

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
Department of Administration, Division of Purchasing

Notice of Request for Comments on Proposed Revised Rule 8.11
Relating to Construction Contract Management
(Filed as Emergency Amendment July 25, 2008)

As previously posted on the Division's website, a public hearing on proposed amendments to construction management procurement regulations was held on January 24, 2008. At this hearing the Division received several comments concerning the proposed regulations. After reviewing these comments, it was decided that many comments from the hearing should be incorporated in the rules. However, as these revisions were made, it was clear to the Division that additional changes in the rules needed to be made and an additional hearing needed to be scheduled.

On April 4, 2008 the Division filed an emergency amendment to address many ongoing projects handled by the Department of Transportation. While this emergency amendment was in effect, the Division prepared a revised proposed Rule 8.11 to address the various concerns that had been raised. Because the State has numerous large scale construction projects in various stages of planning and construction and in order not to delay these projects, the Division initially filed the revised proposed rule with the Secretary of State as an emergency amendment. This filing took place on July 25, 2008. While proposed Procurement Rule 8.11 may be viewed on the Secretary of State's website, an excerpt containing the amended rule is attached to this notice.

Before the Division begins formal rulemaking proceedings, the Division invites public review and comment on the proposed amended rule.. It is requested that any such comments are sent to Lorraine Hynes at lhynes@purchasing.state.ri.us. It would helpful if these comments were sent as an email or an email attachment. All comments need to be submitted by Friday August 15, 2008 by the close of business.

After all comments have been reviewed and after any additional changes are made, the Division will begin the formal rulemaking process, as described in the State's Administrative Procedures Act. A public hearing on the proposed rules will be scheduled. Notice of this hearing will be posted on the website for the Secretary of State, as well as on this website.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
Department of Administration, Division of Purchasing
Responsibility for Selection of Methods of Construction Contracting
Management

Proposed Procurement Regulation 8.11
(Filed as Emergency Amendment July 25, 2008)

- 8.11.1 Construction Contract Management. The intent of Rule 8.11 is to specifically identify alternative methods of management of construction and the criteria to be used in selecting such methods. In addition, the intent of this Rule is to clarify that the method of source selection used to award a state contract for a particular construction project shall continue to be governed by all the applicable provisions of chapter 2 of title 37, entitled "State Purchases", also referred to as the "State Purchases Act". These provisions include but are not limited to sections 37-2-17 "Methods of Source Selection"; 37-2-18 "Competitive sealed bidding"; 37-2-19 "Competitive negotiation"; 37-2-20 "Negotiations after unsuccessful competitive sealed bidding"; 37-2-21 "Noncompetitive procurements"; 37-2-22 "Small purchases" and 37-2-59 "Professional services – Architectural, engineering, and consultant services – Committee". Provided, however, the provisions of Rules 8.11.3 and 8.11.4 shall not apply to road, bridge and heavy construction projects which are funded in whole or in part by federal funds.
- 8.11.2 Road, Bridge and Heavy Construction Projects. The provisions of Rules 8.11.3 and 8.11.4 shall not apply to road, bridge and heavy construction projects that are managed by the Rhode Island Department of Transportation and are funded in whole or in part by federal funds. Road, bridge and heavy construction projects are subject to the methods of management of construction contracting, including the criteria for selecting such methods, that are set forth in applicable federal law, including but not limited to 23 U.S.C. 112(b)(i) as amended, and regulations promulgated thereunder.
- 8.11.3 Construction Contract Management Methods and Criteria. For all other construction projects not included in Rule 8.11.2, the methods below, along with the criteria for each method, are the alternative methods of construction contract management deemed feasible by the Chief

Purchasing Officer. The methods below are not mutually exclusive and may be combined on a project.

8.11.3.1 General Contractor Method. The general contractor method is the generally preferred method of construction work and may be selected for a project when it is determined that the following criteria will be met:

- (a) the project requires timely completion of the construction work in accordance with drawings and/or specifications provided by the State and/or the State's agent.
- (b) the project work may be performed by specialty subcontractors under the control and supervision of a general contractor.
- (c) the project does not require direct supervision or coordination between the contractor and project engineering/design professionals other than as normally performed by State employees.
- (d) the construction project is estimated to cost in excess of ten thousand dollars (\$10,000).

8.11.3.2 Multiple Prime Contractors. The multiple prime contractor method may be selected for a project when it is determined that the following criteria will be met:

- (a) the State or the State's agent is able to coordinate job site activities of any number of contractors and/or subcontractors with varying areas of construction expertise to complete portions of the project in accordance with the State's drawings and specifications and the State or the State's agent will contract directly with such contractors and/or subcontractors.
- (b) the State and/or its agent is able to assume primary responsibility for successful completion of the entire project or is able to delegate such responsibility to one of the multiple prime contractors.
- (c) the construction project is for the rehabilitation or renovation of a building or buildings.
- (d) the contract(s) for the rehabilitation or renovation of any building(s) in the aggregate are estimated to cost less than two million dollars (\$2,000,000).

8.11.3.3 Design-Build. The design-build method may be selected for a project when it is determined that the following criteria will be met:

- (a) the State does not have the ability to prepare the requisite design or engineering specifications, bridging documents, or scope of work.
- (b) the State cannot manage or supervise the work of specialty trade contractors and will not contract directly with such specialty trade contractors.
- (c) the State determines that it is in its best interest for a construction manager to assume responsibility for both final design and construction of the project.
- (d) it is in the State's best interest to select a design-build contractor rather than a general contractor for the project.
- (e) construction work on the project has an estimated cost equal to or greater than two-million five-hundred thousand dollars (\$2,500,000).

8.11.3.4 Construction Manager at Risk. The Construction Manager at Risk method may be selected for a project when it is determined that the following criteria will be met:

- (a) the State lacks the resources to evaluate and implement drawings and specifications as they affect time, cost, and quality of construction and lacks the ability to coordinate the construction of the project, including the administration of change orders.
- (b) the State requires professional assistance in the development of a cost effective design (also known as the construction document phase) for the project.
- (c) it is in the State's best interest to hire a construction manager who can guarantee that the project will be completed on time and will not exceed a specified guaranteed maximum price for construction.

- (d) it is in the State's best interest not to retain the services of a general contractor for the project and not to directly hold contracts with subcontractors, but rather to retain the services of a construction manager, who shall be required to directly retain subcontractors through issuance of multiple, competitively negotiated bid packages.
- (e) it is in the State's best interest to pay a single management fee which may be either a lump sum or a combination of other fees, except that said fees shall not be calculated as a percentage of construction costs, with a guaranteed maximum cost for construction.
- (f) it is in the State's best interest to hire a construction manager who can provide construction services, management services, accounting services, design services, and retain specialty subcontractors as deemed necessary to successfully complete the project.
- (g) the project has an estimated cost equal to or greater than twenty-five million dollars (\$25,000,000).

8.11.3.5 Owner Program Management. The Owner Program Management method may be selected for a project when it is determined that the following criteria will be met:

- (a) it is in the State's best interest to retain a construction manager to supervise and or monitor the activities of a general contractor; and/or
- (b) it is in the State's best interest to retain a construction manager to supervise and or monitor the engineering and architectural services for a project;
- (c) the construction project has an estimated cost equal to or greater than ten thousand dollars (\$10,000).

8.11.4 Construction Contract Management Selection Information. In addition to criteria set-forth in Rule 8.11.3, the following information for a particular project shall be submitted to the Chief Purchasing Officer under Rule 8.11.5:

- 8.11.4.1 when the project must be completed or ready for occupancy or use;
 - 8.11.4.2 the specific nature of the project and its specialized needs, e.g. housing, offices, laboratories, and specialized construction;
 - 8.11.4.3 the extent to which the requirements of the procuring agency and the ways in which said requirements are to be met are known;
 - 8.11.4.4 the location of the project;
 - 8.11.4.5 the size, scope, complexity, and economics of the project;
 - 8.11.4.6 the amount and type of financing available for the project, including whether the budget is fixed and the source of funding, e.g., general or special appropriation, federal assistance moneys, general obligation bonds or revenue bonds;
 - 8.11.4.7 the availability, qualification, and experience of State personnel to be assigned to the project and how much time the State personnel can devote to the project;
 - 8.11.4.8 the availability, experience and qualifications of outside consultants and contractors to complete the project under the various methods being considered;
 - 8.11.4.9 the method of source selection under the State Purchases Act that will be used to award a contract to a vendor for this particular project.
- 8.11.5 Selection Documentation. The purchasing agent or purchasing agency responsible for carrying out the construction project shall set forth in writing to the Chief Purchasing Officer the facts that led to the selection of a particular method of construction contract management pursuant to the criteria set forth in Rule 8.11.2 or 8.11.3 and the information required in Rule 8.11.4. The Chief Purchasing Officer shall include in the contract file a written statement setting forth the facts that led to the selection of a particular method of management of construction in each instance. The Chief Purchasing Officer's written statement may adopt, in whole or in part, any written statements provided by the purchasing agent or purchasing agency.
- 8.11.6 Protest. Any actual or prospective bidder, offeror, or contractor, who

is aggrieved in connection with the solicitation or selection for award of a contract, may file a protest with the Chief Purchasing Officer pursuant to RIGL section 37-2-52.