

1999 DRAFTING REQUEST

Bill

Received: 12/17/1999

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Gary George (608) 266-2500**

By/Representing: **Dan Rossmiller**

This file may be shown to any legislator: **NO**

Drafter: **kuesejt**

May Contact:

Alt. Drafters:

Subject: **State Government - miscellaneous**

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

State procurement from persons doing business in Burma

Instructions:

See attached Mass. law.

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	kuesejt 01/31/2000	gilfokm 01/31/2000		_____			State
/1			jfrantze 02/01/2000	_____	lrb_docadmin 02/01/2000	lrb_docadmin 02/11/2000	

FE Sent For:

<END>

1999 DRAFTING REQUEST

Bill

Received: 12/17/1999

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Gary George (608) 266-2500**

By/Representing: **Dan Rossmiller**

This file may be shown to any legislator: **NO**

Drafter: **kuesejt**

May Contact:

Alt. Drafters:

Subject: **State Government - miscellaneous**

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

State procurement from persons doing business in Burma

Instructions:

See attached Mass. law.

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	kuesejt 01/31/2000	gilfokm 01/31/2000		_____			State
/1			jfrantze 02/01/2000	_____	lrb_docadmin 02/01/2000		

FE Sent For:

<END>

1999 DRAFTING REQUEST

Bill

Received: **12/17/1999**

Received By: **kuesejt**

Wanted: **As time permits**

Identical to LRB:

For: **Gary George (608) 266-2500**

By/Representing: **Dan Rossmiller**

This file may be shown to any legislator: **NO**

Drafter: **kuesejt**

May Contact:

Alt. Drafters:

Subject: **State Government - miscellaneous**

Extra Copic:

Pre Topic:

No specific pre topic given

Topic:

State procurement from persons doing business in Burma

Instructions:

See attached Mass. law.

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
1?	kuesejt	1-1-31-2000	to 2/1	to 2/1			

FE Sent For:

<END>

Kuesel, Jeffery

From: Rossmiller, Dan
Sent: Friday, December 17, 1999 3:35 PM
To: Kuesel, Jeffery
Subject: FW: Mass. State BSP Law

I am forwarding this to you in hopes that it may be useful in drafting legislation regarding the Myanmar (Burma) purchasing restrictions

-----Original Message-----

From: Jeffrey James Robb [<mailto:jero@csd.uwm.edu>] <<mailto:jero@csd.uwm.edu>>
Sent: Friday, December 17, 1999 3:28 PM
To: dan.rossmiller@legis.state.wi.us
Cc: robin.lickel@legis.state.wi.us; jeff.robbs@legis.state.wi.us; ggeorge220@aol.com
Subject: Mass. State BSP Law

Commonwealth of Massachusetts

June 1996
(Selected Definitions)

"Doing business with Burma (Myanmar)", (a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchise of such a person; (b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement; (c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is, largely controlled by the government of Burma (Myanmar), from Burma (Myanmar); (d) providing any goods or services to the government of Burma (Myanmar).

Government of Burma (Myanmar), any public or quasi-public entity operating within Burma (Myanmar) including, but not limited to, municipal, provincial, national or other governmental and military bodies, including all departments and agencies of such bodies, public utilities, public facilities, or any national corporation in which Burma (Myanmar) has a financial interest or operational responsibilities.

To the extent that a person doing business in Burma (Myanmar) is providing only medical supplies, as described here in above, to persons in Burma (Myanmar), then the supply of goods or equipment to the commonwealth by said person shall also be exempt from the preference requirements of these regulations. This exemption from the preference requirements shall not apply in any in which the nature of any person's business dealings in Burma (Myanmar) include both medical and non-medical supplies.

Any person from whom a procurement would be restricted under this section shall not supply goods or services to any state agency, state authority, the house of representatives or senate under any other provision of this chapter, or any other general or special law.

Section 22J.

- (a) The secretary shall establish and maintain a restricted purchase list.
The restricted purchase list shall contain the names of all persons currently doing business with Burma (Myanmar).
- (b) In establishing the restricted purchase list, the secretary shall consult United Nations reports, resources of the Investor Responsibility Research Center and the Associates to Develop Democratic Burma, and other reliable sources. The secretary shall also place the name of any person who, in the statement described in section twenty-two H, declared that he meets the criteria for being so listed.

SECTION 2. It shall be the policy of the commonwealth that the commissioner shall not sell, rent, or dispose of any real property; including but not limited to granting the right to lay, construct, maintain, or operate pipelines through, over, across, or under land, water, park, reservation or highway of the commonwealth, its agencies or its political subdivisions, to any person doing business in or with Burma (Myanmar). The commissioner may sell, rent, or dispose of said property; or grant said rights to said person only after certifying in writing to the speaker of the house of representatives and president of the senate that such action is essential to protect the health and safety of the public.

SECTION 3. The provisions of this act shall apply to contracts entered into after the effective date of this act. Any

existing contract shall remain in full force and effect and not be subject to the provisions of this act until such time as the renewal of the contractual agreement.

Editor's note: Massachusetts automatically adds 10 percent to the cost of any submitted bids if a contractor is found to be "doing business" in Burma.

Jeff Robb
Research Assistant
Institute for Survey and Policy Research
Tel: 229.4188
E-mail: jero@uwm.edu

Kuesel, Jeffery

From: Rossmiller, Dan
Sent: Friday, December 17, 1999 3:38 PM
To: Kuesel, Jeffery
Subject: FW: Oakland

Here is an Oakland City Council resolution on Myanmar (Burma). It, however, appears to deal more concretely with divestment than it deals with purchasing.

-----Original Message-----

From: Jeffrey James Robb [<mailto:jero@csd.uwm.edu>] <<mailto:jero@csd.uwm.edu>>
Sent: Friday, December 17, 1999 3:30 PM
To: dan.rossmiller@legis.state.wi.us; robin.lickel@legis.state.wi.us; jeff.robbs@legis.state.wi.us; ggeorge220@aol.com
Subject: Oakland

Oakland Resolution
Oakland, Calif.: April, 1996

NOW, THEREFORE, BE IT RESOLVED that the City Council adopts the following:

SECTION I. Definitions:

"Commodities" shall include, but not be limited to, supplies, goods, commodities, vehicles, machinery, and equipment.

"Loans" shall include any financial transaction involving Burman entities whether entered into as a singular institution or as a participant in a lending consortia. Such transactions would include purchasing securities, investing in assets, lending monies, making interest-bearing deposits, extending lines of credit, or any other such transaction that is anticipated to result in a return, directly or indirectly, of assets.

"Professional Services" shall mean the performance of any work or labor and shall also include investment counseling, underwriting, providing brokerage services, acting as a trustee or escrow agent, providing any consulting advice or assistance, or otherwise acting as an agent pursuant to a contractual agreement.

"Person" shall mean any individual, firm, partnership, corporation, association, or any other organization or entity, however formed. "Person" shall include any parent, subsidiary, affiliate, division, or franchisee of the person.

The "government of Burma" (also known as "Myanmar") shall mean any public or quasi-public entity operating within Burma, including, but not limited to, municipal, provincial, national, or other government bodies, including all departments and agencies of such bodies, public utilities, public facilities, or any national corporation in which the public sector of Burma has a financial interest or operational responsibilities.

"Doing business with" shall include but not be limited to license, franchise, supply, distribution, management or training agreements, or payment of a tax, levy, fee, duty, charge, or similar sum to the government of Burma, except those payments necessary to prevent the use of its name, trademark, trade name, trade secret, copyright or patent in Burma. All terms used in the Ordinance shall be construed in a manner consistent with the intent of the Ordinance.

SECTION II. Deposit and Investment of City Funds in Banks and Financial Institutions

A. General Prohibited Transaction

1. No City funds shall be deposited or remain deposited in any bank or financial institution which has any outstanding loan to:
 - (a) the government of Burma. Or
 - (b) any person organized under the laws of Burma, or
 - (c) any person for the express purpose of doing business with, conducting operations in, or
 - (d) trading with any, private or public entity located in Burma.

2. No City funds shall be invested or remain invested in the stocks, bonds, securities, or other obligations of any bank or financial institution which has any outstanding loan to:
 - (a) the government of Burma. Or
 - (b) any person organized under the laws of Burma. Or
 - (c) any person for the express purpose of doing business with, conducting operations in, or
 - (d) trading with any private or public entity located in Burma.

3. The prohibitions of this Section shall not apply to any bank or financial institution which submits a Statement in compliance with the requirements of subsection "C" of this Section.
4. The prohibitions of this Section shall not apply to City funds invested under a trust indenture or investment agreement otherwise invested by the City under a pre-existing contractual obligation, provided that such funds, if invested or deposited in non-compliance with this Ordinance, shall be withdrawn or divested at the earliest possible maturity date.

SECTION III. Investment of City Funds

A. General Prohibited Transaction

No City funds shall be invested in or remain invested in the stocks, bonds, securities or other obligations of:

1. the government of Burma, or
2. any person organized under the laws of Burma or any person which does business with any private or public entity located in Burma, or conducts operations in Burma.

B. Implementation by Published List

1. Within ninety (90) days after the effective date of this Ordinance, the City Manager shall file in the Office of the City Clerk ~ distribute to the Mayor and the Director of the Office of Budget and Finance, a listing of persons which are described in subsection A of this Section. The City Manager shall make use of information provided by the Investor Responsibility Research Center and other reliable sources in the compilation of the listing. The City Manager shall update and amend the listing semi-annually, or more frequently as deemed necessary, by the City Manager.
2. The requirements of this Section shall be satisfied by ensuring that no City funds are invested in any stocks, bonds, securities, or other obligations of any persons which appear on the List prepared pursuant to the preceding subsection, or in any stocks, securities, or other obligations of the government of Burma.

C. Compliance

With respect to City funds currently invested in proscribed investments pursuant to this Section, the withdrawal or divestiture required by this Section shall be completed within one (1) year after the effective date of this Ordinance. During this one (1) year period, the City Manager shall make three reports to the Council, as proscribed in Section XI, concerning the progress of divestiture, until all City funds have been withdrawn or divested from proscribed investments. When the City Manager determines that City funds must be divested pursuant to this Section, the City Manager shall advise said companies that the withdrawal or divestiture of City funds is required by this Ordinance. All other provisions of this Section shall take effect on the effective date of this Ordinance.

SECTION IV. Contracting and Purchasing With City Funds

A. General Prohibited Transaction

The City of Oakland shall be prohibited from entering into any contractual agreement for the purchase of any commodities that are manufactured or produced in Burma.

B. Pursuant to the findings set forth herein above, it shall be City policy to minimize the expenditure of City funds on goods and services produced by any person which buys, sells, leases or distributes commodities and/or professional services to:

1. the government of Burma, or any person organized under the laws of Burma or any person which does business with any private or public entity located in Burma, or conducts operations in Burma.

JTK
/

Selective Purchasing & Investment to Avoid Support for Repression in Burma

A Model "Burma Law" for State or Local Governments

For discussion purposes only -- not for distribution.

Contents

I.	Introduction	1
II.	Model Resolution to Avoid Support for Repression in Burma	2
	§ 1. Purpose	2
	§ 2. Working Group	2
	§ 3. Information	4
	§ 4. Findings	4
	§ 5. Transmission to Congress	5
III.	Model Law with Commentary	5
	§ 1. Legislative Findings	5
	§ 2. Statement of Purpose	6
	§ 3. Definitions	7
	§ 4. Burma List, Disclosure and Notice	9
	§ 5. Selective Investment	11
	§ 6. Selective Purchasing	12
	§ 7. Severability	15

Prepared by the
HARRISON INSTITUTE FOR PUBLIC LAW
GEORGETOWN UNIVERSITY LAW CENTER
111 F Street, N.W. - Suite 102
Washington, DC 20001-2095
hinst@law.georgetown.edu
phone 202-662-9600
fax 202-662-9613

Selective Purchasing & Investment to Avoid Support for Repression in Burma

A Model "Burma Law" for State or Local Governments

I. Introduction

In 1996, the Massachusetts legislature enacted a "selective purchasing law" that provides a 10% preference in the award of state contracts to companies that do not do business in Burma. On November 4, 1998, a federal district in Boston court ruled that the Massachusetts Burma law violates the exclusive foreign affairs power of the federal government. In addition, the European Union and Japan have challenged the Massachusetts law before the World Trade Organization (WTO) as a violation of the United States' obligations under the Government Procurement Agreement (GPA), a trade agreement administered by the WTO.

The federal court decision is currently being appealed and may be overturned. Nonetheless, the court decision and the WTO challenge have had a chilling effect on the willingness of some jurisdictions to pass new laws addressing the human rights conditions in Burma. The Model Resolution and Model Selective Purchasing and Investment Law were drafted to provide state and local governments with options for drafting Burma laws that are more politically viable and less vulnerable to attack on both constitutional and WTO grounds than existing selective purchasing legislation. The Model Resolution represents an initial legislative option for jurisdictions that are not immediately able to pass economic measures. It helps educate the public and other policy makers in advance of pursuing the more comprehensive Model Selective Purchasing and Investment Law.

The Model Resolution and Model Law are based on four central principles:

1. **Corporate Stigma:** Corporations are eager not to be subject to state and local selective purchasing and investment laws (or resolutions raising the possibility of future selective purchasing and investment laws) not only because of the direct economic impact of these laws, but also because of concern for the adverse publicity that results from being associated with a oppressive regimes.
2. **Free Speech:** Some state and local actions with foreign policy implications -- particularly expressions of opinion, and arguably purchasing and investment decisions -- are not only constitutionally permissible, but are in fact protected from federal regulation under the First Amendment. *See generally* Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 *Stanford J. Int'l L.* ___ (to be published in January, 1999).

3. **Variety of Economic and Non-Economic Measures:** A federal district court in Boston has recently held that Massachusetts' selective purchasing law on Burma is unconstitutional. This decision is currently being appealed and may be reversed by the court of appeals, or ultimately, the Supreme Court. Yet even if this decision is upheld on appeal, there are other options available for using the market power of state and local governments to support democracy in Burma, including: selective purchasing measures drafted to be consistent with the Government Procurement Agreement (GPA) cited by the federal court and "selective investment" provisions: requiring companies with economic ties to a jurisdiction to disclose any ties with Burma or its military regime; or publication of the list of companies doing business in Burma.
4. **Severability:** In order to discourage legal challenges, a selective purchasing law should be structured so that some portion of it will remain in effect even if other parts are struck down as unconstitutional. Companies would accordingly be faced with the prospect that a legal challenge would generate additional adverse publicity without a reasonable prospect of having the law struck down in its entirety.

II. DRAFT RESOLUTION to Avoid Support for Repression in Burma

1. Purpose

- a. **Investigation.** The purpose of this resolution is to enable the [jurisdiction] [legislature] to determine whether any of its business partners directly support the [military government of Burma], which depends on foreign trade to continue its repression of human rights and on promotion of heroin exports to the United States.
- b. **Options.** This resolution also seeks to identify options that enable the state to use standards of public morality as a market participant that purchases, sells or invests in a global economy. The purpose is to avoid the moral taint and avoid doing harm by doing business with companies that support repression.

2. Working Group [or Special Committee]

- a. **Creation.** This resolution creates a Working Group on Government Purchasing and Human Rights, which exists through the end of the legislative session of the year 2001. The Speaker [or Senate President] shall appoint a chair [or cochairs] of the Working Group from among the sponsors of this resolution. If the Senate [or House] creates a similar working group, the groups may work jointly in order to perform their respective duties. Membership in the Working

Group is open to any member of this body who notifies the chair.

- b. Investigation and report.** The Working Group shall investigate the following questions and report to the House [Senate] annually before that last day of 1999 and 2000 respectively.

(1) Trade that supports repression of human rights or promotion of heroin exports to the United States.

- (a) Are the findings of section 3 still valid? These are findings on repression of human rights and promotion of heroin exports to the United States by the government of Burma. In answering this question, the Working Group may rely on official reports of the United States government, the United Nations and the International Labor Organization.
- (b) Does the state do business with companies that directly support the military government of Burma? In answering this question, the Working Group may assume that "support" includes providing goods and services directly to the government or providing significant foreign exchange by trading with an enterprise that is owned or controlled by the government of Burma.

(2) Options for the state to use standards of public morality as a market participant.

- (a) Are there ways for the state to act consistent with its constitutional authority, U.S. foreign policy and international standards of public morality in order to:
 - (i) avoid doing business with corporations that support repression of human rights; or
 - (ii) encourage corporations in which the state owns or controls investments to avoid support for repression of human rights.
- (b) With respect to constitutional authority for the state to act as a market participant:
 - (i) May the state use international standards of public morality as defined in the federal common law or in treaties that have been ratified by the U.S. Senate, which include provisions for implementation at subnational levels of

government?

(ii) Has Congress preempted the state from using certain options as a market participant?

(c) If the state uses standards of public morality as a market participant, are there ways for the state to minimize administrative or economic burdens on state purchasing officials or the companies that do business with the state? In answering this question, the Working Group shall consult with the [state purchasing department] and the State Treasurer.

3. Information. The [deparatment of legislative reference] shall support the Working Group by:

- (1) obtaining copies of the most recent reports on repression of human rights by [the military government of Burma] including reports of the U.S. Departments of State and Labor, the United Nations, and the International Labor Organization; and
- (2) subscribing to the information service of the Investor Responsibility Resource Center with respect to companies that do business in Burma.

4. Findings. The House [or Senate] [or legislature] finds that:

- a. The military government ruling Burma has violated international standards of public morality, which include violations of human rights agreements that have been cited by the United States Department of State, the United States Department of Labor, the United Nations and the International Labor Organization. These institutions have found that the military government of Burma has:
 - (1) used its military power to engage in systematic imposition of forced labor, forced relocation, torture, rape, and persecution of ethnic minorities;
 - (2) ignored the results of the 1990 elections in which many pro-democracy candidates were selected for seats in the government;
 - (3) imprisoned, killed or exiled many of the candidates who were elected;
 - (4) failed to convene a constitutional convention as promised in 1990; and
 - (5) imposed martial law barring freedom of the press, gatherings of more than five people, and labor and trade union organizing.

- b. The rightfully elected leaders of Burma, exiled Prime Minister Sein Win and Aung San Suu Kyi, the leader of the National League for Democracy, have called upon the world community to impose economic and arms sanctions against the military regime.
 - c. That the system of oppression imposed by the military government is illegal and contrary to international law, including the Convention on Forced Labor No. 105, the Convention on Civil and Political Rights, and the Convention Against Torture, among other agreements.
 - d. Under Burmese law all foreign corporations hiring more than five employees must hire only from a government-supplied list, and the International Labour Organization and the United States Department of Labor have reported that forced labor is used on foreign-backed projects. Well over 5.5 million Burmese have been pressed into forced-labor projects to build the agricultural irrigation systems and infrastructure for commerce including highways, airport runways and railroads. In recent years, forced labor accounts for approximately seven percent of gross domestic product in Burma. These figures do not account for military portering, the most common form of forced labor, which frequently entails brutal treatment and rape of women laborers by soldiers.
 - e. Sound investment policy requires consideration of the political risk associated with investment of [jurisdiction] pension funds in companies that conduct business in countries with oppressive, nondemocratic governments.
5. **Transmission to Congress.** The [clerk of the legislative body] shall transmit a copy of this resolution to the Speaker of the United States House of Representatives, the Majority Leader of the United States Senate, and the [jurisdiction] congressional delegation.

III. Model Law with Commentary

Section 1. Legislative Findings.

The [legislature] finds that:

- (a) The military junta ruling Burma has violated international standards of public morality, which include violations of human rights agreements that have been cited by the United States Department of State, the United States Department of

Labor, the United Nations and the International Labor Organization. These institutions have found that the military junta of Burma has:

- (1) used its military power to engage in systematic imposition of forced labor, forced relocation, torture, rape, and persecution of ethnic minorities;
 - (2) ignored the results of the 1990 elections in which many pro-democracy candidates were selected for seats in the government;
 - (3) imprisoned, killed or exiled many of the candidates who were elected;
 - (4) failed to convene a constitutional convention as promised in 1990; and
 - (5) imposed martial law barring freedom of the press, gatherings of more than five people, and labor and trade union organizing.
- (c) The rightfully elected leaders of Burma, exiled Prime Minister Sein Win and Aung San Suu Kyi, the leader of the National League for Democracy, have called upon the world community to impose economic and arms sanctions against the military regime.
- (d) That the system of oppression imposed by the military junta is illegal and contrary to international law, including the Convention on Forced Labor No. 105, the Convention on Civil and Political Rights, and the Convention Against Torture, among other agreements.
- (e) Under Burmese law all foreign corporations hiring more than five employees must hire only from a junta-supplied list, and the International Labour Organization and the United States Department of Labor have reported that forced labor is used on foreign-backed projects.
- (f) Sound investment policy requires consideration of the political risk associated with investment of [name of jurisdiction] pension funds in companies that conduct business in countries with oppressive, nondemocratic governments.

Comment: *Legislative findings regarding the Burmese regime's human rights record and involvement in illegal activities will help to stigmatize the regime and provide a foundation for the divestment provisions of the statute. Making a finding regarding the risks associated with investing in companies that do business in Burma could help to position the divestment provision as an exercise of business judgment rather than an attempt to influence a foreign government. This finding, however, may not be appropriate if a law does not contain a divestment provision.*

Section 2. Statement of Purpose.

It is the purpose of this act to:

- (a) Exercise the right of **[name of jurisdiction]** secured under the First Amendment of the United States Constitution, to express its support for human rights and democracy in Burma, and to petition the United States government to take appropriate measures to promote human rights and democracy in Burma;¹
- (b) Exercise the right that **[name of jurisdiction]** exercised and which is secured under the First and Tenth Amendments of the United States Constitution, to apply standards of public morality in making decisions regarding the [expenditure] and [investment]² of public funds; and
- (c) Enact legislation that is consistent with and authorized by foreign policy of the United States as adopted by the United States Congress with respect to Burma specifically and with respect to implementation of international human rights agreements, which have been ratified as treaties by the United States Senate.
- (d) Reduce the risk associated with the investment of public pension funds of **[name of jurisdiction]** in companies that conduct business in countries with oppressive, nondemocratic regimes.

The **[clerk of the legislative body]** shall transmit a copy of this chapter to the Speaker of the United States House of Representatives and to the Majority Leader of the United States Senate, and to the **[name of state]** congressional delegation.

Comment: *Describing the law as an exercise of First and Tenth Amendment rights will help to promote the view that the law reflects the quintessentially American values of free speech and federalism. Explicitly linking the law to these constitutional values should help to counter the arguments that are being made, both politically and legally, that selective purchasing laws violate constitutional standards regarding the regulation of commerce and foreign affairs. In addition, as with the Legislative Findings, stating that it is a purpose of the law to reduce the investment risks associated with investing in companies that do business in the Burma identifies a legitimate local purpose for the law.*

¹See the end of this section, and *infra* section 4 for requirement that law and list be sent to Congress.

²Revise according to which economic measures are included.

Section 3. Definitions.

For the purposes of this Act, the following words have the following meanings:

- (a) "Company" means any individual and any partnership, firm, association, corporation, or other entity, or their subsidiaries.
- (b) "Doing business with Burma" means
 - (1) providing goods, commercial services or financial services to the government of Burma or an enterprise in which the government of Burma has an ownership interest. For purposes of this section, financial services include providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, or acting as a trustee or escrow agent; or
 - (2) participating in a joint venture or investment with the government of Burma or an enterprise in which the government of Burma has an ownership interest.
- (c) "Distribution agreement" means an agreement to guarantee a contract for the supply of goods or services.
- (d) "Franchise" means authorization by a company to sell its products.
- (e) "Government of Burma" means any public or quasi-public entity operating within Burma (Myanmar), including, but not limited to, municipal, provincial, national or other governmental and military bodies, including all departments and agencies of such bodies, public utilities, public facilities, or any national corporation in which Burma has a financial interest or operational responsibilities.
- (f) "License" means that permission granted by a company to another company, or to the government of Burma (Myanmar), to exercise a certain privilege or to carry on a particular business.
- (g) "Majority-owned subsidiary" means a company that is at least fifty-one percent owned by another company.
- (h) "Purchasing agency" includes **[List all covered agencies.]**³

³This definition is only necessary for laws that include selective purchasing provisions.

Comment: *Additional definitions may be necessary depending upon the specific version of the law adopted.*

Option: *The definition of “doing business” in Burma can be adjusted -- e.g., if paragraph (1) is eliminated, the definition would embrace only companies doing business with the Burmese government. Similarly, paragraph (b)(5) could be expanded to except any other types of businesses operating in Burma that are considered to be a net benefit to the Burmese people.*

Section 4. Burma List, Disclosure and Notice.

- (a) The **[appropriate official]** shall establish and maintain a list containing the names of all companies currently doing business with Burma. In establishing the list, the secretary shall consult United Nations reports, resources of the Investor Responsibility Research Center and the Associates to Develop Democratic Burma, and other reliable sources. The list shall be updated at least once every three months.
- (b) Any company that is included on the list under this section may submit an affidavit that requests the **[appropriate official]** to remove its name from the list. An officer of the company shall sign this statement and affirm under penalty of perjury that the company is not doing business in Burma as defined in this section.
- (c) The **[appropriate official]** shall provide the list to **[officials responsible for pension fund investments]**, to the **[name of jurisdiction]** house of representatives and to the senate, to the Speaker of the United States House of Representatives, the Majority Leader of the United States Senate, and the **[name of jurisdiction]** congressional delegation. The **[appropriate official]** shall also provide notice of the list by publishing it at least every three months in newspapers of general circulation, or by such other means as the **[appropriate official]** may deem appropriate.

Comment: *Publication of the list of companies doing business in Burma will help other governments and private consumers to make informed purchasing or investment decisions. Publication of the list will also provide notice to companies named on the list so that they will have the opportunity to request that their name be removed if they have been improperly listed, or if they sever their business ties with Burma. The requirement that any affidavit that is submitted to request that a company's name be removed from the Burma list be made under oath by an officer of the corporation is intended to ensure that the issue is addressed by senior management.*

The combined effect of the “Scarlet Letter” provisions -- i.e. the list and its

publica
tion --
would
provid
e an
incenti
ve for
compa
nies to
sever
busines
s ties
with
Burma,
even if
the
divest
ment
provisi
ons
were
struck
down.

Option: *If a jurisdiction is unwilling to impose economic measures such as precluding the investment of public funds in or the award of public contracts to companies doing business in Burma (see *infra*), it could use a modified version of the affidavit requirement to require companies seeking to bid on government contracts to disclose information concerning any business they are conducting in Burma.*

Prospective government contractors could be required to submit an affidavit identifying all business contacts with Burma, including payments made to Burmese, involvement in specific industries (e.g., oil and gas), use of or support of specified infrastructure known to be made with forced labor, etc. The corporate officer signing the affidavit could also be required to attest that he or she is aware of the information concerning the Burmese regimes human rights record recited in the Legislative Findings, and that nonetheless the company chooses to do business in Burma.

Such disclosure requirements would be a source of leverage over companies that

would be faced with the choice of disclosing their business interests in countries with poor human rights records or losing the opportunity to bid on the affected state and local government contracts.

The affidavit requirement could also help to focus the attention of corporate officials on the public relations implications of their continued relationship with the targeted regime, and permit them to be held accountable for their decision to continue the relationship. Requiring the information and affidavits to be submitted and signed under oath by the relevant corporate officials would also help ensure that companies did not attempt to misrepresent the nature of their business activities in the targeted country. In addition, companies may be reluctant to disclose information concerning their business relationship with the targeted country, both because they view such information as proprietary or confidential business information and because inappropriate business relationships with specific government officials may expose them to criminal liability under the Foreign Corrupt Practices Act. Moreover, mere information disclosure requirements are much less likely than economic measures to be held to constitute violations of the dormant foreign affairs power or the dormant commerce clause.

Section 5. Selective Investment.

- (a) No public funds under **[cite to law governing pension fund investments]** shall be remain invested in the stocks, bonds, securities or other obligations of:
- (1) any company identified under section 4 of this Act as doing business in Burma;
 - (2) the government of Burma; or
 - (3) any company organized under the laws of Burma.
- (b) Notwithstanding the provisions of the preceding paragraph, if sound investment policy so requires, the **[agency or board charged with management of pension funds]** may vote to spread the sale of such investments over no more that three years so that no less than one-third the value of said investments is sold in any one year. So long as any funds remain invested in any company listed under section 3 of this Act, the **[agency or board charged with management of pension funds]** shall file with the **[clerk of the legislature]** a report listing all such investments held by the fund and their book market value of the preceding December first.
- (c) When divesting any stocks, bonds, securities or other obligations of companies on the Burma list under section 4 of this Act, the **[mayor/governor]** of

[name of jurisdiction] shall provide notice to that company in a letter reciting the legislative findings contained in section 1 of this Act and stating “ **[name of jurisdiction]** wishes to express its grave concern regarding your company’s economic ties to Burma and its oppressive system. The serious moral issues and the potential economic risk associated with investing in Burma requires **[name of jurisdiction]** to seek alternative investment opportunities.”

- (d) The **[appropriate official]** may and should vote in favor of shareholder resolutions filed by shareholders of companies listed as doing business in Burma under section 4 of this Act when those resolutions:
 - (1) request that companies report on their activities in Burma;
 - (2) request that companies report on the full costs of doing business in Burma;
or
 - (3) address human rights conditions in Burma.
- (e) The **[appropriate official]** may co-file shareholder resolutions filed by shareholders of companies listed as doing business in Burma under section 4 of this Act when those resolutions:
 - (1) request that companies report on their activities in Burma;
 - (2) request that companies report on the full costs of doing business in Burma;
or
 - (3) address human rights conditions in Burma.
- (f) This section authorizes only those actions that comply with the relevant rules of the U.S. Securities and Exchange Commission.

Comment: *Selective investment provisions, more commonly know as divestment laws, were widely used during the anti-apartheid campaign. Although generally considered to be less effective than selective purchasing measures, selective investment laws are less likely than selective purchasing laws to be held unconstitutional. A Baltimore law requiring divestment in South Africa was upheld by the Maryland Court of Appeals. See Baltimore Board of Trustees v. Mayor and City Council of Baltimore, 317 Md. 72, 562 A.2d 720, 744 (1989). Judge Tauro, in his decision striking down Massachusetts selective purchasing law on Burma, cited the Baltimore opinion and suggested that selective investment measures may be permissible because they do not “seek to influence individuals or companies in their private commercial activities.” See National Foreign Trade Council v.*

Baker, 26 F.Supp.2d 287 (D. Mass. 1998).

Option: *Rather than requiring complete divestment from companies doing business in Burma, the selective investment provisions could be drafted as only a ban on new investment.*

Option: *This section could be enacted without the divestment provisions in paragraphs (1) and (2), which would simply authorize pension fund managers to support shareholder resolutions concerning human rights conditions in Burma. Limiting the investment provision to simply authorizing support for shareholder resolutions would eliminate the direct economic impact of the provision, but would also likely reduce both political opposition and the potential for legal challenges to the law.*

Section 6. Selective Purchasing.

- (a) Except as otherwise provided in this section, a purchasing agency may not purchase goods or services from any person listed on the Burma list prepared under Section 4 of this Act, or who is determined through affidavit or through other reliable methods to meet the criteria for so being listed.
- (b) A purchasing agency may purchase goods or services from a company who is on or who is so determined to meet the criteria of the Burma list only after certifying in writing to **[appropriate official]** that:
 - (1) the purchase is necessary in order that a purchasing agency may perform its mission and failure to proceed with the purchase would cause irreparable harm to the purchasing agency's ability to perform its responsibilities; and
 - (2) compliance with paragraph (1) would eliminate the only bid or offer, or would result in inadequate competition.
- (c) In any solicitation, a purchasing agency shall provide notice of the requirements of this section. Prior to reviewing responses to bid documents for any purchases, or, if there are none, prior to making a contract, the purchasing agency shall obtain from such company seeking a contract a statement, under penalty of perjury, from an authorized representative of the company that states the nature and extent to which the company is engaging in activities that meet the definition of doing business in Burma under section 3(b).
- (d) In any purchase that includes bidders or offerors who are on or meet the criteria of the Burma list, the purchasing agency may award the contract to a company who

is on or who meets the criteria of the Burma list only if there is no responsive and responsible bid or offer which is no more than ten percent greater than the lowest bid or offer submitted for goods or a service by a company who is not on the Burma list.

- (e) A company with operations in Burma for the sole purpose of reporting the news, or solely for the purpose of providing goods or services for the provision of international telecommunications shall not be subject to the provisions of this section.
- (f) Notwithstanding the provisions of this section, a purchasing agency may purchase medical supplies intended to preserve or prolong life or to cure, prevent, or ameliorate diseases, including hospital, nutritional, diagnostic, pharmaceutical and non-prescription products specifically manufactured to satisfy identified health care needs, or for which there is no medical substitute. The determination of whether no medical substitute exists shall be made by the purchasing agency requiring the supply, under general standards of good medical and professional practice.
- (g) To the extent that a company doing business in Burma is providing only medical supplies, as above, to persons in Burma, then the supply of goods or equipment to **[name of jurisdiction]** by said company shall also be exempt from the preference requirements of these regulations. This exemption from the preference requirements shall not apply in any case in which the nature of any company's business dealings in Burma include both medical and non-medical supplies.
- (h) Any contract entered into in violation of this section shall be null and void.

Comment: *This selective purchasing provision is based largely on the Massachusetts Burma law, and provides a 10% preference in the award of contracts for companies that do not do business in Burma. Structuring a selective purchasing provision as a bidding preference -- rather than a complete ban on the award of contracts to companies that do business in Burma -- ensures that the jurisdiction will be able to obtain needed products and services, and that the implementation of the selective purchasing provision will not impose an inordinate financial burden on the jurisdiction.*

Option: *Instead of a bidding preference, the selective purchasing provision could be drafted as a **bidding preclusion** -- i.e. companies that are found to be doing business in Burma could be completely precluded from bidding on government contracts.*

Precluding companies from bidding on contracts would arguably have a more significant economic impact than merely granting a bidding preference (although government contract bids are rarely more than 10% apart). In addition, this approach could offer certain drafting advantages. A contract preclusion provision could be drafted by using the relevant scoping provision to define "bidder responsibility." Many state and local purchasing statutes already limit the award of government contracts to "responsible bidders," a term which has been held to permit consideration of the moral character and conduct of the bidder.

Option: *Either a bidding preference or a bidding preclusion provision could be drafted to avoid conflict the Government Procurement Agreement (GPA), a plurilateral trade agreement that is the basis for the challenge to the Massachusetts Burma law being brought before the World Trade Organization by the European Union and Japan. There two ways in which this could be done:*

Limit the provision to contracts above a certain dollar amount. The GPA only applies to contracts above a certain value, which are approximately \$500,000 (355,000 SDRs) for supplies or services and \$7 million (5 million SDRs) for construction.

Exclude agencies covered under the GPA. The GPA does not apply to purchasing by municipalities and only applies to purchasing in 37 of the 50 states, and it does not apply to all agencies within those states. Within the 37 states, the GPA only applies to certain agencies. Accordingly, the 37 states bound under the GPA could enact selective purchasing measures that are limited to the state agencies that are not covered. Making the selective purchasing provisions WTO consistent could remove a major source of political resistance to the enactment of such laws. It should be noted, however, that there are potentially significant constitutional defects in the manner in which the 37 states were bound under the GPA.

Section 7. Severability.

The provisions of this act are severable. If a court holds that any of its provisions or application of its provisions are invalid or unconstitutional, that invalidity or unconstitutionality does not affect the remaining provisions of this act or the application of those provisions to persons or circumstances that are not the subject of the court decision.

Comment: *A severability clause would discourage legal challenges to a selective purchasing law by decreasing the chance that the law would be struck down in its entirety, and thus forcing potential plaintiffs to weigh the value of at best a partial victory, against the adverse publicity that the litigation could generate.*

1ST SECTION of Level 1 printed in FULL format.

ANNOTATED LAWS OF MASSACHUSETTS
Copyright 1999 LEXIS Law Publishing, a division of Reed Elsevier Inc.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH 1999 CH. 117, NOVEMBER 4, 1999

PART I. ADMINISTRATION OF THE GOVERNMENT
TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH
CHAPTER 7. EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE

Mass. Ann. Laws ch. 7, § 22G (1999)

§ 22G. Definitions.

For the purposes of sections twenty-two H to twenty-two M, inclusive, the following words shall, unless the context indicates otherwise, have the following meanings:--

"Comparable low bid or offer", a responsive and responsible bid or offer which is no more than ten percent greater than the lowest bid or offer submitted for goods or a service.

"Distribution agreement", an agreement to guarantee a contract for the supply of goods or a service.

"Doing business with Burma (Myanmar)",

(a) having a principal place of business, place of incorporation or its corporate headquarters in Burma (Myanmar) or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements, or any other similar agreements in Burma (Myanmar), or being the majority-owned subsidiary, licensee or franchisee of such a person;

(b) providing financial services to the government of Burma (Myanmar), including providing direct loans, underwriting government securities, providing any consulting advice or assistance, providing brokerage services, acting as a trustee or escrow agent, or otherwise acting as an agent pursuant to a contractual agreement;

(c) promoting the importation or sale of gems, timber, oil, gas or other related products, commerce in which is largely controlled by the government of Burma (Myanmar), from Burma (Myanmar);

(d) providing any goods or services to the government of Burma (Myanmar).

"Essential", necessary in order that an agency or authority may perform its mission, there being no substitute, to avoid irreparable harm to agency or authority programs.

"Franchise", authorization by a person to sell his products.

Mass. Ann. Laws ch. 7, § 22G

"Government of Burma (Myanmar)", any public or quasi-public entity operating within Burma (Myanmar), including, but not limited to, municipal, provincial, national or other governmental and military bodies, including all departments and agencies of such bodies, public utilities, public facilities, or any national corporation in which Burma (Myanmar) has a financial interest or operational responsibilities.

"License", permission granted by a person to another, or to the government of Burma (Myanmar), to exercise a certain privilege or to carry on a particular business.

"Majority-owned subsidiary", a company that is at least fifty-one percent owned by another company.

"Person", any individual and any partnership, firm, association, corporation, or other entity, or their subsidiaries.

"Secretary", the secretary of administration and finance.

"State agency", all awarding authorities of the commonwealth, including, but not limited to, all executive offices, agencies, departments, commissions, and public institutions of higher education, and any office, department or division of the judiciary.

"State authority", shall include, but not be limited to the: Bay State Skills Corporation, centers of excellence, Community Economic Development Assistance Corporation, Community Development Finance Corporation, Government Land Bank, Massachusetts Bay Transportation Authority, Massachusetts Business Development Corporation, Massachusetts Capital Resource Company, Massachusetts Convention Center Authority, Massachusetts Corporation for Educational Telecommunications, Massachusetts educational loan authority, Massachusetts Health and Educational Facilities Authority, Massachusetts Higher Education Assistance Corporation, Massachusetts Housing Finance Agency, Massachusetts Horse Racing Authority, Massachusetts Industrial Finance Agency, Massachusetts Industrial Service Program, Massachusetts Legal Assistance Corporation, Massachusetts Port Authority, Massachusetts Product Development Corporation, Massachusetts Technology Development Corporation, Massachusetts Technology Park Corporation, Massachusetts Turnpike Authority, Massachusetts Water Resources Authority, Nantucket Land Bank, New England Loan Marketing Corporation, pension reserves investment management board, State College Building Authority, Southeastern Massachusetts University Building Authority, Thrift Institutions Fund for Economic Development, University of Lowell Building Authority, University of Massachusetts Building Authority, victim and witness board, and the Woods Hole, Martha's Vineyard, and Nantucket Steamship Authority.

HISTORY: 1996, 130, § 1, approved June 25, 1996, effective Sept 23, 1996

NOTES:

EDITORIAL NOTE--

Section 3 of the inserting act provides as follows:

Section 3. The provisions of this act shall apply to contracts entered into after the effective date of this act. Any existing contract shall remain in full

Mass. Ann. Laws ch. 7, § 22G

force and effect and not be subject to the provisions of this act until such time as the renewal of the contractual agreement.

CASE NOTES

§

ALM GL c 7 § 22G, Massachusetts' so-called "Burma law," unconstitutionally infringed on federal government's exclusive authority to regulate foreign affairs, where statute was enacted solely to sanction Myanmar for human rights violations and to change its domestic policies, and law had disruptive effect on foreign relations. *National Foreign Trade Council v Baker* (1998, DC Mass) 26 F Supp 2d 287, affd (CA1 Mass) 181 F3d 38.

2ND SECTION of Level 1 printed in FULL format.

ANNOTATED LAWS OF MASSACHUSETTS
Copyright 1999 LEXIS Law Publishing, a division of Reed Elsevier Inc.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH 1999 CH. 117, NOVEMBER 4, 1999

PART I. ADMINISTRATION OF THE GOVERNMENT
TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH
CHAPTER 7. EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE

Mass. Ann. Laws ch. 7, § 22H (1999)

§ 22H. State Agency, Authority, House of Representatives or Senate Prohibited from Procuring Goods or Services from Person on Restricted Purchase List; Exception.

(a) Except as otherwise provided in this section, a state agency, a state authority, the house of representatives or the state senate may not procure goods or services from any person listed on the restricted purchase list maintained by the secretary, or who is determined through affidavit or through other reliable methods to meet the criteria for so being listed.

(b) A state agency, a state authority, the house of representatives or the state senate may procure goods or services from a person who is on or who is so determined to meet the criteria of the restricted purchase list only after certifying in writing to the secretary or, in the case of a state authority, to the chief operating officer that:

- (1) the procurement is essential; and
- (2) compliance with paragraph (a) would eliminate the only bid or offer, or would result in inadequate competition.

(c) In any solicitation, a state agency, a state authority, the house of representatives or the senate shall provide ample notice of the requirements of this section. Prior to reviewing responses to bid documents for any procurements, or, if there are none, prior to entering into any contractual arrangement, the awarding authority shall obtain from such person seeking a contract a statement, under the pains and penalties of perjury, from an authorized representative of such person seeking a contract, on a form to be provided by the awarding authority, declaring the nature and extent to which said person is engaging in activities which would subject said person to inclusion on the restricted purchase list.

(d) In any procurement that includes bidders or offerors who are on or meet the criteria of the restricted purchase list, the awarding authority may award the contract to a person who is on or who meets the criteria of the restricted purchase list only if there is no comparable low bid or offer by a person who is not on the restricted purchase list.

(e) A person with operations in Burma (Myanmar) for the sole purpose of reporting the news, or solely for the purpose of providing goods or services for the provision of international telecommunications shall not be subject to the provisions of sections twenty-two G to twenty-two M, inclusive.

SHISTORY: 1996, 130, § 1, approved June 25, 1996, effective Sept 23, 1996

NOTES:

EDITORIAL NOTE--

Section 3 of the inserting act provides as follows:

Section 3. The provisions of this act shall apply to contracts entered into after the effective date of this act. Any existing contract shall remain in full force and effect and not be subject to the provisions of this act until such time as the renewal of the contractual agreement.

3RD SECTION of Level 1 printed in FULL format.

ANNOTATED LAWS OF MASSACHUSETTS
Copyright 1999 LEXIS Law Publishing, a division of Reed Elsevier Inc.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH 1999 CH. 117, NOVEMBER 4, 1999

PART I. ADMINISTRATION OF THE GOVERNMENT
TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH
CHAPTER 7. EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE

Mass. Ann. Laws ch. 7, § 22I (1999)

§ 22I. Limited Exception for Purchase or Provision of Certain Medical Supplies.

Notwithstanding the provisions of section twenty-two H, a state agency may purchase medical supplies intended to preserve or prolong life or to cure, prevent, or ameliorate diseases, including hospital, nutritional, diagnostic, pharmaceutical and non-prescription products specifically manufactured to satisfy identified health care needs, or for which there is no medical substitute. The determination of whether no medical substitute exists shall be made by the state agency requiring the supply, pursuant to general standards of good medical and professional practice. The state agency shall give notice to the state purchasing agent in writing, certifying compliance with this exemption, said notice and certification being sufficient to allow the purchase of medical supplies under this exemption.

To the extent that a person doing business in Burma (Myanmar) is providing only medical supplies, as described hereinabove, to persons in Burma (Myanmar), then the supply of goods or equipment to the commonwealth by said person shall also be exempt from the preference requirements of these regulations. This exemption from the preference requirements shall not apply in any case in which the nature of any person's business dealings in Burma (Myanmar) include both medical and non-medical supplies.

Any person from whom a procurement would be restricted under this section shall not supply goods or services to any state agency, state authority, the house of representatives or senate under any other provision of this chapter, or any other general or special law.

HISTORY: 1996, 130, § 1, approved June 25, 1996, effective Sept 23, 1996

NOTES:

EDITORIAL NOTE--

Section 3 of the inserting act provides as follows:

Section 3. The provisions of this act shall apply to contracts entered into after the effective date of this act. Any existing contract shall remain in full force and effect and not be subject to the provisions of this act until such

time as the renewal of the contractual agreement.

4TH SECTION of Level 1 printed in FULL format.

ANNOTATED LAWS OF MASSACHUSETTS
Copyright 1999 LEXIS Law Publishing, a division of Reed Elsevier Inc.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH 1999 CH. 117, NOVEMBER 4, 1999

PART I. ADMINISTRATION OF THE GOVERNMENT
TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH
CHAPTER 7. EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE

Mass. Ann. Laws ch. 7, § 22J (1999)

§ 22J. Restricted Purchase List Established; Updating List; Distribution.

(a) The secretary shall establish and maintain a restricted purchase list. The restricted purchase list shall contain the names of all persons currently doing business with Burma (Myanmar).

(b) In establishing the restricted purchase list, the secretary shall consult United Nations reports, resources of the Investor Responsibility Research Center and the Associates to Develop Democratic Burma, and other reliable sources. The secretary shall also place the name of any person who, in the statement described in section twenty-two H, declared that he meets the criteria for being so listed.

(c) The restricted purchase list shall be updated at least once every three months.

(d) The secretary shall provide the lists to all state agencies and state authorities and to the house of representatives and to the senate.

HISTORY: 1996, 130, § 1, approved June 25, 1996, effective Sept 23, 1996

NOTES:

EDITORIAL NOTE--

Section 3 of the inserting act provides as follows:

Section 3. The provisions of this act shall apply to contracts entered into after the effective date of this act. Any existing contract shall remain in full force and effect and not be subject to the provisions of this act until such time as the renewal of the contractual agreement.

5TH SECTION of Level 1 printed in FULL format.

ANNOTATED LAWS OF MASSACHUSETTS
Copyright 1999 LEXIS Law Publishing, a division of Reed Elsevier Inc.
All rights reserved.

*** THIS DOCUMENT IS CURRENT THROUGH 1999 CH. 117, NOVEMBER 4, 1999

PART I. ADMINISTRATION OF THE GOVERNMENT
TITLE II. EXECUTIVE AND ADMINISTRATIVE OFFICERS OF THE COMMONWEALTH
CHAPTER 7. EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE.
[DIVISION OF CAPITAL PLANNING AND OPERATIONS]

Mass. Ann. Laws ch. 7, § 40F1/2 (1999)

§ 40F1/2. Sale, Rental or Other Disposition of Real Property; Procedure to be Utilized by Commissioner; Sale to Persons Doing Business In or With Burma (Myanmar) Prohibited.

(a) When authorized by the general court to sell, rent or otherwise dispose of real property, the commissioner shall proceed in accordance with the provisions of this section, provided that any action or determination required hereunder which the commissioner has undertaken within eighteen months prior to enactment of the authorization to dispose of the property need not be repeated if the commissioner (1) files, as provided in subsection (b), a report fully describing such action or determination, a copy of which shall be sent to the clerks of the senate and the house of representatives, and the joint committee on state administration, and (2) certifies under penalties of perjury that such report is accurate and that the action or determination described therein was undertaken within eighteen months prior to the date of enactment of the authorization to dispose of the property.

The commissioner shall, after notification to and with the advice of the executive heads of state agencies and secretaries of the executive offices, determine whether such property is surplus to both current and foreseeable needs of state agencies. If the commissioner determines that the property is not surplus to either current or foreseeable needs of state agencies, he shall make no disposition that is inconsistent with such determination.

If the commissioner determines that such property is surplus to both the current and foreseeable needs of state agencies, he shall provide written notice, for each city or town in which the property is located, to the city manager in the case of a city under Plan E form of government, the mayor and city council in the case of all other cities, the chairman of the board of selectmen in the case of a town, the county commissioners, the regional planning agency, and the members of the general court. The commissioner shall set forth in such notice a description of the property; a declaration that the property is surplus to the needs of state agencies and that subject to the approval of the commissioner the property is available to any other public agency for a direct public use; and a statement that, if so requested by any public official or body entitled under this section to receive such notice, a public hearing will be

conducted in the city or town where such property is located, to assist the commissioner in determining whether any other public agency has a current or foreseeable direct public use for the property. Following such hearing, if any, but in no event earlier than thirty days following the notice, the commissioner shall determine whether any other public agency has a current or foreseeable direct public use for the property. If he determines that the property is not surplus to either current or foreseeable direct public uses of public agencies, he shall make no disposition that is inconsistent with such determination.

When the property is determined to be surplus to either current state or current direct public uses, but not to foreseeable state or foreseeable direct public uses, the commissioner shall take such action as is necessary to ensure that any disposition of the property is temporary and maintains the commissioner's ability to make such property available to a state agency or other public agency at such time as it is needed.

If the commissioner determines that the property is surplus to both current and foreseeable direct public uses of public agencies, he may dispose of the property to a public agency for other than direct public use, or to an individual or entity, provided that any such disposition shall be subject to the provisions of section forty H.

If the commissioner determines that the property is not needed for current or foreseeable state or direct public use and that the property should be disposed of, either temporarily or permanently, he shall declare that the property is available for disposition and shall determine appropriate reuse restrictions. The commissioner shall ensure that any rental agreement, and in the case of a conveyance a deed or separate disposition agreement as deemed appropriate by the commissioner, shall set forth all such reuse restrictions; shall provide for effective remedies on behalf of the commonwealth, including if deemed appropriate by the commissioner that title to the property, or such lesser interest as is the subject of the disposition agreement, shall revert to the commonwealth in the event of a violation of any such reuse restriction; and shall provide, in the case of a disposition to a public agency for a direct public use, that the title to the property, or such lesser interest as is the subject of the disposition agreement, shall revert to the commonwealth in the event the property is no longer utilized for such direct public use.

In determining reuse restrictions, the commissioner shall conform to all such restrictions pertaining to the property which may have been mandated by the general court, and may adopt additional restrictions, taking account of established state and local plans and policies. The commissioner shall conduct a public hearing to consider reuse restrictions if the property exceeds two acres or if the commissioner determines that a hearing should be held for a smaller parcel. Notice of the public hearing shall be placed at least once each week for four consecutive weeks preceding the hearing, in newspapers with sufficient circulation to inform the people of the affected locality. The hearing shall be held in the locality in which the property is located no sooner than thirty days and no later than thirty-five days after notice thereof is published in the central register.

The commissioner shall establish the value of the property, through procedures customarily accepted by the appraising profession as valid for determining property value, for both the highest and best use of the property as

Mass. Ann. Laws ch. 7, § 40F1/2

currently encumbered and under the reuse restrictions as determined pursuant to this section.

No agreement for the rental or other disposition of state-owned real property, and no deed, executed by or on behalf of the commonwealth, shall be valid unless such agreement or deed contains the following declaration, signed by the commissioner:

The undersigned certifies under penalties of perjury that I have fully complied with the provisions of sections 40F1/2 and 40H of chapter 7 of the General Laws in connection with the property described herein.

 Commissioner, DCPO
 Date: -----

It shall be the policy of the commonwealth that the commissioner shall not sell, rent, or dispose of any real property including but not limited to granting the right to lay, construct, maintain, or operate pipelines through, over, across, or under land, water, park, reservation or highway of the commonwealth, its agencies or its political subdivisions, to any person doing business in or with Burma (Myanmar). The commissioner may sell, rent, or dispose of said property or grant said rights to said person only after certifying in writing to the speaker of the house of representatives and president of the senate that such action is essential to protect the health and safety of the public.

(b) The commissioner shall maintain, for a period of at least six years next following enactment of an authorization by the general court to dispose of real property, a file containing a copy of each document necessary to establish fulfillment of the requirements of subsection (a). Such file shall be open to public inspection.

HISTORY: 1984, 484, § 17; 1987, 157, § 1; 1990, 481, § 19; 1992, 286, § 17; 1996, 130, § 2, approved July 25, 1996, effective Sept 23, 1996

NOTES:

EDITORIAL NOTE--

The 1987 amendment, in the ninth paragraph of subsection (a), in the text of the declaration, added the reference to section 40H.

The 1990 amendment deleted "deputy" preceding "commissioner" wherever appearing.

The 1992 amendment, in the last paragraph of subsection (a), in the signature line, deleted the word "Deputy".

The 1996 amendment, in subsection (a), added the tenth paragraph. Section 3 of the amending act provides as follows:

Section 3. The provisions of this act shall apply to contracts entered into after the effective date of this act. Any existing contract shall remain in full

force and effect and not be subject to the provisions of this act until such time as the renewal of the contractual agreement.

TOTAL CLIENT-SERVICE LIBRARY REFERENCES--

63C Am Jur 2d, Public Lands §§ 40-55.

§

72 Am Jur 2d, States, Territories, and Dependencies §§ 66-72.

15 Am Jur Legal Forms 2d, Public Lands § 212:15.

15B Am Jur Legal Forms 2d, Real Estate Sales § 219:42.

CASE NOTES

Section 26(b) of Chapter 372 of Acts of 1984 does not constitute exception to requirements of ALM GL c 7 §§ 40F, 40F1/2 regarding transfers of real property to Massachusetts Water Resources Authority from Commonwealth. Ops Atty Gen 88/89-5.

1999

Date (time) needed

DN 0125
TUE 2/1

LRB - 4101, 1

BILL

JTK: kmf:

Use the appropriate components and routines developed for bills.

AN ACT . . . [generate catalog] *to repeal . . . ; to renumber . . . ; to consolidate and renumber . . . ; to renumber and amend . . . ; to consolidate, renumber and amend . . . ; to amend . . . ; to repeal and recreate . . . ; and to create . . .* of the statutes; relating to: *state procurement from persons . . .*

doing business in Burma or with the government of Burma.

[NOTE: See section 4.02 (2) (br), Drafting Manual, for specific order of standard phrases.]

Analysis by the Legislative Reference Bureau

For the 3 titles used in an analysis, in the component bar:

For the main heading [old =M], execute: create → anal: → title: → head

For the subheading [old =S], execute: create → anal: → title: → sub

For the sub-subheading [old =P], execute: create → anal: → title: → sub-sub

attached

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION #.

**1999-2000 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-4101/lins
JTK.....

SECTION 1. 16.75 (1) (a) 1. of the statutes, as affected by 1999 Wisconsin Act 9, is amended to read:

16.75 (1) (a) 1. All orders awarded or contracts made by the department for all materials, supplies, equipment and contractual services to be provided to any agency, except as otherwise provided in par. (c) and subs. (2), (2g), (2m), (3m), (3t), (6), (7), (8) and (9) and ss. 16.73 (4) (a), 16.751, 16.753, 16.754, 50.05 (7) (f), 287.15 (7) and 301.265, shall be awarded to the lowest responsible bidder, taking into consideration life cycle cost estimates under sub. (1m), when appropriate, the location of the agency, the quantities of the articles to be supplied, their conformity with the specifications, and the purposes for which they are required and the date of delivery.

SECTION 2. 16.753 of the statutes is created to read:

16.753 Procurement from persons doing business in or with Burma. ^{AA}(1)

In this section:

(a) "Burma" means the nation of Myanmar.

(b) "Distribution agreement" means an agreement to guarantee an order or contract for the provision of materials, supplies, equipment or contractual services.

(c) "Doing business in Burma" means any of the following:

1. Having a principal place of business, place of incorporation or corporate headquarters in Burma, or having any operations, leases, franchises, majority-owned subsidiaries, distribution agreements or similar agreements in Burma.

2. Being a majority-owned subsidiary, licensee or franchisee of a person that has any of the interests described under subd. 1.

3. Promoting the importation or sale of any natural resource from Burma.

(d) "Government of Burma" means any public or quasi-public entity operating within Burma, including any national, provincial, municipal, other governmental or military body, public utility, public facility or national corporation in which the government of Burma has a financial interest or operational responsibilities.

(e) "Majority-owned subsidiary" means an entity that is more than 50% owned by another entity.

(f) "State" means the state of Wisconsin or any agency thereof, a contractor acting pursuant to a contract with the state or any agent of the state.

(2) Notwithstanding [✓] s. 16.75 (1) (a) 2., (2), (2m) and (6), the state shall not purchase materials, supplies, equipment or contractual services from any person who is on the restricted purchase list maintained by the department under sub. (5) [✓] unless the secretary determines that a particular procurement is essential and elimination of a vendor who is on the restricted purchase list would eliminate the only source from which that procurement can be made or would result in competition that would be inadequate to protect the state's financial interests with respect to that procurement.

(3) Each agency that solicits bids or competitive sealed proposals for the purchase of materials, supplies, equipment or contractual services shall provide notice of this section in the solicitation. The secretary may prescribe the form of ~~such~~ ^{the} notice.

(4) Before awarding any order or contract for materials, supplies, equipment or contractual services to be supplied to this state, the agency placing the order or

entering into the contract shall require the proposed vendor to submit a sworn statement, on a form prescribed by the secretary, providing information sufficient to determine whether making the procurement from the proposed vendor would contravene this section.

(5) The secretary shall maintain a restricted purchase list consisting of the names of persons who, during the current or preceding calendar year, are or were doing business in Burma or with the government of Burma. The secretary shall include on the list the name of any person whose statement submitted under sub. (4) indicates that the person meets the criteria for being included on the list. In creating the list, the secretary shall consult United Nations reports, ✓resources of ✓The Investor Responsibility Research Center, The Associates to Develop Democratic Burma and other reliable sources. The secretary shall update the list maintained under this subsection at least once every 3 months. The secretary shall provide the list maintained under this subsection and each revision thereof to each agency making direct procurements.

(6) This section does not apply to: ✓

(a) ~~Any~~ ^A person with operations in Burma for the sole purpose of reporting the news, or solely for the purpose of providing materials, supplies, equipment or contractual services for the provision of international telecommunications.

(b) The purchase of medical supplies intended to preserve or prolong life or to cure, prevent or ameliorate disease, including hospital, nutritional, diagnostic, pharmaceutical and nonprescription products specifically manufactured to satisfy identified health care needs, or for which there is no medical substitute.

(7) The determination of whether a medical substitute exists under sub. (6) (b) ✓ shall be made by the agency making a procurement pursuant to general standards

of good medical and professional practice. An agency making a determination under this subsection shall record a statement of the reasons therefor in writing. If the agency is not the department, the agency shall file a copy of the statement with the department prior to making the procurement.

SECTION 3. 16.82 (6) of the statutes is amended to read:

16.82 (6) May provide any services to a local professional baseball park district created under subch. III of ch. 229, for compensation to be agreed upon between the department and the district, if the district has entered into a lease agreement with the department under sub. (7), except that the department shall not act as a general contractor for any construction work undertaken by the district. No order or contract to provide any such services is subject to s. 16.705, 16.75 (1) to (5) and (8) to (10), 16.752, 16.753, 16.754 or 16.765.

SECTION 4. 23.41 (5) of the statutes is amended to read:

23.41 (5) Each contract for construction work entered into by the department under this section shall be awarded on the basis of bids or competitive sealed proposals in accordance with procedures established by the department. Each contract for construction work shall be awarded to the lowest responsible bidder or the person submitting the most advantageous competitive sealed proposal as determined by the department. If the bid of the lowest responsible bidder or the proposal of the person submitting the most advantageous competitive sealed proposal is determined by the department to be in excess of the estimated reasonable value of the work or not in the public interest, the department may reject all bids or competitive sealed proposals. Every such contract is exempted from ss. 16.70 to 16.75, 16.755, 16.76, 16.767 to 16.82, 16.855, 16.87 and 16.89, but ss. 16.528, 16.753, 16.754 and 16.765 apply to the contract. Every such contract involving an

expenditure of \$30,000 or more is not valid until the contract is approved by the governor.

SECTION 5. 84.01 (13) of the statutes is amended to read:

84.01 (13) ENGINEERING SERVICES. The department may engage such engineering, consulting, surveying or other specialized services as it deems advisable. Any engagement of services under this subsection is exempt from ss. 16.70 to 16.75, 16.755 to 16.82 and 16.85 to 16.89, but ss. 16.528, 16.752^g, 16.753 and 16.754 apply to such engagement. Any engagement involving an expenditure of \$3,000 or more shall be by formal contract approved by the governor.

SECTION 6. 84.06 (2) (a), (3) and (4) of the statutes are amended to read:

84.06 (2) (a) All such highway improvements shall be executed by contract based on bids unless the department finds that another method as provided in sub. (3) or (4) would be more feasible and advantageous. Bids shall be advertised for in the manner determined by the department. Except as provided in s. 84.075, the contract shall be awarded to the lowest competent and responsible bidder as determined by the department. If the bid of the lowest competent bidder is determined by the department to be in excess of the estimated reasonable value of the work or not in the public interest, all bids may be rejected. The department shall, so far as reasonable, follow uniform methods of advertising for bids and may prescribe and require uniform forms of bids and contracts. Except as provided in par. (b), the secretary shall enter into the contract on behalf of the state. Every such contract is exempted from ss. 16.70 to 16.75, 16.755 to 16.82, 16.87 and 16.89, but ss. 16.528, 16.752^g, 16.753 and 16.754 apply to the contract. Any such contract involving an expenditure of \$1,000 or more shall not be valid until approved by the governor. The secretary may require the attorney general to examine any contract

and any bond submitted in connection with the contract and report on its sufficiency of form and execution. The bond required by s. 779.14 (1m) is exempt from approval by the governor and shall be subject to approval by the secretary. This subsection also applies to contracts with private contractors based on bids for maintenance under s. 84.07.

(3) **CONTRACTS WITH COUNTY OR MUNICIPALITY; DIRECT LABOR; MATERIALS.** If the department finds that it would be more feasible and advantageous to have the improvement performed by the county in which the proposed improvement is located and without bids, the department may, by arrangement with the county highway committee of the county, enter into a contract satisfactory to the department to have the work done by the county forces and equipment. In such contract the department may authorize the county to purchase, deliver and store materials and may fix the rental rates of small tools and equipment. The contract shall be between the county and the state and shall not be based on bids, and may be entered into on behalf of the county by the county highway committee and on behalf of the state by the secretary. Such contract is exempted from s. 779.14 and from all provisions of chs. 16 and 230, except ~~s.~~ ss. 16.753 and 16.754. If the total estimated indebtedness to be incurred exceeds \$5,000 the contract shall not be valid until approved by the governor. The provisions of this subsection relating to agreements between a county and the state shall also authorize and apply to such arrangements between a city, town or a village and the state. In such cases, the governing body of the city, town or village shall enter into the agreement on behalf of the municipality.

(4) **SPECIAL CONTRACTS WITH RAILROADS AND UTILITIES.** If an improvement undertaken by the department will cross or affect the property or facilities of a railroad or public utility company, the department may, upon finding that it is

feasible and advantageous to the state, arrange to perform portions of the improvement work affecting such facilities or property or perform work of altering, rearranging or relocating such facilities by contract with the railroad or public utility. Such contract shall be between the railroad company or public utility and the state and need not be based on bids. The contract may be entered into on behalf of the state by the secretary. Every such contract is exempted from s. 779.14 and from all provisions of chs. 16 and 230, except ss. 16.528, 16.752, 16.753 and 16.754. No such contract in which the total estimated debt to be incurred exceeds \$5,000 shall be valid until approved by the governor. As used in this subsection, "public utility" means the same as in s. 196.01 (5), and includes a telecommunications carrier as defined in s. 196.01 (8m), and "railroad" means the same as in s. 195.02. "Property" as used in this subsection includes but is not limited to tracks, trestles, signals, grade crossings, rights-of-way, stations, pole lines, plants, substations and other facilities. Nothing in this subsection shall be construed to relieve any railroad or public utility from any financial obligation, expense, duty or responsibility otherwise provided by law relative to such property.

9 (#)



SECTION 7. Initial applicability. This act first applies to orders or contracts for which bids or competitive sealed proposals are solicited after the effective date of this subsection or, if a procurement is to be made without solicitation of bids or competitive sealed proposals, to any order placed or contract awarded after the effective date of this subsection.

(END)

1999-2000 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-4101/lins2
JTK.....

analysis

This bill restricts the procurement of any materials, supplies, equipment or contractual services by this state from any person doing business in Burma or with the government of Burma. Under the bill, the secretary of administration is directed to maintain a restricted purchase list consisting of persons from whom state procurements are restricted. The list is compiled from statements that are required to be filed by proposed vendors and from other reliable sources. With limited exceptions, state procurements from persons whose names appear on the list are prohibited unless the secretary of administration determines that a particular procurement is essential and that elimination of a vendor whose name is on the list would eliminate the only source from which that procurement can be made or would result in competition that would be inadequate to protect the state's financial interests with respect to that procurement.

The bill does not apply to any person with operations in Burma for the sole purpose of reporting the news, or solely for the purpose of providing materials, supplies, equipment or contractual services for the purpose of telecommunications. Medical supplies are also exempted from the procurement restriction.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-4101/1dn

JTK.../i:...

King

As you know, the validity of a Massachusetts law that is similar to the attached draft has been questioned as infringing on the federal government's exclusive authority to regulate foreign affairs and as violating the international Government Procurement Agreement, a trade agreement administered by the World Trade Organization ~~XXXXXXXXXX~~. The breadth of these agreements has also been questioned in that they may have the effect of transgressing rights of the states and citizens thereof under the U.S. Constitution. Due to litigation on this matter, enforcement of the Massachusetts law has been enjoined. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D.C., Mass., 1998), affd. 181 F. 3d 38 (1999).

Jeffery T. Kuesel
Managing Attorney
Phone: (608) 266 6778

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-4101/1dn
JTK:kmg:jf

February 1, 2000

As you know, the validity of a Massachusetts law that is similar to the attached draft has been questioned as infringing on the federal government's exclusive authority to regulate foreign affairs and as violating the international Government Procurement Agreement, a trade agreement administered by the World Trade Organization. The breadth of these agreements has also been questioned in that they may have the effect of transgressing rights of the states and citizens thereof under the U.S. Constitution. Due to litigation on this matter, enforcement of the Massachusetts law has been enjoined. See *National Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287 (D.C., Mass., 1998), affd. 181 F. 3d 38 (1999).

Jeffery T. Kuesel
Managing Attorney
Phone: (608) 266-6778

**SUBMITTAL
FORM**

**LEGISLATIVE REFERENCE BUREAU
Legal Section Telephone: 266-3561
5th Floor, 100 N. Hamilton Street**

The attached draft is submitted for your inspection. Please check each part carefully, proofread each word, and sign on the appropriate line(s) below.

Date: 02/01/2000

To: Senator George

Relating to LRB drafting number: LRB-4101

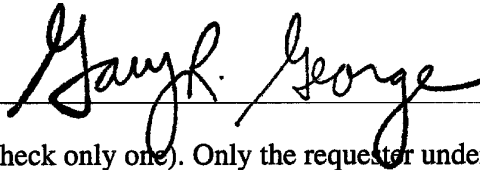
Topic

State procurement from persons doing business in Burma

Subject(s)

State Government - miscellaneous

1. **JACKET** the draft for introduction _____



in the Senate or the Assembly _____ (check only one). Only the requester under whose name the drafting request is entered in the LRB's drafting records may authorize the draft to be submitted. Please allow one day for the preparation of the required copies.

2. **REDRAFT.** See the changes indicated or attached _____.

A revised draft will be submitted for your approval with changes incorporated.

3. Obtain **FISCAL ESTIMATE NOW**, prior to introduction _____.

If the analysis indicates that a fiscal estimate is required because the proposal makes an appropriation or increases or decreases existing appropriations or state or general local government fiscal liability or revenues, you have the option to request the fiscal estimate prior to introduction. If you choose to introduce the proposal without the fiscal estimate, the fiscal estimate will be requested automatically upon introduction. It takes about 10 days to obtain a fiscal estimate. Requesting the fiscal estimate prior to introduction retains your flexibility for possible redrafting of the proposal.

If you have any questions regarding the above procedures, please call 266-3561. If you have any questions relating to the attached draft, please feel free to call me.

Jeffery T. Kuesel, Managing Attorney
Telephone: (608) 266-6778