the communications system.

That manufacturer required contractors to be licensed by it to buy its materials and to install its system. Further, that manufacturer had a stated written policy that it would not license contractors for projects which were already specified. One of the bidders, Wayne J. Griffin Electric, Inc., was not so licensed on the specified Sumitomo System and bid on a completely different system, saying that it would perform this work itself. And, Sumitomo indicated both in an internet web page and in an email generated for the bid protest that once a project was specified for its product, as this procurement was, it would not license any other bidders. So, it was very clear that apart from being unlicensed at the time its bid was submitted, Griffin would not be able to get licensed by Sumitomo at any time during the performance of the project.

From Mass Bay's perspective, Griffin had submitted an unresponsive bid. And, per the provisions of MGL C. 149, s. 44F, it appeared that such bid had to be rejected by the owner. That statute, in pertinent part, provides:

“(3) Every sub-bid in connection with a contract subject to section forty-four A for a sub-trade designated on the general bid form pursuant to section forty-four F(2) shall be for the complete work of the sub-trade as specified, and shall be filed with the awarding authority, in a sealed envelope, before twelve o'clock noon at least four days, Saturdays, Sundays and legal holidays excluded, before the day fixed by the awarding authority for the opening of general bids, and forthwith after the time limit for the filing thereof shall be publicly opened and read by the awarding authority, which, within two days thereafter, Saturdays, Sundays and legal holidays excluded, shall reject every sub-bid which is not accompanied by a bid deposit as prescribed in sub-section (2) of section forty-four B, or which otherwise does not conform with sections forty-four A to forty-four H, inclusive, or which is on a form not completely filled in, or which is incomplete, conditional or obscure, or which contains any addition not called for . . .”

It appeared, therefore, that this was a case for mandatory rejection. However, Griffin was low by about five hundred thousand dollars, this on a project for which it submitted a bid of less than three million dollars.² Admittedly, that's a lot of money for any project and it is particularly so for a project of this size. Mass Port did not reject Griffin's bid and Mass Bay objected to Mass Port's accepting the Griffin bid. This is what the Attorney General's hearing officer (AG) held in her decision denying the protest:

“I find that this listing (Sumitomo) is appropriate, because Griffin has a statutory right to propose an equal product in which it is certified, notwithstanding the language of the specifications precluding substitutions. (Cases cited) MassPort cannot reject Griffin for its intent to propose a substitute product. This Office has consistently stated that product

submittal is to be conducted *after* contract award and cannot form the basis for rejection of a bid. (Cases cited) Conditioning a contract award on product submittal could invite favoritism. . . . Mass Bay argues that Griffin will have to provide the proprietary product if MassPort determines that Griffin’s “or equal” product is not actually equal, which it cannot do because it is not certified by Sumitomo. However, Griffin can decide to walk away from the contract, and MassPort can access its bond.³ So, even if MassPort determines that Griffin’s “or equal” product is not actually equal, Griffin does not have to provide the proprietary product.”

This decision raises a variety of issues, some of which follow:

1. How does one determine who is the low bidder if different bidders are bidding on different systems with the alternative system not being either approved or rejected until after the submittal process?
2. What protection does the general contractor have if its subcontractor’s alternative system is rejected several months into the project?
3. With the public owner having the ability to either reject or accept the alternative system at the submittal stage, can’t that just as easily lead to favoritism?
4. If the proprietary product can be waived at will, then what is the point of having the proprietary specification statute in the first place?

IV. PERFORMANCE SPECIFICATIONS

There is very little Massachusetts law on this. The words ‘performance specifications’ appear in only one appellate case I have been able to find. And, in that case, the words are there just so the court can say that it won’t decide an issue based on them as that issue was not correctly before the court! The words are also used in the AG bid protest look-up resulting with only six cases, having to do with five different projects. (Two of the protests were on the same job and were essentially the same issue.) I’ve looked at all of them. But, principally, the use of the words ‘performance specifications’ are, generally, used only in considering whether or not a proposed material is the equal of a specified material, which isn’t really what ‘performance specifications’ are really about. More on that later. And, of the six decisions, only two of which are relatively recent (2008 and 2011), the other four of them issuing before the year 2000. The fact that in the last seventeen years only two AG cases even have the words ‘performance specifications’ in them suggests that true performance specifications are not often to be found in Massachusetts public construction, at least in terms of presenting issues for bid protests to the Attorney General’s Office.

A kind of encyclopedia of Massachusetts law is contained in something called the “Mass Practice Series”. The following is from an article in that reference, contained in 57 Mass. Practice, Construction law s.7:4 (Joel Lewin; Charles E. Schaub, Jr.):

s. 7:4 Performance vs. design specifications

“Design specifications explicitly set forth the work to be performed by the contractor. Design specifications describe the materials to be used in the work and the manner in which the contractor's work is to be constructed in detail. Design specifications include precise measurements and allowed tolerances and are typically used for the design-bid-build project delivery method.

Performance specifications focus on the result to be achieved and the performance requirements that the final product must meet and leave it to the contractor to determine how to achieve those results. The contractor has the discretion as to how to obtain the result dictated by the owner. Performance specifications “set forth an objective or standard to be achieved and the [contractor] is expected to exercise his ingenuity in achieving that objective or standard of performance.” Performance standards are commonly used for sophisticated and complicated design-build projects such as energy generation facilities.

The significance between the two types of specifications is that with performance specifications, the contractor has construction and design-like obligations which has implications on whether the specifications are covered by an implied warranty. The characterization of the type of specification is determinative of which party bears the risk of loss for defects in the final product.

Where a party provides a contractor with a set of plans and specifications for construction to follow, that is, design specifications, there is an implied warranty that as long as the contractor performs the work consistent with those plans and specifications, the contractor will not be held responsible for the consequences of any defects in those plans and specifications. Unlike design specifications, because the contractor has much broader discretion under performance specifications, the contractor cannot rely on an implied warranty to shield itself from liability arising out of defective performance specifications, nor can it seek recovery for defective work arising out of alleged design defects. Thus, whether a specification is interpreted as design or performance has significant risk implications for the contractor.

There are several considerations when drafting performance specifications. Performance standards should provide clear instructions as to the required result. Although labels are not necessarily outcome determinative, if the parties intend the specifications to be performance based, the contract should expressly state that. The drafter should use language that reinforces the intent to provide the contractor with discretion and flexibility and avoid mandating specific

equipment or material. For example, if the contractor is required to install an HVAC system, the drafter should avoid specifying the components of the system and, instead, require that the system achieve clearly defined temperature and humidity requirements. Finally, performance standards should include explicit and defined criteria to verifying a contractor's performance.”

Although there are case citations in this article, none of these are citations to Massachusetts cases, except for the first sentence of the next to last paragraph. While decisions from other states may be persuasive authority (term of art) for a court to follow, it is, generally speaking, only Massachusetts decisions which are mandatory authority (term of art), meaning law that a Massachusetts court must follow.

Another definition of ‘performance specification’ can be found on the internet at <https://www.archtoolbox.com/representation/specifications/types-of-construction-specifications.html>:

“A performance specification is a document that specifies the operational requirements of a component or installation. Simply put, a performance specification tells the contractor what the final installed product must be capable of doing. The contractor is not instructed as to how to accomplish the task of meeting the performance specification requirements - only as to how the component must function after installation. For example, a performance specification may be used in the construction of an industrial pumping system. The specification would provide a required pumping rate (say 500 gallons per minute), a required pressure (20 psi) and the difference in height between the pump and the final destination (+40 feet). The specification will also state that the liquid to be pumped will be at a temperature of 140°F and is corrosive (pH of 3). It is up to the contractor to provide pumping equipment that meets or exceeds the requirements stated in the specification. In many cases the contractor will also be required to test equipment to make sure that is operating properly, and will provide operations manuals.

The general concept behind the performance specification is for the architect or engineer to describe what they need, and the contractor to determine the best way to get there. The performance specification focuses on the outcome and shifts the selection of materials and methods, as well as a portion of the design work, onto the shoulders of the contractor. This approach can provide incentives for innovation and flexibility in the construction approach, but also reduces the amount of control that the architect or engineer has over the project.”

The only Massachusetts court case I have found discussing performance specifications is that of *Coghlin Elec. Contractors, Inc. v. Gilbane Bldg. Co.*, 472 Mass. 549 36 N.E.3d 505 (2015), a case heard by Massachusetts’ highest court, the Supreme Judicial Court. And, this is what the Court said about this, from footnote 6 on page 567:

“Because the issue is not raised, we do not address the distinction between “performance” specifications and “design” specifications. See J. Lewin & C.E. Schaub, Jr., *Construction Law* § 7:4, at 467 (2014–2015) (design specifications “describe the materials to be used in the work and the manner in which the contractor’s work is to be constructed in detail” while performance specifications “focus on the result to be achieved” and give contractor discretion as to how to complete final product). We assume for the purposes of reviewing the allowance of the motion to dismiss that the designs at issue in this case contain design specifications. See *id.* at 468 (contractor “cannot rely on an implied warranty to shield itself from liability arising out of defective performance specifications”).”

I will comment briefly on three of the six AG decisions concerning ‘performance specifications’, which such decisions, in the main, are really a discussion of whether or not some proposed material is an equal to a specified product. My sense of a true ‘performance specification’ is just that: it’s up to the contractor to decide upon construction criteria, including what materials will be employed, to achieve a certain specified goal. But, the AG’s cases, however mentioning in certain of them the words ‘performance specification’, mostly are ‘as equal’ cases, which are really not the same thing.

The protest of Cheviot Corporation and Richard E. Graham Co. Inc., (two protests on the same job, essentially the same issue) Town of Brookline, Lincoln School; Aluminum Windows, June 22, 1992 dealt with issues as to whether or not this trade had to be rebid because the specifications required a five year warranty on the windows, which allegedly is impossible for a bidder to provide and/or the specifications require the submittal of test results with regard to load uniform deflection in connection with a test which does not exist.

The warranty issue largely involved whether or not the contractor’s performance bond would cover the five year period and whether or not this would be a typical surety bond undertaking. (There was some evidence that three years was the maximum amount of time a surety would warrant the windows under the performance bond.) These aren’t actual ‘performance specification’ issues, particularly as to the warranty because the warranty in and of itself doesn’t describe what the required elements of construction had to be.

If the construction had to meet the requirements of a test, that is kind of a performance specification issue but where the test didn’t exist, in this case no performance specification was involved. In any event, the AG stated that Brookline had to rebid this trade.

The protest of Mass Installation, Inc., City of Salem (Furnish and Install Water Meters_, December 13, 1999 claimed to be about a performance specification. “The Technical Specifications were written as performance specifications for single-jet water meters” is a reference in the decision. However, as stated elsewhere in the decision: “The City frankly stated

that technical specifications were written based upon the mechanics and performance of a Metron meter.”

As stated by the AG:

“The City explained that the specification was written as a performance specification and that the City would have accepted any meter that was “() . . . at least equal in quality, durability, appearance, strength and design (to the Metron meter), (2) . . .(would) perform at least equally the function imposed by the general design for the public work being contracted for or the material being purchased, and (3) . . . conform(ed) substantially, even with deviations, to the detailed requirements for the item in the said specifications.”

The City identified at least five manufacturers of single-jet meters and said that it would have accepted any of them, although it appeared that four of these manufacturers either didn’t market their meters in the United States or did so only on a limited basis. The protest was based on the Protester’s concern with the reluctance of certain water meter manufacturers to supply the American market with their product. But, as the AG said on page 8 of the decision: “There is no requirement that at least three manufacturers be *willing* to supply their product.” (Emphasis supplied.) The procurement did have a ‘performance guarantee provision’, which included the following language:

“The selected vendor shall also provide water meters approved by the City that will increase the City’s water consumption revenue enough to offset the entire turnkey product costs within (5) years. The selected vendor will provide with bid documents, proof of a third party insurance policy to that effect. The insurance policy guarantees that the City will receive a (5) year project payback or the City will be reimbursed the difference between the contract price and the actual revenue that the City recovered from the installed new water meters.”⁴

This would seem to be some indicia of a performance specification, meaning the provision of materials that would accomplish a certain result rather than just indicating the names of three or four manufacturers who can provide an acceptable product.

The AG said that: “the Performance Guarantee Provision was reasonable in its intent. The City, as a consumer, has the right to seek assurances that the product it is purchasing will perform as the seller claims. The net effect of the Provision, however, stifles competition.” The AG noted that the Protester had not bid this job due to its inability to supply the required third party guarantee. The City was ordered to reprocur for this and other grounds.

Another case on this issue is the Protest of Marshall Roofing & Sheet Metal Co. Inc, City of Peabody, Roof Replacements at Various Buildings, March 4, 1996. Peabody considered its procurement to be a performance specification and the AG referenced the specification as a

performance specification. But, the specification was based on a Garland system. Peabody rejected Marshall's bid because it was based on a Hickman system, even though the Hickman system was included in the Acceptable Manufacturers paragraph of the specifications.

Peabody wanted to use as a test standard ASTM 5147 to compare the Garland system with the Hickman system. Marshall contended that this was inapplicable to a Hickman system. Further, this test standard requirement or procedure was not set forth in the specifications.

There was no specified product for Garland but there were clear specified products for the Hickman system and for the Tremco system.

The AG said:

“In providing a description of material, Peabody set forth performance criteria that could undoubtedly be met by items in the Garland product line and which may have been met by individual products from the Hickman and Tremco lines. However, the components of the Hickman system identified in the Acceptable Manufacturer paragraph may not satisfy the performance criteria.”

Peabody considered the Garland products as the “measuring stick ‘ for evaluating Hickman's products, which it considered as deficient in two respects. The AG said that given the great debate between the parties over the proper method for evaluating the system submitted, there is not conclusive evidence before the AG to determine whether or not the individual components of the Hickman system would pass muster. The AG stated that the award of the contract cannot be contingent upon pre-approval of a particular material, referencing various cases. The result was that the AG said that Peabody may not reject Marshall's bid based upon the product proposed to be used by Marshall.

V. DESIGN BUILD

There is an Attorney General decision discussing and explaining the ‘design build’ process in some detail, being the decision in the case of Protest of Maverick Construction Corporation, Massachusetts Technology Collaborative, Fiber Optic Network, July 11, 2011.

From the discussion on pages 4-7 of the decision:

“There is no case law or Bid Protest Decisions interpreting the Commonwealth's Design Build statute, M.G.L. c. 149A, s. 14-21. That law is an alternative delivery method that is an option for public works projects with an estimated value of \$5 million or more. On a design build project, the owner selects and executes a single contract with a single entity - e.g., a design build firm, joint venture or contractor that subcontracts with a designer - to

design and construct the project. Design and construction are combined into a single stage, “with no separate bid for construction based on complete plans and specifications. Instead, design build contracts are procured on a scope of work statement and performance requirements. Contracting with a design-build entity enables construction schedules to be accelerated by beginning construction *before the design is complete* and eliminating the time required to solicit competitive construction bids.” See the OIG’s (ED: this is the Office of the Inspector General) “Designing and Constructing Public Facilities” Manual (Fall 2005), page 145 (emphasis added). The awarding authority is required to obtain prior approval of the OIG before using design build for a public works project.

The Design Build statute, at section 15, defines “design build” to include design services by the design build entity: “ ‘Design build’ a construction delivery system that provides *responsibility for the delivery of design services* and construction services within a single contract.” (Emphasis added). Section 18 states that the awarding authority shall retain the services of a design professional to provide technical advice and professional expertise to the awarding authority. The awarding authority and design professional then develop 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 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.” (Emphasis added)

Section 19 provides further explanation of the scope of work statement that must be included in the RFP:

“The RFP shall set forth a detailed scope of work including design *concepts*, 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*. (Emphasis added).

Section 19 also allows for a stipend to be paid to unsuccessful proposers if their ideas are used by the awarding authority:

“The RFP may provide for a stipend on 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 by the RFP, is paid to the proposer. . .”

The only Massachusetts court case discussing design build contracts is the Coghlin case referenced above, which, also, is the only Massachusetts case discussing performance specifications. And, that case sheds almost no light on the elements of either design-build or performance specifications.

The design build procurement method is highly statutory and is contained within MGL 149A, sections 14-21. I will summarize the essential elements of this. Many provisions of this procedure are similar to the procedures for contractor at risk procurements, as outlined below. This process is very complicated and requires owners of the highest sophistication and competence just to administer the process. By my own subjective experience, such owners are rarely to be found.

By statute, this is a process for the construction, reconstruction, alteration, remodeling or repair of a public works project where the owner estimates the cost to be five million dollars or more.

The statute defines ‘Design build’ as a construction delivery system that provides responsibility for the delivery of design services and construction services within a single contract.

Traditionally, a ‘public building project’ means just that. It has something to do with a building. Generally speaking, most of the statutes describing the procurement for public building projects are contained within MGL C. 149, s. 44A-H. A ‘public work’, on the other hand, principally deals with non-buildings, for things such as water and sewer work, roads, tunnels, bridges and paving and the statute principally governing this is MGL C. 30, s. 39M.

The Commonwealth or any of its agencies and authorities shall engage an owner’s representative to provide professional project oversight with regard to any major contract. By statute, a ‘major contract’ is defined as one with a certified estimate of cost exceeding fifty million dollars. This individual shall be selected and retained prior to the award of a major contract by a public agency.

Before undertaking a design build project, the owner shall submit a detailed application to the Inspector General (IG). If the project meets the requirements of the IG, the IG shall issue a notice to proceed. Decisions on applications are to be made within 60 days of submittal. There are some exempt agencies from this process but they have to make submissions of their procedures to the IG and these procedures have to be approved by the IG before the agency can proceed with a design build project. IG decisions on exempt agency procedures will also be made within sixty days of submittal. The public owner or exempt agency will proceed with its design build project in two phases.

Phase one begins with the owner giving public notice of a public works project, soliciting letters of interest from design build entities (DBE). This public notice and solicitation has various required elements. Upon receipt of letters of interest from DBEs, the owner shall provide each with an RFQ, which serves as the basis by which an owner creates a shortlist of DBE's to receive an RFP in phase two of the process. The RFQ contains a number of statutorily-required items which the DBE has to supply. Evaluation by the owner of such responses will involve: (a) establishing a rating of each response as either advantageous or not advantageous or unacceptable; (b) a composite rating for each proposal; (c) an investigation of all information supplied. DBEs achieving a composite rating of highly advantageous or advantageous shall be eligible to receive an RFP in Phase two. At least 2 DBEs should be identified to receive an RFP.

Before issuing an RFQ, an owner shall contract with a design professional (DP) to provide technical advice and professional expertise to the owner. After retaining a DP, the owner shall develop a scope of work statement that defines the project and provides the DBE with sufficient information regarding the owner's objectives and requirements. Once the scope of work is developed, the owner will develop a draft RFP. DBEs receiving a draft RFP may submit written comments on it at the same time as submitting a response to the RFQ. The owner at its sole discretion may incorporate these comments into the final RFP and then provide the prequalified DBEs with the final RFP. The RFP shall include a detailed scope of work including design concepts, technical requirements, performance criteria, construction requirements, time constraints and will identify the cost basis - low bid or best value - by which the owner will evaluate proposals. The owner, at its discretion, may provide for a process, including the establishment of a team, to review conceptual technical submittals before full proposal submittals for the purposes of identifying defects that would cause rejection of the proposal as non-responsive. The RFP may also provide for a stipend to unsuccessful proposers who submit proposals. The owner may only use such ideas and designs in the non-successful proposals if a stipend is paid to the proposer.

The owner may evaluate proposals on either a best value or low bid basis. If low bid is used, then each proposal, including the price or prices, shall be submitted as one complete proposal. For best value, each proposal shall be submitted by the proposer in two separate proposals, one of them technical and the other for price. Proposals will be evaluated by a selection committee. After opening the proposals, the owner shall publicly calculate the overall value rating for each proposal. This could be the total price divided by the quality score or by another specified method. The owner shall enter into good faith negotiations with the responsible proposer with the lowest price per quality score point. When these negotiations are successful, the owner will enter into a design build contract with the DBE. Many of the public bidding statutory sections as contained within MGL Chapter 30 and various sections of MGL Chapter 149 will apply to this construction, such sections as defined in the statute.

The IG shall promulgate regulations and guidelines to implement these statutory sections.

VI. CONTRACTOR AT RISK

By my own subjective experience and observation, this process is being increasingly used as a public procurement method. It is, however, *incredibly* complicated and requires a public owner to have at least three separate committees to oversee and participate in this process!

The construction management at risk procurement method (CMR) is highly statutory and is contained within MGL 149A, sections 1-13. I will summarize the essential elements of this.

This is a procurement method for the construction, reconstruction, installation, demolition, maintenance or repair of any building estimated to cost five million dollars or more. Prior to using this method, the public owner must obtain a notice to proceed from the IG. The construction management at risk program is defined as:

“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.”

The owner shall procure an owner’s project manager before submitting an application to use the construction management at risk delivery method, who may assist the owner in the procurement of the designer, who will also be procured prior to submitting the application.

The application seeking approval of using the construction management at-risk method is fairly complex and must conform to the regulations and procedures put forth by the IG. The IG must make a decision concerning the application within 60 days of its submittal. If approved, the IG will issue a notice to proceed. There are a number of public agencies who are exempt from having to follow this specific process but will still have to submit their procedures for the review and approval by the IG.

The public agency shall utilize a 2 phase selection process for the selection of a CMR firm. The first phase is the owner’s giving public notice of the project and solicits responses to an RFQ from CMR firms. The RFQ has a variety of things that must be included by the

requirements of this statute. Proposed CMR bidders have to submit a statement of qualifications in response to the RFQ which also has statutory requirements as to content. The owner's prequalification committee will review the various CMR statements of qualifications. Only CMR firms achieving an acceptable rating will be selected to proceed to phase 2 of the selection process and receive a request for proposals. At least three CMR firms must receive the request for proposals. The successful CMR firm shall provide a performance and payment bond in the full sum of the guaranteed maximum price (GMP).

Before issuing a request for proposals (RFP) the owner will establish a selection committee. The owner shall issue an RFP to each CMR firm that has been prequalified to receive an RFP, which has extremely detailed requirements as to content. The RFP shall require the submission of separate price and technical components. Upon receipt of the proposals to the RFP, the selection committee will evaluate them and will rank the proposals submitted by the CMR firms. The selection committee will commence non-fee negotiations with the highest ranked CMR firm. If these are not successful, the selection committee will commence negotiations with lower ranked CMR firms, starting from the next highest ranked CMR firm and lower, as necessary. The goal of these negotiations is to reach an acceptable contract.

Such contract will utilize a cost-plus not to exceed GMP form of contract. The CMR firm is not entitled to share in any cost savings but the contract may include an incentive clause in the contract for various performance objectives, which cannot exceed one per cent of the estimated construction cost. The GMP shall be determined based on design documents which are at least 60 per cent completed. The GMP amendment to the contract between the owner and the CMR firm shall include a detailed line item cost breakdown by trade, dollar amounts for the CMR firm's contingency and for the general conditions and fees along with other requirements.

The owner shall establish a trade contractor election process for all of the filed subbid trades and for all other sub-bid classes of work. There is a selection process for the trade contractors and other subcontractors, which requires such to be prequalified. The CMR firm itself may submit its qualification to bid on trade contract or other subcontract work. All trade contracts shall be secured by performance and payment bonds in the full amount of the trade contract amount.⁵ The owner shall establish a trade contractor prequalification committee. (That's the third committee an owner must have!) The owner will give public notice of the trade contractor work using an RFQ to solicit responses from eligible trade contractors. The public notice and solicitation has a list of statutorily-required components. Various elements of the trade contractor's submission are assigned points, such as for management experience, references and capacity to complete projects. Only trade contractors who achieve a score of 70 points or greater shall be prequalified to submit a bid. Each trade contractor's score will be revealed to the trade contractor but shall not be considered to be a public record. The request for bids has a list of statutorily-required components. A contract award will go to the lowest pre-qualified bidder. There is a form for trade contract contained within the statute which is similar to the form for filed subcontractor subcontract contained in MGL C. 149, s. 44F but which has some additional elements.

Most of the statutory sections contained in MGL C. 149, s. 44 and of MGL Chapter 30 will apply to projects procured under this method, which specific sections are identified in the statute.

VII. CONCLUSION

As readers intrepid enough to read this entire Squib have seen, some of these concepts and procedures are quite complicated. For delivery methods particularly defined by statute – such as with design build projects and contractor at risk projects – there is no substitute for reading such statutes for those who are seriously interested in participating in such projects. I suspect that most public owners involved with such projects don't always comply with each and every statutory requirement. It's hard to imagine that a public owner, for example, will have the three committees that the contractor at risk scheme specifically requires.

The Attorney General is given the power to enforce the public bidding laws, including MGL C. 149A (which would include the design build statutes and the contractor at risk statutes). That enforcement includes a bidder's right to file bid protests for claimed violations of these statutes. As we have seen, both statutes are very complex and require the public owner to take a lot of steps as part of each procurement. In my view, it is (and will be) the rare owner who is able to meet each of the requirements of these two very complicated statutes.

Bid protests can be filed objecting to how a public owner didn't comply with applicable statutes in proceeding with any particular procurement.

The grist for such (bid protest) mills would seem to be plentiful!⁶ That's another way of saying that there might be gold in them thar hills!

(Copyright claimed 2017)

Jonathan P. Sauer

Sally E. Sauer

Sauer & Sauer

Phone: 508-668-6020, 6021

Main Office

15 Adrienne Rd.

E. Walpole, MA 02032

Conference Facility

284 Main Street (Route 1A)

Walpole, MA 02081

All correspondence and deliveries should be sent/made to the Main Office only.

www.sauerconstructionlaw.com

jonsauer@sauerconstructionlaw.com

sallysauer@sauerconstructionlaw.com

“ Knowledge is Money in Your Pocket (It really is!)”

(TM Pending)

(This article is not intended to be specific legal advice and should not be taken as such. Rather, it is intended for general educational purposes only. Questions of your rights and obligations

under the law are best addressed to legal professionals examining your specific written documents and factual and legal situations. Sauer & Sauer, concentrating its legal practice on only construction and surety law issues, sees as part of its mission the provision of information and education (both free) to the material suppliers, subcontractors, general contractors, owners and sureties it daily serves, which will hopefully assist them in the more successful conduct of their business. Articles and forms are available on a wide number of construction and surety subjects at www.sauerconstructionlaw.com.) We periodically send out ‘Squibs’ - short articles, such as this one - on various construction and surety law subjects. If you are not currently on the emailing list and would like to be, please contact us and we will, as Captain Picard would say, ‘Make it so’!)

¹ A *squib* is defined as ‘a short humorous or satiric writing or speech’. Wiktionary defines *squib* as “a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses.”

² It is undoubtedly only pure happenstance that the greater the price advantage an owner will receive based on the bids submitted, the less egregious claimed egregious errors seem!

³ That is not necessarily the case. All that the bid bond guarantees is that the bidder will sign a contract and furnish any required payment and performance bonds. Since the submittal process does not occur until a party is under contract, the condition of the bid bond has been fulfilled and, consequently, no claims against it would seem possible.

⁴ A surety bond is not an insurance policy. (Unlike insurance products, surety bond premiums are not actuarially determined. And, insurance products do not have indemnity from the insured as to the insurer’s losses and expenses, which is the case with surety bonds.) And, I know of no ‘insurance policy’ that would fulfil this requirement.

⁵ When a general contractor requires a filed subbidder to provide payment and performance bonds for projects bid under MGL C. 149, s. 44A-H (per plans and specifications) projects, the general contractor is required to pay for such bonds. The CMR firm, however, is not responsible for paying the premiums for the trade contractor’s payment and performance bonds, the price of which is to be included in the trade contract amount.

⁶ Wikipedia defines ‘grist for the mill’ as follows: “The proverb_”all is grist for the mill” means “everything can be made useful, or be a source of profit.” There are some minor variations, such as “all’s grist that comes to his mill”, meaning that the person in question can make something positive out of anything that comes along.”