



Office of the
Inspector General
Commonwealth of Massachusetts

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Procuring Outside
Consultants With Fees
From Applicants

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Procuring Outside Consultants with Fees from Applicants

The Office of the Inspector General endeavors to assist municipalities in interpreting the Uniform Procurement Act, M.G.L. c.30B. This advisory was prepared in response to confusion among local jurisdictions about the application of that statute to the process for hiring outside consultants under M.G.L. c.44, §53G. Both statutes are applicable to the hiring process and can easily be followed with the help of the following discussion. This advisory will begin with a brief overview of M.G.L. c.44, §53G, and then proceed to a discussion of how M.G.L. c.30B applies to procurements of outside consultants.

Section 53G of M.G.L. c.44 authorizes Zoning Boards of Appeal, Planning Boards, Boards of Health and Conservation Commissions to establish special revolving funds for fees payable by applicants for permits and approvals. The boards and commissions may use revolving funds, without appropriation, to hire outside consultants to examine the applications. Once an applicant's project is completed or their application is denied, the unused portion of the fee is returned to them, plus interest.

According to the Massachusetts Department of Revenue (DOR), a revolving fund "allows a community to raise revenues for a specific service and use those revenues without appropriation to support the service."¹ Generally, municipal finance law provides that all monies received by municipal departments, boards and committees belong to the community's general fund and prohibits the expenditure of those funds without specific appropriation.² Revolving fund statutes specifically exempt particular receipts from these requirements by earmarking them for specific spending purposes and authorizing a particular municipal official to spend them for those purposes without appropriation.

¹ DOR website, <http://www.mass.gov/dor>

² M.G.L. c.44, §53.

Authority to Hire Consultants

Funds from an M.G.L. c.44, §53G account may be used when implementing authority conferred by the following laws:

- Zoning Boards of Appeals, M.G.L. c.40A, §§9 or 12
- Low or Moderate Income Housing, M.G.L. c.40B, §21
- Subdivision Control, M.G.L. c.41, §81Q
- Boards of Health, M.G.L. c.111, §31
- Conservation Commissions, M.G.L. c.40, §8C; M.G.L. c.131, §40; or any local wetlands ordinance or bylaw.

It is important to keep in mind that M.G.L. c.44, §53G does not authorize the hiring of consultants or the imposition of fees to do so; it merely provides a means by which to pay the cost of certain consultants without appropriation. Municipalities may only hire these outside consultants without appropriation if they have promulgated rules for the hiring of outside consultants under one of the statutes listed in M.G.L. c.44, §53G.

Some jurisdictions have encountered legal trouble by assuming M.G.L. c.44, §53G grants them the authority to hire a type of consultant that is not expressly authorized by the above-stated laws, and to impose those fees on applicants. For example, one Zoning Board of Appeals enacted a rule providing that “in hiring outside consultants, the Board may engage...lawyers...who can assist the Board in analyzing a project to ensure compliance with all relevant laws,” and requiring the permit applicant to pay a “review fee” covering the reasonable cost of legal fees for that service.³ On its face, the rule appeared to be perfectly reasonable. However, the Massachusetts Housing Appeals Committee held that because the rule was promulgated under the authority of M.G.L. c.40B, which does not contain specific authority to hire lawyers, the review fee was invalid. The Housing Appeals Committee found, based on the language of the statute and cases interpreting it, that M.G.L. c.40B only allows fees to be imposed for “technical review” and not for legal services. Consequently, the jurisdiction had to assume a cost of almost \$20,000 in legal fees it had charged to the applicant.

³ *John B. Wise, Trustee of Plyburn Realty Trust v. Lynnfield Board of Appeals*, 2004 MA. HAC. 02-23, 2004 WL 5052504 (Mass. Hous. App. Ct. 2004).

If you have any questions about whether a given fee or expense may permissibly be transferred to applicants, please check with your legal counsel prior to incurring the expense.

Implementation of M.G.L. c.44, §53G

Section 53G of M.G.L. c.44 specifies certain administrative rules a municipality must enact prior to establishing a revolving fund. Among other things, a municipality must establish and vote on rules that:

- Impose a reasonable fee for the employment of outside consultants, and
- Provide a means to appeal the choice of consultants to the city council or town board of selectmen.

While the procedure for appeals is largely at the discretion of the municipality, the subject matter of an appeal is limited to claims that the selected consultant either has a conflict of interest or does not possess the minimum required qualifications. In addition, a consultant must possess minimum qualifications that include either 1) an educational degree in or related to the field at issue or 2) three or more years of practice in the field at issue or a related field. Note that the right to appeal and the procedure for appeals under M.G.L. c.44, §53G are in addition to any rights of bidders to challenge an award under M.G.L. c.30B. Furthermore, the appeals procedure under M.G.L. c.44, §53G does not preclude further judicial review if otherwise permitted by law.

For the accounting procedures that govern special revolving funds for hiring outside consultants under one of the statutes listed in M.G.L. c.44, §53G, see page 3, item B, Accounting Procedures, of Massachusetts Department of Revenue, Property Tax Bureau, Informational Guideline Release: Special Revolving Funds for Hiring Outside Consultants, IGR No. 03-208 (August 2003), available at http://www.mass.gov/Ador/docs/dls/publ/igr/2003/lgr_03_208.pdf.

M.G.L. c.44, §53G and M.G.L. c.30B

Chapter 30B establishes procedures to follow for most agreements for supplies and services, dispositions of surplus supplies, and real property acquisitions and dispositions by local governmental bodies. Section 2 of M.G.L. c.30B defines “services” as “The furnishing of labor, time, or effort by a contractor, not involving the furnishing of a specific end product other than reports.” Hiring an outside consultant clearly falls under this definition. Using M.G.L. c.44, §53G does not excuse the jurisdiction from complying with the law simply because the services are paid for by the applicant and not the jurisdiction; for the purposes of M.G.L. c.30B, the person who pays for services is irrelevant. The law applies because there is an agreement between the jurisdiction and the vendor to perform consulting services.

When procuring services in connection with M.G.L. c.44, §53G, jurisdictions are required to follow M.G.L. c.30B unless the services are specifically exempt. In limited circumstances, the employment of an outside consultant will fall under one of the statutory exceptions to M.G.L. c.30B. An example of this would be a town conservation commission contracting with a regional planning commission to assist it in reviewing wetland applications. This contract would be exempt as an agreement between political subdivisions under M.G.L. c.30B, §1(b)(9) because the conservation commission is purchasing services from one of the governmental entities that are included in M.G.L. c.30B, §1(b)(9).

It is important to note that the exemption for contracts with “designers” under M.G.L. c.30B, §1(b)(15) only applies to certain services, including studies, surveys, soil tests and cost estimates that are done in connection with construction, and does not include the review of another designer’s plans. A contract with a designer to review the work of another designer — such as the review of a subdivision plan submitted by an applicant — is subject to M.G.L. c.30B. “Hybrid” contracts that include both exempt services and a peer review will also be subject to M.G.L. c.30B. For more information on which designer services are exempt from M.G.L. 30B, see “Designer Contracts and Chapter 30B: When are Designer Contracts Exempt from Chapter 30B?” *Procurement Bulletin*, v12 n2 p2 (2006), available at <http://www.mass.gov/ig/publ/nlmay06.pdf>.

Procurements for contracts valued at less than \$5,000 must be based on “sound business practices.”⁴ Procurements for contracts valued at \$5,000 or more, but less than \$25,000, require the solicitation of at least three oral or written quotes.⁵ Procurements for contracts valued at \$25,000 or more require either an Invitation for Bid (IFB)⁶ or a Request for Proposal (RFP)⁷ process. Note that a separate procurement process must be performed for each new consulting contract.

If you choose to solicit quotes, this Office recommends you use a standardized form, such as the attached sample Request for Quotes form. For a procurement pursuant to M.G.L. c.44, §53G, your quality requirements must include at least one of the “minimum qualifications” listed by the statute: either an educational degree in or related to the field at issue, or three or more years of practice in the field at issue or a related field. You may choose to include additional quality requirements to fit the demands of your particular project. Remember, when soliciting quotes or using an IFB, you must select the responsive and responsible bidder offering the lowest price, so you will want to ensure your quality requirements are written strictly enough that you are willing to award to any vendor who meets your requirements. You will only consider bidders that meet all of your quality requirements, so decide in advance which of the two requirements you will include, or draft a quality requirement that allows either of the two minimum qualifications.

Those governmental bodies that have appointed a Chief Procurement Officer (CPO) may also use an M.G.L. c.30B, §6 RFP process to procure the outside consultant. It is this Office’s opinion that an RFP process can be used even when the dollar value of the contract is less than the statutory threshold, but that you must follow all of the requirements of M.G.L. c.30B, §6. If you have any questions about how to implement a procurement process under M.G.L. c.30B, please see our procurement manual, entitled *Municipal, County, District, and Local Authority Procurement of Supplies, Services, and*

⁴ M.G.L. c.30B, §4.

⁵ *Id.*

⁶ M.G.L. c.30B, §5.

⁷ M.G.L. c.30B, §6.

Real Property, 5th Edition (September 2006) and contact this Office with any further questions.

If the services you are procuring are exempt from M.G.L. c.30B, this Office recommends that you first check your local by-laws, ordinances, or procurement procedures to determine whether or not your local jurisdiction has established requirements to procure contracts which are not subject to M.G.L. c.30B. This Office recommends conducting a competitive process in order to obtain the needed quality of services at the best price, even if the proposed contract is exempt from M.G.L. c.30B.

Useful References:

Complying with M.G.L. c.30B

Massachusetts Office of the Inspector General, *Municipal, County, District and Local Authority Procurement of Supplies, Services and Real Property*, 5th Edition (September 2006), available at <http://www.mass.gov/ig/publ/30bmanl.pdf>.

Drafting Effective IFBs and RFPs

Massachusetts Office of the Inspector General, *Practical Guide to Drafting Effective Invitations for Bids and Requests for Proposals for Supplies and Services* (April 2005), available at <http://www.mass.gov/ig/publ/pracguid.htm>.

Implementing M.G.L. c.44, §53G

Massachusetts Department of Revenue, Property Tax Bureau, *Informational Guideline Release: Special Revolving Funds for Hiring Outside Consultants*, IGR No. 03-208 (August 2003), available at http://www.mass.gov/Ador/docs/dls/publ/igr/2003/lgr_03_208.pdf.

Please direct questions about the accounting procedures required by M.G.L. c.44, §53G to:

Bureau of Municipal Finance Law
Division of Local Services
Massachusetts Department of Revenue
P.O. Box 9569
Boston, MA 02114-9569
Local Services "Attorneys of the Day" Hotline: 617-626-2400

Please direct questions about M.G.L. c.30B to:

Office of the Inspector General
One Ashburton Place, Room 1311
Boston, MA 02108
Chapter 30B Hotline: 617-722-8838

SAMPLE REQUEST FOR QUOTES

| | | | |
|---|-------------------|-------------------------------|-------|
| Requisition #: | Department: | | |
| P.O.#: | | | |
| PURCHASE DESCRIPTION AND CONTRACT TERMS: | | | |
| QUALITY REQUIREMENTS: | | | |
| All consultants selected must possess either an educational degree in or related to the field at issue, from a recognized public or private college or university, or three or more years of practice in the field at issue or a related field. | | | |
| VENDORS CONTACTED | Total Price Quote | Unit Price(s) (if applicable) | Notes |
| 1. Company: _____ Contact: _____ Address: _____ Date: _____ Telephone: _____ Fax: _____ Solicited by: _____ | | | |
| 2. Company: _____ Contact: _____ Address: _____ Date: _____ Telephone: _____ Fax: _____ Solicited by: _____ | | | |
| 3. Company: _____ Contact: _____ Address: _____ Date: _____ Telephone: _____ Fax: _____ Solicited by: _____ | | | |
| RECOMMENDATION: | | | |
| Name: | | Department: | |
| Signature: | | Date: | |