

OFFICE OF
ATTORNEY GENERAL
MAURA HEALEY



Construction Procurement

M.G.L. c. 149 §§ 44A-M and c. 30, § 39M

Presented by Deborah Anderson
Office of the Attorney General
Fair Labor Division

617-963-2371

Deborah.Anderson@mass.gov



Procurement: A.G. v. I.G.

- The Attorney General's Office enforces the construction procurement laws.
- The Inspector General's Office handles fraud, waste and abuse and also 30B Supplies and Services.
- The Inspector General has a 30B hotline: 617-722-8838.
- The Attorney General has me. 617-963-2371.
- The Attorney General holds Bid Protest Hearings; the Inspector General no longer holds protest hearings.
- The Inspector General offers the MCPPO training program.
- IG Manuals, Bulletins, reports;
- Attorney General Bid Protest Decisions; FAQs.



Public Building Construction Law (M.G.L. c. 149, §§44A-M)

Applies to:

- construction, reconstruction, installation, demolition, maintenance or repair.
Alteration of a building.
- on a building (a structure with four walls and a roof)
- estimated to cost \$10,000 or more; sound business practices if less than \$10,000.



General Tips

- Watch out for Bid Splitting: less than \$10,000 or less than any other threshold. Avoids the advertising requirements. On-call alternative.
- Distinction between service contracts (G.L. c. 30B) and construction.
- Equipment rental vs. construction.
- Is there a “cost?” Insurance company; donor.
- No negotiation with lowest bidder.



General Tips

- Need not have more than one bidder
- Procurement method for multi-year contracts
- Unit prices: Estimated quantities mandatory if part of the rule for award
- Rebidding a contract



Violation of Bid Laws

- Civil and criminal penalties.
- Contract is unenforceable, regardless of the good faith of the contractor who performs work.
- *Baltazar v. Lunenburg* (2006).
- Contract must be signed by someone authorized to bind the awarding authority.



\$10,000 - \$50,000

- Cap applies to both Labor and Materials unless OSD or blanket contract is used
- \$50,000 limit is per project
- Must advertise on your website, COMMBUYS, near your office and Central Register. No advertisement if 2 responses from blanket or OSD contract.
- Seek written responses from no fewer than 3 contractors
- Include a scope-of-work statement



\$50,000-\$150,000

- Sealed bids using 30, 39M
- Advertise in office, COMMBUYS, Central Register and newspaper
- 5% Bid bond; issues with signatures
- DCAMM certification if >\$150,000



Public Building Construction Law

\$150,000

- Procedure
 - Invite sealed bids
 - Advertise: local newspaper, Central
 - Register, and your bulletin board or website
 - 5% bid deposit
 - 100% payment bond
 - 100% performance bond
- DCAMM certification for generals and filed subs



Filed Sub-bid Requirements

- Must be a building project under M.G.L. c. 149, except a modular building
- Entire project must be worth over \$150,000
- Estimated cost of filed sub-bid is more than \$25,000. Good faith estimate
- Sub-bid falls into statutory classification
- Tip: Fewer than 3 filed sub-bids received



DCAMM certification Tips

- Must have certification even if you bid lower than the thresholds. Cannot waive.
- Owner may ask for DCAMM certification even if the project is less than \$150,000
- If prime certification is needed, filed sub-bid certification will not be accepted, but they can get the prime certificate to you after bid opening



M.G.L. c. 30, § 39M



\$10,000-\$50,000

- Written scope of work
- Solicit 3 responses
- Advertise on website, COMMBUYS, Central Register and near office
- OSHA requirements kick in
- Blanket contract or OSD vendor list
- Tip: Supply vs. Construction material
- May use 30B option



Over \$50,000

- Sealed bids
- 5% bid deposit
- Central Register, posting, and newspaper
- Or can use the procedures of M.G.L. c. 30B, which doesn't have bid deposit or Central Register requirements, for any amount of construction materials. 30B also does not have the proprietary specifications requirement of 30, 39M.



Bonds

- Tip: signatures needed on bid bond
- Tip: develop your own bonds
- Tip: change orders and bond increases – email me.
- Genuine payment bonds – new Court decision



Proprietary specifications

- M.G.L. c. 30 sec. 39M(b) makes full competition the norm
- Name a minimum of 3 brands or provide material description that can be met by 3 vendors, or equal
- Proprietary specifications may be used for sound reasons in the public interest; document justification.
- Proprietary specifications must have an “or equal” clause



“Or equal”

- Awarding authority decides if product is equal
- Must be equal in quality, durability, appearance, strength and design
- Must perform the intended function at least equally
- Must conform substantially, even with deviations, to the specifications
- Takes place after the award of the contract



Change Orders

- Should not exceed 20% of the original contract value. Rule of thumb.
- Cumulative
- If it does, it should be bid out
- Must grow out of original scope of contract
- Equitable adjustments as exceptions: G.L. c. 30, sec. 39N



AIA v. Waltham

- Important Designer Selection Law Decision
- Awarding authorities may not ask for fee proposals to be submitted at the same time as the designers' qualifications
- This is true, even if the fee proposal is submitted in a separate envelope
- You can only ask for a fee proposal once you have chosen your top-ranked finalist



Exclusions

Scenario:

General contractor bidder
excluded by all filed sub-bidders.

Result?



Exclusions

Result:

- The excluded general contractor cannot bid.
- He may not use his own forces to complete the filed sub-bid work.



Pre-Bid Meetings

Scenario:

You would like to require mandatory pre-bid meetings. Is this legal?



Pre-Bid Meetings

Answer:

- Yes, they are legal.
- However, you may waive attendance at the meeting as a condition for bidding if you so choose.



Timing of Change Orders

Scenario:

You issue change orders soon after contract award. Is this OK?



Timing of Change Orders

Answer:

- Generally, no.
- Rationale is that the bid order may have been different if the changed specification was in the original bid documents.



FOIA Requests

Scenario:

You receive a FOIA request from a disappointed bidder. What should you do?



FOIA Requests

Answer:

- In most cases, the potential protestor simply wants to know why he was rejected.
- Avoid FOIA request by telling him the reason for the rejection up-front.
- Tip – provide promptly in order to avoid a possible Bid Protest Hearing.



General Contractor Subs

Scenario:

A GC Sub is not DCAMM-certified. Is this OK?



General Contractor Subs

Answer:

- They are no longer filed sub-bidders, so certification is not required.
- Awarding authority may require certification as a quality requirement.
- Arises when no filed sub-bids are received or they are restricted to a general contractor or general contractors.



Estimates & Bid Results

Scenario:

Bids come in higher than the estimate. Must you re-bid under the proper procurement law?



Estimates & Bid Results

Answer:

- No, you should not re-bid in this scenario.
- Procurement method is determined by pre-bid estimate, not the bid results.
- Estimate must be made in good faith.



Non-collusion Affidavits

Scenario:

A bidder does not include a non-collusion affidavit with his bid?
Do you have to reject the bid?



Non-Collusion Affidavits

Answer:

- These affidavits are not necessary if you used the statutory bid form in 149 projects.
- You should devise a standard 30, 39M bid form that includes this language.



Addenda

Scenario:

You receive a low bid that does not acknowledge an addendum that affects price. Must you reject it?



Addenda

Answer:

- There is an exception to this rule.
- If the value of the addendum is “insignificant” when compared to the difference between the low bidder and the second low bidder, you may waive the acknowledgement of the addendum.
- *Grant* court case.



Withdrawal of Bid

Scenario:

- A filed sub-bidder wants to withdraw his bid. How long does he have?
- What about a general contractor?



Withdrawal of Bid

Answer:

- The filed sub-bidder has 5 days after the presentation of the contract by the general contractor to execute a contract and present bonds.
- General contractor has 5 days after awarding authority presents a contract.
- Withdrawal period tracks these timeframes.
- Bid bond may be available.



Prevailing Wage for Awarding Authorities



Key Points for Awarding Authorities

- Request official prevailing wage rate schedules from DLS before bids or quotes are solicited. Provide wage rate schedules to all bidders or persons providing price quotes.
- Ensure that all bids reflect prevailing wage rates; review all bids carefully.
- Include the wage rate schedule in the contract once a contractor has been selected.
- Confirm that no contractor with whom you are about to engage is debarred from public work.
- Provide annual updates of the prevailing wage rate schedule to your contractors if you have a multi-year construction project.



Key Points for Awarding Authorities

- Monitor the contractors' compliance with the prevailing wage laws. For construction projects, weekly certified payroll records must be collected by awarding authorities from all contractors and subcontractors and kept on file for three years from the date of completion of the contract. When reviewing CPR submissions, make sure you:
 - see a copy of the apprentice's ID card on every CPR that lists workers being paid apprentice wage rates;
 - see documentation of employees' completion of the OSHA 10 training;
 - receive a final statement of compliance within 15 days of the completion of the contractor or subcontractor's work.
- Notify the AGO/FLD if contractors fail to comply with CPR submission or if you believe a contractor is not paying the prevailing wage rates.