Office of the Inspector General

Commonwealth of Massachusetts

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Braintree's Sewer Permit and Sewer Bank Program

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INTRODUCTION

The Office of the Inspector General (Office) received a complaint concerning the Braintree Water and Sewer Commission's (Commission) administration of sewer permits, permit fees, and the Town of Braintree's sewer bank. The Office subsequently undertook a limited review of the sewer permit and sewer bank program administered by the Braintree Water and Sewer Department (Department) and overseen by the Commission. During the course of that review, the Office identified an unusual contract arrangement between the Commission and a local developer in which the developer agreed to construct improvements for the Commission in exchange for credits against future sewer fees. This 1998 deal appears to have been made by the Commission in violation of the public construction bidding statutes and provided for weak contract controls.

In January 2003, the Office submitted the facts regarding this contract to the Office of the Attorney General and requested an informal opinion regarding the applicability of the construction statute (specifically, M.G L. c. 30, §39M) to the contract. In a February 2003 letter, the Office of the Attorney General concurred with this Office's view that the statute did apply to this agreement. (Both letters are presented in the Appendix to this report.)

In July 2002, the Department was moved under the jurisdiction of the Department of Public Works, which is under the control and supervision of the Board of Selectmen.[1] This reorganization resulted in the dissolution of the Commission. The Office is presenting its findings on the 1998 contract to the Town of Braintree. The Office is also posting this report on the Office's website to help prevent the recurrence of similar problems on future construction contracts.

[1] Chapter 160 of the Acts of 2001.

FINDINGS

Finding 1. In 1998, the Braintree Water and Sewer Commission executed an illegal, no-bid agreement with a private developer to reconstruct the Plain Street Lift Station in return for sewer permit fee credits of unknown value.

According to minutes of a Commission meeting held on January 7, 1998, two representatives of M.X. Messina Company (Messina), a local developer, attended the meeting to discuss a proposal to replace the Plain Street Lift Station in return for a credit from the Braintree Water and Sewer Department. The minutes indicated that the three Commissioners attending the meeting agreed to review and vote on the matter "when they had a full Board" on January 21, 1998. However, minutes of the January 21, 1998 Commission meeting show that only three Commissioners were in attendance. Nevertheless, the Commission voted to sign the proposed agreement. The minutes stated:

> [A Messina representative] advised the Board of their proposed agreement of Messina Enterprises replacing the Plain Street pump station and thereafter, receiving a credit from the Water and Sewer Dept. until the cost of same equal to the use. [The Messina representative] asked if the Board would sign the agreement so they could get the plans finished for final approval. After much discussion the Board voted to sign the agreement.

On the same day, the three Commissioners signed a three-page "Plain Street Lift Station Reconstruction Agreement" with Francis X. Messina. The agreement noted that Messina desired to develop several parcels of land served by the Lift Station, that the Lift Station lacked the capacity to handle development of Messina's parcels or other parcels within the Lift Station service area, and that the Town's Water and Sewer Department lacked the resources to upgrade the Lift Station. The agreement authorized Messina to reconstruct the Lift Station "at its own expense":

> Messina shall be allowed to reconstruct the Lift Station at its own expense based upon plans and specifications developed by the Department consultant with such modifications as are agreed to by the parties. . . . Upon final agreement of the parties on the plans and specifications this

> Agreement shall be amended to add the Final Plans and Specifications as an Exhibit.[2]

Under the agreement, the Department was responsible for inspecting the construction work, reviewing and approving any changes to the final plans and specifications, providing Messina with a punchlist of any incomplete items, and notifying Messina of the Department's acceptance of the work.

The statement that Messina would reconstruct the Lift Station "at its own expense" was contradicted by a provision in the agreement authorizing Messina to receive a credit equal to the total cost of the work, to be used on any parcels owned by Messina or "affiliated entities":

> Messina shall be entitled to a credit equal to the total cost of the work to reconstruct the Lift Station against all so[-]call[ed] rehabilitation fees or other one time fees associated with hook-up of water and sewer service (presently $1 per gallon for both water and sewer) for development of property within Commerce Park or on other parcels owned by Messina or affiliated entities within the area serviced by the Lift Station, or elsewhere within the Town of Braintree.

The agreement also contained a very broadly worded provision stating that, after completing the reconstruction work, Messina and its "affiliated entities" would not be denied sewer service for any development projects within the area serviced by the Lift Station, nor would they be required to pay for any future repairs of the Town-owned sewer system.

Public contracts for construction, reconstruction, alteration, remodeling, or repair estimated to cost more than $10,000 that do not involve a building are subject to the advertising and bidding requirements of M.G.L. c. 30, §39M as well as other statutory

[2] The copy of the Agreement provided to the Office by a consultant to the Department did not include an exhibit containing the final plans and specifications for the Lift Station.

requirements, such as the prevailing wage law.[3] The Commission's no-bid contract with Messina for reconstruction of the Lift Station violated M.G.L. c. 30, §39M as well as numerous other statutory provisions, including those such as those governing payment bonds,[4] change orders,[5] payment procedures,[6] financial reporting,[7] and certification of tax compliance.[8] (See the Appendix for correspondence between the Office of the Inspector General and the Office of the Attorney General regarding this position.)

Finding 2. In addition to violating Massachusetts public contracting law, the Commission's agreement lacked basic owner protections.

The agreement contained no reference to, methodology for calculating, or not-to-exceed limit on the total cost of the work to be used as the basis for the sewer permit fee credit to which Messina was entitled. The agreement did not require Messina to provide invoices or other documentation of the expenditures on which the credit would be based. Furthermore, the agreement did not specify a required completion date, nor did

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[3] M.G.L. c. 149, §§26 and 27, the prevailing wage law, requires contractors performing work for public construction projects to pay prevailing wages. Before soliciting bids for any construction project, an awarding authority must obtain a prevailing wage sheet from the Division of Occupational Safety; this rate sheet is normally included in the invitation for bids for construction services.

[4] Contracts subject to M.G.L. c. 30, §39M require a payment bond in the amount of at least 50 percent of the contract price.

[5] M.G.L. c. 30, §§39N-39O requires the awarding authority to adjust the price if field conditions differ substantially or materially from the plans or if the awarding authority suspends or delays the work for 15 days or more. M.G.L. c. 44, §31C and c. 30, §39I state that the contract should include terms governing the adoption and pricing of change orders, that the contract should clearly specify who is authorized to approve change orders on behalf of the awarding authority, and that the awarding authority is not obligated to pay for change orders that are not approved in writing.

[6] M.G.L. c. 30, §§39F, 39G, and 39K contain provisions governing payment procedures that must be included in the contract.

[7] M.G.L. c. 30, §39R requires that contractors keep certain financial records for six years, make them available for inspection by certain state agencies, and file periodic financial reports.

[8] M.G.L. c. 62C, §49A requires any person contracting with a public jurisdiction in Massachusetts to certify in writing that he or she has complied with state tax laws, reporting of employees and contractors, and withholding and remitting of child support.

it include a termination clause or any remedies for substandard performance by the contractor.

According to Commission records, the cost of the reconstruction project – and, thus, the dollar value of the sewer permit fee credit to which Messina was entitled – was not determined for more than three years after the Commission signed the agreement with Messina. In a letter to the Commission dated March 26, 2001, Messina's General Counsel provided an itemized listing of the funds reportedly expended by Messina for the engineering and construction work on the Lift Station. Messina's reported expenditures totaled $252,755.09. This total included engineering costs of $9,300, a base construction contract cost of $191,500, six change orders totaling $37,096.33, and a project management fee of $14,858.76 (calculated at 6.5 percent of the base construction contract and the six change orders).

There were two attachments to the letter from Messina's General Counsel: a $650 quotation for an electric heater submitted to Messina by D. W. White Construction, Inc. (D. W. White) on March 23, 2000 and an Application and Certificate for Payment submitted to Messina by D. W. White on April 24, 2000. The Application and Certificate for Payment consisted of billings to Messina for construction work on two pump stations in Braintree, one of which was the Plain Street Lift Station.[9] Although the Application and Certificate for Payment submitted by D. W. White did not clearly identify the billings associated with each project, the letter from Messina's General Counsel listed the base contract cost and the change order amounts reportedly billed by D. W. White in connection with the Plain Street Lift Station work. The Application and Certificate for Payment indicated that 100 percent of the work on both projects had been completed, although it did not include a $650 change order listed in the letter from Messina's General Counsel as a cost of the Lift Station project.

The letter from Messina's General Counsel indicated the project cost included payments for engineering services totaling $9,300. However, the attachments did not include invoices to Messina from the two engineering firms identified in the letter. The portion of

[9] The other pump station was located in Commerce Park.

the Application and Certificate for Payment labeled "Architect's Certificate for Payment" was not signed or dated. In short, the project cost information submitted to the Department by Messina, and provided to the Office by the Department, did not include full documentation of Messina's reported costs.

Nevertheless, the Executive Director hired in September 2000 – several years after the Commission executed the agreement with Messina – told the Office in October 2001 that he was satisfied with both the quality and the cost of the construction work performed by Messina. He stated that the Town's engineering consultant, Beta Engineering, designed the renovations to the Lift Station[10] and that Messina built the project to the Town's standards.

Finding 3. The improperly procured contract and inadequately documented construction agreement appears to have been symptomatic of a broader pattern of deficient procurement and contracting practices in the Water and Sewer Department.

During the 1999 fiscal year, the Town engaged the services of its independent auditor, Powers & Sullivan, to review the Water and Sewer Department. In September 1999, the independent auditor issued a management letter that identified numerous deficiencies in the Department's procurement and contract administration practices. Among the deficient practices highlighted by the independent auditor were the following:

- The Department has not consistently obtained the appropriate bids and quotes to comply with the Massachusetts Procurement Law.
- Procedures have not been implemented to verify that contracts and change orders are appropriately authorized.
- The Department does not adequately monitor the balances of its outstanding contracts and capital articles. As a result, the Department and Town have approved contracts and change orders that exceed article authorizations and paid vendors amounts in excess of their approved contracts.
- There are no procedures in place to verify that charges to appropriation line items and capital articles are appropriate. As a result, the Department has

[10] According the letter from Messina's General Counsel, Messina paid Beta Engineering $3,600 in connection with the Plain Street Lift Station.

consistently recorded expenses to capital articles that do not coincide with the article's intended purpose.

- The Department's records are not filed in an organized manner. As a result, the Department could not locate a significant number of contracts and invoices.

- The Department does not maintain all authorized copies of paid invoices.

In November 2000, the independent auditors issued a management letter to the Town for the 2000 fiscal year. With respect to Department operations, the independent auditors reported that the Department had instituted a number of corrective measures in response to the previous year's management letter: for example, the independent auditors reported that the Department had implemented procedures to comply with applicable procurement laws, to verify that contracts and change orders were appropriately authorized, and to maintain all authorized copies of paid invoices. However, the other deficiencies identified in 1999 had not been corrected.[11]

CONCLUSION

As noted in the Introduction, the Braintree Water and Sewer Commission was dissolved through a July 2002 reorganization. The findings in this report are being provided to the Town of Braintree in an effort to help ensure that any future contracts of a similar nature are legally procured and include appropriate contract safeguards to protect the interest of the Town of Braintree.

[11] The November 2000 management letter did not indicate whether or not the Department had instituted an effective record-keeping system. However, the Office's review indicates that the Department had not done so as of March 2001, the end of the period covered by the Office's review.

APPENDIX

- January 8, 2003 letter from Deputy General Counsel Brian C. O'Donnell, Office of the Inspector General, to Assistant Attorney General Joseph E. Ruccio, Office of the Attorney General.

- February 6, 2003 letter from Assistant Attorney General Joseph E. Ruccio, Office of the Attorney General, to Deputy General Counsel Brian C. O'Donnell, Office of the Inspector General.

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January 8, 2003

Joseph E. Ruccio, Esq.
Assistant Attorney General
Office of the Attorney General
200 Portland Street
Boston, MA 02144

Dear Attorney Ruccio

I am writing to request an informal opinion from your office regarding the applicability of M.G.L. c.30, §39M to a project which is discussed in a report to be published by this Office. The essential facts are as follows:

A private land developer proposed to develop several parcels of land serviced by a specific water and sewer pumping station ("Lift Station"). The governing Water and Sewer Commission and the developer recognized that the extant pumping station lacked the capacity to handle the proposed developments. The project would not be permitted unless the Lift Station capacity could be increased. Consequently the developer offered to reconstruct the Lift Station "at its own expense" with the technical plans for said reconstruction being subject to the approval of the awarding authority. Pursuant to the proposed arrangement, the developer would then be entitled to a credit (equal to its cost for the reconstruction of the Lift Station) against all municipal fees associated with the hook up of water and sewer service for its developed parcels. In this instance the developer's credit amounted to nearly $253,000 based on its reported construction costs.

A question has risen as to whether the project of the reconstruction of the Lift Station should have been considered a public works construction project subject to M.G.L. c. 30,§39M. It is the interpretation of this Office that, even though the awarding authority did not pay directly for the reconstruction of the Lift Station, the project did have a "cost" to the awarding authority well in excess of $10,000 (in the form of $250,000 in fee credits) and therefore the work should have been the subject of a competitive bidding process under M.G.L. c. 30,§39M.

It would be most appreciated if you could provide us with some guidance regarding whether the Office of the Attorney General would be likely to reach a similar conclusion under similar factual circumstances. If you need to consider additional facts in order to develop an opinion or wish to discuss any aspect of this request, please call me.

Your time and consideration in this matter is most appreciated.

Sincerely,

Brian C O'Donnell

Brian C. O'Donnell
Deputy General Counsel

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February 6, 2003

BY FACSIMILE & US MAIL

Brian C. O'Donnell, Esq.,
Deputy General Counsel
Office of the Inspector General
One Ashburton Place, Room 1311
Boston, MA 02108

Dear Brian:

You have requested an informal opinion on the applicability of the public bidding laws to a construction project which is discussed in a report to be published by the Office of the Inspector General. The facts presented to me regarding the project are recited below.

A private developer proposed to develop parcels of land that were serviced by a public water and sewer lift station. Improvements were needed to the lift station before it could accommodate such development. The developer offered to perform the improvements, with the technical plans to be approved by the governing water and sewer commission. In exchange, the developer requested a credit equal to the cost of the improvements against all municipal fees associated with the hook up of water and sewer service for the parcels of land. The developer received approximately $250,000 in such fee credits after reporting that it had spent this amount in construction costs.

Whether the public bidding laws apply to this non-cash payment for a construction project turns on the laws' legislative intent. The public bid laws "facilitate[] the elimination of favoritism and corruption as factors in the awarding of public contracts and emphasize[] the part which efficient, low-cost operation should play in winning public contracts." Interstate Engineering Corp. v. City of Fitchburg, 367 Mass. 751, 758 (1975).

A payment other than a direct cash payment for construction services was at issue in Foundation for Fair Contracting of Massachusetts v. Holyoke Community Charter School, Decision of the Attorney General, July 15, 2002. The protest involved the rehabilitation of a building for use as a charter school. Enlace, a non-profit community group with many ties to the charter school, borrowed money for purchase of the building

and the needed construction. After construction, Enlace was to rent the building to the charter school, which rent the school would pay with public funds. The rental payments would then be passed through to Enlace's lender. We held that the bidding laws applied because Enlace was serving primarily as a "vehicle through which public funding [was] to be paid" for construction costs. Id. at 9.

Likewise, public funds are being used to pay for the project you describe. The municipality paid $250,000 in lost fees that would have been deposited in public coffers. If it had bid the project out, perhaps the municipality would have paid less.

Further, allowing this construction to proceed outside the bidding laws runs the risk of favoritism. There may have been other similarly situated developers who would have wanted the opportunity to receive the dollar-for-dollar credit. Moreover, in the future, blatant favoritism could easily be disguised as the type of transaction you describe.

This risk should not be taken, given that the municipality could have borrowed the money for the project without much cost to it. The municipality would have received $250,00 in municipal fees within a relatively short time from the loan. Therefore, the interest would be the only cost of borrowing the money and would be fairly manageable.

Lastly, M.G.L. c. 41 § 81U sets out the various options for structuring construction to be performed by a developer as a condition to approval of its subdivision plan. All of the options involve the developer funding the construction. Exceptions to this rule are a matter for the Legislature.

In sum, I agree with your conclusion that the public bidding laws apply. I hope that this analysis is helpful to you. Please feel free to contact me with any additional questions, or to discuss this further.

Sincerely,

Joseph E. Ruccio, III
Assistant Attorney General
Bid Unit - Fail Labor and Business Practices Division