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HOUSE . . . . . No. 2978

The Commonwealth of Massachusetts

In the Year Two Thousand Nine

An Act relative to public safety and fair practices in procurement relating to the Commonwealth of Massachusetts selection of architects, engineers and related professionals..

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The General Laws are hereby amended by inserting after Section 19 of Chapter 30B, the following new Section:--

Section 20 – SELECTION OF ARCHITECTS, ENGINEERS AND RELATED PROFESSIONALS

(A) For purposes of this section the following phrases shall have the following meanings:

"Firm" means any individual, firm, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture, engineering, land surveying, landscape architecture, environmental science, planning and program management.

"Agency" means any department, commission, council, board, bureau, committee, institution, agency, state university, government corporation, authority, or other establishment or procurement office of the Commonwealth, excluding cities, towns, or municipalities.

(3) "Architectural and Engineering Services" means:

professional services of an architectural or engineering nature, as defined by State law, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;

professional services of an architectural or engineering nature performed by contract that are associated with research planning, development, design, investigations, inspections, tests, evaluations, consultations, program management, value engineering, construction, alteration, or repair of real property; and

such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies; investigations; surveying and mapping; soil tests; construction phase services; drawing reviews; evaluations; consultations; comprehensive planning; program management; conceptual designs, plan and specifications; soils engineering; cost estimates or programs; preparation of drawings, plans, or specifications; supervision or administration of a construction contract; construction management or scheduling; preparation of operation and maintenance manuals, and other related services.

(4) "Related Professional Services" means:

1. professional services including land surveying, landscape architecture, environmental science, planning and licensed site professionals, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;

professional services performed by contract that are associated with research, planning, development, design, investigations, inspections, surveying and mapping, tests, evaluations, consultations, comprehensive planning program management, value engineering, construction, alteration, or repair of real property; and

such other professional services, or incidental services, which members of the related professions described in (4)1 above (and individuals in their employ) may logically or justifiably perform, including master plans, studies, surveys, soil tests, cost estimates or programs; preparation of drawings, plans, or specifications supervision or administration of a construction contract; construction management or scheduling; conceptual designs, plans and specifications; construction phase services, soils engineering, drawing reviews, cost estimating, preparation of operation and maintenance manuals, and other related services.

Nothing contained in the foregoing as amended shall be construed as constituting regulation and/or oversight of any designated firms or identified professionals services.

(5) “Project’ means any capital improvement project or any design, study, plan,

survey, or new or existing program activity of a State agency, including the development of new or existing programs that require architectural, engineering or related professionals services and shall not include any public building construction project undertaken pursuant to the provisions of Mass. Gen. Laws, Chapters 7, 149 or 149A.

(B) The Commonwealth of Massachusetts Legislature hereby declares it to be the policy of the Commonwealth of Massachusetts to publicly announce all requirements for architectural, engineering, and related professional services, to procure these services on the basis of

demonstrated competence and qualifications, and to negotiate contracts after selecting a firm, at fair and reasonable prices.

(C) PREQUALIFICATION.

For those agencies that prequalify architectural, engineering, and related services, the agency head shall encourage firms engaged in the lawful practice of their profession to submit annually a statement of qualifications and performance data.

(D) PUBLIC NOTICE.

Whenever a project requiring architectural, engineering, or related professional services is proposed for a State Agency, the agency shall provide no less than 14 days advance notice published in a professional services bulletin or advertised within the official State Agency website setting forth the projects and services to be procured. The professional services bulletin shall be made available to each firm that requests the information. The professional services bulletin shall include a description of each project and shall state the time and place for interested firms to submit a letter of interest and, if required by the public notice, a statement of qualifications. If it is determined that a sole source selection of a qualified firm is in the best interest of the agency then the project is not publicly advertised.

(E) EVALUATION PROCEDURE.

An agency shall evaluate the firms submitting letters of interest and other prequalified firms, taking into account qualifications; and the agency may consider, but shall not be limited to considering, ability of professional personnel, past record and experience, performance data on file, willingness to meet time requirements, location, workload of the firm and any other

qualifications based on factors as the agency may determine in writing are applicable. The agency may conduct discussions with and require presentations by firms deemed to be the most qualified regarding their qualifications, approach to the project and ability to furnish the required services. In no case shall an agency, prior to selecting a firm for negotiation seek formal or informal submission of verbal or written estimates of costs or proposals in terms of dollars, hours required, percentage of construction cost, or any other measure of compensation.

(F) SELECTION PROCEDURE.

An agency shall select architects, engineers and related professional firms on the basis of qualifications for the type of professional services required. An agency may solicit or use pricing policies and proposals or other pricing information to determine consultant compensation only after the agency has selected a firm and initiated negotiations with the selected firm.

The procedures that an agency creates for the screening and selection of firms shall be within the sole discretion of the agency and may be adjusted to accommodate the agency's scope, schedule and budget objectives for a particular project. Adjustments to accommodate an agency's objectives may include provision for the direct appointment of a firm if the value of the project does not exceed $25,000, or if it is determined that a sole source selection of a qualified firm is in the best interest of the agency and the project is not publicly advertised.

The decision of an agency that has complied with the provisions of this Act is final and binding.

(G) CONTRACT NEGOTIATION.

The agency and the selected firm shall mutually discuss and refine the scope of services for the project and shall negotiate conditions, including but not limited to compensation level and performance schedule based on scope of services. The compensation level paid must be reasonable and fair to the agency as determined solely by the agency. In making such determination, the agency shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof.

If the agency and the selected firm are unable for any reason to negotiate a contract at a compensation level that is reasonable and fair to the agency, the agency shall, in writing, formally terminate negotiations with the selected firm. The agency shall then negotiate with the second ranked most qualified firm. The negotiation process may continue in this manner through successive ranked firms until an agreement is reached or the agency terminates the consultant contracting process.

(H) SMALL CONTRACTS AND SOLE SOURCE CONTRACTS.

The provisions of this Act do not apply to architectural, engineering, and related professional services contracts of less than $25,000, or sole source contracts that are awarded to a qualified firm as determined to be in the best interest of the agency, where only one firm has been solicited regarding the project and the project is not publicly advertised.

(I) EMERGENCY SERVICES.

The provisions of this Act do not apply in the procurement of architectural, engineering, and related professional services by agencies (i) when an agency determines in writing that it is in the best interest of the State to proceed with the immediate selection of a firm or (ii) in

emergencies when immediate services are necessary to protect the public health and safety, including, but not limited to, earthquake, tornado, storm, or natural or man-made disaster.

(J) FIRM PERFORMANCE EVALUATION.

Each agency shall evaluate the performance of each firm upon completion of a contract. That evaluation shall be made available to the firm who may submit a written response, with the evaluation and response retained solely by the agency. The evaluation and response shall not be made available to any other person or firm and is exempt from disclosure under the Freedom of Information Act.

(K) CERTIFICATE OF COMPLIANCE. Each contract for architectural, engineering, and related professional services by an agency shall contain a certificate signed by a representative of the agency and the firm that each has complied with the provisions of this Act.

SECTION 2. Chapter 30B, Section 1, subsection 15 of the General Laws are hereby amended by striking the word "designers" and adding the following new subsection:

(34A) contracts with architects, engineers and related professionals.

SECTION 3. Chapters 30B, Section 2 of the General Laws are hereby amended by striking the definition of "Designer" and replacing it with the following text:

"Architects and Engineers", a person performing professional services of an architectural or engineering nature, as defined by State law, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph; professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, investigations, inspections,

tests, evaluations, consultations, program management, value engineering, construction, alteration, or repair of real property; and such other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies; investigations; surveying and mapping; soil tests; construction phase services; drawing reviews; evaluations; consultations; comprehensive planning; program management; conceptual designs, plans and specifications; soils engineering; cost estimates or programs; preparation of drawings, plans, or specifications; supervision or administration of a construction contract; construction management or scheduling; preparation of operation and maintenance manuals, and other related services.

"Related Professionals" are professionals engaged in professional services including land surveying, landscape architecture, environmental science, planning, and licensed site professionals, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph; professional services performed by contract that are associated with research, planning, development, design, investigations, inspections, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, value engineering, construction, alteration, or repair of real property; and such other professional services, or incidental services, which members of the related professions described in (4)1 above (and individuals in their employ) may logically or justifiably perform, including master plans, studies, surveys, soil tests, cost estimates or programs; preparation of drawings, plans, or specifications; supervision or administration of a construction contract; construction management or scheduling; conceptual designs, plans and specifications; construction phase services, soils engineering, drawing

reviews, cost estimating, preparation of operation and maintenance manuals, and other related services.

Nothing contained in the foregoing shall be construed as constituting regulation and/or oversight of any designated firms or identified professionals services.

SECTION 4. The General Laws are hereby amended by deleting Section 8A of Chapter 81, in its entirety and inserting the following new Section:--

Section 8A. The Department shall publicly announce all Requests for Engineering Survey Services; procure these services on the basis of demonstrated competence and qualifications; and negotiate contracts after selecting a firm, at fair and reasonable prices.

The Department shall adhere to the following processes for each Request of Engineering Survey Services.

(A) PUBLIC NOTICE.

Whenever a project requiring Engineering Survey Services or related professional services is proposed for the Department, the Department shall provide no less than 14 days advance notice published in a professional services bulletin or advertise with the official Department website setting forth the project and services to be procured. The professional services bulletin shall be made available to each firm that requests the information. The professional services bulletin shall include a description of each project and shall state the time and place for interested firms to submit a letter of interest and, if required by the public notice, a statement of qualifications. If it is determined that a sole source selection of a qualified firm is in the best interest of the agency then the project is not publicly advertised.

(B) EVALUATION PROCEDURE.

The Department shall evaluate the firms submitting letters of interest and other prequalified firms, taking into account qualifications; and the Department may consider, but shall not be limited to considering, ability of professional personnel, past record and experience, performance data on file, willingness to meet time requirements, location, workload of the firm and any other qualifications based on factors as the agency may determine in writing are applicable. The Department may conduct discussions with and requires presentations by firms deemed to be the most qualified regarding their qualifications, approach to the project and ability to furnish the required services. In no case shall the Department, prior to selecting a firm for negotiation seek formal or informal submission of verbal or written estimates of costs and proposals in terms of dollars, hours required, percentage of construction cost, or any other measure of compensation.

(C) SELECTION PROCEDURE.

An agency shall select engineering survey firms and related professional firms on the basis of qualifications for the type of professional services required. The Department may solicit or use pricing policies and proposals or other pricing information to determine consultant compensation only after the Department has selected a firm and initiated negotiations with the selected firm.

The procedures that the Department creates for the screening and selection of firms shall be within the sole discretion of the Department and may be adjusted to accommodate the Department's scope, schedule and budget objectives for a particular project. Adjustments to accommodate the Department's objectives may include provision for the direct appointment of a

firm if the value of the project does not exceed $25,000, or if it is determined that a sole source selection of a qualified firm is in the best interest of the Department and the project is not publicly advertise.

The decision of the Department that has complied with the provisions of this Act is final and binding.

(D) CONTRACT NEGOTIATION.

The Department and the selected firm shall mutually discuss and refine the scope of services for the project and shall negotiate conditions, including but not limited to compensation level and performance schedule based on the scope of services. The compensation level paid must be reasonable and fair to the Department as determined solely by the Department. In making such determination, the Department shall take into account the estimated value of the services to be rendered, the scope, complexity, and professional nature thereof.

If the Department and the selected firm are unable for any reason to negotiate a contract at a compensation level that is reasonable and fair to the Department, the Department shall, in writing, formally terminate negotiations with the selected firm. The Department shall then negotiate with the second ranked most qualified firm. The negotiation process may continue in this manner through successive ranked firms until an agreement is reached or the agency terminates the consultant contracting process.

(E)_SMALL CONTRACTS AND SOLE SOURCE CONTRACTS

The provisions of this Act do not apply to architectural, engineering, and related professional services contracts of less than $25,000, or sole source contracts that are awarded to

a qualified firm as determined to be in the best interest of the Department, where only one firm has been solicited regarding the project and the project is not publicly advertised.

(F) EMERGENCY SERVICES

The provisions of this Act do not apply in the procurement of engineering survey services and related professional services by agencies (i) when the Department determines in writing that it is in the best interest of the State to proceed with the immediate selection of a firm or (ii) in emergencies when immediate services are necessary to protect the public health and safety, including, but not limited to, earthquake, tornado, storm, or natural or man-made disaster.