

HOUSE No. 2978

The Commonwealth of Massachusetts

PRESENTED BY:

Joseph R. Driscoll, Jr.

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to public safety and fair practices in procurement relating to the Commonwealth of Massachusetts selection of architects, engineers and related professionals.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Joseph R. Driscoll, Jr.	5th Norfolk
Steven A. Baddour	First Essex

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE HOUSE, NO. 3182 OF 2007-2008.]

The Commonwealth of Massachusetts

In the Year Two Thousand and Nine

AN ACT RELATIVE TO PUBLIC SAFETY AND FAIR PRACTICES IN PROCUREMENT
RELATING TO THE COMMONWEALTH OF MASSACHUSETTS SELECTION OF ARCHITECTS,
ENGINEERS AND RELATED PROFESSIONALS.

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

1 SECTION 1. The General Laws are hereby amended by inserting after Section 19 of Chapter
2 30B, the following new Section:--

3 Section 20 – SELECTION OF ARCHITECTS, ENGINEERS AND RELATED PROFESSIONALS

4 (A) For purposes of this section the following phrases shall have the following meanings:

5 (1) “Firm” means any individual, firm, partnership, corporation, association, or other legal entity
6 permitted by law to practice the professions of architecture, engineering, land surveying, landscape
7 architecture, environmental science, planning and program management.

8 (2) “Agency” means any department, commission, council, board, bureau, committee, institution,
9 agency, state university, government corporation, authority, or other establishment or
10 procurement office of the Commonwealth, excluding cities, towns, or municipalities.

11 (3) “Architectural and Engineering Services” means:

12 1. professional services of an architectural or engineering nature, as defined by State law,
13 which are required to be performed or approved by a person licensed, registered, or
14 certified to provide such services as described in this paragraph;

15 2. professional services of an architectural or engineering nature performed by contract that
16 are associated with research planning, development, design, investigations, inspections,
17 tests, evaluations, consultations, program management, value engineering, construction,
18 alteration, or repair of real property; and

19 3. such other professional services of an architectural or engineering nature, or incidental
20 services, which members of the architectural and engineering professions (and
21 individuals in their employ) may logically or justifiably perform, including studies;

22 investigations; surveying and mapping; soil tests; construction phase services; drawing
23 reviews; evaluations; consultations; comprehensive planning; program management;
24 conceptual designs, plan and specifications; soils engineering; cost estimates or
25 programs; preparation of drawings, plans, or specifications; supervision or administration
26 of a construction contract; construction management or scheduling; preparation of
27 operation and maintenance manuals, and other related services.

28 (4) "Related Professional Services" means:

- 29 1. professional services including land surveying, landscape architecture, environmental
30 science, planning and licensed site professionals, which are required to be performed or
31 approved by a person licensed, registered, or certified to provide such services as
32 described in this paragraph;
- 33 2. professional services performed by contract that are associated with research, planning,
34 development, design, investigations, inspections, surveying and mapping, tests,
35 evaluations, consultations, comprehensive planning program management, value
36 engineering, construction, alteration, or repair of real property; and
- 37 3. such other professional services, or incidental services, which members of the related
38 professions described in (4)1 above (and individuals in their employ) may logically or
39 justifiably perform, including master plans, studies, surveys, soil tests, cost estimates or
40 programs; preparation of drawings, plans, or specifications supervision or administration
41 of a construction contract; construction management or scheduling; conceptual designs,
42 plans and specifications; construction phase services, soils engineering, drawing reviews,
43 cost estimating, preparation of operation and maintenance manuals, and other related
44 services.
- 45 4. Nothing contained in the foregoing as amended shall be construed as constituting
46 regulation and/or oversight of any designated firms or identified professionals services.

47 (5) "Project" means any capital improvement project or any design, study, plan,

48 survey, or new or existing program activity of a State agency, including the development of new or
49 existing programs that require architectural, engineering or related professionals services and shall
50 not include any public building construction project undertaken pursuant to the provisions of Mass.
51 Gen. Laws, Chapters 7, 149 or 149A.

52 (B) The Commonwealth of Massachusetts Legislature hereby declares it to be the policy of the
53 Commonwealth of Massachusetts to publicly announce all requirements for architectural, engineering,
54 and related professional services, to procure these services on the basis of demonstrated competence and
55 qualifications, and to negotiate contracts after selecting a firm, at fair and reasonable prices.

56 (C) PREQUALIFICATION.

57 For those agencies that prequalify architectural, engineering, and related services, the agency head shall
58 encourage firms engaged in the lawful practice of their profession to submit annually a statement of
59 qualifications and performance data.

60 (D) PUBLIC NOTICE.

61 Whenever a project requiring architectural, engineering, or related professional services is proposed for a
62 State Agency, the agency shall provide no less than 14 days advance notice published in a professional

63 services bulletin or advertised within the official State Agency website setting forth the projects and
64 services to be procured. The professional services bulletin shall be made available to each firm that
65 requests the information. The professional services bulletin shall include a description of each project and
66 shall state the time and place for interested firms to submit a letter of interest and, if required by the
67 public notice, a statement of qualifications. If it is determined that a sole source selection of a qualified
68 firm is in the best interest of the agency then the project is not publicly advertised.

69 (E) EVALUATION PROCEDURE.

70 An agency shall evaluate the firms submitting letters of interest and other prequalified firms, taking into
71 account qualifications; and the agency may consider, but shall not be limited to considering, ability of
72 professional personnel, past record and experience, performance data on file, willingness to meet time
73 requirements, location, workload of the firm and any other qualifications based on factors as the agency
74 may determine in writing are applicable. The agency may conduct discussions with and require
75 presentations by firms deemed to be the most qualified regarding their qualifications, approach to the
76 project and ability to furnish the required services. In no case shall an agency, prior to selecting a firm for
77 negotiation seek formal or informal submission of verbal or written estimates of costs or proposals in
78 terms of dollars, hours required, percentage of construction cost, or any other measure of compensation.

79 (F) SELECTION PROCEDURE.

80 (1) An agency shall select architects, engineers and related professional firms on the basis of
81 qualifications for the type of professional services required. An agency may solicit or use pricing
82 policies and proposals or other pricing information to determine consultant compensation only after
83 the agency has selected a firm and initiated negotiations with the selected firm.

84 (2) The procedures that an agency creates for the screening and selection of firms shall be within
85 the sole discretion of the agency and may be adjusted to accommodate the agency's scope, schedule and
86 budget objectives for a particular project. Adjustments to accommodate an agency's objectives
87 may include provision for the direct appointment of a firm if the value of the project does not exceed
88 \$25,000, or if it is determined that a sole source selection of a qualified firm is in the best interest of the
89 agency and the project is not publicly advertised.

90 (3) The decision of an agency that has complied with the provisions of this Act is final and
91 binding.

92 (G) CONTRACT NEGOTIATION.

93 (1) The agency and the selected firm shall mutually discuss and refine the scope of services for the
94 project and shall negotiate conditions, including but not limited to compensation level and
95 performance schedule based on scope of services. The compensation level paid must be
96 reasonable and fair to the agency as determined solely by the agency. In making such
97 determination, the agency shall take into account the estimated value of the services to be
98 rendered, the scope, complexity, and professional nature thereof.

99 (2) If the agency and the selected firm are unable for any reason to negotiate a contract at a
100 compensation level that is reasonable and fair to the agency, the agency shall, in writing, formally
101 terminate negotiations with the selected firm. The agency shall then negotiate with the second
102 ranked most qualified firm. The negotiation process may continue in this manner through
103 successive ranked firms until an agreement is reached or the agency terminates the consultant
104 contracting process.

105 (H) SMALL CONTRACTS AND SOLE SOURCE CONTRACTS.

106 The provisions of this Act do not apply to architectural, engineering, and related professional services
107 contracts of less than \$25,000, or sole source contracts that are awarded to a qualified firm as determined
108 to be in the best interest of the agency, where only one firm has been solicited regarding the project and
109 the project is not publicly advertised.

110 (I) EMERGENCY SERVICES.

111 The provisions of this Act do not apply in the procurement of architectural, engineering, and related
112 professional services by agencies (i) when an agency determines in writing that it is in the best interest of
113 the State to proceed with the immediate selection of a firm or (ii) in emergencies when immediate
114 services are necessary to protect the public health and safety, including, but not limited to, earthquake,
115 tornado, storm, or natural or man-made disaster.

116 (J) FIRM PERFORMANCE EVALUATION.

117 Each agency shall evaluate the performance of each firm upon completion of a contract. That evaluation
118 shall be made available to the firm who may submit a written response, with the evaluation and response
119 retained solely by the agency. The evaluation and response shall not be made available to any other
120 person or firm and is exempt from disclosure under the Freedom of Information Act.

121 (K) CERTIFICATE OF COMPLIANCE. Each contract for architectural, engineering, and related
122 professional services by an agency shall contain a certificate signed by a representative of the agency and
123 the firm that each has complied with the provisions of this Act.

124 SECTION 2. Chapter 30B, Section 1, subsection 15 of the General Laws are hereby amended by striking
125 the word "designers" and adding the following new subsection:

126 (34A) contracts with architects, engineers and related professionals.

127 SECTION 3. Chapters 30B, Section 2 of the General Laws are hereby amended by striking the definition
128 of "Designer" and replacing it with the following text:

129 "Architects and Engineers", a person performing professional services of an architectural or engineering
130 nature, as defined by State law, which are required to be performed or approved by a person licensed,
131 registered, or certified to provide such services as described in this paragraph; professional services of an
132 architectural or engineering nature performed by contract that are associated with research, planning,
133 development, design, investigations, inspections, tests, evaluations, consultations, program management,
134 value engineering, construction, alteration, or repair of real property; and such other professional services
135 of an architectural or engineering nature, or incidental services, which members of the architectural and
136 engineering professions (and individuals in their employ) may logically or justifiably perform, including
137 studies; investigations; surveying and mapping; soil tests; construction phase services; drawing reviews;
138 evaluations; consultations; comprehensive planning; program management; conceptual designs, plans and
139 specifications; soils engineering; cost estimates or programs; preparation of drawings, plans, or
140 specifications; supervision or administration of a construction contract; construction management or
141 scheduling; preparation of operation and maintenance manuals, and other related services.

142 "Related Professionals" are professionals engaged in professional services including land surveying,
143 landscape architecture, environmental science, planning, and licensed site professionals, which are
144 required to be performed or approved by a person licensed, registered, or certified to provide such
145 services as described in this paragraph; professional services performed by contract that are associated
146 with research, planning, development, design, investigations, inspections, surveying and mapping, tests,
147 evaluations, consultations, comprehensive planning, program management, value engineering,
148 construction, alteration, or repair of real property; and such other professional services, or incidental
149 services, which members of the related professions described in (4)1 above (and individuals in their
150 employ) may logically or justifiably perform, including master plans, studies, surveys, soil tests, cost
151 estimates or programs; preparation of drawings, plans, or specifications; supervision or administration of
152 a construction contract; construction management or scheduling; conceptual designs, plans and
153 specifications; construction phase services, soils engineering, drawing reviews, cost estimating,
154 preparation of operation and maintenance manuals, and other related services.

155 Nothing contained in the foregoing shall be construed as constituting regulation and/or oversight of any
156 designated firms or identified professionals services.

157 SECTION 4. The General Laws are hereby amended by deleting Section 8A of Chapter 81, in its entirety
158 and inserting the following new Section:--

159 Section 8A. The Department shall publicly announce all Requests for Engineering Survey
160 Services; procure these services on the basis of demonstrated competence and qualifications; and
161 negotiate contracts after selecting a firm, at fair and reasonable prices.

162 The Department shall adhere to the following processes for each Request of Engineering Survey
163 Services.

164 (A) PUBLIC NOTICE.

165 Whenever a project requiring Engineering Survey Services or related professional services is
166 proposed for the Department, the Department shall provide no less than 14 days advance notice
167 published in a professional services bulletin or advertise with the official Department website
168 setting forth the project and services to be procured. The professional services bulletin shall be
169 made available to each firm that requests the information. The professional services bulletin
170 shall include a description of each project and shall state the time and place for interested firms
171 to submit a letter of interest and, if required by the public notice, a statement of qualifications. If
172 it is determined that a sole source selection of a qualified firm is in the best interest of the agency
173 then the project is not publicly advertised.

174 (B) EVALUATION PROCEDURE.

175 The Department shall evaluate the firms submitting letters of interest and other prequalified
176 firms, taking into account qualifications; and the Department may consider, but shall not be
177 limited to considering, ability of professional personnel, past record and experience, performance
178 data on file, willingness to meet time requirements, location, workload of the firm and any other
179 qualifications based on factors as the agency may determine in writing are applicable. The
180 Department may conduct discussions with and requires presentations by firms deemed to be the
181 most qualified regarding their qualifications, approach to the project and ability to furnish the
182 required services. In no case shall the Department, prior to selecting a firm for negotiation seek
183 formal or informal submission of verbal or written estimates of costs and proposals in terms of
184 dollars, hours required, percentage of construction cost, or any other measure of compensation.

185 (C) SELECTION PROCEDURE.

186 (1) An agency shall select engineering survey firms and related professional firms on the basis
187 of qualifications for the type of professional services required. The Department may solicit
188 or use pricing policies and proposals or other pricing information to determine consultant
189 compensation only after the Department has selected a firm and initiated negotiations with
190 the selected firm.

191 (2) The procedures that the Department creates for the screening and selection of firms
192 shall be within the sole discretion of the Department and may be adjusted to
193 accommodate the Department's scope, schedule and budget objectives for a particular
194 project. Adjustments to accommodate the Department's objectives may include
195 provision for the direct appointment of a firm if the value of the project does not
196 exceed \$25,000, or if it is determined that a sole source selection of a qualified firm is
197 in the best interest of the Department and the project is not publicly advertise.

198 (3) The decision of the Department that has complied with the provisions of this Act is
199 final and binding.

200 (D) CONTRACT NEGOTIATION.

201 (1) The Department and the selected firm shall mutually discuss and refine the scope of
202 services for the project and shall negotiate conditions, including but not limited
203 to compensation level and performance schedule based on the scope of services. The
204 compensation level paid must be reasonable and fair to the Department as determined
205 solely by the Department. In making such determination, the Department shall take
206 into account the estimated value of the services to be rendered, the scope, complexity,
207 and professional nature thereof.

208 (2) If the Department and the selected firm are unable for any reason to negotiate a contract at
209 a compensation level that is reasonable and fair to the Department, the Department shall, in
210 writing, formally terminate negotiations with the selected firm. The Department shall then
211 negotiate with the second ranked most qualified firm. The negotiation process may
212 continue in this manner through successive ranked firms until an agreement is reached or
213 the agency terminates the consultant contracting process.

214 (E) SMALL CONTRACTS AND SOLE SOURCE CONTRACTS

215 The provisions of this Act do not apply to architectural, engineering, and related professional
216 services contracts of less than \$25,000, or sole source contracts that are awarded to a qualified
217 firm as determined to be in the best interest of the Department, where only one firm has been
218 solicited regarding the project and the project is not publicly advertised.

219 (F) EMERGENCY SERVICES

220 The provisions of this Act do not apply in the procurement of engineering survey services and
221 related professional services by agencies (i) when the Department determines in writing that it is
222 in the best interest of the State to proceed with the immediate selection of a firm or (ii) in
223 emergencies when immediate services are necessary to protect the public health and safety,
224 including, but not limited to, earthquake, tornado, storm, or natural or man-made disaster.