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FRANK T. KEEFE
SECRETARY

TUNNEY F. LEE
DEPUTY COMMISSIONER

MEMORANDUM

TO: All Interested Parties

FROM: Tunney F. Lee, Deputy Commissioner
Division of Capital Planning and Operations

DATE: January 16, 1985

RE: Chapter 484 of the Acts of 1984

* *

Chapter 484 of the Acts of 1984 has recently been signed into law. The Act makes a number of significant revisions in the public construction laws and state real property laws. For the most part, Chapter 484 reflects the work of the Inspector General's Task Force on Improving Chapter 579 of the Acts of 1980, although a number of provisions of the Task Force's proposed legislation were revised or supplemented during the legislative process.

As the public agency most directly affected by Chapter 484 and pursuant to the Division's responsibilities to provide legal counsel to public agencies under G.L. Chapter 7, section 40C (8), the Division's legal staff has compiled the attached memorandum as a guide to those persons, agencies, and businesses whose operations will be affected by the Act. The sections of the Act that will be of particular concern to the following groups are as follows:

State Agencies: entire Act.

Counties: Sections 1-3, 6-8, 10, 11, 15-17, 19, 21-23, 26, 30, 34, 35, 37-53, 56.

Other Public Agencies: Sections 1-3, 6, 7, 10, 15-17, 19, 21-23, 30, 34, 35, 37-40, 42-53, 56.

Contractors: Sections 7, 9-11, 26, 30, 34, 35, 37-40, 42-53, 56.

Designers: Sections 1-3, 5-7, 9-11, 26, 30, 34, 35, 42-53, 56.

Developers: Sections 8, 9, 13-19, 30, 54, 55.

The attached memorandum should be read in concert with Chapter 484. Copies of Chapter 484 will eventually be available in the State House Bookstore, Room 116, State House. A limited number of copies may be picked up in the DCPO's Bid Room at One Ashburton Place, Boston, MA, 15th Floor.

If you have any questions concerning the provisions of Chapter 484, please call DCPO's Legal Office at 727-4053, 727-8726.

TFL;RPG:mac

SUMMARY OF CHAPTER 484 OF THE ACTS OF 1984

INTRODUCTION

Chapter 484 of the Acts of 1984 (the Act) was recently signed into law. The Act makes many significant changes in the state's public construction laws and the state's real property management laws. It is a complex piece of legislation the large portion of which originated in the work of the Inspector General's Task Force on Improving Chapter 579 of the Acts of 1980. Below is a review of the Act, with explanations of the most important substantive revisions mandated by the Act, brief statements of the purpose of the revisions and their impact on current procedure or practices.

The provisions of the Act go into effect on April 7, 1985, with the exception of section 46, which becomes effective on July 1, 1985. For purposes of comparing current requirements with the revisions mandated by the Act, this memorandum refers to the law in effect prior to April 7, 1985 as the "current" law.

This memorandum is intended to be used as a general guide to the provisions of the Act. It should be read in concert with the specific statutory language and should not be used as a substitute for the Act itself.

DESIGNER SELECTION

Section 1. Amends Chapter 7, section 38A½

This section revises the business organization requirements for design firms doing public building construction design work. Its effect will be to expand the number of firms that can provide design services on public building projects.

Section 2. Amends Chapter 7, section 38C

This section appears to make no immediate change to the existing dollar amount threshold that triggers compliance with designer selection procedures for feasibility studies.

Section 3. Amends Chapter 7, section 38D

This section revises the current advertising requirements for design services by providing that design services on building projects, the estimated construction cost of which ranges between ten and twenty-five thousand dollars, need only be advertised in the Central Register.

Section 4. Amends Chapter 7, section 38F(c)

This is a technical revision.

Section 5. Amends Chapter 7, section 38F(e)

This section removes an extremely onerous conflicts-of-interest provision currently applicable to Designer Selection Board members.

Section 6. Amends Chapter 7, section 38H

The most significant changes made by this section are the following:

paragraph (d). The strict separation between the designer performing a study and the designer providing design development services is eliminated on "repair" projects, provided the total design fee is twenty-five thousand dollars or less.

paragraph (f). Designers will be required to carry professional liability insurance coverage in a minimum amount equal to ten percent of the estimated construction cost of a public building project. The current law allows the awarding authority to determine the amount of coverage. The awarding authority may increase the minimum coverage required.

paragraph (i). On building projects undertaken by a city or town, the study/program designer may be continued into the design development stage of the same project, provided an independent review is conducted of the study/program to insure that the study/program is reasonable and adequate.

GENERAL PROVISIONS

Section 7. Amends Chapter 7, section 39A (g), (g)(1)

This section is extremely significant because it modifies the definitions of "capital facility project" and "building project" that are the legal cornerstones in determining the applicability of various laws to a particular project. The changes in the definitions will have the following effects:

a. The funding source for a public building project, eg. appropriation, bond, trust fund, restricted revenue, grant, etc., is no longer relevant in determining whether a project is a capital facility project. In the case of state agency building projects, particular attention is directed to Chapter 7, section 40A(1) as revised by Section 10 of the Act.

b. Building projects undertaken by all public agencies as part of the development of sewer, water, and highway systems, are not subject to the designer selection procedures of Chapter 7, section 38C. This clarifies an ambiguity in the current definition of building project, as it applies to cities and towns.

Section 8. Amends Chapter 7, section 39A(v)

The current exemption of county owned land from the state property procedures of Chapter 7, section 40E-40L, is retained in this section.

DIVISION OF CAPITAL PLANNING AND OPERATIONS

Section 9. Amends Chapter 7, section 39B

This section clarifies those procedures of DCPO that must be formalized as regulations, subject to legislative and gubernatorial approval.

Section 10. Revises Chapter 7, section 40A (1)

This section provides that DCPO retains "oversight" jurisdiction (not "control and supervision") over state building projects funded from sources other than appropriation or bond issues. See Section 7 of the Act and the definitions of "oversight" and "control and supervision" in Chapter 7, section 39A. It will have particular significance in administering those projects funded out of trust funds or restricted revenue accounts.

Section 11. Revises Chapter 7, section 40C(2)

This section modifies the current DCPO MBE/WBE set aside program:

a. Set aside credits are allowed for MBE/WBE suppliers equal to ten percent of the purchase order amount; a one hundred percent credit is allowed if the MBE/WBE supplier is also the manufacturer of the product.

b. DCPO is no longer locked into an overall five percent set aside for MBEs and five percent set aside for WBEs on each project it advertises for bid. DCPO can modify the MBE/WBE set aside amounts on a project provided it meets annual MBE/WBE set aside targets.

Section 12. Amends Chapter 7, section 40D

This section combines the various annual reporting requirements of DCPO into a single section of the law.

<u>DCPO'S REAL PROPERTY MANAGEMENT</u>

Section 13. Amends Chapter Chapter 7, section 40E

This section clarifies that title to real property of every state agency, board of trustees, etc., shall, as a matter-of-law, be considered to be held in the name of the Commonwealth. It eliminates the argument whether Section 10 of Chapter 579 of the Acts of 1980 required a physical title transfer to achieve this uniform result.

Section 14. Amends Chapter 7, section 40E

This section specifies that DCPO cannot delegate to other state agencies, its authority to declare state-owned real property surplus.

Section 15 and 16. Amends Chapter 7, section 40E and 40F

These sections of the Act significantly modify the state's real property disposition procedures. Generally, the provisions of section 40F detail the procedures that DCPO must follow when it determines to dispose of a real property interest in state property, either temporarily or permanently.

Significant aspects of the section that revise or supplement the current law are as follows:

a. The section distinguishes between a disposition of state-owned land to another public agency for a direct public use, and a pass through for a private use.

b. The section distinguishes between temporary and permanent uses of available state property.

c. The section provides a procedure for developing re-use restrictions on property to be disposed.

d. The section expands DCPO's notice requirements for property dispositions and public hearings required.

e. The section provides DCPO with the general authority to dispose of interests in state real property temporarily, for periods of five years or less.

f. The section requires DCPO to report to the legislature on all bills filed in the legislature that would dispose of state real property.

g. The section details the information that DCPO must compile before it submits, or recommends the approval of, a bill to dispose of surplus state property.

h. The section addresses issues of appraisals.

Section 17. Adds a new section 40F½ to Chapter 7

This section must be read in concert with Section 16 (section 40F). Its provisions parallel many of the procedures required by section 40F. This section addresses the procedures that must be followed when the legislature enacts legislation that authorizes the disposition of an interest in state real property. Many of the provisions of section 40F½ are duplicative of section 40F; however, that is deliberate because the Act intends to establish uniform disposition procedures for both a DCPO initiated disposition prior to submission of a bill to the legislature and a legislatively initiated disposition. A significant provision that will eliminate most of the potential duplication, in the case where DCPO-sponsored legislation is enacted, is found in the provision that if DCPO has followed certain procedures during the eighteen month period prior to enactment, those procedures need not be repeated.

Section 18. Revises Chapter 7, section 40H

The advertising requirements for acquisition or disposition by the state of an interest in real property remain substantially consistent with the current section 40H, with the important exception that the acquisition of unique properties does not require public advertising, only public notice.

Section 19. Amends Chapter 7, section 40I

This section alters the current public notice and public hearing requirements governing proposed significant changes in the use of property on behalf of state agencies. The section decreases the size of property subject to the requirements for public notice and hearings, from two acres to one acre. The section also doubles the time period required to provide notice to various persons and governmental entities and it adds to the list of public officials who must be notified.

Section 20. Amends Chapter 7, section 40K

This section adds a specific date for the annual filing of DCPO's real property inventory.

Section 21. Amends Chapter 7, section 40L

This section revises a provision in the current law by requiring DCPO to promulgate real property management regulations, subject to legislative and gubernatorial approval. The section also greatly expands the areas that are to be covered by those regulations.

DCPO GENERAL PROVISIONS

Section 22. Amends Chapter 7, section 41B

This section clarifies the authority of DCPO's Office of Programming over studies and programs undertaken on behalf of all state agencies and building authorities.

Section 23. Amends Chapter 7, section 41B

This section sets up a central depository of plans in the DCPO's Office of Programming for all building projects undertaken by state agencies and building authorities.

Sections 24 and 25. Amends Chapter 7, sections 42B and 42C.

Typographical corrections.

Section 26. Amends Chapter 7, section 42C

This section further clarifies the DCPO's final acceptance procedures, the user agency's involvement in those procedures, and clearly states that the DCPO has the final responsibility for accepting a project and making a final payment to the Contractor.

Sections 27 and 27A. Amends Chapter 7, section 42D and 42F

Technical revisions.

Section 28. Amends Chapter 7, section 43A

This section specifies an annual date for the filing of DCPO's building inventory with the legislature.

Section 29. Amends Chapter 7, section 43E

This section clarifies the meaning of "using agency" as used in section 43E.

CENTRAL REGISTER

Section 30. Amends Chapter 9, section 20A

This section clarifies the obligation of public agencies to advertise various contracting opportunities in the Central Register.

MISCELLANEOUS

Sections 31, 32, and 33. Amends Chapter 29, sections 7C, 7D, and 7I

Technical revisions.

PUBLIC ADVERTISING

Section 34. Repeals Chapter 29, section 8A

The construction advertising law for state agencies is repealed by this section and replaced by an advertising law applicable to all public agencies for both building construction projects and public works projects. See Chapter 149, section 44J as revised by Section 52 of the Act.

Section 35. Amends Chapter 30, section 39M

This section revises the public bidding law for public works projects by providing that building projects estimated to cost more than five thousand but not more than twenty-five thousand dollars shall be bid pursuant to Chapter 30, section 39M. This section should be read in concert with Section 44 of the Act. That section increases the threshold for building projects that must be bid under Chapter 149, section 44A-44G to projects estimated to cost more than twenty-five thousand dollars. It also deletes the requirement that municipalities bid public works construction projects estimated to cost more than two thousand dollars under this section. Projects over five thousand dollars must be bid.

MISCELLANEOUS

Section 36. Amends Chapter 30, section 39Q

Technical revision

CONTRACTOR'S RECORDS

Section 37. Amends Chapter 30, section 39R(b)

This section deletes the awarding authority from the list of public agencies that may review a contractor's records after a project has been accepted.

Section 38. Chapter 30, section 39R(d)

This section revises the contractor's current obligation to submit financial statements to the awarding authority during the term of a project and instead requires that the statements be filed with DCPO and made available to the awarding authority upon request.

Section 39. Amends Chapter 30, section 39R(e)

This section revises the current law by clarifying that a violation of a contractor's statutory record keeping requirements may be grounds for debarment of that contractor, pursuant to Chapter 149, section 44C.

Section 40. Amends Chapter 30, section 39R(f)

This section retains the exclusion from the public records law of the financial statements required by section 39R. The awarding authority still has access to a contractor's records upon request to DCPO.

COUNTY CAPITAL PLANS

Section 41. Amends Chapter 35, section 28

This section requires that counties must submit their annual capital facility budget to the DCPO.

CITIES AND TOWNS ADVERTISING REQUIREMENTS

Section 42. Repeals Chapter 43, sections 28, 28A

The current advertising law applicable to cities and towns soliciting proposals for construction work or construction equipment, supplies, or materials, is repealed by this section. The certification required pursuant to Chapter 43, section 28A is also repealed. The uniform provisions in Section 52 of the Act are substituted for Chapter 43, section 28.

MISCELLANEOUS

Section 43. Inserts new Chapter 149, sections 29B, 29C

The new section 29B makes any agreement between an owner and contractor to waive or cancel a payment bond a false and deceptive act as set forth in Chapter 93A, section 2.

The new section 29C makes void and unenforceable any agreement relative to a construction project, that is intended to indemnify a person or entity from liability for its own negligence or that of its agents, that resulted in personal injury or damage to property.

The provisions of section 29B and 29C apply to private, as well as public construction.

BIDDING REQUIREMENTS

Section 44. Amends Chapter 149, section 44A(2)

This section raises the threshold of the building construction bidding statute from "more than five thousand dollars" to "more than twenty-five thousand dollars". Building construction, reconstruction, installation, demolition, maintenance or repair projects estimated to cost more than five but not more than twenty-five thousand dollars will still be advertised and bid, but under the simpler requirements of Chapter 30, section 39M, without prequalification of bidders or filed sub-bids.

Section 45. Amends Chapter 149, section 44A(4)

This section removes the requirement that only an extreme emergency caused by a catastrophe justifies a waiver of public bidding. Under this section, work necessary to preserve health or safety of persons or property can be done under a waiver granted by DCPO. It also legitimizes the situation where an awarding authority must contract for emergency work before a waiver request is made to DCPO, provided DCPO approval is sought as soon as possible. If approval is denied, the work must cease; but the contractor can be paid the fair value of work already done.

DCPO is also authorized to waive advertising under Section 52 of the Act; Chapter 149, section 44J.

Section 46. Amends Chapter 149, section 44D

The present system whereby each awarding authority must receive applications to bid, review the qualifications of all applicants, and publish a list of contractors eligible to bid on each building construction project before opening bids will change to a centralized system, effective for public building projects advertised after July 1, 1985. (see section 56 of this Act)

After that date, awarding authorities will advertise directly for bids. Bids will be valid only when accompanied by (1) a certificate of eligibility issued by DCPO, showing that the contractor has been approved to bid on projects the size and nature of that advertised, and (2) an update statement summarizing the contractor's record for the period between the latest DCPO certification and the date the contractor submits its bid. Once the awarding authority determines the low bidder, it will verify whether the contractor is eligible by checking the DCPO certification, and responsible by checking the contractor's most recent work as listed in the update statement.

Contractors will apply to DCPO for annual certification, submitting information similar to what has been required under the present statute. If they are dissatisfied with DCPO's determination, they may appeal to the Commissioner of Labor and Industries.

Every awarding authority will complete and submit to DCPO a contractor evaluation at the end of every building construction project. The contractor will receive a copy, and may file a response to DCPO.

The section continues to apply only to contractors who contract directly with awarding authorities, not to sub-bidders.

Sections 47 and 48. Amend Chapter 149, section 44F

This section corrects two typographical errors.

Section 49. Amends Chapter 149, section 44F

This section further defines "employees on his own payroll" with whom the sub-bidder customarily performs Paragraph E work, to "mechanics or laborers as referred to" in Chapter 149, section 26.

This section also makes it clear that the customary practice of receiving a single general bid that includes the work of a statutory sub-trade is appropriate, when the project is predominantly work of that sub-trade. In such a situation general bidders will be limited to contractors who customarily perform the sub-trade work called for, with their own employees.

Section 50. Amends Chapter 149, section 44F(a)

If (a) no sub-bids are received for a particular trade, or (b) only bids restricted to the use of one or more general bidders are received, the awarding authority will no longer be required to set an allowance for the general bidder to carry in its bid, and subsequently solicit invitation sub-bids. Instead, the sub-trade work in question can be included by addendum in the general contractor's work and the general contractor will be responsible for including his actual price for that sub-trade work in his original general bid submission.

Where the awarding authority rejects sub-bids because less than three bids are received or for any other reason, the law remains the same as it currently is, eg., the awarding authority will establish an allowance and invite further sub-bids with the ultimate result being an adjustment in the general contract price.

Section 51. Amends Chapter 149, section 44F

This provision makes an exception in the role that a general bidder who submits a sub-bid is required to list his own sub-bid in his Item 2. If the lowest sub-bid is not restricted either to or from him, and is lower than his own, he will now be able to carry that sub-bid.

Section 52. Adds new section Chapter 149, section 44J

This section combines the advertising requirements for all public agencies for both public works and public buildings, into one uniform statute. The current state agency advertising law, Chapter 29, section 8A is repealed by Section 34 of the Act and the municipal advertising law, Chapter 43, section 28, is repealed by Section 42 of the Act.

Posting and advertising will now be uniform for all construction contracts subject to competitive bidding estimated to cost over five thousand dollars. The statute requires posting for at least one week before bid opening, and advertisement in the central register and in a newspaper of general circulation. Note that municipalities are no longer required to advertise twice. DCPO's Deputy Commissioner may set further advertising requirements.

DCPO may waive advertising in cases of extreme emergency. This provision is currently in Chapter 29, section 8A. Now the full responsibility for emergency waivers on all public projects will be at DCPO. Chapter 43, section 28, allows a municipality to waive advertising in an emergency. Under the new statute, that waiver must be obtained from DCPO.

Violation of any provision of Chapter 149, section 44J, carries the criminal penalties formerly in Chapter 43, section 28: a fine of up to ten thousand dollars and/or imprisonment for not more than three years, and exclusion from any state or local public office. Contract splitting to avoid advertising could result in a payment by the offender of up to five thousand dollars, double damages and costs.

MISCELLANEOUS

Section 53. Amends Chapter 260, section 2B

This section clarifies the statute of limitations for tort claims arising out of design, planning, construction, or general administration of real property improvements. Under the current law, a legal action must be brought within three years after the cause of action accrues, but no more than six years after the "performance or furnishing of such design, planning, construction, or general administration". Under this amendment, the six year period begins to run on private projects at the earlier of (1) the opening of the improvement to use; or (2) substantial completion of the improvement and the owner's taking possession for occupancy. On public work, the six years run from the earlier of (1) official acceptance by the public agency; (2) opening of the property to public use; (3) contractor's acceptance of the agency's punch list under Chapter 30, section 39G; or (4) substantial completion and owner's taking possession for occupancy.

Section 54.

The transfer of title provision in section 10, Chapter 579, Acts of 1980, is repealed. This material is now covered in Chapter 7, section 40E above.

Section 55.

DCPO, by July 1, 1985, shall promulgate as regulations the criteria for determining whether state property is surplus.

Section 56.

The new, centralized prequalification system will apply to contracts advertised after July 1, 1985.

SUMMARY OF CHAPTER 484 OF THE ACTS OF 1984

ERRATA SHEET

Section 2, page 1. Chapter 7 section 38c(e)

This revision provides that on a project without an associated estimated construction cost, including a feasibility study, that project shall be exempt from the designer selection procedures if the cost of design services is less than $2500.

S-112

Comm. from Tunney F. Lee, Deputy Commissioner, Mass. Division of Capital Planning & Operations, transmitting a summary of Chapter 484 of the Acts of 1984 Re: public construction laws & state real property laws.

Copies sent to the City Manager, Inspectional Services Commissioner, Kathy Spiegelman of Community Development + Barbara Duffy, Purchasing Dept. 2/6/85 mh

In City Council,

February 4, 1985

2/4/1985

Comm. placed on File

Copies to Depts Concerned.

City Mgr Purch Dept
Insp Services
Comm Development