INTERIM REPORT

of the

SPECIAL COMMISSION

Relative to the

AWARDING OF CONTRACTS FOR
CONSTRUCTION AND FOR MATERIALS
BY COUNTIES, CITIES, TOWNS,
AND DISTRICTS IN CASES
OF EXTREME EMERGENCY AND
OTHER RELATED MATTERS.

(under Chapter 88 of the Resolves of
1965 and most recently revived
and continued by Chapter 4
of the Resolves of 1975)

November 19, 1975.
MEMBERS OF THE COMMISSION

Sen. Alan D. Sisitsky, Senate Chairman
Rep. Charles J. Buffone, House Chairman
Sen. John Olver
Sen. George Rogers
Sen. Arthur Tobin
Sen. Michael LoPresti
Sen. Ronald MacKenzie
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Rep. John Driscoll
Mr. Joseph F. Rugo, III
Mr. Joseph M. Corwin
Mr. Frederick J. Kussman
Mr. Hugh Shepley
Mr. Frank A. Sonsini
Resolved, That a special commission, to consist of the committee on state administration, and four persons to be appointed by the governor, one of whom shall be a member of the Associated General Contractors of Massachusetts, Inc., one a member of the Associated Subcontractors of Massachusetts, one the director of building construction or his designee, and one a licensed architect, is hereby established for the purpose of making an investigation and study of the subject matter of current house documents numbered 140, relative to the awarding of contracts for construction and for materials by counties, cities, towns and districts in cases of extreme emergency; 141, relative to the awarding of contracts for repairs to public buildings by counties, cities, towns and districts in cases of extreme emergency; 1836, clarifying the application of the public building bidding statute to the Massachusetts Port Authority; 1837, clarifying the status of restricted sub-bids on public building projects; 1838, further regulating the award of contracts for the construction, reconstruction, alteration, remodeling, repair or demolition of buildings by the commonwealth and governmental units thereof; 1840, permitting awarding authorities to gain the benefit of the lowest responsible and eligible bids under the statutes regulating competitive bidding in the award of contracts for public building projects; 1841, adjusting the general contract price by the cost of the premiums for the performance and payment bonds required of general contractors on public building construction; 2032, providing for security for payments to laborers, subcontractors, materialmen, and others engaged in public construction; 2033, providing for security for payments to laborers, subcontractors, materialmen, and others engaged in public construction; 2034, relative to sub-bids to be filed in connection with contracts for public building projects; 2035, requiring performance and payment bonds on public building construction; 2036, relative to the method of payment to subcontractors on contracts for construction, reconstruction, alteration, remodeling, repair or demolition of public buildings and works; 2221, extending the application of certain provisions pertaining to public contracts to public authorities; 2231, relative to the submission of subbids by general bidders on construction contracts; 2412, clarifying the provisions of an act to require that all contracts for construction and for materials be awarded to the lowest responsible and eligible bidder, and to assure full competition in the taking of bids for such contracts; 2589, relative to construction by utility companies and to building construction on redevelopment projects; 2590, providing for the regulation of heating, piping, air conditioning, and refrigeration trade and for the licensing of the members therein; 2749, relative to including all piping and equipment incidental to plumbing in bid specifications; and 3084, requiring building contractors to post a performance bond for two thousand dollars prior to the issuance of a building permit. Approved August 3, 1965.
The Commonwealth of Massachusetts

to the Honorable Senate and House of Representatives:

This Commission was created to investigate and study the complex public construction legislation which the Joint Committee on State Administration deemed as worthy of further research. Chapters 25, 34, 36, 38 and 49 of the Resolves of 1975 referred several matters to the Commission for careful consideration.

As a part of the diligent work of the Commission members and staff, several public hearings were held and considerable research done. The members of this Commission have approved several remedies and new procedures which will benefit the public by improving both the awarding and the administration of public construction contracts. In the appendix is a copy of the bill which this Commission highly recommends to the General Court of the Commonwealth of Massachusetts.

Section 1 of the recommended legislation is based on House 1797 which was referred to the Commission for study by Chapter 25 of the Resolves of 1975. This section requires an awarding authority to request all general bidders to substitute lower responsible sub-bidders when the general bidder has not specified the lowest sub-bidder in his general bid. This is the present practice of the Bureau of Building Construction. Nevertheless, local awarding authorities are sometimes unfamiliar with competitive bidding procedures because they award building contracts infrequently. Section 1 would force local awarding authorities to request substitutions which would save money and will result in a net savings to the taxpayer.

Section 2 of the proposed legislation in the appendix is based on H. 1793 which was referred to the Commission
by Chapter 36 of the Resolves of 1975. This section provides that general bids must be opened no later than one week after the opening of sub-bids except where sub-bids for a sub-trade are all rejected. In the case of rejection, the awarding authority can extend the time up to 14 days more than the original seven day period. Thus this section requires speedy administration of contract awards and allows contractors to capitalize on the price quotations given by suppliers at the time of biddings. Without this section, inflation can result in cost increases to the contractors and hence to the public. Finally, this section allows the awarding authority the flexibility to deal with situations where no sub-bids are available or acceptable for use by the generals.

Section 3 of the proposed legislation in the appendix is based on H. 1792 which was referred to this Commission by Chapter 36 of the Resolves of 1975. This section amends section 445 of Chapter 149 by allowing general bidders who bid certain sub-trade work to use a lower sub-bidder. This is something the Bureau and general contractors have wanted for some time. It could help secure lower prices, particularly for masonry work which general contractors often bid only for self protection to be certain there will be a masonry sub-bid available for their use.

At the same time section 3 of the proposed legislation amends section 445 of Chapter 149 by giving sub-contractors better protection against general contractors who bid certain sub-trade work only for the purpose of later bid-shopping that sub-trade work to a subcontractor--all in violation of the entire statute. Under the bill only general contractors who customarily perform a sub-trade with their own employees will be eligible to bid for that sub-trade work. If a general contractor later bid shops and subcontracts that sub-trade, the portion of his general contract for that sub-trade will be invalid and the general contractor will have to pay
the awarding authority any added cost as a result of bid shopping and subcontracting that sub-trade work. Thus section 3 will increase competition within the statutory sub-bidding while decreasing bid shopping. These in turn will act to reduce public construction costs.

Section 4 of the bill in the appendix is based on H. 691 which was referred to the Commission by Chapter 36 of the Resolves of 1975. The basic intent of H. 691 was to allow contractors to submit bid bonds, instead of cash, as bid deposits for public works projects. This is the current practice for public building projects. Technical redrafting of H. 691 was necessary to maintain the integrity of section 44A of Chapter 749 of the General Laws and to accomplish the intent of H. 691.

Section 4 adds only two sentences to the present language contained in section 39M of Chapter 30, the public works statutes. These lines require every general bid for a contract subject to Section 39M to be accompanied by:

a. a bid bond
b. cash
c. a certified check
d. or treasurer's of cashier's check

The contracts affected by this legislation are those contracts for the construction, reconstruction, alteration, remodeling or repair of any public work if the contract is for over $5,000 for the Commonwealth or $2,000 for local awarding authorities. This would improve the public construction laws because:

1. Due to the increased costs of borrowing money, it becomes costly to bid public contracts with certified or cashier's checks.

2. The added costs of borrowing money to accompany proposals for public projects must be included in the bid price and borne by the inhabitant of the state, city or town.

3. The present system discriminates against the smaller contractors because they do not have the resources to borrow the money for security on proposal.

4. The discrimination against the smaller contractors results in less competition on bidding and therefore a higher project price.
5. The use of a bid bond enables a contractor to bid on more projects and in a sense prequalifies a contractor within the limits of his capacity to perform.

6. Chapter 149 of the general laws pertaining to building projects allows for bid bonds whereas Chapter 30 section 39M does not have the same provision for any valid reason.

Thus section 4 of the proposed legislation contained in the appendix would decrease the cost of public construction by increasing competition in the bidding process and by eliminating unnecessary interest costs incurred during the bidding process.

Section 5 is based on H. 2609 which was referred to the Commission by Chapter 36 of the Resolves of 1975. This section authorizes the Bureau of Building Construction to insert arbitration provisions in its general contracts as an experiment to see whether arbitration brings about more prompt and better resolution of disputes. This section will not allow arbitration of disputes over work assignments for mechanics and laborers or disputes as to the right to a contract award. The Department of Labor and Industries will continue in its present capacity and authority with regard to these disputes. Arbitration of the numerous disputes arising out of public construction contracts will save the taxpayers money now being unnecessarily spent in litigation. Arbitration will also free the already overburdened courts of many cases which are better decided by construction experts in the more informal settings of an arbitration proceeding. Finally, this section requires that the arbitration proceedings be final, binding and conclusive upon all parties except as otherwise provided in the Uniform Arbitration Act. Thus arbitration proceedings are invalid where the award is produced by corruption, fraud, other undue means, mistake, or impartiality and conflict of interests of the arbitrators.

Section 6 of the recommended legislation in the appendix is also based on H. 2609. This section insures that the surety bond company will be bound by any arbitration award.
Without this section, subcontractors would have to try the case over again against the surety on the payment bonds. Retrial would result in unnecessary delays and redundant legal proceedings which would incur added expenses. Thus section 6 will speed the administration of public construction contracts and reduce the potential costs to the taxpayers.

Section 7 of the legislation in the appendix is based on H. 1801 which was referred to the Commission by Chapter 36 of the Resolves of 1975. This section allows the courts to decide whether certain arbitrations should be consolidated. Other states such as New York, presently allow the courts to do so. Yet in Massachusetts, a recent court decision (Stop and Shop Companies, Inc. v. Gibane Building Company, 1973 A.S. 1479) held that the courts had no power to decide the question. Section 7 of the proposed legislation will bring Massachusetts in line with current construction practices throughout the country. It allows a party to the arbitration to seek a Superior Court order for consolidation.

The advantage of consolidation to the public is that it will reduce the number of arbitration proceedings by combining disputes arising from the same fact situation but involving different parties. Furthermore, this will prevent inequity awards which might occur in cases where one arbitration award differs from another award over the same dispute but involving only one common party. Thus section 7 will reduce costs of arbitration and speed the arbitration proceedings along to an equitable award binding all parties connected with a dispute.

Section 8 of the proposed legislation in the appendix is based on H. 3025 which was referred to this Commission by Chapter 38 of the Resolves of 1975. This section amends section 39G of Chapter 30, the payment schedule statutes for public works projects.
It would allow the contractor to certify in writing to the awarding authority that his work has been completed, and would then allow the awarding authority 21 days in which to check the veracity of this statement. If there is agreement, then the rest of the Section 39G statute, involving the preparation of final estimates, goes into operation. If there is disagreement, then the awarding authority states the areas of disagreement to the contractor in writing, and it becomes the contractor's responsibility to correct them.

Failure by the contractor to complete the items listed by the contracting authority within 45 days will give the contracting authority the right to terminate the contract. This will force an end to projects which drag long beyond the deadline with only trivial work remaining. Hence, this section would facilitate the completion of all the loose ends remaining on a public works project.

The other substantial change that this section will accomplish deals with the question of liability for damages to a project incurred between the opening of a project to the public and the awarding of final payments to the contractor. Both of these actions are at present initiated by the awarding authority. In the case of highway projects, awarding authorities have held the contractor responsible for damages wrought on the project by the public. Building contractors have for years been protected from liability to damage caused by occupants of state buildings. Highway contractors, however, have frequently been required to repair damages caused by users.

By rectifying this situation, this section would create public works practices which conform to the present public building statutes. It, further, affords a contractor with the Commonwealth protection against vandalism and other wanton or reckless behavior.
In summary, the recommended legislation in the appendix is designed to accomplish five objectives:

1. increase competition in the bidding process
2. maintain the integrity of the public bidding laws
3. reduce costs of construction
4. provide equitable results in arbitration
5. speed the completion of public construction projects

We, the members of this Commission, strongly believe that our recommendations will accomplish these objectives and thereby provide for the public benefit.

Respectfully submitted,

MEMBERS OF THE COMMISSION

[Signatures of members]
The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Seventy-Five.

AN ACT MAKING CHANGES IN THE LAWS RELATING TO PUBLIC CONSTRUCTION TO ASSURE FAIR COMPETITION AMONG GENERAL BIDDERS AND SUB-BIDDERS AND TO PERMIT DISPUTES INVOLVING CONTRACTS OF THE COMMONWEALTH TO BE SETTLED BY ARBITRATION.

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

SECTION 1. Delete the first two sentences in subparagraph (2) of section 441 of chapter 149 and insert in place thereof the following sentence: — After the initial selection of the lowest responsible and eligible general bidder, the awarding authority shall request the general bidders to carry out the agreement in the Form For General Bid to substitute eligible and responsible sub-bidders with prices lower than those named in their general bids and shall reduce the general bid price of each by the difference between the amount of the sub-bids originally named and the amount of any substituted sub-bids.

SECTION 2. Amend the second paragraph of section 44F of said chapter by deleting the last sentence in the second paragraph and inserting in place thereof the following sentence: — General bids shall be publicly opened and read by the awarding authority not later than the seventh day after the opening of sub-bids, but if the awarding authority rejects all sub-bids for any sub-trade or if the awarding authority does not receive any sub-bids for any sub-trade, the awarding authority may extend the public opening of general bids up to an additional fourteen day period to permit the receipt and opening of new sub-bids for that sub-trade or sub-trades before the opening of general bids.

SECTION 3. Delete section 44J of chapter 149 and insert in place thereof the following section 44J:
44J (1) If a general bidder has customarily performed any sub-trade listed in Item 2 of the general bid form with employees on his own payroll who are mechanics and laborers as defined in section twenty-six of this chapter, he may submit a sub-bid for such sub-trade on the sub-bid form prescribed by section 44G, which sub-bid by the selected general bidder shall be considered on a par with other sub-bids filed with the awarding authority. A sub-bid submitted by a person, firm or corporation which manages and controls or is managed and controlled by the general bidder shall be considered as a sub-bid of that general bidder. Such general bidder shall submit under Item 2 of the general bid form either (1) his own name and sub-bid price or (2) the name and sub-bid price of the lowest responsible and eligible sub-bidder for that sub-trade which is (i) lower than such general bidder's sub-bid price (ii) available to use by such general bidder and (iii) not restricted to use by such general bidder nor to use by such general bidder and one or more general bidders.

2 The awarding authority shall reject any sub-bid by a general bidder if he cannot show he has customarily performed the sub-trade with employees on his own payroll who are mechanics and laborers as defined in section twenty-six of this chapter or if the price is unduly low. As used herein "show" means to establish a prior practice of customary performance by payroll records, records of insurance premium payments computed on such payroll records and actual past performance. If the awarding authority rejects the sub-bid of the general bidder, the awarding authority shall substitute the lowest eligible and responsible sub-bidder for that sub-trade who is (i) available for use by such general bidder, and (ii) not restricted to use by such general bidder nor to use by such general bidder and one or more general bidders, and the general bidder shall accept that substitution.

3 A selected general bidder, whose sub-bid is not rejected under this section, shall perform that sub-trade with employees on his own payroll who are mechanics and laborers as defined in section twenty-six of this chapter. If he fails to do so, either by performance of all or any part of the sub-trade by employees on the payroll of another person, or by performance of all or any part of the sub-trade by agreement to place the employees of
another person on the general contractor's payroll, the awarding authority shall (1) immediately terminate the general contractor's contract for that sub-trade, (2) make no further payments for that sub-trade performed up to the termination date, (3) receive and publicly open sub-bids for the remainder of that sub-trade in accordance with this chapter but shall not permit the general contractor to submit a sub-bid for that remainder and (4) substitute the lowest responsible and eligible sub-bidder from the new sub-bids. To the extent that the total of the amount paid the general contractor for that sub-trade plus the sub-bid price of the new lowest and responsible and eligible sub-bidder exceeds the original sub-bid price of the general contractor, the awarding authority shall deduct the amount of such excess from payments to the general contractor.

SECTION 4. Amend paragraph (a) of section 39M of chapter 30 by adding the following two sentences after the first sentence: — Every bid for such contract shall be accompanied by a bid deposit in the form of a bid bond, or cash, or a certified check on, or a treasurer's or cashier's check issued by, a responsible bank or trust company, payable to the awarding authority. Such bid deposit shall be in an amount not less than five percent of the value of the proposed work as estimated by the awarding authority, but in no event less than one hundred dollars.

SECTION 5. Amend chapter 30 by adding a new section 39Q reading as follows: —

Section 39Q. Every contract subject to section forty-four A of chapter one hundred forty-nine or section thirty-nine M of this chapter may, at the option of the awarding authority, provide that all claims, disputes and other matters arising out of or relating to the contract or breach thereof, except disputes as to work assignments for mechanics and laborers by contractors or subcontractors and disputes as to the right to a contract award or the right to be included in a contract award, shall be decided by arbitration as provided in chapter two hundred fifty-one.
1975] HOUSE — No. 6798

1 SECTION 6. Amend section 29 of chapter 149 by adding the
2 following paragraph at the end of section 29: —
3 If a contractor principal on a bond furnished hereunder and the
4 claimant are parties to a written contract with a provision to
5 submit to arbitration any controversy thereafter arising, the
6 surety on said bond shall be deemed a party to said arbitration
7 provision. Either the claimant, the contractor principal or surety
8 may demand arbitration in accordance with said written contract
9 and the arbitration award shall decide any controversy between
10 the claimant, on the one hand, and the contractor principal and
11 surety, on the other hand, including liability of the contractor
12 principal and surety on said bond. The arbitration shall be in
13 accord with chapter two hundred fifty-one and the court shall
14 confirm any award as therein provided. An award in favor of any
15 claimant shall include reasonable legal fees based upon the time
16 spent and the results accomplished.

1 SECTION 7. Amend section 2 of chapter two hundred fifty-
2 one, as amended by section one of chapter three hundred seventy-
3 four of the laws of 1960 by adding the new subsection (f) reading
4 as follows:
5 (f) A party aggrieved by the failure or refusal of another to (1)
6 agree to consolidate one arbitration proceeding with another or
7 others, for which the method of appointment of the arbitrator or
8 arbitrators is the same, or (2) separate one arbitration proceeding
9 from another or others, may apply to the superior court for an
10 order for consolidation or separation. The court shall proceed
11 summarily to the determination of the issue so raised. If a
12 claimant under c. 149, § 29 applies for an order for consolidation
13 or separation, the issue shall be decided upon provisions in c. 149,
14 § 29 governing consolidation or separation of such actions;
15 otherwise the issue shall be decided upon the basis provided
16 under rules of Civil Procedure for consolidation and separation
17 of trials and the court shall issue an order accordingly.

1 SECTION 8. Section 39G of Chapter 30 of the General Laws,
2 as most recently amended by Chapter 774 of the Acts of 1972, is
hereby further amended by deleting the text and inserting in place thereof the following: —

Upon substantial completion of the work required by a contract with the Commonwealth or any agency or political subdivision thereof for the construction, re-construction, alteration, remodeling, repair or improvement of public work not exempted from the provisions of this section, the contractor shall present in writing to the duly authorized representative or agent of the contracting authority his certification that said work has been substantially completed. Within twenty-one days thereafter, said duly authorized representative or agent of the contracting authority shall present to the contractor either a written declaration of the contracting authority that said work has in fact been substantially completed, or an itemized list, in writing, of the work yet uncompleted and of such magnitude as to refute a claim that the work required by the contract has been substantially completed. In the event that the duly authorized representative or agent of the contracting authority fails to respond to the contractor's certificate in the manner prescribed in this section, said certification shall be deemed, for the purposes of this section, to have the same effect in law as a contracting authority's declaration that the work has been substantially completed.

Thereafter, and within 65 days of the contracting authority's declaration that the work has been substantially completed, the duly authorized representative or agent of the contracting authority shall prepare in duplicate a final estimate of the quantity of work done thereunder and the value of such work. After preparation, said final estimate shall be submitted forthwith to the contracting authority and a duplicate copy shall be transmitted to the contractor. Such final estimate shall include the value of all work performed under any such contract and all retained percentage, after deducting therefrom the total of all previous periodic or partial payments. The contracting authority shall deduct and retain from payment of said final estimate a sum sufficient to satisfy all demands for direct payment filed by subcontractors under the provisions of Section 39F of this chapter but no contract subject to the provisions of Section 39F shall contain any other provision authorizing the awarding authority
to deduct or retain any sums by virtue of claims assessed against the contractor by subcontractors, material suppliers or others.

If, after final inspection has been made, there are any payment or extra work items that are in dispute between the contractor and the contracting authority, either as to the quantity or value of work performed hereunder, such items or claims may be excluded from the final estimate, and payment for such disputed items may be deferred until such time as agreement has been reached between the contractor and contracting authority or until such claim has been adjudicated. In such cases, a semi-final estimate shall be prepared within said period of sixty-five days after completion covering the value of all work performed and all retained percentage on all items of the contract that are not in dispute but subject to the same deductions and retainage as set forth above and with all disputed items or claims excluded. The existence of a dispute between a contractor and the contracting authority as to any payment item or items shall not be considered a valid reason for delaying preparation of a semi-final estimate as provided herein.

In the event that any such contract has been substantially completed and the project is to be opened to public use by order of the contracting authority, or, in the case of contracts for the repair or improvement of public ways, whenever public traffic is allowed to use said ways during the course of the construction activity, the contracting authority shall not require the contractor to repair or replace any item of work damaged as a result of such lawful public use. Thereafter, when all or part of the project has been opened to public use but final acceptance of the work is subject to delay because of minor uncompleted items which do not impair the usefulness of the project, a semi-final estimate shall also be prepared within a like period of sixty-five days after such contract has been substantially completed and placed in public use. Such semi-final estimate shall include an estimate of the value of all work performed in accordance with the terms of the contract, including the amount of retained percentage withheld by the contracting authority from previous periodic payments, but excluding (a) the same deductions and retainage as in the case of final estimates, as provided by the first paragraph of
this section, (b) an estimate of the value of the work remaining to
be performed, and (c) any items or claims for extra work, or parts
thereof, that may be in dispute; and payment for such excluded
items or parts thereof, that may be in dispute; and payment for
such excluded items or portions thereof may be deferred until
such remaining work has been satisfactorily completed, or in the
case of disputed items or claims until such time as agreement has
been reached thereon or such claim has been adjudicated.

"Substantial completion", for the purposes of this section, shall
be defined as completion of the work required by the contract so
that the value of the work remaining to be done is less than one
percent of the original contract price.

If a contracting authority or its duly authorized representative
or agent delays or fails to prepare any final or semi-final estimate
within the period of time provided by this section, interest on the
amount due the contractor on any such final or semi-final
estimate shall be computed and paid by the contracting authority
at the rate of three percentage points above the re-discount rate
then charged by the Federal Reserve Bank of Boston. Payment of
interest shall begin on the sixty-sixth day after the contract has
been satisfactorily completed or the project has been substantially
completed and opened to public use, as the case may be, and shall
be paid until the date such estimate has been prepared and
submitted to the contractor for acceptance. The amount of such
interest shall be included in the estimate when prepared.

If the contractor fails to complete the project within 45 days
after the contracting authority has issued its list of unfinished
items in response to the contractor’s declaration of substantial
completion of the project, the contracting authority shall have the
right to terminate the contract except where the delay is caused by
conditions beyond the control of the contractor.