

# PUBLIC CONSTRUCTION REFORM 2004

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## Construction Legislation

# Reform Forged From Widespread Support

BY MONICA LAWTON

**M**assachusetts Lt. Gov. Kerry Healey signed historic legislation on July 19 that makes sweeping changes to the state's public construction laws – the first in more than 20 years. It was an event many thought would never happen. But it happened with the support of everyone with a stake in the public construction process – including our organization, the Associated Subcontractors of Massachusetts (ASM).



For years, there had been calls for “construction reform” in Massachusetts, but time and again, the efforts failed due largely to opposition from the ASM and related industry groups. Not that subcontractors were against change. On the contrary, we had long called for better design, better project oversight, and better screening of contractors, including subcontractors, to assure quality performance. But to many others, “reform” usually meant one thing: the repeal of the filed sub-bid law and the elimination of competitive bidding for subcontractors. Naturally, subcontractors protested. Even legislators recognized that eliminating competition did not make sense and would not save millions of dollars, as proponents claimed.

Then in 2003, circumstances changed. With municipalities facing fiscal crises, there was growing pressure to save money on school construction. Once again, there were calls to repeal filed sub-bidding. But this time, the Legislature responded by setting up a special commission to determine a course of action. Unlike past commissions, this one

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Massachusetts Lt. Gov. Kerry Healey signed into law this summer sweeping changes to the state's construction regulations. The bill had widespread support from politicians and many in the construction industry.

was balanced, with both supporters and opponents of the present bidding system. It was chaired by Sen. Dianne Wilkerson, D-Boston, Rep. Martin Walsh, D-Dorchester, and Christopher Gordon of Massport. The commission included Division of Capital Asset Management (DCAM) Commissioner David Perini as well as the Inspector General of the Commonwealth, Gregory Sullivan. ASM was named to the 20-member commission to represent subcontractors, while other organizations represented general contractors, architects, municipalities, unions, open shop companies, and minority- and women-owned businesses. For the first time, all interested parties were at the table.

At the start, last December, there was the usual finger pointing. But commission members quickly realized that everyone shared the blame for problems in public construction – contractors, architects and public owners alike. There was no single cause and no simple fix. From that point, commission members resolved to look at the entire system, and achieve consensus on ways to improve it. After six months of marathon weekly meetings and negotiations, commission members signed off on nearly 100 pages of reform recommendations. As Sen. Wilkerson said at a press conference, “This is not a tweaking. This is a major reform of our pub-

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lic construction laws.”

With unanimous support from the commission, and bipartisan support in both branches of the Legislature, the construction reform package quickly made its way to the governor's desk, where it was signed amid much fanfare. Like most good legislation, it is a compromise, fairly balancing all interests. It preserves the best features of the present system – including competitive filed sub-bidding – while instituting major improvements to every stage of the procurement process, from design through construction.

The new law improves the design process by streamlining designer selection procedures and eliminating the two-step peer review requirements. It strengthens project oversight, by requiring cities and towns to hire “owners’ project managers” on all projects that cost more than \$1.5 million, instead of relying on volunteer building committees. It promotes quality by requiring annual DCAM certification of subcontractors as well as project-by-project prequalification of both general contractors and subcontractors on all projects that cost more than \$10 million. It also allows optional prequalification on smaller projects. Numerous other provi-

sions raise the bar higher for contractors, while promoting the broadest inclusion of qualified firms.

Most significantly, the new law allows the use of “alternative methods” of construction for the first time in Massachusetts, modeled on private sector practice: construction management at risk delivery for buildings, and design-build for roads and bridges, on projects over \$5 million.

ASM is particularly proud of the CM at risk language. It was drafted jointly by our organization, by the Associated General Contractors, and by the Boston Society of Architects, in a collaborative effort that started well before the commission was established. Under CM at risk, the CM is selected on quality as well as price, starts early to ensure that design plans are good, and is responsible for costs that exceed a guaranteed maximum price. At the same time, trade contractors must be pre-qualified to bid and contracts are awarded to the lowest prequalified bidder, assuring quality work at the lowest possible price.

The new law took effect immediately, except for the provisions on CM at risk, design-build, and subcontractor certification, which

have been delayed until January 1, 2005, to allow time for proper implementation. DCAM and the Inspector General's office are working together on regulations, and have put together fact sheets on the new legislation which should soon be available on their Websites.

For ASM, it was an honor to work with the administration, municipal officials and other industry groups to create legislation that is reform in the true sense of the word, addressing the concerns of public owners, while remaining fair to contractors. The new law gives public owners more control over their projects and the selection of contractors, and holds contractors more accountable for their work. The result should be smoother projects and minimal change orders and delays. In other words, better construction at lower cost, which was the goal from the start.

The legislation not only signals a new era in Massachusetts public construction, but also serves as a model for the rest of the nation, showing how public construction should be done. The challenge over the next several months will be to achieve a smooth transition for the new procedures, so that the legislation lives up to its great promise. ■

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# Construction Reform Legislation

## Chapter 193 of the Acts of 2004

### *Overview of Key Provisions*

#### **Changes to designer selection process**

- Speeds up the designer selection process by allowing municipal awarding authorities to hire the same designer used for the feasibility study to complete the final design, eliminating the old “peer review” requirement.
- Requires uniform designer selection procedures to be used by all municipalities, including standard application form, standard fee guidelines and uniform procedures for evaluation of applicants and fee negotiation – all as a way to streamline and upgrade the selection process, and invite more competition.

#### **Changes to bidding thresholds**

- Trade threshold for filed sub bidding is doubled from \$10,000, up to \$20,000.
- Threshold for projects subject to filed sub bidding is increased 400% from \$25,000 to \$100,000.
- Projects between \$25,000 and \$100,000 are subject to the competitive sealed bid process of Ch.30,39M, with no filed sub bids.
- For projects between \$10,000 and \$25,000, there must be public notification and written bids; a formal sealed bid process is no longer required.
- Projects up to \$10,000 must solicit a minimum of three written price quotes; previously, no laws applied.
- DCAM’s authority to grant “emergency waivers” from the bidding laws is expanded to allow waivers for narrowly defined “security projects,” such as those at Massport to alleviate terrorist threats.

#### **Improvements to project oversight: Owner’s Project Manager (OPM)**

- Before hiring a designer, public agencies must hire an “owner’s project manager” on any project over \$1.5 million to advise the owner on selection of designer, value engineering and cost estimating, prequalification of general contractors and subcontractors, scheduling, construction oversight, and project evaluation.

#### **Changes to improve qualifications of contractors**

- Annual DCAM certification is now required of subcontractors, and certification of general contractors is tightened, with passing “score” increased from 70 to 80 points.
- Prequalification of general contractors and subcontractors is mandatory on all projects over \$10 million, and optional on projects under that amount.

### **Changes to improve qualifications of contractors** *(continued)*

- Subcontractor performance and payment bonds are required on all projects where there has been prequalification of subcontractors.
- Evaluation of subcontractors is now required as it is for general contractors and all evaluation forms submitted to DCAM by public agencies (and any contractor/subcontractor responses) are now a public record. Public agencies that fail to complete subcontractor evaluations will be ineligible to receive public funds.
- Debarment is now mandatory in situations where debarment is required by law – for example, in cases of criminal conviction for violations of wage or workers' comp statutes, or cases where contractors have been debarred by the federal government or in other states.
- Contractors who mis-classify employees are now subject to criminal and civil remedies, including debarment.

### **New authorization to use Alternative Delivery Methods, Chapter 149A**

- The use of CM at Risk is allowed on all building projects costing \$5 million or more, with the approval of the Inspector General.
- The use of Design Build is allowed on all Ch. 30 public works projects (roads and bridges) costing \$5 million or more, subject to the approval of the Inspector General.

### **Changes to broaden the inclusion of minority and women owned businesses**

- DCAM in consultation with SOWMBA will establish an “affirmative marketing program” to ensure participation of MBE & WBE businesses on state-owned, state-funded, and state-assisted building projects. Unlike past programs, the requirements will extend to municipalities, on projects that have state support.
- Under the program, DCAM and SOWMBA will establish annual regional participation goals, based on availability of MBE and WBE businesses. Procedures will also be established for good faith waivers.
- There are no provisions to extend the requirements to subcontractors to any greater extent than required in the past.

### **Miscellaneous changes**

- The UMass enabling act is amended to clarify the definition of “nongovernmental sources of funding” to mean private donations and gifts, or certain commercial or federal grants or contracts. Student tuitions and fees will no longer qualify as “nongovernmental sources” of funding that make projects eligible for exemptions from the bid law.
- MSCBA enabling act is likewise amended to limit the definition of “nongovernmental sources of funding” and to restrict the use of alternative methods to a single method similar to CM at Risk on building projects costing \$1 million or more – which is currently the method of choice at MSCBA. MSCBA will still be able to procure the designer and the CM as a team, but must then follow the provisions of CM at Risk, particularly with respect to prequalification and selection of trade contractors.

# Subcontractor Prequalification

## What is prequalification?

- Prequalification is the new first phase in a 2-phase procurement process that allows public awarding authorities to limit the “bidding pool” to general bidders and sub-bidders who are qualified to do the work. It has several advantages:
  - ✓ Assures that only qualified contractors are in the bidding pool
  - ✓ Raises the bar for quality of work
  - ✓ Assures that price is no longer the only deciding factor in winning a contract
- In the second phase, the awarding authority invites bids only from prequalified bidders. The remainder of the bidding process and award of contracts is unchanged, and follows the existing procedures under Ch. 149.
- The subcontractor prequalification requirements can be found in Section 19 of Chapter 193 of the Acts of 2004. Section 19 establishes a new section in Ch.149: Section 44D3/4.

## When is it required?

- Prequalification of general contractors and subcontractors by public awarding authorities is **mandatory** on all Ch. 149 projects over \$10 million, and **optional** on projects between \$100,000 and \$10 million. It is also mandatory on *all* CM at Risk projects. In general, the new requirements apply to all projects put out to bid after July 19, 2004.
- Prequalification is **discretionary** for five “exempt” state agencies: DCAM, Massport, MWRA, Mass. State College Building Authority, and UMass Building Authority.
- With minor differences, the prequalification process is the same for both GCs & subs.

## Steps in the process

- **Prequalification Committee:** The Awarding Authority begins the process by establishing a four-person prequalification committee, which consists of one representative of the designer and 3 representatives of the awarding authority, including the Owner’s Project Manager if there is one. The State College Building Authority is allowed to have a 5-person committee. The Prequalification Committee can be the same individuals as on the CM prequalification committee.
- **Public Notice/ Request for Qualifications:** The awarding authority must give public notice that prequalification is required, and solicit responses to a “Request for Qualifications” (RFQ). The public notice must appear in the newspaper, in the Central Register and on Comm-Pass, at least two weeks before the date for responses. **The public notice and RFQ must include:**
  - (1) **The time and date for receipt of responses** to the RFQ, the address of the office to which the responses are to be delivered, and the timeframe in which the public agency will respond to subcontractor submissions;
  - (2) **The evaluation procedure** and the criteria for the prequalification of subcontractors, including the point rating system, and the schedule for the evaluation process;
  - (3) **A general description of the project** and the subcontractor’s class of work;

- (4) **The anticipated schedule and estimated construction cost** for the project, as well as estimated cost of the subcontractor's class of work;
- (5) **A listing of the project team** including the awarding authority, designer, and awarding authority's owner's project manager, if applicable;
- (6) **A statement indicating that the RFQ will be used to prequalify subcontractors** who will be invited to submit a bid pursuant to sections 44E and 44F;
- (7) **A prohibition against any unauthorized communication** or contact with the awarding authority outside of official pre-bid meetings; and if desired,
- (8) **A limitation on the size** and number of pages to be sent in response to the RFQ.



- **Statement of Qualifications:** The RFQ requires subcontractors to submit a "Statement of Qualifications" signed under pains & penalties of perjury, providing information in four major categories only:

- (1) Management experience;
- (2) References;
- (3) Financial capacity to complete projects; and
- (4) Mandatory documentation of bonding capacity and DCAM certification.

**In each category, subcontractors can be asked to provide only the information outlined below – nothing more.** The RFQ must state the specific points for each major category and sub-category of information. The points for each major category are mandated by statute, but within each of the four major categories, the awarding authority can use discretion in allocating points among the subcategories, consistent with the total points for the category.

**(1) Management Experience (50 points; minimum of 25 required for approval):**

- (i) **Business Owners** – name, title, years with firm.
- (ii) **Management Personnel** – names, title, education and construction experience, years with firm, list of projects.
- (iii) **Similar Project Experience** – project name(s), description, description of scope, original trade contract sum, final trade contract sum with explanation, date completed.
- (iv) **Terminations** – list of any projects on which the subcontractor was terminated or failed to complete the work.
- (v) **Legal Proceedings** – All legal or administrative proceedings currently pending against the subcontractor or concluded adversely to the subcontractor within the past three years relating to the procurement or performance of any public or private construction contract. Legal proceedings shall not include any actions that primarily involve personal injury or workers' compensation claims, or where the sole cause of action involves the subcontractor's exercise of its rights for direct payment under Chapter 30, section 39F.
- (vi) **Safety Record** – three year history of the subcontractor's workers' compensation experience modifier
- (vii) **Compliance Record** – General contractors *only* are required to submit information on and evidence of their compliance with MBE and WBE inclusion goals and workforce inclusion goals. This requirement does NOT apply to subcontractors.

**(2) References (30 points; minimum of 15 required for approval):**

- (i) **References** for all similar projects listed in (1)(iii) including project name, reference entity, address, telephone and fax number, and contact person.  
*NOTE: The legislation currently requires references "from owners and architects," which means you may be asked to get letters of reference from them. We expect the legislation will be amended to require you to provide a list of references only, (i.e. no letters) – which list shall include general contractors as well as owners and architects. It should be up to the public owner to seek the actual references.*
- (ii) **Credit References** – a minimum of five references from key suppliers, vendors and banks, including telephone and fax number of contact person.
- (iii) **Public Project Record** – a list of all completed public building construction project(s) as defined in section 44A of chapter 149 during past three years with project name, owner, address, telephone and fax number and contact person.

**(3) Capacity to Complete Projects (20 points; minimum of 10 required for approval):**

- (i) **Annual revenue** for the prior three fiscal years. This is a lump sum figure, not a detailed list of projects and revenues. Financial statements CANNOT be required of subcontractors; they are required from general contractors only. Any financial information submitted is confidential and not a public record.
- (ii) **Revenue under contract** for next three fiscal years. Again, this is a lump sum figure.
- FIN Stmt NOT NEEDED FOR SUBS*  
*- GCs CAN be ASKED FOR ADJUSTED Stmt.*  
*CAN + be ASKED FOR JOB BREAK DOWN info*

**(4) Mandatory requirements, for which no points are assigned:**

- (i) **A commitment letter for payment and performance bonds** at 100% of the estimated subcontract value from a surety company licensed to do business in the Commonwealth and whose name appears on United States Treasury Department Circular 570. *NOTE: The RFQ should provide the estimated budgets for the trade classes of work, to enable subcontractors to get the necessary bonding commitment letter. Subcontractors will be required to provide these bonds, at their own cost.*
- (ii) **A Certificate of Eligibility** as issued by the division of capital asset management and maintenance showing a capacity rating sufficient for the project, and an update statement. *NOTE: DCAM certification will not be available by the January 1, 2005 date set in the statute. It is expected that certification of subcontractors will be done on a rolling basis through 2005, and will not be required for prequalification or bidding until a date late in the year.*
- **Opening of Responses:** Responses to the RFQ will not be opened publicly, but in the presence of one or more witnesses, and the awarding authority will prepare a register of responders that will be a public record.
  - **Evaluation:** The prequalification committee will evaluate and score the respondents based ONLY on the criteria and point system in the RFQ. *NOTE: The time frame for the prequalification process must be stated in the RFQ. It is not set by statute, but as a practical matter, the process is expected to require approx. four weeks to complete, in most cases.*



- **Scoring:** A minimum score of 70 is required to be prequalified to bid. A subcontractor will be notified whether the company is prequalified, but will not necessarily receive the company's score; however, the score is available to the subcontractor on request. *NOTE: Subcontractors must achieve more than minimum scores in at least one category to be prequalified, as the minimums do not add up to 70 points.*
- **Minimum of 3 prequalified contractors required:** The awarding authority must prequalify a minimum of 3 subcontractors to proceed. If it prequalifies fewer than 3, it must reject all responses and re-issue an RFQ. If the prequal process was *optional*, the awarding authority can either issue a new RFQ or invite filed sub bids under Ch. 149.  
*NOTE: On projects where prequalification is mandatory, the statute currently requires awarding authorities to keep issuing RFPs until they get three prequalified subcontractors. This is impractical. We expect it will be amended to require re-issuing the RFP one additional time, then allow use of the regular filed sub bid process if they are still unable to prequalify three subcontractors.*
- **Limited appeals process:** Decisions of the prequalification committee are final and not subject to appeal except on grounds of fraud or collusion.
- **Public record:** At the completion of the prequalification process, all information submitted by subcontractors becomes a public record, EXCEPT for financial information.
- **Invitations to bid:** Awarding authority must request bids only from prequalified subcontractors. *NOTE: The statute does not state a minimum time that must be allowed for preparation of bids, after receiving notice of prequalification. The time frame will be addressed either by amendment, or in the regulations, and will be a minimum of two weeks, if not more.*

## Implementation

DCAM is now in the process of promulgating regulations and procedures to implement the prequalification process. You should regularly check the DCAM website at <http://www.mass.gov/cam/> for updated information. It is expected the guidelines will include a model "form" that awarding authorities will be encouraged to use, in order to standardize the process statewide.

The prequalification requirements took effect when the legislation was signed on July 19, so awarding authorities are now requiring prequalification on new projects as they come out to bid. In the absence of standardized forms and procedures, awarding authorities are creating their own, which has led to some confusion. The situation should improve as official regulations and procedures become available. In the meantime, be sure to review the prequalification materials carefully and question any provisions that do not appear to follow the statutory requirements.

# Subcontractor Certification

The Construction Reform Legislation (in Section 18) requires sub-bidders to be certified by DCAM in much the same way that prime contractors are, effective January 1, 2005. As a practical matter, DCAM will be unable to certify all subcontractors by January 1, 2005. A bill is being filed to give DCAM until December 31, 2005 to complete subcontractor certification. It is expected that certification of subcontractors will be done on a rolling basis through 2005, by classes of work, and will not be required for prequalification or bidding until certification has been completed for all trades.

Once certification is available, sub-bidders will be required to submit a DCAM certificate of eligibility and an update statement with their bids on all building projects where the estimated cost of construction is more than \$100,000 and the estimated filed sub bid contract is more than \$20,000.

The **certificate of eligibility** is a one page document issued annually by DCAM after review of the applicant's construction experience and financial condition. It contains the name of the contractor, the areas of work in which it is certified and permitted to bid, and other relevant information. The **update statement** is a DCAM form completed and signed by the subcontractor containing updated information on projects which the sub-bidder has under contract since receiving certification.

Applications for a certificate of eligibility are not a public record.

A subcontractor who is already certified by DCAM as a general contractor for a particular trade will automatically be certified as a sub-bidder for that trade and will NOT need separate certification.

Subcontractor certification is essentially the same as prime contractor certification except:

- Projects will be evaluated over the past 3 years compared to 5 years for prime contractors.
- 10 projects will be evaluated as opposed to 20 for GCs
- The certificate of eligibility will not show single project and aggregate limits like the certificate for prime contractors.
- The certificate of eligibility will show the number of prior construction projects evaluated by DCAM, the average numerical value on those projects, and the number of projects given scores below the passing score established by DCAM (80%) over the last 3 years.

Public agencies that fail to submit to DCAM the subcontractor evaluation forms together with any subcontractor responses within 90 days of project completion (certificate of occupancy) will not be eligible for state funding.

Evaluations of subcontractors, and subcontractor responses to evaluations will be considered public records.

Regulations and guidelines pertaining to DCAM certification are expected to be available before the end of the year. They will be published in the Central Register and DCAM's website at <http://www.mass.gov/cam>.

# Construction Management at Risk

## Section 27 of Chapter 193 of the Acts of 2004

### What is the CM at Risk delivery method?

CM at Risk is an alternative to the traditional design-bid-build method used under Chapter 149, and is modeled on private sector practice. A new statute, Chapter 149A, was created by the Construction Reform legislation (Chapter 193 of the Acts of 2004) giving municipalities and other public agencies the option to use CM at Risk on projects estimated to cost \$5 million or more.

Under CM at risk, the public owner prequalifies and selects a Construction Manager (CM) during the design phase. The CM provides planning, estimating, scheduling and other consulting services to the owner and architect during the design phase. When the design is near completion, the CM and the public owner negotiate a Guaranteed Maximum Price (GMP) and schedule. The CM then acts as the general contractor during the construction of the project, plays a key role in prequalification of the trade contractors and other subcontractors, and holds all of the contracts for labor and materials on the project. The CM is required to share all cost information with the public owner so that an informed owner will pay only for the Cost of the Work plus an agreed fee up to the GMP.

### What are the benefits of CM at Risk Delivery for public owners?

It is expected that public owners will benefit by:

- Being able to prequalify and select the CM based not on low bid, but on reputation and record in controlling costs, meeting deadlines and satisfying customers.
- Having the CM participate in design and phasing decisions so that “unbuildable” or costly design details can be avoided, and design/drawing inconsistencies can be limited.
- Having protection from unexpected cost increases because the CM “owns” the budget and is limited to a GMP.
- Being able to “fast track” the start of construction by bidding early trade contracts separately, then later incorporating them into the final GMP.
- Having the right to monitor and audit the construction costs of the project to ensure the owner pays only the costs of the work plus the agreed fee to the CM.
- Having a process that fosters a spirit of cooperation – rather than disputes – between the owner, architect, CM and trade contractors due to clearly defined project responsibilities and the desire of all parties to obtain good references for future work.

### Who may use CM at Risk? What projects are eligible?

- CM at Risk is available to all Public Agencies, both state and municipal, for public building projects with an estimated cost of \$5 million or more. (The term “Public Agency” used in the legislation has the same meaning as Awarding Authority used elsewhere in Ch. 149.)
- The Public Agency must first receive the approval of the Inspector General (IG), by submitting a detailed application demonstrating it has the capacity and procedures to manage the CM at Risk project.
- DCAM, Massport, MWRA, UMass, and the Mass. State College Building Authority must apply to the IG only for their first CM project, but must then submit their procedures annually to the IG for review and approval.

## **What stays the same as in Chapter 149?**

- The Public Agency selects the architect as under the current system, and has complete control of the design.
- The CM acts as the General Contractor and is responsible for construction, and holds the contracts with the Trade Contractors and other Subcontractors.
- All Trade Contractors have access to the process; i.e., all have the right to apply for prequalification to bid.
- Trade contracts are awarded to the lowest bidders, and bids are based on complete plans and specs.
- Trade Contractors enjoy the same contract and payment protections as under current law including the 2-page form of subcontract, and direct payment rights.
- Key provisions of Ch.149 and Ch.30 still apply, including prevailing wage requirements and provisions relating to indemnification, payment bonds, equitable adjustment, delays, prompt decision-making, and record-keeping.

## **What is new or different?**

### **Selection of the Owner's Project Manager and the CM**

- The Public Agency must engage an experienced "Owners Project Manager" (OPM) to serve as owner's representative and oversee the project to assure efficient, timely and cost effective project delivery. The OPM must have experience on projects of similar size and complexity, and may be either an outside firm or experienced in-house employees.
- The CM at Risk comes on board at earlier stage (preconstruction) and works with the designer up-front on design, scope, constructability, budget, division of work etc., which minimizes the opportunity for gaps in the documents that can lead to change orders, disputes and delays.
- The CM at Risk is selected during a two-step RFQ and RFP process by a prequalification committee and a selection committee named by the Public Agency.
- The Public Agency must clearly spell out the procedures and criteria to be used in the prequalification and selection process. The Public Agency is free to determine the criteria and point systems for ranking respondents.
- The prequalification committee must select a minimum of three firms to receive an RFP; otherwise must readvertise the project OR revert to Ch. 149.
- The Public Agency has more flexibility and discretion in selecting the CM, and may base their decision on quality as well as price.

### **Guaranteed Maximum Price (GMP)**

- The CM at Risk provides a GMP, which is the Guaranteed Maximum Price the awarding authority will pay for the project. The GMP is comprised of the hard cost of the work, the general conditions costs, and the fee payable to the CM at risk. The CM at Risk is responsible for all cost overruns other than owner requested changes, and must return any cost savings to the Public Agency. The CM can participate in incentives, not to exceed 1% of the construction cost. There is no requirement to share incentives with Trade Contractors.
- The GMP must be based on at least 60% design, and be executed before the start of any construction work, except in special circumstances where the public agency opts to fast track the project. The Public Agency may start work before setting a GMP if they first execute a separate contract with the CM that provides for payment for all early work, AND provided ALL classes of work that start early are designated as "trade contractors," who have special protections in the CM at Risk process.

- If the Public Agency is unable to negotiate a GMP with the selected CM or second-ranked CM, they must revert to the Chapter 149 procurement process.

### **Selection of Trade Contractors**

- All filed sub-bid classes of work currently listed in Ch. 149 are designated “Trade Contractors.” There is a prescribed selection process for Trade Contractors and a modified process for other subcontractors.
- The CM prepares trade contractor packages for bidding based on design documents provided by the designer.
- A Request for Qualifications (RFQ) will be issued for each trade exceeding \$20,000.
- All Trade Contractors must be prequalified according to the same process and criteria used for traditional Ch. 149 projects.
- The CM at Risk may submit qualifications if it customarily performs the trade work with its own forces.
- All prequalified Trade Contractors will receive a Request for Bid (RFB), and the contract will be awarded to the lowest bidder.
- All Trade Contractors must provide payment and performance bonds, as an additional quality safeguard.
- Trade Contractors must certify that they will prequalify their sub-subs, where applicable.

### **Selection of Other Subcontractors**

- Subcontractors for non-filed sub-bid classes of work that exceed \$20,000 are prequalified and selected by the CM, subject to approval of the Public Agency. The CM submits to the Public Agency a set of criteria that subcontractors must be able to meet, and a list of firms able to meet the criteria. The Public Agency can strike firms from the list, or add to the list with the approval of the CM at Risk. The CM will make the final selection, based on price, quality and other factors, and inform the Public Agency of the reasons for the selection.
- Subcontracts for work estimated to cost \$20,000 or less may be awarded by the CM using any method selected by the CM with the approval of the Public Agency.
- Subcontracts for the supply of material or equipment may also be awarded at the discretion of the CM.

### **Sequence at a Glance**

1. Public Agency (has the same meaning as “Awarding Authority”) hires Owner’s Project Manager, or utilizes in-house professional.
2. Public Agency hires Designer.
3. Public Agency decides to use CM at Risk, and gets approval of the Inspector General.
4. Public Agency issues a detailed RFQ for a CM at Risk.
5. Public Agency sets up CM Prequalification Committee.
6. Prequalification Committee evaluates responses to the RFQ and selects at least three CM respondents to receive an RFP. Decisions of the Prequal Committee are final.
7. Public Agency issues an RFP to all prequalified CMs. RFP includes both a price component and technical component.
8. Public Agency sets up a CM Selection Committee (can be the same as the Prequalification Committee).

### **Sequence at a Glance, *continued***

9. Selection Committee evaluates and ranks proposers, and begins non-fee negotiations, starting with first-ranked proposer, which continue until reaching a contract with one of the proposers. CM at Risk works with Designer & Owner's Project Manager on preconstruction.
10. CM and Public Agency negotiate a GMP before the start of construction, at no less than 60% design. Public Agency has escape clause if unable to negotiate a GMP, that lets them negotiate with the next ranked CM. If no agreement is reached with the second proposer, then the Public Agency must revert to Chapter 149, (but by then will have a good set of plans that may improve the results under Ch. 149).
11. Public Agency may start construction before reaching a GMP, provided they execute a separate contract for early work and designate early trades as "Trade Contractors."
12. Public Agency issues a Trade Contractor RFQ, for all sub bid classes of work in 44F and any other classes of work named for the project.
13. Public Agency sets up 4-person Trade Contractor Prequalification Committee, which can mirror the make-up of the CM Prequalification Committee.
14. Prequalification Committee evaluates responses to RFQ using strict criteria (which cannot be changed in any way), and prequalifies all trade contractors with a score of 70 or higher. A minimum of three trade contractors must be prequalified in each trade, or a new RFQ issued.
15. Public Agency issues Request for Bid (RFB) to prequalified Trade Contractors. Bid packages include construction documents at 100% completion. Bid form must list sub-subs, who must be prequalified by the trade contractors.
16. Trade Contracts are awarded to lowest bidders. If there are fewer than three bidders and the bids are over-budget, the Public Agency must try to negotiate a price with one of the bidders (starting with the lowest). If unsuccessful, the CM solicits additional bids using procedures for selection of other subcontractors.
17. Trade Contract is the same as in Ch.149.
18. Other subcontractors are prequalified and selected by the CM, with the approval of the Public Agency. Public Agency has right to add or subtract from the list of subs prequalified by the CM. Form of contract is at the discretion of the CM.
19. Construction begins.
20. Within 5 years (i.e., by July 2009) the Office of the Inspector General reviews Public Agency experience with CM at Risk and submits a report to the Legislature with recommendations, if any.

