

Public Construction Bidding in Massachusetts Frequently Asked Questions

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Section 1: GENERAL QUESTIONS

1. What activities are included in the term “construction”?

Construction, reconstruction, installation, demolition, maintenance or repair.
See M.G.L. c. 149, § 44A(2)(B).

2. What is the definition of “construction”?

For buildings, construction is the building or alteration of a building; for public works projects it is the building or alteration of a public work.

Public works construction "...has a nexus to land, such as a road, sewerage or waterworks facility, bridge or park."

See *Perlera v. Vining Disposal Service, Inc.*, 77 Mass.App.Ct. 491, 493 (1999).

See *IBEW Local 103 v. Executive Office of the Trial Court*, [buildings] Bid Protest Decision, January 22, 2015.

See *Bioremediation Cleanup v. Wachusett Regional School District*, [public works] Bid Protest Decision, May 18, 2007.

3. When is “maintenance” of a building not construction, but a service under 30B?

M.G.L. c. 149 requires the alteration of a building. Oiling parts and changing filters are not construction. Replacing duct work is construction.

See *Thorn Transit International v. M.B.T.A.*, 40 Mass.App.Ct. 650 (1996).

4. What is “Paragraph E”?

Paragraph E is specialized work within a filed sub-trade that is, in the opinion of the awarding authority, customarily sub-contracted to those sub-subcontractors who are experienced in the specialized work.

A Paragraph E listing must be *bona fide* at the time of bid submission, not at the time of bid opening. See *G & H Heating & Cooling v. Freetown*, Bid Protest Decision (October 20, 2018).

A Vehicle Exhaust System should be bid as a Paragraph E listing under the HVAC filed sub-bid, unless the awarding authority has a legitimate reason to split the work.

See *Sheet Metal Workers' Union Local 17 v. Burlington*, Bid Protest Decision (July 3, 2018).

5. Are testing, commissioning and programming construction?

No. They are not considered construction because they do not involve any alteration of a building. This question is often raised in Bid Protest Hearings involving Paragraph E submissions.

See *General Mechanical v. Dedham*, Bid Protest Decision, February 26, 2004.

6. What is a building?

A structure or edifice enclosing a space within its four walls and a roof.

See *Langone v. Westfield Gas & Electric*, Bid Protest Decision, October 1, 2007.

Coal elevators and sand hoppers are buildings.

See *Cochran v. Roemer*, 287 Mass. 500 (1934), *Wilbur v. Newton*, 307 Mass. 191, 194 (1940).

7. What is the difference between M.G.L. c. 30B and M.G.L. c. 149, and c. 30, § 39M?

M.G.L. c. 149 and M.G.L. c. 30, § 39M cover the procurement of construction. M.G.L. c. 30B covers the procurement of supplies and services, the disposal of surplus property, and the acquisition and disposition of real property by municipalities.

The Inspector General has jurisdiction over M.G.L. c. 30B; the Attorney General has jurisdiction over construction under M.G.L. c. 149, and c. 30 § 39M, as well as the Designer Selection Law [M.G.L. c. 7C], and alternative delivery methods [M.G.L. c. 149A].

See M.G.L. c. 149, § 44H [jurisdiction of the Attorney General].

See *Shady Tree v. Attleboro*, June 11, 2012, Bid Protest Decision, [Public works]

See *IBEW Local 103 v. Department of Public Health*, Bid Protest Decision, January 25, 2011 [building]

8. What is the construction sequence of M.G.L. c. 149 and M.G.L. c. 30 § 39M projects?

Planning, design and construction.

In the planning stage, project requirements are defined and often documented in a study, environmental report, or other planning document. The design stage results in a complete set of plans and specifications describing the project to be built. In the construction stage, bids are solicited on the completed design, and the selected contractor completes the construction.

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This sequential project delivery method is often referred to as the design-bid-build method. The design-bid-build delivery method is required by M.G.L. c. 149, the public building construction law, and M.G.L. c. 30, § 39M, the public works construction law.

9. Is the installation of a new carpet construction?

Yes, if the carpet is tacked onto the floor or glued on to it.

See *Mari & Son Flooring Co., Inc. v. Southeastern Massachusetts University Bldg. Authority*, 3 Mass. App. Ct. 580, 584 (1975) ("detailed specifications for installation of the carpeting suggest that the contract calls for "construction.")

10. If an insurance company is paying a contractor to fix a roof damaged by a storm, is it subject to public construction procurement laws?

If the insurance company selects the contractor and pays him directly, it is not a public procurement. If the insurance company gives the awarding authority a check and the awarding authority uses it to select and pay a contractor, it is a public procurement.

11. When is a private party subject to the public bidding laws?

The public bid laws may apply to construction on private land if the construction is done by a public agency. The *Brasi Dev. Corp v. Att'y Gen.*, 45 Mass 684 [2010] court set up a multi-factored test to determine whether a project is public or private.

See *Pioneer Valley Building Trades Council v. Sabis Charter School*, Bid Protest Decision, February 1, 2000.

See *Everett Mills v. DCAMM*, Bid Protest Decision, July 28, 2011.

12. What is bid-splitting?

The splitting of one contract into two or more contracts, for the purpose of evading the advertising requirements or other requirements of the construction bid laws. Bid splitting often occurs when an awarding authority wants to avoid a dollar amount threshold that implicates different bidding requirements, such as the threshold for DCAMM certification.

See M.G.L. c. 149, § 44J(3): "No contract or preliminary plans and specifications shall be split or divided for the purpose of evading the provisions of this section."

See *Sheet Metal Workers' Union Local 17 v. Burlington*, Bid Protest Decision (July 3, 2018).

13. What happens if an awarding authority violates the public bidding laws?

The law contains severe civil and criminal penalties for those public officials who seek to evade the requirements of the public construction laws by failing to publicly advertise contracts or by splitting contracts into smaller contracts in order to avoid competitive bidding. M.G.L. c. 149, § 44J(7).

Contracts awarded in violation of these requirements may be held unenforceable by a court regardless of whether the designer or contractor was acting in good faith. Any contract signed by an individual who lacks the authority to bind the jurisdiction will be legally unenforceable.

See *Baltazar Contractors, Inc. v. Town of Lunenburg*, 65 Mass. App. Ct, 718 (2006) (holding that a contractor may not recover damages under a construction contract because the town failed to comply with public bidding requirements).
See *ACS v. Barre*, Bid Protest Decision, November 14, 2016.

14. May an awarding authority negotiate with the lowest bidder to reduce the price or scope of the construction project?

No, even if the bidder is the only bidder, this is not permitted under the construction bid laws.

15. May a contract be awarded for a price or scope not contained in the bid?

No.

16. If a labor rate is requested by the awarding authority, may a bidder submit a rate that is lower than the prevailing wage?

Yes. Bidders must *pay* the prevailing wage, but they need not bid it, unless there is a local rule or requirement in the bid documents that requires the bid to be at or above the prevailing wage.

If the low bidder's labor rate is significantly below the prevailing wage rate, however, the awarding authority should ask the bidder to explain how it can pay the prevailing wage rate given the overall bid price.

See *Y.E.S. v. Chelsea*, Bid Protest Decision, August 3, 2009.

17. In a multi-year contract, is the contractor entitled to additional money when the labor rates are increased on an annual basis?

No. The bidder should anticipate labor rate increases when it is putting together its bid.

18. May an awarding authority accept a bid when there is only one bidder?

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Yes.

19. May an awarding authority waive “mandatory” attendance at a pre-bid conference?

Yes, since the requirement of a pre-bid conference is a local requirement and not a statutory requirement, the awarding authority may waive the rule at the awarding authority discretion.

See *Harding v. Dartmouth*, Bid Protest Decision, September 1, 2015.

20. Must an awarding authority reject a bid that is not signed by the bidder?

Not necessarily. If there's other evidence that it is an authorized bid, such as a bidder's signature on other documents submitted with the bid, this will meet the signature requirement.

See *Business Construction Corp. v. Stoughton*, Bid Protest Decision, March 23, 1998.

21. May a bid be signed electronically?

Yes.

See M.G.L. c. 110G, § 7.

22. Is electronic bidding permissible?

Yes.

See *Quinn Bros. v. Wakefield*, Bid Protest Decision, February 13, 2012.

23. Is the “exceptions” method of bidding permissible?

No. The exceptions method allows bidders to modify the scope of the project, and thus, the bidders are not bidding on the same project.

See *Maverick v. Leverett*, Bid Protest Decision, April 3, 2013.

24. Must an awarding authority consider all years of a multi-year contract, including option years, in deciding what procurement method to use?

Yes.

See *FFCM v. North Shore Community College*, Bid Protest Decision, July 24, 2017.

25. When does the submittal of a proposed product “equal” to a proprietary product named in the bid specifications, take place?

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Submittal of a proposed product takes place *after the award of the contract*, and not with the submission of a bid. A bidder's "responsibility" does not include a review of an equal product.

See M.G.L. c. 149, § 44H.

See *SIGNET v. Barnstable*, Bid Protest Decision, January 26, 2012.

26. Are Energy Management Services Contracts subject to the construction bid laws?

No. Such contracts, when bid under c. 25A, § 11C, are not subject to c. 149, even though they likely include alterations to a building or buildings. They are subject to the jurisdiction of the Department of Energy Resources.

See M.G.L. c. 149, §. 44A(F).

Section 2: UNIT PRICES

1. Are estimated quantities required for unit prices that are part of the rule for award?

Yes.

See *Langone v. Westfield Gas & Electric*, Bid Protest Decision, May 1, 2007.

2. If unit prices in a bid solicitation are informational only, and not part of the rule for award, may the awarding authority negotiate the unit prices with the bidder after the contract is signed?

Yes.

Section 3: LATE BIDS

1. What happens if a delivery service delivers a bid to the correct room, but it is late?

It is a late bid which cannot be opened. The bidder is responsible for the delivery service's tardiness.

See *Dynamic Painting v. Mass. D.P.W.*, Decision of the Department of Labor and Industries, August 22, 1991.

2. What happens if a bid is delivered on time to the correct room, but not found before the bid opening?

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This is an overlooked bid which may be opened, unless it has not been in a secure place, e.g. a locked drawer.

See *Hi-Way Safety Systems v. DCR*, Bid Protest Decision, May 27, 2009.

3. If an overlooked bid has not been in a secure place, what should an awarding authority do?

Re-bid the contract.

See, Inspector General Procurement Bulletin, 2000, volume 6.

4. What should an awarding authority do if it discovers an overlooked bid that has been in a secure location?

It should invite all bidders in that trade to the opening of the bid.

Section 4: RE-BIDDING A CONTRACT

1. When may an awarding authority re-bid a contract?

Petricca Const. Co. v. Commonwealth., 37 Mass. App. Ct. 392 (1994) established the only circumstances in which an awarding authority may re-bid a contract: insufficient funds, ambiguous specifications and new specifications on re-bid.

2. May an awarding authority re-bid a contract if it receives only one general bid?

No, unless it is over budget, had ambiguous specifications or new specifications on re-bid.

3. May an awarding authority re-bid a sub-trade if it received fewer than three bids and the prices are not reasonable without further competition?

No. A law permitting that remedy was repealed. Use *Petricca* rules.

4. In order to re-bid a contract, does a change in scope have to be material?

Yes.

See *Stanley Roofing v. Hopkinton*, Bid Protest Decision, September 12, 2016.

5. In order to re-bid a contract, must a change in scope also have a material impact on price?

No.

See *Conway v. UMass Building Authority*, Bid Protest Decision, May 7, 2014.

Section 5: ADDENDA

1. Must an awarding authority reject a bid that does not acknowledge all addenda?

Not necessarily. If an addendum does not affect the bidder's price or scope of work, the awarding authority may accept the bid.

See *Pavilion Floors v. Belmont*, Bid Protest Decision, April 14, 2016.

2. Must an addendum be issued two days before bid opening?

If the addendum is not substantive – e.g., changing the time of the bid opening – it may be issued one day before the bid opening.

3. Are there any exceptions to the rule that the failure to acknowledge addenda that affect a bidder's price or scope must be rejected?

Yes. The *Grant Construction Co. v. New Bedford*, 1 Mass. App. Ct. 843 (1973) case identified an exception to this general rule. The addendum at issue affected the cost and scope of the work; however: "in light of the small and insignificant cost of the items covered by the addendum, [the bidder's] failure to acknowledge receipt of the addendum was a minor deviation which did not preclude the city from accepting the bid."

Note that the Court did not establish a percentage test for determining a "small and insignificant cost."

See *Cardillo v. Lawrence*, Bid Protest Decision, December 28, 2005.

Section 6: BUILDING PROJECTS

Subsection A: CERTIFICATES

1. Must the awarding authority reject a bid that does not include a DCAMM certificate?

There has been no judicial ruling on this issue, but the Attorney General's Office has taken the position that since a bidder's DCAMM status may be determined immediately by checking DCAMM's online listing, as long as the bidder was certified

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at the time of bid, s/he may submit his DCAMM certificate a day or two after the bid opening.

See *Waterline v. Andover*, Bid Protest Decision, December 19, 2005.

2. Must the awarding authority reject a bid that does not include an Update Statement?

Yes. Unlike a DCAMM Certificate of Eligibility, an Update Statement is not sent to or maintained by DCAMM in its records, but is only submitted by the bidder to the awarding authority for the specific project being bid.

See *Andrews v. West Newbury*, Bid Protest Decision, May 22, 2006.

3. May an awarding authority waive the requirement of DCAMM certification if certification was not required by law but asked for by the awarding authority?

There has been no judicial ruling on this issue, but the Attorney General's Office has taken the position that this would be unfair to contractors who decided not to bid because of the non-statutory DCAMM certificate requirement.

4. If a project requires a prime DCAMM certificate in a specific trade, must the awarding authority reject a bidder who submits a sub-bidder's certificate in the same trade?

No. As long as the bidder was certified at the time of bid, the proper certificate may be submitted a day or two after the bid.

See *Waterline v. Andover*, Bid Protest Decision, December 19, 2005.

5. If the project estimate was less than \$150,000, so that no DCAMM certificate was required, must an awarding authority reject bids from non-certified contractors that come in over \$150,000?

No. The determinative factor is the awarding authority's pre-bid good faith estimate of the cost of construction, not the bid prices that were received.

6. Does a Certificate of Corporate Vote need to be submitted with the bid?

No. It is not required by statute to be submitted with the bid. It may be produced prior to award.

See *GVW v. Boston*, Attorney General Bid Protest Decision, August 4, 1999.

7. Must a bid which does not contain a certificate of non-collusion be rejected?

Not necessarily. In c. 149 building projects, the statutory bid form contains a non-collusion statement right above the bidder's signature. This is sufficient; a

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separate non-collusion statement is duplicative and may be waived. In M.G.L. c. 30, § 39M procurements, there is no statutory bid form, but the awarding authority should create a standard bid form that includes a statement of non-collusion. An affidavit of non-collusion must be submitted with c. 149A bids.

Subsection B: BID SECURITY

1. When is bid security required?

When a bid, as opposed to a quote, is submitted; i.e. over \$50,000 for c. 149, 149A and c. 30, § 39M.

2. Is bid security required by the Designer Selection Law?

No.

3. What forms of bid security are acceptable?

A bid bond, cash, a certified check on, or a treasurer's or cashier's check issued by, a responsible bank or trust company, in a form acceptable to the awarding authority.

M.G.L. c. 149, § 44B.

4. Is a bid bond not signed by the bidder legal?

Yes.

See *Pratt v. Gibbs*, 63 Mass. 82 (1851) (a bond executed by the surety only is good at common law.)

5. What is the purpose of bid security?

The awarding authority may retain it as liquidated damages in the event the bidder fails to sign a contract, with certain exceptions.

See M.G.L. c. 149, § 44B.

6. In what circumstances may the bidder retain its bid security, even if it fails in its duty to execute a contract?

Death, disability, bona fide clerical or mechanical error of a substantial nature. See M.G.L. c. 149, § 44B(3),

7. What is a “bona fide clerical or mechanical error of a substantial nature”?

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Errors of copying, transference or transcription, including mistakes of arithmetical computation, which occur during the final stages of bid preparation.

See *Lincoln-Sudbury R.S.D. v. Brandt-Jordan Corp.*, 356 Mass. 114 (1969).

The omission of pricing for certain items in a trade bid is not a clerical or mechanical error; it is a negligent oversight.

See *Floortown, Inc. v. Boston*, Department of Labor and Industries Decision, July 12, 1989.

8. What is the amount of required bid security?

5% of the entire bid, including alternates.

M.G.L. c. 149, § 44B(2).

9. Must option years of a contract be counted in determining whether a bid bond is required?

Yes.

See *FFCM v. North Shore Community College*, Bid Protest Decision, July 24, 2017.

10. Is it arbitrary for an awarding authority to reject a bid bond made out to the wrong awarding authority?

No. Because the law is uncertain on this issue, it would not be arbitrary for an awarding authority to conclude that it is not in a form acceptable to it.

See *Revoli v. Bristol County Commissioners*, Bid Protest Decision, August 12, 2011.

11. When is a payment bond required?

When the contract is over \$25,000, a 50% payment bond is required for M.G.L. c.149 and M.G.L. c. 30 projects.

A 100% payment bond is required for M.G.L. c. 149 contracts over \$150,000.

See M.G.L. c. 149, § 29.

12. When is a performance bond required?

When the contract is for buildings over \$150,000 in M.G.L. c. 149, [but not M.G.L. c. 30, § 39M projects,] a 100% performance bond is required.

See M.G.L. c. 149, § 44E.

Section 7: OWNER'S PROJECT MANAGER (OPM)

1. When is an Owner's Project Manager (OPM) required?

When the project is a building project [rather than a public works project] that is estimated to cost \$1.5 million or more.

See M.G.L. c. 149, § 44A ½.

2. Must an awarding authority follow the provisions of M.G.L. c. 7C, the Designer Selection Law, in selecting an OPM?

No. A qualifications-based method must be used, but M.G.L. c. 7C does not apply to the selection of an OPM.

See DCAMM's OPM Guidelines, December 2004.

Section 8: DESIGNER SELECTION LAW

1. When does the Designer Selection Law, M.G.L. c. 7C, apply to a building project?

When the estimated cost of the design services is \$30,000 or more, *and* the estimated cost of construction is \$300,000 or more.

2. May the Designer Selection Committee require a fee proposal at the same time as the submission of the designer's qualifications?

No. A fee is solicited *after* the awarding authority has chosen the highest-ranking firm.

See M.G.L. c. 7C, § 54(a)(ii).

See *AIA v. Waltham*, Bid Protest Decision (May 23, 2018).

Section 9: FILED SUB-BIDS

1. When are filed sub-bids required?

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When the estimated cost of construction is over \$150,000 and the cost of the trade filed sub-bid is over \$25,000.

See M.G.L. c. 149, § 44F.

2. May the awarding authority's estimate of whether the filed sub-bid is worth over \$25,000 be challenged?

Yes. The awarding authority's decision may be challenged at a Bid Protest Hearing.

See *DDS Industries v. Billerica*, Bid Protest Decision, March 22, 2012.

3. What are the filed sub-bid categories?

(a) Roofing and flashing; (b) metal windows; (c) waterproofing, damp-proofing and caulking; (d) miscellaneous and ornamental iron; (e) lathing and plastering; (f) acoustical tile; (g) marble; (h) tile; (i) terrazzo; (j) resilient floors; (k) glass and glazing; (l) painting; (m) plumbing; (n) heating, ventilating and air-conditioning; (o) electrical work, including direct electrical radiation for heating; (p) elevators; (q) masonry work; (r) fire protection sprinkler system as defined in section 81 of chapter 146; and (s) any other class of work for which the awarding authority deems it necessary or convenient to receive sub-bids.

See M.G.L. c. 149, § 44F(1)(a).

4. Must all filed sub-bid work be bid at the same time?

There is a rebuttable presumption that all filed sub-bid work in a construction project must be bid together. This presumption may be overcome by an awarding authority if it demonstrates a legitimate reason to split up the trade.

See *Sheet Metal Workers' Union Local 17 v. Burlington*, Bid Protest Decision (July 3, 2018).

5. May a filed sub-bidder subcontract any of its "core" work?

No.

See *Coghlin v. DCAMM*, Bid Protest Decision, March 18, 2011.

6. May a filed sub-bidder subcontract any of its "core" work to subcontractors for MBE/WBE purposes?

No.

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See *Coghlin v. DCAMM*, Bid Protest Decision, March 18, 2011.

7. Must a filed sub-bidder's work be contained in one section of the specifications?

Yes.

See M.G.L. c. 149, § 44F(a)(1).

See *Miller v. Fichera*, 7 Mass.App.Ct. 494 (1979).

See *Zap v. UMass Amherst*, Bid Protest Decision, August 27, 2015.

Note that if trade specifications clearly refer to other specific specifications outside the trade section, the specifications may be legal. The sub-bidder may not be required to "comb through" all the specifications to find out where his work may be referenced. The awarding authority could not, for example, have only a blanket statement saying that the bidder must refer to all other specifications to seek out his work.

8. Must the general bidders include the lowest filed sub-bidders in their general bids?

There is no requirement for the general bidder to select the lowest filed sub-bidder in a trade.

See generally, M.G.L. c. 149, 44E.

9. May the awarding authority request substitution of the lowest filed sub-bid [or any other filed sub-bidder] for the sub-bidder named by the general contractor in its bid?

As long as the general contractor does not have an objection to the "standing and ability" of the substituted bidder, the substitution will be made.

See M.G.L. c. 149, c. 44E (2)(9)(D).

See *Roblin Hope Industries, Inc. v. J. A. Sullivan Corp.*, 6 Mass. App. Ct. 481, (1978):

"The term "standing and ability" is not a meaningless phrase. We reject Sullivan's argument that a selected general bidder has an absolute right to sustain its rejection of a sub-bidder proposed by an awarding authority merely by a pro forma recitation of the words of the statute."

See *I & R Mechanical v. Boston*, Bid protest Decision, September 19, 2005 (The standing and ability objection must be valid and supported by the record.)

10. Does the general contractor determine whether a filed sub-bidder is responsible?

No. That determination is made by the awarding authority.

See M.G.L. c. 149, § 44F(3).

11. May a general contractor bidder carry a filed sub-bidder in its bid at an amount lower than what the filed sub-bidder submitted?

Yes.

See *TLT v. Bedford*, 66 Mass.App.Ct. 1113 [2006].

Section 10: PREQUALIFICATION

1. When is prequalification required for building projects?

When the estimated cost of construction is \$10 million or more.
The awarding authority may choose to prequalify bidders on any project over \$100,000.

See M.G.L. c. 149, § 44D1/2.

2. What agencies are exempt from the prequalification statutes?

DCAMM, the Massachusetts Port Authority, the Massachusetts Water Resources Authority, the Massachusetts State Colleges Building Authority, and the University of Massachusetts Building Authority.

See M.G.L. c. 149, § 44D1/2(b)(1).

3. Must the prequalification process be re-opened if there are scope changes between the time of prequalification and the time of bid in an M.G.L. c. 149 project?

No. There is no requirement that the design of the project be completed at the time of prequalification and therefore, many scope changes may occur between prequalification and bid time.

See *Egan v. Haverhill*, Bid Protest Decision, May 19, 2017.

4. May the prequalification committee give a contractor zero points if it cannot reach a reference?

No. The Committee should ask the contractor for more references.

5. Are the responders' Statements of Qualifications open to the public?

Not until the evaluations have been completed. The financial information submitted by the bidders shall not be open to the public.

See M.G.L. c. 149, § 44D1/2.

6. May a prequalification committee deduct points if a contractor does not list two banks as credit references?

No.

See *Lighthouse Masonry v. Fall River*, Bid Protest Decision, September 23, 2011.

7. May a prequalification committee consider unsolicited information about a contractor?

Yes, but if the effect of this third party information is a failing score, the contractor should be given an opportunity to rebut the information.

See DCAMM Prequalification Guidelines [January 2018].

See *Barr v. Holliston*, 462 Mass, 112 (2012).

8. Must the lowest prequalified bidder in a M.G.L. c. 149A project be awarded the contract?

No. The awarding authority must consider the bidder's Update Statement at the time of bid. The Update Statement may contain information that leads the awarding authority to conclude that the bidder is not responsible.

See *Lighthouse Masonry v. Rockland*, Bid Protest Decision, March 23, 2011.

9. Must the awarding authority's prequalification committee consider a general contractor's compliance with Minority and Women's Business Enterprise goals and Workforce Inclusion goals?

Yes.

See M.G.L. c. 149, § 44D1/2(e)(1)(vii).

Section 11: PUBLIC WORKS PROJECTS

1. Is the Single Contract Limit in a Massachusetts Department of Transportation (MassDOT) project determined based on the total of a project's component parts, or split between the parts?

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It is based on the total of its component parts.

See *Axtell's v. MassDOT*, Bid Protest Decision, May 12, 2017.

2. Does the Designer Selection Law, M.G.L., c. 7C, apply to a public works project?

No.

3. Is an Owner's Project Manager (OPM) required?

No. An OPM is only required when the project is a building project, rather than a public works project.

4. Does DCAMM certification apply to public works projects?

No.

5. Is tree trimming a public works construction project or a M.G.L. c. 30B service?

Since the earth is not disturbed, tree trimming is covered by M.G.L. c. 30B. Consult the Massachusetts Department of Labor Standards for questions regarding the applicability of prevailing wage on these projects.

6. Is tree removal a public works construction project or a M.G.L. c. 30B service?

Since the earth is disturbed, M.G.L. c. 30, § 39M applies to tree removal.

7. Is lawn mowing a public works construction project or a M.G.L. c. 30B service?

For the reasons stated above, it is a 30B service. Consult the Massachusetts Department of Labor Standards for questions regarding the applicability of prevailing wage on these projects.

8. Is the purchase of winter sand a construction material procurement or a M.G.L. 30B procurement?

Since the awarding authority is not building anything with the sand, it is a 30B procurement.

9. What is the difference between a M.G.L. c. 30, § 39M procurement over \$50,000 and the purchase of construction supplies without labor [M.G.L. c. 30B, § 5 option]?

The M.G.L. c. 30B option does not require a 5% bid deposit.

10. Is snow hauling a M.G.L. c.30, § 39M procurement?

No. It does not involve construction.

Section 12: RESPONSIBILITY

1. Who determines if the bidder is responsible?

The awarding authority.

See *Capuano v. Wilbraham*, 330 Mass. 494 (1953).

2. What does “responsible” mean?

“Responsible” means demonstrably possessing the skill, ability and integrity necessary to faithfully perform the work called for by a particular contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of section forty-four D of this chapter.

See M.G.L. c. 149, § 44A.

3. How can an awarding authority’s determination of non-responsibility be overturned?

A finding of non-responsibility will be overturned if it is arbitrary, illegal, or made in bad faith.

See *Catamount Construction Inc. v. Town of Pepperell*, 7 Mass. App. Ct. 911(1979).

4. May an awarding authority rely more heavily on its own experience with a contractor in judging its responsibility?

Yes.

See *GVW v. DCAMM*, Bid Protest Decision, February 20, 2007.

5. May an awarding authority find a bidder to not be responsible if it lacks similar project experience, when it was required in the Invitation to Bid?

Yes.

See *Virgilio v. Southern Worcester County R.S.D.*, Bid Protest Decision, August 15, 2017.

6. Is an awarding authority confined to consider only the bidder’s DCAMM file and its Update Statement in making its responsibility decision in a M.G.L. c. 149 project?

No. An awarding authority has broad discretion to access other sources of information in its consideration of a bidder's responsibility.

See *Barr, Inc. v. Holliston*, 462 Mass, 112, 117 (2012)

Section 13: ALTERNATIVE DELIVERY METHODS UNDER M.G.L. c. 149A

1. What types of alternative delivery methods are authorized by M.G.L. c. 149A?

Construction Manager at Risk ["CMR"] for building projects and Design/Build for public works projects over \$5 million. Both methods require the approval of the Inspector General.

2. How does CMR differ from M.G.L. c. 149?

M.G.L. c. 149 mandates a design - bid - build delivery system. CMR is a design-build process where the construction manager firm gets involved in the project prior to the completion of the design of the building. During the preconstruction period, the CMR acts as a construction manager, advising the owner on issues such as the project budget, the project schedule and development of the project design. At a predetermined point during design development, the owner and the CMR firm agree on a guaranteed maximum price for the construction work. During the construction stage of a CMR project, the CMR – which has until this point acted as a construction manager – takes on the role of the project's general contractor.

3. How are trade contractors procured under CMR?

Through a two-phase process that starts with prequalification and then proceeds to bidding by the prequalified entities. This is similar to the two-phase selection process used under M.G.L. c. 149 for projects over \$10 million which require prequalification.

4. In what instances may a CMR prequalification committee's decision be overturned?

The complainant must prove fraud or collusion. M.G.L. c. 149 includes arbitrariness and capriciousness, as well as fraud or collusion.

5. May trade contractors sub-contract core portions of their work to other contractors?

No. This is the same rule that filed sub-bidders must follow.

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See *MIFWA v. DCAMM*, Bid Protest Decision, December 13, 2010.

6. Is there a statutory bid form under CMR?

No. Unlike M.G.L. c. 149 projects, CMR projects do not have a statutory bid form.

7. Are Paragraph E listings required under CMR?

Since there is no statutory bid form under CMR, there is no Paragraph E. The same basic requirements, however, are found in M.G.L. c. 149A, § 8(g)(6).

8. Must a CMR trade contractor list itself if it is going to self-perform portions of work under M.G.L. c. 149A, § 8(g)(6)?

No. Unlike M.G.L. c. 149, § 8(g)(6), if a bidder intends to self-perform work under 149A, it need not list itself.

See M.G.L. c. 149A, § 8(g)(6), which requires the listing of sub-subcontractors.

9. Can the awarding authority negotiate with a trade bidder on a scope of work that was not contained in the original procurement?

No.

See *Cogswell Sprinkler v. Springfield*, Bid Protest Decision, July 8, 2012.

10. What is the difference between M.G.L. c. 30, § 39M and Design/Build under M.G.L. c. 149A?

Instead of a design/bid/build system, under M.G.L. 149A 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. Thus, 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 based on a scope of work statement and performance requirements.

11. Is design/build commonly used by municipalities?

No, it is rarely used because it is only available for public works projects over \$5 million.

Section 14: MUNICIPAL MODERNIZATION LAW

1. What was the effective date of the Municipal Modernization Law (“MML”)?

November 7, 2016.

See M.G.L. C. 149, § 44A; M.G.L. c. 30, §39M

2. What changes did the MML make?

It raised certain bidding ceilings, authorized the creation and use of “blanket” contracts by awarding authorities and increases the limits on Operational Service Department (“OSD”) contracts.

3. What bidding ceilings were raised?

M.G.L. c. 149, §44A raised:

- the three written quote process from \$10,000 - \$25,000 to \$10,000 - \$50,000;
- the sealed bid process, without DCAMM certification, from \$25,000 - \$100,000 to \$25,000 - \$150,000, and
- the DCAMM certificate requirement from over \$100,000, to \$150,000 and over for general contracts and raised the filed sub-bid DCAMM certificate requirement from \$20,000 to \$25,000.

M.G.L. c. 30, § 39M: raised the three written response procurement from \$10,000 - \$25,000 to \$10,000 - \$50,000.

OSD contract limits were raised from \$10,000 of labor to \$50,000 worth of labor.

No changes were made to the Designer Selection Law or M.G.L. c. 149A.

4. What are “blanket” contracts?

Blanket contracts are contracts awarded to multiple vendors, after the establishment of a pool of vendors by the awarding authority for procurement of construction of individual projects.

5. What is the ceiling on blanket contracts?

Blanket contracts may only be used for individual projects that contain up to \$50,000 worth of labor.

6. How does the awarding authority procure blanket contracts?

Follow M.G.L. c. 149 or M.G.L. c. 30, § 39M for contracts **over** \$50,000:

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- Advertise in a newspaper, Central Register CommBUYS, and near the awarding authority's office.
- Require a 5% bid bond.
- Require a 50% payment bond.
- Award to a few contractors, each for the full amount of the contract.

7. How does the awarding authority use blanket contracts?

Prepare a scope of work statement. Solicit 3 quotes, at least 2 of which must be from the blanket contract vendor pool, for each project. Award to lowest bidder acceptable to the awarding authority.

M.G.L. c. 149, § 44A.

The awarding authority does not have to follow the advertising rules for projects between \$10,000 and \$50,000 if the awarding authority uses a blanket contract and obtains a minimum of two responses from the blanket vendor pool or the OSD list of vendors.

8. What if the awarding authority does not have a blanket contract or does not use the OSD list of vendors?

The awarding authority must follow all of the rules for procurements that total between \$10,000 and \$50,000. There is no bifurcation of labor and materials. The awarding authority must follow all of the advertising rules.

M.G.L. c. 149, § 44A.

Section 15: MODULAR BUILDINGS

1. What is the definition of modular building?

"Modular Building", a pre-designed building or units of a pre-designed building assembled and equipped with internal plumbing, electrical or similar systems prior to movement to the site where such units are attached to each other and such building is affixed to a foundation and connected to external utilities; or any portable structure with walls, a floor, and a roof, designed or used for the shelter of persons or property, transportable in one or more sections and affixed to a foundation and connected to external utilities.

See M.G.L. c. 149, § 44A(1).

2. Must an awarding authority use the modular procurement law, M.G.L. c. 149, § 44E(4) to procure a modular building?

No. The regular M.G.L. c. 149 process may also be used.

See M.G.L. c. 149, § 44[E][4]: “(4) A public agency **may** procure modular buildings in accordance with the provisions of this section.” M.G.L. c. 149 is rarely used for modular procurement, however.

3. Does the awarding authority need complex architectural plans from an architect in order to procure a modular building?

Not necessarily. The modular manufacturer provides the design work and produces prototypes for the awarding authority consideration. The awarding authority simply advises the modular manufacturer what the awarding authority needs are.

4. Is the off-site fabrication of the modular building subject to the prevailing wage?

No.

See M.G.L. c. 149, § 44E(4): “The provisions of sections twenty-six to twenty-seven G, inclusive, shall not apply to the manufacture of modular buildings procured pursuant to this section, but shall apply to all work ordinarily and customarily performed on modular buildings at building sites...”

5. Are “pre-engineered” buildings, such as Butler buildings or Star buildings, modular buildings?

No. Instead of a few self-contained units, pre-engineered buildings come in hundreds of pieces, and are not equipped with internal plumbing, electrical or other systems. A designer has to provide a full set of plans and specifications, unlike a modular building, where such design is not required.

6. What DCAMM certifications are needed for a modular building?

Either Modular or General Contractor certification. A General Contractor is automatically qualified to undertake Modular building.

Sub-bid certification is needed if the onsite trade work is \$25,000 or more.

M.G.L. c. 149, § 44F.

7. Do the proposers submit their qualifications and prices at the same time to the awarding authority?

Yes, but the qualifications are reviewed without the reviewer[s]' knowledge of the price proposals.

See M.G.L. c. 149, § 44E(4).

Section 15: MINORITY AND WOMEN WORKFORCE PARTICIPATION GOALS

- 1. Are workforce participation goals the same as Minority and Women's Business Enterprise ("M/WBE") goals?**

No. M/WBE goals refer to participation by businesses owned by minorities and women. Workforce participation goals refer to the makeup of the contractors' workforce.

- 2. What construction contracts require women and minority workforce participation goals?**

All contracts by a state agency or state-assisted contracts for design, construction, reconstruction, installation, demolition, maintenance or repair must contain workforce participation goals for minorities and women.

See M.G.L. c. 149, § 44A(g).

- 3. What are the women and minority workforce participation goals for these contracts?**

6.9% for women and 15.3% for minorities.

See Administration & Finance Administrative Order 2009-14.

- 4. What must these contracts include in addition to the goals?**

The contract must include the processes and procedures to ensure compliance with the workforce participation goals, including reporting and enforcement provisions.

See M.G.L. c. 149, § 44A(G).

- 5. Is a contractor's record of compliance with workforce participation goals considered by DCAMM in its certification decisions?**

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Yes.

See M.G.L. c. 149, § 44D(3).