

Accompanying the first recommendation of the Division of Energy Resources (Houses, No. 100). State Administration.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Ninety-Two.

AN ACT RELATIVE TO CONTRACTS FOR THE PURCHASE OF ENERGY MANAGEMENT SERVICES.

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

1 SECTION 1. Section 38C of chapter 7 of the General Laws,
2 as appearing in the 1990 Official Edition, is hereby further
3 amended by adding after the last sentence of subsection (e) the
4 following sentence: — Projects consisting of energy management
5 services procured in accordance with section 11B of chapter 25A
6 and regulations promulgated thereunder shall be exempt from the
7 jurisdiction of the board.

1 SECTION 2. Section 38K of chapter 7 of the General Laws,
2 as appearing in the 1990 Official Edition, is hereby amended by
3 inserting after subsection (c) thereof, the following new
4 subsection: —
5 (d) Notwithstanding the provisions of paragraph (a) of this
6 section, a city, town, or agency, board, commission, authority or
7 instrumentality thereof may procure energy management services
8 in accordance with section 11B of chapter 25A and regulations
9 promulgated thereunder.

1 SECTION 3. Section 3 of chapter 25A of the General Laws,
2 as appearing in the 1990 Official Edition, is hereby amended by
3 inserting, after the definition of "Energy conservation projects,"
4 the following paragraph: —
5 "Energy management services", a program of services,
6 including energy audits, energy conservation measures, energy

7 conservation projects, or a combination thereof, as well as
8 building maintenance and financing services primarily intended
9 to reduce the cost of energy to operate one or more buildings;.

1 SECTION 4. Chapter 25A of the General Laws, as appearing
2 in the 1990 Official Edition, is hereby amended by inserting after
3 section 11A the following new section: —

4 Section 11B. (a) A public agency may, in the manner provided
5 by this section, undertake the procurement of energy management
6 services. At least one week prior to soliciting proposals for a
7 contract pursuant to this section, a public agency, not including
8 a state agency or building authority, shall notify the commissioner
9 of energy resources in writing, in such form and including such
10 information as the commissioner shall prescribe by regulation, of
11 the agency's intent to solicit proposals. Such notification shall,
12 at a minimum, include a complete copy of the agency's request
13 for proposals. Requests for proposals for an energy management
14 services contract to be entered into on behalf of a state agency
15 or a building authority, shall be developed jointly by the division
16 of capital planning and operations and the using agency. Such
17 proposals shall only be solicited by said division after the
18 commissioner of said division has given his prior written approval
19 and no contract for energy management services shall be valid
20 unless approved and signed by said commissioner.

21 The public agency shall solicit competitive sealed proposals
22 through a request for proposals. The provisions of Chapter 30B
23 shall apply to the procurement of energy management services
24 pursuant to this section by public agencies, not including state
25 agencies or building authorities, and a public agency, not
26 including a state agency or building authority, procuring energy
27 management services pursuant to this section shall be deemed a
28 "governmental body" for purposes of such procurement. The
29 request for proposals shall include (1) the time and date for receipt
30 of proposals and the address of the office to which the proposals
31 are to be delivered; and (2) a description of the services to be
32 procured, including specifications and all evaluation criteria that
33 will be utilized by the public agency. The request for proposals
34 may incorporate documents by reference, provided that the

35 request for proposals specifies where prospective offerors may
36 obtain the documents. The public agency shall make copies of the
37 request for proposals available to all persons on an equal basis.
38 Public notice of the request for proposals shall conform to the
39 procedures set forth in paragraph (1) of section 44J of
40 chapter 149. Proposals shall be opened publicly, in the presence
41 of two or more witnesses, at the time specified in the request for
42 proposals, and shall be available for public inspection.

43 The provisions of sections 44A, 44B and 44E through 44H,
44 inclusive, of chapter 149 shall not apply to contracts procured
45 pursuant to this section. The provisions of section 44D of
46 chapter 149 shall apply as appropriate to proposals submitted for
47 contracts under this section and every such proposal shall be
48 accompanied by (1) a copy of a certificate of eligibility issued by
49 the commissioner of capital planning and operations, and (2) by
50 an update statement. The offeror's qualifications shall be
51 evaluated by the division of capital planning and operations in
52 a manner designated by the commissioner of said division. If the
53 public agency determines that any offeror is not responsible or
54 eligible, the agency shall reject the offeror, and shall give written
55 notice of such action to the division of capital planning and
56 operations.

57 Payments under a contract for energy management services
58 may be based in whole or in part on energy cost savings.

59 The public agency shall promptly publish in the central register
60 notice of the offeror awarded the contract.

61 A public agency entering into such contract shall, within thirty
62 days, file a copy thereof with the commissioner of energy
63 resources.

64 (b) The commissioner of energy resources, in consultation with
65 the commissioner of the division of capital planning and
66 operations, shall promulgate regulations for the procurement of
67 services under this section, provided however, that the
68 commissioner of the division of capital planning and operations
69 shall promulgate regulations for services to be procured for state
70 agencies and building authorities. Such regulations may limit the
71 scope of services procured and the duration of contracts, and shall
72 include any requirements that the commissioner of energy

73 resources or commissioner for the division of capital planning and
74 operations deems necessary to promote prudent management of
75 such contracts at the appropriate facilities. Such regulations shall
76 require the submission, at least annually, of such information as
77 the commissioner of energy resources or commissioner of the
78 division of capital planning and operations may deem necessary
79 in order to monitor the costs and benefits of contracts for energy
80 management services.

81 (c) The commissioner of energy resources shall enforce the
82 requirements of this section and regulations promulgated
83 hereunder as they relate to public agencies except for state
84 agencies and building authorities and shall have all the necessary
85 powers to require compliance therewith. The commissioner of the
86 division of capital planning and operations shall enforce all such
87 regulations as they relate to state agencies and building
88 authorities. Any order of the commissioner of energy resources
89 under this paragraph shall be effective and may be enforced
90 according to its terms, and enforcement thereof shall not be
91 suspended or stayed by the entry of an appeal therefrom. The
92 superior court for Suffolk county shall have jurisdiction over
93 appeals of orders of the commissioner of energy resources under
94 this paragraph, and shall also have jurisdiction upon application
95 of said commissioner to enforce all orders of said commissioner
96 under this paragraph. The burden of proof shall be upon the
97 appealing party to show that the order of said commissioner is
98 invalid. An aggrieved person shall not be required to seek an order
99 from said commissioner as a condition precedent to seeking any
100 other remedy.

101 (d) As used in this section, the following words and terms shall
102 have the following meanings:

103 "Building authority", the University of Massachusetts Building
104 Authority, the Southeastern Massachusetts University Building
105 Authority, the University of Lowell Building Authority or the
106 Massachusetts State College Building Authority or any other
107 building authority which may be established for similar purposes.

108 "Eligible", able to meet all requirements for offerors or bidders
109 set forth in this section and section forty-four D of chapter one
110 hundred and forty-nine and not debarred from bidding under

111 section forty-four C of said chapter one hundred and forty-nine
112 or any other applicable law, and who shall certify that he or she
113 is able to furnish labor that can work in harmony with all other
114 elements of labor employed or to be employed on the work.

115 “Public agency”, a department, agency, board, commission,
116 authority, or other instrumentality of the Commonwealth or
117 political subdivision of the Commonwealth or two or more
118 subdivisions thereof.

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

125 “State agency”, a state agency, board, bureau, department,
126 division, section, or commission of the commonwealth or county.

127 (e) The commissioner of energy resources shall monitor all
128 contracts entered into pursuant to this section and shall annually
129 file a report on the status of such contracts, including the costs
130 and benefits of each contract to date, to the house and senate
131 committees on ways and means and the joint committee on energy
132 not later than June thirtieth of each year. Said commissioner shall
133 file each report with the inspector general at least thirty days
134 before filing such report with said committees. The inspector
135 general shall review each report with respect to the prevention of
136 fraud, waste and abuse and shall make such comments as the
137 inspector general deems warranted. At the request of the inspector
138 general, the commissioner of energy resources shall annex the
139 inspector general’s comments to said report.

140 (f) The commissioner’s report due June 30, 1997, shall review
141 the costs and benefits of contracts entered into pursuant to this
142 section and shall include the commissioner’s recommendation as
143 to whether the authority to enter into such contracts should be
144 extended.

1 SECTION 5. Section 39R of chapter 30 of the General Laws,
2 as appearing in the 1990 Official Edition, is hereby amended by
3 striking out paragraphs (1) and (2) in subsection (a) and inserting
4 in place thereof the following paragraphs: —

5 (1) "Contractor" means any person, corporation, partnership,
6 joint venture, sole proprietorship, or other entity awarded a
7 contract pursuant to section thirty-nine M of chapter thirty,
8 sections forty-four A through H, inclusive of chapter one hundred
9 and forty-nine, sections thirty eight A $\frac{1}{2}$ through O, inclusive, of
10 chapter seven and section eleven B of chapter twenty-five A.

11 (2) "Contract" means any contract awarded or executed
12 pursuant to sections thirty-eight A $\frac{1}{2}$ through O, inclusive, of
13 chapter seven and any contract awarded or executed pursuant to
14 section thirty-nine M of chapter thirty, or sections forty-four A
15 through H, inclusive, of chapter one hundred and forty-nine, or
16 section eleven B of chapter twenty-five A, which is for an amount
17 or estimated amount greater than one hundred thousand dollars.

1 SECTION 6. Section 39R of chapter 30 of the General Laws,
2 as appearing in the 1990 Official Edition, is hereby amended by
3 striking out in subsection (b) the words "Subsection (a)(2) hereof
4 notwithstanding, every agreement or contract awarded or
5 executed pursuant to section thirty B through thirty P, inclusive,
6 of chapter seven, and pursuant to section thirty-nine M of chapter
7 thirty or to section forty-four A through H, inclusive, of chapter
8 one hundred and forty-nine, shall provide that:", and inserting in
9 place thereof the following words: —

10 Subsection (a)(2) hereof notwithstanding, every agreement or
11 contract awarded or executed pursuant to sections thirty-
12 eight A $\frac{1}{2}$ through O, inclusive, of chapter seven, section thirty-
13 nine M of chapter thirty, section forty-four A through H,
14 inclusive, of chapter one hundred and forty-nine, or sec-
15 tion eleven B of chapter twenty-five, shall provide that:.

1 SECTION 7. Subsection (2) of section 44A of chapter 149 of
2 the General Laws, as appearing in the 1990 Official Edition, is
3 hereby amended by adding at the end thereof the following new
4 sentence: —

5 Further notwithstanding the provisions of the preceding
6 paragraph of this subsection, a public agency may procure energy
7 management services in accordance with section eleven B of
8 chapter twenty-five A and regulations promulgated thereunder.

1 SECTION 8. Section 44J of chapter 149, as amended by
2 section 79 of chapter 341 of the acts of 1989, is hereby amended
3 by striking out the first sentence of subsection (1) and substituting
4 therefor the following sentence: —

5 (1) No public agency or authority of the commonwealth or any
6 political subdivision thereof shall award any contract for which
7 competitive bids are required pursuant to section forty-four A of
8 this chapter or section thirty-nine M of chapter thirty, or for
9 which competitive proposals are required pursuant to sub-
10 section (4) of section 44E of this chapter or section eleven B of
11 chapter twenty-five A, unless a notice inviting bids or proposals
12 therefor shall have been posted no less than one week prior to
13 the time specified in such notice for the receipt of said bids or
14 proposals in a conspicuous place in or near the offices of the
15 awarding authority, and shall have remained posted until the time
16 so specified, and unless such notice shall also have been published
17 at least once not less than two weeks prior to the time so specified
18 in the central register published by the secretary of state pursuant
19 to section twenty A of chapter nine and in a newspaper of general
20 circulation in the locality of the proposed project.

