

The General Laws of Massachusetts

PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

CHAPTER 25A. DIVISION OF ENERGY RESOURCES

Chapter 25A: Section 11C. Contracts for procurement of energy management services

Section 11C. (a) A public agency may, in the manner provided by this section, contract for the procurement of energy management services. Such contracts may include terms of ten years or less. Contracts which include cogeneration projects shall have terms of twenty years or less. The public agency shall solicit competitive sealed proposals through a request for proposals. At least one week prior to soliciting proposals for a contract pursuant to this section, a public agency shall notify the commissioner of energy resources in writing, in such form and including such information as the commissioner shall prescribe by regulation, of the agency's intent to solicit proposals. Such notification shall, at a minimum, include a complete copy of the agency's request for proposals. An acknowledgment of receipt, in such form and by including such information as the commissioner shall prescribe by regulation, shall be issued to the public agency upon successful compliance with the requirements of this paragraph.

Requests for proposals for an energy management services contract to be entered into on behalf of a state agency or a building authority, shall be developed jointly by the division of capital asset management and maintenance and the using agency. Such proposals shall only be solicited by the division of capital asset management and maintenance after the commissioner of said division has given his prior written approval, and no contract for energy management services shall be valid unless approved and signed by said commissioner. Said commissioner may delegate to state agencies and building authorities the authority to enter into such contracts with an estimated construction cost of less than two hundred thousand dollars. Such delegation shall be in writing from the commissioner to the regulating agency or building authority.

The request for proposals published by a public agency under this section shall include: (1) the time and date for receipt of proposals and the address of the office to which the proposals are to be delivered; (2) a description of the services to be procured, including specific requirements and all evaluation criteria that will be utilized by the state agency or building authority; and (3) proposed contract terms and conditions and an identification of such terms and conditions which shall be deemed mandatory and non-negotiable. The request for proposals may incorporate documents by reference, provided that the request for proposals specifies where prospective offerors may obtain the documents. The public agency shall make copies of the request for proposals available to all persons on an equal basis. Public notice of the request for proposals shall conform to the procedures set forth in subsection (1) of section forty-four J of chapter one hundred and forty-nine. Proposals shall be opened publicly, in the presence of two or more witnesses, at the time specified in the request for proposals, and shall be available for public inspection.

The provisions of sections forty-four A, forty-four B and forty-four E through forty-four H, inclusive, of chapter one hundred and forty-nine shall not apply to contracts procured pursuant to this section. The provisions of section forty-four D of chapter one hundred and forty-nine shall apply as appropriate

to proposals submitted for contracts under this section, and every such proposal shall be accompanied by (1) a copy of a certificate of eligibility issued by the commissioner of the division of capital asset management and maintenance, and (2) by an update statement. The offeror's qualifications shall be evaluated by the division of capital asset management and maintenance in a manner designated by the commissioner of said division. If the public agency determines that any offeror is not responsible or eligible, the public agency shall reject the offeror, and shall give written notice of such action to the division of capital asset management and maintenance.

State agencies and building authorities shall award contracts under this section to the lowest offeror demonstrably possessing the skill, ability, and integrity necessary to perform faithfully energy management services.

Payments under a contract for energy management services may be based in whole or in part on any cost savings attributable to a reduction in energy and water consumption due to the contractor's performance or revenues gained due to the contractor's services which are aimed at energy and water cost savings.

(b) The provisions of this subsection shall apply to a governmental body, as defined in this section, procuring contracts under this section.

Unless no other manner of description suffices, and the governmental body so determines in writing, setting forth the basis for the determination, all requirements shall be written in a manner which describes the requirements to be met without having the effect of exclusively requiring a proprietary supply or service, or a procurement from a sole source.

Subject to a governmental body's authority to reject, in whole or in part, any and all proposals, as provided in this section, a governmental body shall unconditionally accept a proposal without alternation or correction, except as provided in this paragraph. An offeror may correct, modify, or withdraw a proposal by written notice received in the office designated in the request for proposals prior to the time and date set for opening the proposals. After proposal opening, an offeror may not change any provisions of the proposal in a manner prejudicial to the interests of the governmental body or fair competition. The governmental body shall waive minor informalities or allow the offeror to correct them. If a mistake and the intended proposal are clearly evident on the face of the proposal document, the governmental body shall correct the mistake to reflect the intended correction and so notify the offeror in writing, and the offeror may not withdraw the proposal. An offeror may withdraw a proposal if a mistake is clearly evident on the face of the proposal but the intended correction is not similarly evident.

The governmental body shall evaluate each proposal and award each contract based solely on the criteria set forth in the request for proposals. Such criteria shall include, but not be limited to, all standards by which the governmental body will evaluate responsiveness, responsibility, qualifications of the offeror, technical merit, and cost to the governmental body. The request for proposals shall specify the method for comparing proposals to determine the proposal offering the lowest overall cost to the governmental body, taking into consideration comprehensiveness of services, energy or water cost savings, costs to be paid by the governmental body, and revenues to be paid to the governmental body. If the governmental body awards the contract to an offeror who did not submit the proposal offering the lowest overall cost, the governmental body shall explain the reason for the award in writing.

The evaluations shall specify revision, if needed, to each proposal which should be obtained by negotiation prior to awarding the contract to the offeror of the proposal. The governmental body may condition an award on successful negotiation of the revisions specified in the evaluation, and shall explain in writing the reasons for omitting any such revision from a plan incorporated by reference in

the contract.

(c) The public agency may cancel a request for proposals, or may reject in whole or in part any and all proposals when the public agency determines that cancellation or rejection serves the best interests of the public agency. The public agency shall state in writing the reason for a cancellation or rejection.

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

The public agency shall, within thirty days, file a copy thereof with the commissioner of energy resources.

The commissioner of energy resources, in consultations with the commissioner of the division of capital asset management and maintenance, shall promulgate regulations for the procurement of energy management services under this section, provided however, that the commissioner of the division of capital asset management and maintenance shall promulgate regulations for services to be procured for state agencies and building authorities, and further provided, that regulations affecting the operations of housing authorities within the jurisdiction of the department of housing and community development shall be promulgated in consultation with the director of housing and community development. Such regulations may limit the scope of services procured and the duration of contracts, and shall include any requirements that the commissioner of energy resources or commissioner of the division of capital asset management and maintenance deems necessary to promote prudent management of such contracts at the appropriate facilities. Such regulations shall require the submission, at least annually, of such information as the commissioner of energy or commissioner of the division of capital asset management and maintenance may deem necessary in order to monitor the costs and benefits of contracts for energy management services.

(d) The commissioner of energy resources shall enforce the requirements of this section and regulations promulgated hereunder as they relate to public agencies except for state agencies and building authorities and shall have all the necessary powers to require compliance therewith. The commissioner of the division of capital asset management and maintenance shall enforce all such regulations as they relate to state agencies and building authorities. Any order of the commissioner of energy resources under this subsection shall be effective and may be enforced according to its terms, and enforcement thereof shall not be suspended or stayed by the entry of an appeal therefrom. The superior court for Suffolk county shall have jurisdiction over appeals of orders of the commissioner of energy resources under this subsection, and shall also have jurisdiction upon application of said commissioner to enforce all orders of said commissioner under this subsection. The burden of proof shall be upon the appealing party to show that the order of said commissioner is invalid. An aggrieved person shall not be required to seek an order from said commissioner as a condition precedent to seeking any other remedy.

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

“Building authority”, the University of Massachusetts Building Authority, the Southeastern Massachusetts University Building Authority, the University of Lowell Building Authority or any other building authority which may be established for similar purposes.

“Eligible”, able to meet all requirements for offerors or bidders set forth in this section and section forty-four D of chapter one hundred and forty-nine and not debarred from bidding under section forty-four C of said chapter one hundred and forty-nine or any other applicable law, and who shall certify that he or she is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work.

“Governmental body”, a city, town, district, regional school district, county, or agency, board, commission, authority, department or instrumentality of a city, town, district, regional school district or

county, and all other public agencies which are not a state agency or building authority.

“Minor informalities”, minor deviations, insignificant mistakes, and matters of form rather than substance of the proposal or contract document which can be waived or corrected without prejudice to other offerors, potential offerors, or the public agency.

“Person”, any natural person, business, partnership, corporation, union, committee, club, or other organization, entity or group of individuals.

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

“Responsible”, 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 this section and section forty-four D of chapter one hundred and forty-nine.

“Responsive offeror”, a person who has submitted a proposal which conforms in all respects to the requests for proposals.

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

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PART I. ADMINISTRATION OF THE GOVERNMENT

TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH

CHAPTER 25A. DIVISION OF ENERGY RESOURCES

Chapter 25A: Section 11I. Contracts for energy management; guaranteed energy savings contracts; qualified providers

[Text of section added by 2006, 11, Sec. 1 effective February 3, 2006.]

Section 11I. (a) As used in this section, the following words shall have the following meanings:--

"Eligible", able to meet all requirements for offerors or bidders set forth in this section including, without limitation, being certified by the division of capital asset management and maintenance as eligible to provide energy management systems services and not debarred from bidding under section 44C of chapter 149 or any other applicable law.

"Energy conservation measures", measures involving modifications or maintenance and operating procedures of a building or facility and installations therein, which are designed to reduce energy consumption in such building or facility, or the installation, modification of an installation in a building or facility which is primarily intended to reduce energy consumption.

"Energy conservation projects", projects to promote energy conservation, including but not limited to, energy conserving modification to windows and doors; caulking and weather-stripping; insulation, automatic energy control systems; hot water systems; equipment required to operate variable steam, hydraulic, and ventilating systems; plant and distribution system modifications including replacement of burners, furnaces or boilers; devices for modifying fuel openings; electrical or mechanical furnace ignition systems; utility plant system conversions; replacement or modification of lighting fixtures; energy recovery systems; and, cogeneration systems.

"Energy management services", a program of services, including energy audits, energy conservation measures, energy conservation projects, or a combination thereof, and building maintenance and financing services, primarily intended to reduce the cost of energy and water in operating 1 or more buildings, which may be paid for in whole or in part, by cost savings attributable to a reduction in energy and water consumption which result from the services.

"Energy management systems", the design and installation of systems or maintenance programs to conserve energy use within a building, including, without limitation, performance-contracting energy saving projects; the installation or modification of new and existing equipment which will reduce energy and water consumption associated with heating, ventilation, and air conditioning system, lighting system, building envelope, domestic hot water system, and other energy and water using devices; and the work associated with monitoring and verifying project savings and the study or design of the subject work, whether performed directly or managed through subcontractors.

"Energy savings", a measured reduction in fuel, energy, operating or maintenance costs resulting from the implementation of 1 or more energy management services when compared with an established baseline of previous fuel, energy, operating or maintenance costs, including, but not limited to, future capital replacement expenditures avoided as a result of equipment installed or services performed pursuant to the guaranteed energy savings contract.

"Guaranteed energy savings contract", a contract for the evaluation, recommendation or implementation of 1 or more energy management services in which payments are based, in whole or in part, on any energy savings attributable to the contract.

"Person", any natural person, business, partnership, corporation, union, committee, club, or other organization, entity or group of individuals.

[Definition of "Public agency" effective until January 1, 2007. For text effective January 1, 2007, see below.]

"Public agency", a city, town or district, including a regional school district, or a combination of 2 or more such cities, towns or districts, including regional school districts, or a department, agency, board, commission, authority or other instrumentality of the commonwealth.

[Definition of "Public agency" as amended by 2006, 11, Sec. 2 effective January 1, 2007. See 2006, 11, Sec. 4. For text effective until January 1, 2007, see above.]

"Public agency", a city, town, district including a regional school district, or a combination of 2 or more such cities, towns or districts, including regional school districts.

"Qualified provider", responsible and eligible person able to meet all requirements set forth in this section, and not debarred from bidding under section 44C of chapter 149 or any other applicable law and experienced in the design, implementation, and installation of energy savings measures.

"Request for qualifications", a solicitation directed to qualified providers issued by a public agency to obtain energy management services pursuant to a guaranteed energy savings contract subject to the provisions of this section. The request for qualifications shall include the following:

- (1) The name and address of the public agency.
- (2) The name, address, title, and phone number of a contact person.
- (3) The date, time, and place where qualifications must be received.
- (4) A description of the services to be procured, including a facility profile with a detailed description of each building involved and accurate energy consumption data for the most recent 2 year period, stated objectives for the program, a list of building improvements to be considered or required and a statement as to whether the proposed improvements will generate sufficient energy savings to fund the full cost of the program.
- (5) The evaluation criteria for assessing the qualifications.
- (6) A statement that the public agency may cancel the request for qualifications, or may reject in whole or in part any and all energy savings measures, when the public agency determines that cancellation or rejection serves the best interests of the public.
- (7) Any other stipulations and clarifications the public agency may require, which shall be clearly identified in the request for qualifications.

"Responsible", 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 44D of chapter 149.

(b) A public agency may choose to use this section in the procurement of energy management services as an alternative to the procedures set out in section 11C. Nothing in this section shall preclude any such agency from choosing to proceed thereafter under said section 11C.

(c) A public agency may enter into a guaranteed energy savings contract in order to achieve energy

savings at facilities in accordance with this section.

(d) All energy savings measures shall comply with current local, state, and federal construction and environmental codes and regulations.

(e) Before entering into a guaranteed energy savings contract, a public agency shall issue a request for qualifications. Public notice of the request for qualifications shall conform to the procedures set forth in subsection (1) of section 44J of chapter 149. At least 1 week before soliciting a request for qualifications for a guaranteed energy savings contract, a public agency shall notify the commissioner of energy resources in writing, in a form and including information as the commissioner of the division of capital asset management and maintenance shall prescribe by regulation, of the agency's intent to solicit qualifications. The notification, at a minimum, shall include a copy of the agency's request for qualifications. An acknowledgment of receipt, in a form and including information as the commissioner of the division of capital asset management and maintenance shall prescribe by regulation, shall be issued by the commissioner of energy resources to the public agency upon successful compliance with the requirements of this subsection. Qualifications shall be opened publicly, in the presence of 2 or more witnesses, at the time specified in the request for qualifications, and shall be available for public inspection. The provisions of sections 44A, 44B and 44E to 44H, inclusive, of chapter 149 shall not apply to contracts procured pursuant to this section. Section 44D of said chapter 149 shall apply as appropriate to qualifications submitted for contracts under this section, and every such qualification shall be accompanied by (1) a copy of a certificate of eligibility issued by the commissioner of the division of capital asset management, and (2) by an update statement.

The public agency shall evaluate the qualified providers to determine which best meets the needs of the public agency by reviewing the following:--

- (1) references of other energy savings contracts performed by the qualified providers;
- (2) the certificate of eligibility and update statement provided by the qualified providers;
- (3) quality of the products proposed;
- (4) methodology of determining energy savings;
- (5) general reputation and performance capabilities of the qualified providers;
- (6) substantial conformity with the specifications and other conditions set forth in the request for qualifications;
- (7) time specified in the qualifications for the performance of the contract; and
- (8) any other factors the public agency considers reasonable and appropriate, which factors shall be made a matter of record.

Respondents shall be evaluated only on the criteria set forth in the request for qualifications.

The public agency shall conduct discussions with, and may require public presentations by, each person who submitted qualifications in response to the request for qualifications regarding their qualifications, approach to the project, and ability to furnish the required services. The public agency shall select in order of preference 3 such persons, unless fewer persons respond, they consider to be the most highly qualified to perform the required services. The agency may request, accept, and consider proposals for the compensation to be paid under the contract only during competitive negotiations conducted pursuant to subsection (f).

(f) The public agency may cancel a request for qualifications, or may reject in whole or in part any and all proposals when the public agency determines that cancellation or rejection serves the best interests of the public agency. The public agency shall state in writing the reason for a cancellation or

rejection.

(g) The public agency shall negotiate a contract with the most qualified person at compensation which the public agency determines is fair, competitive, and reasonable. Should the public agency be unable to negotiate a satisfactory contract with the person considered to be the most qualified at a price the public agency determines to be fair, competitive, and reasonable, negotiations with that person shall be formally terminated. The public agency shall then undertake negotiations with the second most qualified person. Failing accord with the second most qualified person, the public agency shall terminate those negotiations and then undertake negotiations with the third most qualified person. Should the public agency be unable to negotiate a satisfactory contract with any of the selected persons, the public agency may select additional qualified providers who responded to the request for qualifications, in the order of their competence and qualification, and continue negotiations in accordance with this subsection until either an agreement is reached or the public agency cancels the request for qualifications.

(h) The decision of a public agency as defined by section 1, regarding the selection of a qualified provider shall be final and not subject to appeal except on the grounds of fraud or collusion.

(i) The public agency shall provide public notice of the meeting at which it proposes to award the guaranteed energy savings contract, of the name of the parties to the proposed contract, and of the purpose of the contract. The public notice shall be made at least 10 days before the meeting. The public agency shall promptly publish in the central register notice of the award. The public agency shall promptly publish in the central register notice of the award and those public agencies other than state agencies and building authorities shall notify the commissioner of energy resources of such award and provide a copy of the guaranteed energy savings contract.

(j) The guaranteed energy savings contract shall include a written guarantee of the qualified provider that either the amount of energy savings guaranteed will be achieved or the qualified provider shall reimburse the public agency for the shortfall amount. Methods for measurement and verification of guaranteed savings shall conform to the most recent standards established by the Federal Energy Management Program of the United States Department of Energy. The commissioner of energy resources shall enforce the requirements of this section and regulations promulgated hereunder as they relate to public agencies except for state agencies and building authorities and shall have all the necessary powers to require compliance therewith. The commissioner of the division of capital asset management and maintenance shall enforce the regulations as they relate to state agencies and building authorities. Any order of the commissioner of energy resources under this subsection shall be effective and may be enforced according to its terms, and enforcement thereof shall not be suspended or stayed by the entry of an appeal therefrom. The superior court for Suffolk county shall have jurisdiction over appeals of orders of the commissioner of energy resources under this subsection, and shall also have jurisdiction upon application of the commissioner to enforce all orders of the commissioner under this subsection. The burden of proof shall be upon the appealing party to show that the order of the commissioner is invalid. An aggrieved person shall not be required to seek and order from the commission as a condition precedent to seeking any other remedy. The value of guaranteed savings may represent either all, or part of annual payments at the discretion of the agency. The guaranteed energy savings contract term for providing a guarantee, measurement and verification, maintenance, service and installment or lease payments shall not exceed 20 years. The division of capital asset management and maintenance, in concurrence with the state inspector general, shall promulgate regulations for the procurement of energy management services, including establishing safeguards to be included in guarantee energy savings contracts. The regulations shall require the submission, at least annually, of information as the commission of the division of capital asset management and maintenance and the state inspector general consider necessary in order to monitor the costs and

benefits of contracts for energy management services.

(k) Payments under a contract for energy management services may be based in whole or in part on any cost savings attributable to a reduction in energy and water consumption due to the contractor's performance or revenues gained due to the contractor's services which are aimed at energy and water cost savings.

(l) Unless no other manner of description suffices, and the public agency so determines in writing, setting forth the basis for the determination, all requirements shall be written in a manner which describes the requirements to be met without having the effect of exclusively requiring a proprietary supply or service, or a procurement from a sole source.

(m) Before entering into a guaranteed energy savings contract, the public agency shall require the qualified provider to file with the public agency a payment or a performance bond relating to the installation of energy savings measures, in an amount equal to 100 per cent of the estimated contract value from a surety company licensed to do business in the commonwealth and whose name appears on United States Treasury Department Circular 570.

(n) Guaranteed energy savings contracts may extend beyond the fiscal year in which they become effective.