

HOUSE No. 00017

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven.

Chapter 32 of the General Laws is hereby amended by adding the following section –

Section 23A (a) This section shall apply to every retirement board contract for the procurement of investment, actuarial, legal and accounting services.

As used in this section the following words shall, unless the context requires otherwise, have the following meanings:-

"Contract", all types of agreement for the procurement of services, regardless of what the parties may call the agreement.

"Contractor", a person having a contract with the retirement board.

"Retirement board", a board established under the provisions of this chapter, the provisions of chapter thirty – four B or the Massachusetts water resources authority retirement board excluding the pension reserves investment management board.

"Majority vote", as to any action by or on behalf of a retirement board, a simple majority of the board.

"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 retirement board.

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

"Procurement", acquiring a service, and all functions that pertain to the obtaining of a service, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

"Procurement officer", an individual duly authorized by the retirement board to assist in a procurement.

"Proposal", a written offer to provide a service at a stated price submitted in response to a request for proposals.

"Purchase description", the words used in a solicitation to describe the services to be purchased, including specifications attached to or incorporated by reference into the solicitation.

"Request for proposals", the documents utilized for soliciting proposals, including documents attached or incorporated by reference.

"Responsible bidder or offeror", a person who has the capability to perform fully the contract requirements, and the integrity and reliability which assures good faith performance.

"Responsive bidder or offeror", a person who has submitted a bid or proposal which conforms in all respects to the request for proposals.

"Services", the furnishing of labor, time, or effort by a contractor, not involving the furnishing of a specific end product other than reports. This term shall not include employment agreements, collective bargaining agreements, or grant agreements.

(1) A retirement board shall enter into procurement contracts for investment, actuarial, legal and accounting services utilizing competitive sealed proposals, in accordance with the provisions of this section.

(2) A retirement board that awards a contract shall maintain a file on each such contract and shall include in such file a copy of all written documents required by this section. Written documents required by this section shall be retained by the retirement board for at least six years from the date of final payment under the contract.

(a) The retirement board or its procurement officer shall give public notice of the request for proposals and a reasonable time prior to the date for the opening of proposals. The notice shall:

(1) indicate where, when and for how long the request for proposal may be obtained;

(2) describe the service desired, and reserve the right of the retirement board to reject any or all bids;

(3) remain posted, for at least two weeks, in a conspicuous place in or near the offices of the retirement board until the time specified in the request for proposals; and

(4) be published at least once, not less than two weeks prior to the time specified for the receipt of proposals, in a newspaper of general circulation within the area served by the retirement board and in the case of a procurement for investment, accounting, actuarial or legal services in a publication of interest to those engaged in providing such services.

The retirement board or its procurement officer shall also place the notice in any publication established by the state secretary for the advertisement of such procurements.

The retirement board or its procurement officer may distribute copies of the notice to prospective bidders, and may compile and maintain lists of prospective bidders to which notices may be sent.

(b) The retirement board shall unconditionally accept a proposal without alteration or correction, except as provided in this paragraph. A bidder 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 the proposal opening. After proposal opening, a bidder may not change the price or any other provision of the proposal in a manner prejudicial to the interests of the retirement board or fair competition. The retirement board shall waive minor informalities or allow the bidder to correct them. If a mistake and the intended proposal are clearly evident on the face of the proposal document, the procurement officer shall correct the mistake to reflect the intended correct proposal and so notify the bidder in writing, and the bidder may not withdraw the proposal. A bidder may withdraw a proposal if a mistake is clearly evident on the face of the proposal document but the intended correct proposal is not similarly evident.

(c) The retirement board shall solicit proposals through a request for proposals. The request for proposals shall include:

(1) the time and date for receipt of proposals, the address of the office to which the proposals are to be delivered, the maximum time for proposal acceptance by the retirement board;

(2) the purchase description and all evaluation criteria that will be utilized pursuant to paragraph (d); and

(3) all contractual terms and conditions applicable to the procurement provided that the contract may incorporate by reference a plan submitted by the selected offeror for providing the required services.

The request for proposals may incorporate documents by reference; provided, however, that the request for proposals specifies where prospective offerors may obtain the

documents. The retirement board or its procurement officer shall make copies of the request for proposals available to all persons on an equal basis.

(d) The retirement board or its procurement officer shall not open the proposals publicly, but shall open them in the presence of one or more witnesses at the time specified in the request for proposals. Notwithstanding the provisions of section seven of chapter four, until the completion of the evaluations, or until the time for acceptance specified in the request for proposals, whichever occurs earlier, the contents of the proposals shall remain confidential and shall not be disclosed to competing offerors. At the opening of proposals the retirement board or its procurement officer shall prepare a register of proposals which shall include the name of each offeror and the number of modifications, if any, received. The register of proposals shall be open for public inspection.

(e) The retirement board or its consultant retained pursuant to the provisions of this chapter shall be responsible for the initial evaluation of the proposals. The retirement board or its consultant retained pursuant to the provisions of this chapter shall prepare their initial evaluations based solely on the criteria set forth in the request for proposals. The evaluations shall specify in writing:

(1) for each evaluation criterion, a rating of each proposal as highly advantageous, advantageous, not advantageous, or unacceptable, and the reasons for the rating;

(2) a composite rating for each proposal, and the reasons for the rating; and

(3) revisions, if any, to each proposed plan for providing the required services which should be obtained by negotiation prior to awarding the contract to the offeror of the proposal.

In the event the initial evaluation is conducted by a consultant retained pursuant to the provisions of this chapter said consultant shall review all initial evaluations with the retirement board and provide to each member of the retirement board the initial evaluation of each proposal.

(f) The retirement board shall determine the most advantageous proposal from a responsible and responsive offeror taking into consideration price and the evaluation criteria set forth in the request for proposals. The retirement board shall award the contract by written notice to the selected offeror within the time for acceptance specified in the request for proposals. The parties may extend the time for acceptance by mutual agreement. The retirement board 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.

(g)(1) In the event of a competitive process to select an investment service provider the request for proposals shall include mandatory contractual terms and conditions to be incorporated into the contract including provisions stating that the contractor is a fiduciary with respect to the funds which the contractor invests on behalf of the retirement board, provisions stating that the contractor shall not be indemnified by the retirement board, provisions requiring the contractor to annually inform the commission and the board of any arrangements in oral or in writing, for compensation or other benefit received or expected to be received by the contractor or a related person from others in connection with the contractors services to the retirement board or any other client, provisions requiring the contractor to annually disclose to the commission and the retirement board any compensation, in whatever form, paid or expected to be paid, directly or indirectly, by the contractor or a related person to others in relation to the contractors services to the retirement board or any other client, and provisions requiring the contractor to annually disclose to the commission and the retirement board in writing any conflict of interest the contractor may have that could reasonably be expected to impair the contractor's ability to render unbiased and objective services to the retirement board. Other mandatory contractual terms and conditions shall address investment objectives, brokerage practices, proxy voting and tender offer exercise procedures, terms of employment and termination provisions. The retirement board shall make a preliminary determination of the most advantageous proposal from a responsible and responsive offeror taking into consideration price and the evaluation criteria set forth in the request for proposals. The retirement board or its duly designated agent, subject to the approval of the retirement board, may negotiate all terms of the contract not deemed mandatory or non-negotiable with such offeror. If, after negotiation with such offeror, the retirement board in consultation with its duly designated agent and its consultant retained pursuant to the provisions of this chapter determines that it is in the best interests of the retirement board, the retirement board in consultation with its consultant retained pursuant to the provisions of this chapter may determine the proposal which is the next most advantageous proposal from a responsible and responsive offeror taking into consideration price and the evaluation criteria set forth in the request for proposals, and may negotiate all terms of the contract with such offeror. The retirement board shall award the contract to the most advantageous proposal from a responsible and responsive offeror taking into consideration price, the evaluated criteria set forth in the request for proposals, and the terms of the negotiated contract. The retirement board shall award the contract by written notice to the selected offeror within the time for acceptance specified in the request for proposals. The time for acceptance may be extended for up to 45 days by mutual agreement between the retirement board and the responsible and responsive offeror offering the most advantageous proposal as determined by the retirement board.

On or before January 1 of each year the contractor shall file the disclosures required herein with the board and the commission. Failure to file disclosures or the filing of inaccurate disclosures shall subject the contractor to proceedings under section 21A.

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

(3) A person submitting a proposal for the procurement or disposal of services to any retirement board shall certify in writing on the proposal as follows:

The undersigned certifies under penalties of perjury that this proposal has been made and submitted in good faith and without collusion or fraud with any other person. As used in this certification, the word "person" shall mean any natural person, business, partnership, corporation, union, committee, club, or other organization, entity, or group of individuals.

(Signature of individual submitting bid or proposal)

(Name of business)

(4) Each retirement board member shall certify to the commission in writing with respect to a procurement subject to the provisions of this section, as follows:

The undersigned certifies under penalties of perjury that, to the best of his/her knowledge and belief, this proposal has been made and submitted in good faith and without collusion or fraud with any other person. As used in this certification, the word "person" shall mean any natural person, business, partnership, corporation, union, committee, club, or other organization, entity, or group of individuals.

(Signature of individual retirement board member)

(Name of retirement board)

(5) No person shall cause or conspire to cause the splitting or division of any request for proposals, proposal, solicitation, or quotation for the purpose of evading a requirement of this section.

(6) Unless otherwise provided by law and subject to paragraph (a), a retirement board may enter into a contract for any period of time which serves the best interests of the retirement board; provided, however, that the retirement board shall include in the solicitation the term of the contract and conditions of renewal, extension or purchase, if any.

(a) A retirement board shall not award a contract for a term exceeding five years, including any renewal, extension, or option provided, however, that a retirement board may participate in a limited partnership, trust or other entity with a term for a period longer than five years as part of an investment of system assets.

When a contract is to contain an option for renewal, extension, or purchase, the solicitation shall include notice of the provision. The retirement board shall retain sole discretion in exercising the option, and no exercise of an option shall be subject to agreement or acceptance by the contractor.

(b) The retirement board shall not exercise an option for renewal, extension or purchase unless the retirement board, after reasonable investigation of costs and benefits, has determined in writing that the exercise of the option is more advantageous than alternate means of procuring comparable services.

(7) All specifications shall be written in a manner which describes the requirements to be met without having the effect of exclusively requiring a proprietary service, or a procurement from a sole source.

(8) All contracts shall be in writing, and the retirement board shall make no payment for a service rendered prior to the execution of such contract.

(a) A contract made in violation of this section shall not be valid, and the retirement board shall make no payment under such contract. Minor informalities shall not require invalidation of a contract.

(b) A person who causes or conspires with another to cause a contract to be solicited or awarded in violation of a provision of this section shall forfeit and pay to the appropriate retirement board a sum of not more than two thousand dollars for each violation. In addition, the person shall pay double the amount of damages sustained by the retirement board by reason of the violation, together with the costs of any action. If more than one person participates in the violation, the damages and costs may be apportioned among them.

(c) The commission or the retirement board shall have authority to institute a civil action to enforce paragraph (b).