HOUSE . . . . . No. 17

The Commonwealth of Massachusetts

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The Honorable Steven James
Clerk of the House of Representatives
State House, Room 145
Boston, Massachusetts 02133

January 3, 2011

Dear Mr. James:

[Recommendation Header Text]

1.) AN ACT RELATIVE TO PROCUREMENT

[Recommendation Narrative Text]

Sincerely,

[Filer Name]
[Filer Title]

HOUSE . . . . . No. 17

So much of the recommendations of the Public Employee Retirement Administration Commission (House, No. 15) as relates to procurement (House, No. 17). Public Service.

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

An Act relative to procurement.

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

Chapter 32 of the General Laws is hereby amended by adding the following section –

Section 23A (a) This section shall apply to every retirement board contract for the procurement of investment, actuarial, legal and accounting services.

As used in this section the following words shall, unless the context requires otherwise, have the following meanings:-

"Contract", all types of agreement for the procurement of services, regardless of what the parties may call the agreement.

"Contractor", a person having a contract with the retirement board.

"Retirement board", a board established under the provisions of this chapter, the provisions of chapter thirty – four B or the Massachusetts water resources authority retirement board excluding the pension reserves investment management board.

12 "Majority vote", as to any action by or on behalf of a retirement board, a simple majority
13 of the board.

14 "Minor informalities", minor deviations, insignificant mistakes, and matters of form
15 rather than substance of the proposal, or contract document which can be waived or corrected
16 without prejudice to other offerors, potential offerors, or the retirement board.

17 "Person", any natural person, business, partnership, corporation, union, committee, club,
18 or other organization, entity or group of individuals.

19 "Procurement", acquiring a service, and all functions that pertain to the obtaining of a
20 service, including description of requirements, selection and solicitation of sources, preparation
21 and award of contract, and all phases of contract administration.

22 “Procurement officer”, an individual duly authorized by the retirement board to assist in a
23 procurement.

24 "Proposal", a written offer to provide a service at a stated price submitted in response to a
25 request for proposals.

26 "Purchase description", the words used in a solicitation to describe the services to be
27 purchased, including specifications attached to or incorporated by reference into the solicitation.

28 "Request for proposals", the documents utilized for soliciting proposals, including
29 documents attached or incorporated by reference.

30 "Responsible bidder or offeror", a person who has the capability to perform fully the
31 contract requirements, and the integrity and reliability which assures good faith performance.

32 "Responsive bidder or offeror", a person who has submitted a bid or proposal which
33 conforms in all respects to the request for proposals.

34 "Services", the furnishing of labor, time, or effort by a contractor, not involving the
35 furnishing of a specific end product other than reports. This term shall not include employment
36 agreements, collective bargaining agreements, or grant agreements.

37 (1) A retirement board shall enter into procurement contracts for investment, actuarial,
38 legal and accounting services utilizing competitive sealed proposals, in accordance with the
39 provisions of this section.

40 (2) A retirement board that awards a contract shall maintain a file on each such contract
41 and shall include in such file a copy of all written documents required by this section. Written
42 documents required by this section shall be retained by the retirement board for at least six years
43 from the date of final payment under the contract.

44 (a) The retirement board or its procurement officer shall give public notice of the request
45 for proposals and a reasonable time prior to the date for the opening of proposals. The notice
46 shall:

47 (1) indicate where, when and for how long the request for proposal may be obtained;

48 (2) describe the service desired, and reserve the right of the retirement board to reject any
49 or all bids;

50 (3) remain posted, for at least two weeks, in a conspicuous place in or near the offices of
51 the retirement board until the time specified in the request for proposals; and

52 (4) be published at least once, not less than two weeks prior to the time specified for the
53 receipt of proposals, in a newspaper of general circulation within the area served by the
54 retirement board and in the case of a procurement for investment, accounting, actuarial or legal
55 services in a publication of interest to those engaged in providing such services.

56 The retirement board or its procurement officer shall also place the notice in any
57 publication established by the state secretary for the advertisement of such procurements.

58 The retirement board or its procurement officer may distribute copies of the notice to
59 prospective bidders, and may compile and maintain lists of prospective bidders to which notices
60 may be sent.

61 (b) The retirement board shall unconditionally accept a proposal without alteration or
62 correction, except as provided in this paragraph. A bidder may correct, modify, or withdraw a
63 proposal by written notice received in the office designated in the request for proposals prior to
64 the time and date set for the proposal opening. After proposal opening, a bidder may not change
65 the price or any other provision of the proposal in a manner prejudicial to the interests of the
66 retirement board or fair competition. The retirement board shall waive minor informalities or
67 allow the bidder to correct them. If a mistake and the intended proposal are clearly evident on the
68 face of the proposal document, the procurement officer shall correct the mistake to reflect the
69 intended correct proposal and so notify the bidder in writing, and the bidder may not withdraw
70 the proposal. A bidder may withdraw a proposal if a mistake is clearly evident on the face of the
71 proposal document but the intended correct proposal is not similarly evident.

72 (c) The retirement board shall solicit proposals through a request for proposals. The
73 request for proposals shall include:

74 (1) the time and date for receipt of proposals, the address of the office to which the
75 proposals are to be delivered, the maximum time for proposal acceptance by the retirement
76 board;

77 (2) the purchase description and all evaluation criteria that will be utilized pursuant to
78 paragraph (d); and

79 (3) all contractual terms and conditions applicable to the procurement provided that the
80 contract may incorporate by reference a plan submitted by the selected offeror for providing the
81 required services.

82 The request for proposals may incorporate documents by reference; provided, however,
83 that the request for proposals specifies where prospective offerors may obtain the documents.
84 The retirement board or its procurement officer shall make copies of the request for proposals
85 available to all persons on an equal basis.

86 (d) The retirement board or its procurement officer shall not open the proposals publicly,
87 but shall open them in the presence of one or more witnesses at the time specified in the request
88 for proposals. Notwithstanding the provisions of section seven of chapter four, until the
89 completion of the evaluations, or until the time for acceptance specified in the request for
90 proposals, whichever occurs earlier, the contents of the proposals shall remain confidential and
91 shall not be disclosed to competing offerors. At the opening of proposals the retirement board or
92 its procurement officer shall prepare a register of proposals which shall include the name of each
93 offeror and the number of modifications, if any, received. The register of proposals shall be open
94 for public inspection.

95 (e) The retirement board or its consultant retained pursuant to the provisions of this
96 chapter shall be responsible for the initial evaluation of the proposals. The retirement board or its
97 consultant retained pursuant to the provisions of this chapter shall prepare their initial
98 evaluations based solely on the criteria set forth in the request for proposals. The evaluations
99 shall specify in writing:

100 (1) for each evaluation criterion, a rating of each proposal as highly advantageous,
101 advantageous, not advantageous, or unacceptable, and the reasons for the rating;

102 (2) a composite rating for each proposal, and the reasons for the rating; and

103 (3) revisions, if any, to each proposed plan for providing the required services which
104 should be obtained by negotiation prior to awarding the contract to the offeror of the proposal.

105 In the event the initial evaluation is conducted by a consultant retained pursuant to the
106 provisions of this chapter said consultant shall review all initial evaluations with the retirement
107 board and provide to each member of the retirement board the initial evaluation of each proposal.

108 (f) The retirement board shall determine the most advantageous proposal from a
109 responsible and responsive offeror taking into consideration price and the evaluation criteria set
110 forth in the request for proposals. The retirement board shall award the contract by written notice
111 to the selected offeror within the time for acceptance specified in the request for proposals. The
112 parties may extend the time for acceptance by mutual agreement. The retirement board may
113 condition an award on successful negotiation of the revisions specified in the evaluation, and
114 shall explain in writing the reasons for omitting any such revision from a plan incorporated by
115 reference in the contract.

116 (g)(1) In the event of a competitive process to select an investment service provider the
117 request for proposals shall include mandatory contractual terms and conditions to be
118 incorporated into the contract including provisions stating that the contractor is a fiduciary with
119 respect to the funds which the contractor invests on behalf of the retirement board, provisions
120 stating that the contractor shall not be indemnified by the retirement board, provisions requiring
121 the contractor to annually inform the commission and the board of any arrangements in oral or in
122 writing, for compensation or other benefit received or expected to be received by the contractor
123 or a related person from others in connection with the contractors services to the retirement
124 board or any other client, provisions requiring the contractor to annually disclose to the
125 commission and the retirement board any compensation, in whatever form, paid or expected to
126 be paid, directly or indirectly, by the contractor or a related person to others in relation to the
127 contractors services to the retirement board or any other client, and provisions requiring the
128 contractor to annually disclose to the commission and the retirement board in writing any
129 conflict of interest the contractor may have that could reasonably be expected to impair the
130 contactor's ability to render unbiased and objective services to the retirement board. Other
131 mandatory contractual terms and conditions shall address investment objectives, brokerage
132 practices, proxy voting and tender offer exercise procedures, terms of employment and
133 termination provisions. The retirement board shall make a preliminary determination of the most
134 advantageous proposal from a responsible and responsive offeror taking into consideration price
135 and the evaluation criteria set forth in the request for proposals. The retirement board or its duly
136 designated agent, subject to the approval of the retirement board, may negotiate all terms of the
137 contract not deemed mandatory or non-negotiable with such offeror. If, after negotiation with
138 such offeror, the retirement board in consultation with its duly designated agent and its

139 consultant retained pursuant to the provisions of this chapter determines that it is in the best
140 interests of the retirement board, the retirement board in consultation with its consultant retained
141 pursuant to the provisions of this chapter may determine the proposal which is the next most
142 advantageous proposal from a responsible and responsive offeror taking into consideration price
143 and the evaluation criteria set forth in the request for proposals, and may negotiate all terms of
144 the contract with such offeror. The retirement board shall award the contract to the most
145 advantageous proposal from a responsible and responsive offeror taking into consideration price,
146 the evaluated criteria set forth in the request for proposals, and the terms of the negotiated
147 contract. The retirement board shall award the contract by written notice to the selected offeror
148 within the time for acceptance specified in the request for proposals. The time for acceptance
149 may be extended for up to 45 days by mutual agreement between the retirement board and the
150 responsible and responsive offeror offering the most advantageous proposal as determined by the
151 retirement board.

152 On or before January 1 of each year the contractor shall file the disclosures required
153 herein with the board and the commission. Failure to file disclosures or the filing of inaccurate
154 disclosures shall subject the contractor to proceedings under section 21A.

155 (2) The retirement board may cancel a request for proposals or may reject in whole or in
156 part any and all proposals when the retirement board determines that cancellation or rejection
157 serves the best interests of the system. The retirement board shall state in writing the reason for a
158 cancellation or rejection.

159 (3) A person submitting a proposal for the procurement or disposal of services to any
160 retirement board shall certify in writing on the proposal as follows:

161 The undersigned certifies under penalties of perjury that this proposal has been made and
162 submitted in good faith and without collusion or fraud with any other person. As used in this
163 certification, the word ""person" shall mean any natural person, business, partnership,
164 corporation, union, committee, club, or other organization, entity, or group of individuals.

165

166 (Signature of individual submitting bid or proposal)

167

168 (Name of business)

169 (4) Each retirement board member shall certify to the commission in writing with respect
170 to a procurement subject to the provisions of this section, as follows:

171 The undersigned certifies under penalties of perjury that, to the best of his/her knowledge
172 and belief, this proposal has been made and submitted in good faith and without collusion or
173 fraud with any other person. As used in this certification, the word ""person" shall mean any
174 natural person, business, partnership, corporation, union, committee, club, or other organization,
175 entity, or group of individuals.

176

177 (Signature of individual retirement board member)

178

179 (Name of retirement board)

180 (5) No person shall cause or conspire to cause the splitting or division of any request for
181 proposals, proposal, solicitation, or quotation for the purpose of evading a requirement of this
182 section.

183 (6) Unless otherwise provided by law and subject to paragraph (a), a retirement board
184 may enter into a contract for any period of time which serves the best interests of the retirement
185 board; provided, however, that the retirement board shall include in the solicitation the term of
186 the contract and conditions of renewal, extension or purchase, if any.

187 (a) A retirement board shall not award a contract for a term exceeding five years,
188 including any renewal, extension, or option provided, however, that a retirement board may
189 participate in a limited partnership, trust or other entity with a term for a period longer than five
190 years as part of an investment of system assets.

191 When a contract is to contain an option for renewal, extension, or purchase, the
192 solicitation shall include notice of the provision. The retirement board shall retain sole discretion
193 in exercising the option, and no exercise of an option shall be subject to agreement or acceptance
194 by the contractor.

195 (b) The retirement board shall not exercise an option for renewal, extension or purchase
196 unless the retirement board, after reasonable investigation of costs and benefits, has determined
197 in writing that the exercise of the option is more advantageous than alternate means of procuring
198 comparable services.

199 (7) All specifications shall be written in a manner which describes the requirements to be
200 met without having the effect of exclusively requiring a proprietary service, or a procurement
201 from a sole source.

202 (8) All contracts shall be in writing, and the retirement board shall make no payment for a
203 service rendered prior to the execution of such contract.

204 (a) A contract made in violation of this section shall not be valid, and the retirement
205 board shall make no payment under such contract. Minor informalities shall not require
206 invalidation of a contract.

207 (b) A person who causes or conspires with another to cause a contract to be solicited or
208 awarded in violation of a provision of this section shall forfeit and pay to the appropriate
209 retirement board a sum of not more than two thousand dollars for each violation. In addition, the
210 person shall pay double the amount of damages sustained by the retirement board by reason of
211 the violation, together with the costs of any action. If more than one person participates in the
212 violation, the damages and costs may be apportioned among them.

213 (c) The commission or the retirement board shall have authority to institute a civil action
214 to enforce paragraph (b).