

## What Design Professionals Need to Know About Construction Reform

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On July 19, 2004 Lieutenant Governor Kerry Healey signed into law Chapter 193 of the Acts of 2004, the most significant public construction reform package in over twenty years. This law was the work product of The Commonwealth of Massachusetts Special Commission on Public Construction Reform (“the Commission”), which began work in December of 2003 and met from January through May of 2004. The Commission, which included architects, engineers, construction trades and legislators as members, was charged with investigating and making recommendations as to the adequacy and efficiency of the laws and regulations governing public construction projects. After meetings and public hearings, the Commission made recommendations, which were incorporated into the law.

The provisions of the law which will impact most upon the practices of design professionals are: (1) the requirement of an owner’s project manager on projects valued at \$1.5 million or more, (2) the repeal of the “peer review” requirement in the designer selection law regarding municipal projects, (3) the pre-qualification of general bidders on projects valued at \$10 million or more, (4) the use of CM at risk for public building projects, and (5) the use of design-build for horizontal public works construction projects. This legislation provides new roles for design professionals on public construction projects. As discussed below, the opportunity brings new risks, which must be controlled by contract provisions and appropriate insurance policies. The following is a more detailed explanation of these various provisions of the law.

### Owner’s Project Manager

The Commission decided that public construction projects of a certain size would benefit from “hands-on oversight at the owner’s level.” The legislation requires that before entering into a contract for design services, a public agency retain a project manager for all projects valued at more than \$1.5 million. The project manager will “serve as the public agency’s agent and consultant during the planning, design, and implementation of a contract for the construction, reconstruction, installation, demolition, maintenance or repair.” The legislation provides that the owner’s project manager will be a person who is registered as an architect or a professional engineer, and who has at least 5 years experience in the construction and supervision of construction of buildings. If the person is not registered as a professional architect or engineer, he or she must have at least seven years of experience in the construction and supervision of construction of buildings.

Serving as the owner’s project manager on public construction projects provides a new role for design professionals. The role is broadly defined, however. The duties of the project manager include:

“providing advice and consultation with respect to design, value engineering, scope of the work, cost estimating, general contractor and subcontractor pre-qualification, scheduling, construction and the selection, negotiation with and oversight of a designer and a general contractor for the project, ensuring the preparation of time schedules which shall serve as

control standards for monitoring performance of the building project, and assisting in project evaluation, including but not limited to, written evaluations of the performance of the design professional, contractors and subcontractors.”

The broad scope of the project manager’s role raises issues regarding insurance and exposure to liability for design professionals. As compared with the design professional’s role in the traditional design-bid-build situation, the risk of exposure to liability is increased here because of the project manager’s involvement in scheduling, cost estimating, providing advice relating to the construction and supervising the construction. A contract specifically tailored to this situation with a limitation of liability and an indemnification provision would control the risk. Likewise, the design professional serving as an owner’s project manager would need to have an insurance policy that would cover the increased risk.

#### Repeal of the “Peer Review Requirement”

The Commission responded to concerns municipal officials raised that the “peer review” requirement of preliminary design work created additional costs and added delay to the process. The legislation provides that an independent review of a feasibility study is now at the discretion of the municipality. It also provides for application of a uniform designer selection process at the municipal level. All cities, towns and public agencies will use a standard designer selection form.

#### Pre-Qualification of General Bidders on Projects

The legislation requires pre-qualification of general contractors and subcontractors on all public construction projects valued at \$10 million or more. Interested general contractors must submit a signed statement of qualifications, which includes information such as management experience, similar project experience, terminations, legal proceedings, credit references, an audited financial statement and a commitment letter for payment and performance bonds. The awarding authority must establish a pre-qualification committee for the purpose of reviewing and evaluating responses submitted in response to the RFQ. The pre-qualification committee will consist of one representative of the designer and three representatives of the awarding authority. One of the representatives on the committee will be the owner’s project manager there is a requirement for one on the project. There is a role for design professionals on pre-qualification committees, either as the designer’s representative or as the owner’s project manager. Serving in this capacity may slightly increase a design professional’s exposure to liability, but the exposure may be controlled with appropriate contract provisions.

The law further provides that the following agencies are exempt: (a) the division of capital asset management and maintenance, the Massachusetts Port Authority, the Massachusetts Water Resources Authority, the Massachusetts State Colleges Building Authority, and the University of Massachusetts Building Authority.

The Division of Capital Asset Management and Maintenance is in the process of promulgating regulations and guidelines for this new process.

#### CM at Risk

The Commission, recognizing the efforts on the part of public agencies to use alternative delivery methods, provided for the use of Construction Management at Risk for contracts for the construction or repair of any building estimated at \$5 million or more, starting January 1, 2005. In order to insure

that the alternative approach is well thought out and the best delivery method for the project, the legislation requires pre-approval from the Inspector General's office.

In CM at Risk, one entity is responsible for the pre-construction consulting and construction of the project at a guaranteed maximum price. Legislators supported the use of CM at Risk for public projects because the construction manager will bear the risk of any cost overruns. In a press release from Lieutenant Governor Kerry Healey's office, she is quoted as saying that the legislation "... now holds construction managers accountable for project delays that result in cost overruns, not the taxpayers." Of course, if the project comes in under budget, the construction manager will profit.

As the construction manager acts as the general contractor during the construction phase and is responsible for all overruns (except for owner-requested change orders) it is important that an A/E firm serving as a construction manager have appropriate insurance and require bonds from subcontractors. The liability exposure is greater here than in a design-bid-build situation, because an A/E firm acting as a construction manager will be responsible for the work itself. Any guarantee or warranty of construction work is excluded under Professional Liability policies.

#### Design-Build

In design-build, another alternative form of project delivery, a single entity is responsible for the design and construction of the project. The legislation allows for the use of design-build for horizontal projects valued at \$5 million or more. Like CM at Risk, prior approval from the Inspector General's office is required.

During the selection process, the awarding authority will retain a design professional "to provide technical advice and professional expertise" to the awarding authority; but it may use the services of a design professional employed by the awarding authority. The design professional will assist in developing a scope of work statement that will provide design-build entities with sufficient information concerning the awarding authority's objectives and requirements. Of course, the design professional hired in this capacity is excluded from participating as a member of the design-build entities competing for the award of the contract.

As the design-build entity will be responsible for the design and the construction of the project, it is important that an A/E firm competing for these contracts manage its risk through the use of appropriate contract provisions and insurance that meets the risk.

In summary, the construction reform legislation provides a number of opportunities for design professionals in public construction, from serving as owner's project managers, to serving on pre-qualification committees, assisting in defining the scope of the work for a design-build project and competing for the award of CM at Risk and design-build projects. Although there is enhanced risk in performing some of these roles, the risk may be managed through appropriate contract provisions and insurance.

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